CORONAVIRUS: INTERNATIONAL REGULATORY UPDATE 25 – 29 MAY 2020

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International

The Financial Stability Board's (FSB's) Standing Committee on Supervisory and Regulatory Cooperation (SRC), in cooperation with the Basel Committee on Banking Supervision (BCBS), the Committee on Payments and Market Infrastructures (CPMI), the International Association of Insurance Supervisors (IAIS) and the International Organization of Securities Commissions (IOSCO), has held a virtual meeting to discuss international policy responses to COVID-19 with representatives from central banks, regulatory authorities and finance ministries as well as about 30 international banks, insurance firms, asset managers, market infrastructures and credit rating agencies. The meeting explored the effectiveness of prudential and other financial policy measures taken to date, including experiences with their implementation. Participants also discussed policy issues going forward, notably how financial institutions can better cope with the challenges resulting from rising solvency risks, and exchanged views on potential areas that may warrant further policy coordination.

IOSCO has issued a public statement highlighting the importance to investors and other stakeholders of having timely and high-quality information about the impact of COVID-19 on issuers' operating performance, financial position and

If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Marc Benzler +49 69 7199 3304
Caroline Dawson +44 207006 4355
Steven Gatti +1 202 912 5095
Owen Lysak +44 207006 2904
Lena Ng +65 6410 2215
Gareth Old +1 212 878 8539
Mark Shipman + 852 2826 8992
Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname @cliffordchance.com

Clifford Chance LLP,
10 Upper Bank Street,
London, E14 5JJ, UK

prospects. In particular, the statement:

- reiterates the importance of disclosure of the impact on amounts recognised, measured and presented in financial statements;
- highlights the importance of transparent and complete disclosures, noting that in an environment of heightened uncertainty, disclosures should be entity-specific and transparent, particularly when involving significant judgments and estimates;
- restates that in the current environment, it is important that issuers are mindful of the elements of reliable and informative non-GAAP measures;
- notes that interim financial information will require more robust disclosures of material information and management's response to the changing circumstances;
- reminds auditors of their responsibilities to report on Key Audit Matters, including how the auditor addressed the matters; and
- encourages issuers to balance the flexibility provided by regulators extending the period to file financial information with the responsibility to provide timely and comprehensive financial information that includes reasonable and supportable judgments.

European Union

The EU Commission has put forward its proposal for a major recovery plan. To ensure the recovery is sustainable, even, inclusive and fair for all Member States, the Commission is proposing to create a new recovery instrument, Next Generation EU, embedded within the long-term EU budget.

The Commission has also published a proposed regulation on the creation of a Solvency Support Instrument to support companies which, while viable, face solvency risks due to the economic crisis caused by the pandemic. The proposal includes an EU guarantee to the European Investment Bank (EIB) under the European Fund for Strategic Investments (EFSI) Regulation. Solvency support will form a third window under the EFSI – a solvency support window – in order to mobilise private capital to support the solvency of eligible companies. The Commission intends for the instrument to be in place as soon as possible in 2020, at the latest by the start of October 2020, and for it to be deployed at full capacity quickly in the course of 2021. The Solvency Support Instrument will be open to all Member States and to all the sectors covered by the EFSI Regulation, with a focus on those Member States whose economies have been most affected by the pandemic and/or where the availability of State solvency support is more limited. To aid the roll-out of the instrument, Member States can:

- establish national special purpose vehicles that could apply for support under the solvency support window;
- invest in line with State aid rules alongside the EIB Group guarantee or investment either directly or via a national promotional bank or institution into funds or special purpose vehicles; and
- facilitate the creation of equity funds or special purpose vehicles by engaging with institutional investors.

In addition, the Commission has published its adjusted Work Programme for 2020, which is intended to prioritise the actions needed to support the EU's recovery and resilience and changes the timings of some of the Commission's planned work accordingly. Amongst other things, the Commission is delaying the adoption of both its Action Plan on the Capital Markets Union and its Renewed Sustainable Finance Strategy from Q3 to Q4 2020.

The Commission has also adopted a Delegated Regulation amending the regulatory technical standards (RTS) for prudent valuation under Article 105(14) of the Capital Requirements Regulation (CRR). The Delegated Regulation introduces a temporary adjustment intended to mitigate increases in aggregated amounts of additional valuation adjustments (AVA) under the prudent valuation framework and their excessive effect on amounts deducted from banks' own funds as a result of the current period of market volatility. This adjustment will increase the aggregation factor used to calculate the total AVA amount under the core approach from 50% to 66%. The increase is temporary and will be applicable until 31 December 2020.

Finally, the Commission has approved a EUR 8 billion Austrian scheme to compensate companies for damage caused by the outbreak. As notified by Austria, the compensation, in the form of direct grants, can cover a maximum of 75% of fixed costs incurred during a limited period of three months, with a maximum amount of EUR 90 million per group. The Commission has also approved Lithuanian plans to set up a fund with a target size of up to EUR 1 billion that will invest through debt and equity instruments in medium-sized and large enterprises active in Lithuania affected by the outbreak.

The European Banking Authority (EBA) has published a preliminary assessment of the impact of COVID-19 on the EU banking sector. The EBA notes that banks entered the health crisis with strong capital and liquidity buffers and managed the pressure on operational capacities, activating their contingency plans. It expects the crisis to affect asset quality and the profitability of banks going forward, but also notes that the capital accumulated by banks during the past years along with the capital relief provided by regulators amounts on average to five percentage points above their overall capital requirements. According to the EBA, this capital buffer should allow banks to withstand the potential credit risk losses derived from a sensitivity analysis based on the 2018 stress test.

The EBA has also published an opinion following the notification by the French macroprudential authority, the Haut Conseil de Stabilité Financière (HCSF), of its intention to extend a measure introduced in 2018 on the use of Article 458(9) of the Capital Requirements Regulation (CRR) to safeguard institutions from excessive risk-taking and to prevent the build-up of future vulnerabilities. The measure is intended to tighten, for French global or other systemically important institutions, the large-exposure limits applicable to large and highly indebted non-financial corporations (NFCs) resident in France or groups of connected NFCs assessed to be highly indebted and based in France. Based on the evidence submitted, the EBA does not object to the extension of the proposed measure, which will be applied from 1 July 2020 to 30 June 2021.

The EU Parliament's Economic and Monetary Affairs (ECON) Committee has published its draft report on the proposal for a regulation amending the Capital Requirements Regulation (CRR) as regards adjustments in response to the COVID-19 pandemic. The draft report sets out the ECON Committee's suggested amendments to the text proposed by the EU Commission.

France

The Governor of the Banque de France has issued Decision No. 2020-04 of 27 May amending Decision No. 2020-02 of 20 April 2020 on additional temporary measures relating to the Banque de France refinancing operations and eligibility of collateral. In particular, the decision amends Article 4 (BDF1) and modifies the eligibility criteria that had been applicable to certain additional credit claims. The decision also includes loans benefiting from the guarantee given by the French State (prêts garantis par l'Etat – PGE), subject to certain conditions being met, amongst the additional credit claims that qualify as eligible collateral for the Eurosystem under the additional temporary measures. Valuation haircuts are also amended. The decision entered into force on 29 May 2020.

Germany

The German Federal Financial Supervisory Authority (BaFin) has updated its guidance on payment moratoria in its coronavirus FAQs to include further guidance on the administration of non-legislative payment moratoria, which is subject to a two-stage notification procedure. First, participating institutions (or an entity acting on their behalf, e.g. a banking association) notify BaFin of a payment relief scheme in accordance with paragraph 17 of the EBA guidelines (EBA/GL/2020/02). Second, if, in BaFin's opinion, the scheme fulfils the criteria set out in paragraph 10 of the guidelines, BaFin in turn notifies the EBA of the payment relief scheme as a moratorium without legal form pursuant to paragraph 18 of the guidelines. BaFin has also provided guidance on its administrative practice in particular cases, e.g. indicating that even though paragraph 10 d) of the EBA guidelines provides that, in case of a payment moratorium, the other terms and conditions of the loan agreement (e.g. the interest rate) should not be changed, it may be inevitable to suspend certain covenants for the duration of the moratorium, so that such arrangements may be permissible in the context of a non-legislative payment moratorium.

Netherlands

The Dutch Central Bank (DNB) has extended the temporary reduction in capital requirements for significant institutions using internal models for market risk recently announced by the European Central Bank (ECB) to all Dutch less significant institutions. The temporary relief measure allows banks to adjust the supervisory component of these requirements. DNB agrees with the ECB's temporary reduction of the qualitative market risk multiplier to compensate for currently observed increases of another factor, the quantitative multiplier, which can increase when market volatility has been higher than predicted by the bank's internal model. The decision will be reviewed after six months on the basis of observed volatility.

Poland

The Monetary Policy Council (a body of the National Bank of Poland) has decided to decrease the NBP interest rates at the following levels:

- reference rate at 0.10% on an annual basis;
- lombard rate at 0.50% on an annual basis;
- deposit rate at 0.00% on an annual basis;

- rediscount rate at 0.11% on an annual basis; and
- discount rate on bills of exchange at 0.12% on an annual basis.

The resolution of the Monetary Policy Council will enter into force on 29 May 2020.

Spain

Royal Decree-Law 15/2020 of 21 April on urgent complementary measures to support the economy and employment has been debated and voted on by the Spanish Congress of Deputies, which agreed that the Royal Decree-Law should be ratified as well as processed as a Draft Law. Among the measures to strengthen business financing, Article 7 of the Royal Decree-Law sets out the basic conditions for the Insurance Compensation Consortium (ICC) to accept as reinsurance the credit and suretyship insurance risks undertaken by private insurance companies. The ICC will be authorised to accept, as reinsurance, the risks undertaken by private insurance companies authorised to operate in the credit and suretyship classes of insurance, should they so request and provided they sign or accede to the corresponding agreement with the ICC. The conditions on which the ICC would provide this reinsurance cover are as follows:

- modalities of coverage – the agreement to be entered into shall envisage those modalities of coverage, among the common ones in the reinsurance market, which allow the direct coverage offered by the cedant insurers to be complemented quickly and efficiently by the reinsurance, contributing to providing certainty to economic transactions;
- economic conditions – the ICC shall establish the financial conditions to be applied to the coverage so as to ensure the financial balance of the agreement in the long term, considering, within the aforementioned conditions, the corresponding set-off for the management expenses incurred by the ICC; and
- purpose and duration – the reinsurance coverage may be applied, as of 1 January 2020, to insurance transactions carried out by authorised insurance companies in the credit class of insurance with a significant volume of operations and whose insureds are domiciled in Spain. Its duration will be maintained as long as the reasons of public interest that justified its adoption remain and for a minimum period of two years.

The transactions carried out by the ICC under the Royal Decree-Law shall be conducted with absolute financial and accounting separation from the rest of the transactions it may carry out, with integration, where appropriate, of the contributions made by the Spanish State for the purpose of maintaining the former transactions' adequate technical-financial balance. Further to the enactment into law, there will be a period of eight working days expiring on 1 June 2020 for the submission of amendments.

In addition, Royal Decree-Law 19/2020 of 26 May adopting complementary measures regarding agricultural, scientific, economic, employment and social security matters to mitigate the effects of COVID-19 has been published. The RDL sets out the special regime on moratoria covered by the sectoral framework agreements subscribed by lending institutions through their representative associations and is applicable to institutions that declare their adherence to the corresponding framework agreement and report it to the Bank of Spain. Conventional moratoria may cover all types of loans, credits and leasing. The adjustment of the initial agreement may consist of either the redistribution of instalments without amending the maturity or the extension of the maturity. However, such agreements shall not establish new conditions not contained in the initial agreement subject to the moratorium, such as the marketing of new products or the requirement of new guarantees. When a financial institution grants a legal moratorium and a conventional moratorium, the conventional moratorium agreement should expressly include the recognition of the legal moratorium, suspending the effects of the conventional moratorium until the expiration of the legal moratorium. Prior to the execution of the moratorium, the financial institution must provide the borrower with pre-contractual information on the main characteristics, risks and costs of the transaction. The RDL also sets out several provisions to promote the use of electronic channels as a complement to traditional ones and to ease the procedures of drafting and adopting moratorium agreements. Finally, the RDL establishes an exceptional regime for the granting of notarial instruments executing the conventional moratoria agreed under the sectoral agreements in order to complement the legal moratorium and ease the processing of the corresponding agreements. The RDL entered into force on 28 May 2020.

United Kingdom

The Financial Conduct Authority (FCA) has launched a consultation on additional temporary guidance to strengthen payment firms' prudential risk management and arrangements for safeguarding customers' funds in light of the exceptional circumstances of the coronavirus pandemic. The guidance outlines the FCA's expectation of firms to put in place more robust plans for winding down so that customer funds are returned in a timely manner. The consultation, which will apply to all payments firms, will last for two weeks and closes on 5 June 2020. If confirmed, the final guidance will be published at the end of June.

In addition, the FCA has published the latest edition of its Primary Market Bulletin (PMB), which includes:

- a statement on temporary relief for the timing of the publication of half yearly financial reports;
- a statement on market practice on 'going concern' assessments, following difficulties raised by issuers about how to address coronavirus-related uncertainties in the 'going concern' assessment and their disclosure in financial statements; and
- commentary on the FCA's view on issuers' engagement with shareholders at this time and issuers' role in delivering 'soft pre-emption' in placings.

The FCA has also published its latest Market Watch newsletter, which contains commentary on market conduct and discipline in the context of coronavirus, including, among other things, the appropriate treatment of inside information, information on short selling and identifying and managing conflicts of interest by market participants that may arise in capital raisings.

Finally, the FCA has announced that it will temporarily allow firms to let individuals in exceptional circumstances carry over any uncompleted Continuing Professional Development (CPD) hours to the next CPD year, i.e. the next 12-month period in which to complete the relevant CPD. This applies to CPD years ending before 1 April 2021. The FCA expects individuals to stay up to date with its COVID-19 regulatory developments which could count towards CPD as relevant. It is also encouraging firms to look into other available online equivalents to training courses or other ways for their staff to get the necessary CPD and to take these other options into account as part of their decision to carry over CPD hours.

Meanwhile, the Prudential Regulation Authority (PRA) has issued a statement on the application of regulatory capital and IFRS 9 requirements to payment holidays granted or extended to address the challenges of COVID-19.

The PRA has also published a Q&A document addressing some commonly asked questions regarding residential and commercial property valuations for CRR purposes during the period of disruption caused by COVID-19. In recent weeks, the PRA has received a number of questions from firms in relation to requirements in the CRR for property valuations for residential and commercial real estate exposures. In particular, given the recent disruption in the property market caused by COVID-19, firms have identified difficulties in conducting physical inspections due to social distancing measures, obtaining reliable property valuations and determining appropriate approaches to suspended or unreliable house price indices.

Hong Kong

Following the additional guidance issued by the BCBS on 3 April 2020 to alleviate the impact of COVID-19 on the global banking system, the Hong Kong Monetary Authority (HKMA) has issued a circular to announce that it will apply the following measures set out in the BCBS guidance in the context of Hong Kong:

- clarifications on the treatment of extraordinary support measures related to COVID-19 – the HKMA has published several technical clarifications on the treatment of extraordinary support measures related to COVID-19 to ensure that authorised institutions reflect the risk-reducing effect of these measures when calculating their regulatory capital requirements;
- expected credit loss provisioning – the HKMA expects authorised institutions to continue to apply the relevant expected credit loss (ECL) frameworks for accounting purposes. In particular, it expects ECL estimates to reflect the mitigating effect of the significant economic support and payment relief measures put in place by public authorities and the banking sector. Moreover, the provision of relief measures to borrowers should not automatically result in exposures moving from a 12-month ECL to a lifetime ECL measurement. The HKMA expects authorised institutions to exercise informed judgement and use the flexibility inherent in HKFRS/IFRS 9 to give due consideration to long-term economic trends in estimating ECL; and
- margin requirements for non-centrally cleared over-the-counter (OTC) derivatives – the HKMA has decided to defer the final two implementation phases of margin requirements for non-centrally cleared OTC derivatives by an additional year. With this extension, the final implementation phase will start on 1 September 2022, at which point covered entities with an average aggregate notional amount (AANA) of non-centrally cleared OTC derivatives greater than HKD 60 billion will be subject to the requirements. As an intermediate step, from 1 September 2021, covered entities with an AANA of non-centrally cleared OTC derivatives greater than HKD 375 billion will be subject to the requirements.

The Hong Kong Government has announced that directors of companies listed on the Stock Exchange of Hong Kong (SEHK) or directors of companies applying for listing on the SEHK, who (i) are on duty travel from Mainland China to Hong Kong or (ii) return from duty travel from Mainland China to Hong Kong and satisfy certain eligibility criteria, may apply for exemption from the compulsory quarantine arrangement. The initiative is intended to enable directors of Hong Kong-listed companies and listing applicants to perform essential business activities which are in the interest of Hong Kong's economic development, including traveling to Mainland China or Hong Kong to attend shareholders' meetings or regulatory meetings to comply with the obligations under relevant Ordinances or other regulatory instruments, such as the Listing Rules. Under the initiative, during any specified time period, each of the listed companies or listing applicants can only nominate a maximum of two directors for the exemption. The exempted persons will also be subject to certain conditions.

United States

The Commodity Futures Trading Commission (CFTC) has approved an interim final rule (IFR) which defers the compliance date for the initial margin requirements under the CFTC Margin Rule from 1 September 2020 to 1 September 2021. The IFR is intended to provide entities subject to the 1 September 2020 compliance date with additional time in light of COVID-19 and is consistent with the Basel Committee on Banking Supervision's and the International Organization of Securities Commissions' (BCBS/IOSCO's) recent revisions to the implementation schedule for margin requirements for non-centrally-cleared derivatives. The IFR will be effective when published in the Federal Register. Comments on the IFR are due 60 days after the date of publication in the Federal Register.

The CFTC has also approved a proposed rule that amends regulation 3.10(c)(3), which provides an exemption from registration as a commodity pool operator (CPO) for certain persons located outside the US who are operating offshore commodity pools that are neither offered nor sold to US participants. The proposal also includes other measures related to CPO requirements. This proposed rule has a 60-day comment period following publication in the Federal Register.

RECENT CLIFFORD CHANCE BRIEFINGS

How the NEU CP market can give European corporates access to the ECB's Pandemic Emergency Purchase Programme (PEPP)

As part of the European Central Bank's pandemic emergency purchase programme (the PEPP), the Banque de France has, since the end of March 2020, been buying Neu CP.

This briefing discusses what the PEPP is and why it has been put in place; what the relevance of the PEPP is to the Neu CP Market; and how European corporates can find out if the Banque de France can purchase any of their Neu CP under PEPP.

https://www.cliffordchance.com/briefings/2020/05/how-the-neu-cp-market-can-give-european-corporates-access-to-the.html

A legal overview of foreign investment in Russia's 'strategic' sectors

This briefing provides a detailed overview of Russia's regulatory regime governing foreign investment in so-called 'strategic' sectors of the Russian economy. The briefing discusses the scope of application, approval procedure, exemptions, case law and transactional tips, and contains flowcharts for ease of use. It also highlights draft amendments that will likely be adopted in the course of 2020. These amendments are designed to close certain loopholes. They do not, however, substantially change the existing regime. Finally, the briefing attempts to provide a brief outlook on the impact that the COVID-19 pandemic is likely to have on future legislative amendments and the practical application of the foreign investment regime.

https://www.cliffordchance.com/briefings/2020/05/a-legal-overview-of-foreign-investment-in-russia.html

Coronavirus – additional relief from NYSE shareholder approval requirements facilitates raising urgently needed capital

Companies listed on the New York Stock Exchange seeking to rapidly raise urgently needed capital due to circumstances related to the COVID-19 pandemic may benefit from new temporary conditional relief from the NYSE's shareholder approval requirements. A release issued by the US Securities and Exchange Commission approving the immediate effectiveness of Section 312.03T of the NYSE's Listed Company Manual is comparable to a recently approved temporary exception to Nasdaq's shareholder approval requirements.

This briefing discusses the relief and providing an overview of current NYSE shareholder approval requirements.

https://www.cliffordchance.com/briefings/2020/05/coronavirus--additional-relief-from-nyse-shareholder-approval-re.html