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Briefing note

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Capital Markets Union: EU Commission launches mid-term review

The EU Commission has launched a consultation on the planned Capital Markets Union (CMU) mid-term review. The consultation aims to gather stakeholders' views on how the current CMU programme can be updated and completed so that it represents a strong policy framework for the development of capital markets, building on the initiatives that the Commission has presented so far. The results of this consultation will feed into the mid-term review of the CMU Action Plan that the Commission aims to publish in June 2017.

Comments are due by 17 March 2017.

EMIR: EU Commission adopts Delegated Regulation amending RTS on risk-mitigation techniques for uncleared derivatives

The EU Commission has adopted a Delegated Regulation amending an error in the regulatory technical standards (RTS) for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (CCP).

The amending Delegated Regulation corrects an error in Article 37 of the RTS where paragraphs on the phase-in of variation margin (VM) requirements to intra-group transactions were omitted.

ESMA and EBA report on functioning of CRR with related obligations under EMIR

The European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) have published a joint report on the functioning of the Capital Requirements Regulation (CRR) with the European Market Infrastructure Regulation (EMIR).

Under Article 515 of the CRR, the EBA and ESMA were required to report jointly with regard to institutions operating as a CCP, in order to avoid duplication of requirements for derivative transactions and thereby avoid increased regulatory risk and increased costs for monitoring by competent authorities.

The report calls for the requirements for credit, market and counterparty risk in the CRR to be clarified in order to ensure that only risks not already covered by specific financial resources for activities not related to clearing are to be covered by CRR requirements. The report recommends that the exclusion be extended to activities covered by interoperability arrangements.

The EBA and ESMA recommend that the EU Commission clarify the overlap of the capital requirements for CCPs holding a banking licence and clarify the wording of Article 305 of the CRR, which regulates the treatment of clients' exposures to clearing members.

CRR: RTS on data waiver permissions for IRB approach published in Official Journal

Commission Delegated Regulation (EU) 2017/72, which sets out regulatory technical standards (RTS) specifying conditions for data waiver permissions under the Capital Requirements Regulation (CRR), has been published in the Official Journal.

The RTS set out the conditions according to which competent authorities may grant permission to institutions to use relevant data covering a two year period rather than a five year period for the probability of default, own-loss given default and own-conversion factor estimates for certain types of exposures when they implement the internal ratings based (IRB) approach. Due to the EBA's recognition of increased uncertainty of the estimation of risk parameters that result from the use of a short data history, the RTS introduce conditions to limit the use of the data waiver. Moreover, the waiver would not be allowed after five years have elapsed from the initial permission granted to an institution.

The RTS will enter into force on 3 February 2017.

Brexit: UK Prime Minister discusses negotiating objectives

The Prime Minister, the Rt Hon Theresa May MP, has delivered a speech setting out the Government's negotiating objectives for exiting the EU. The speech set out twelve priorities that the Government intends to use to negotiate Brexit and establish a framework for a new partnership between the UK and the EU.

The Government's twelve priorities relate to:

- providing certainty wherever possible to business and the wider public as the Government moves through the negotiation process;
- ending the jurisdiction of the European Court of Justice in the UK;
- strengthening the union between the four nations of the UK and ensuring no new barriers to living and doing business within the union are created;
- maintaining the Common Travel Area with the Republic of Ireland;

- controls on immigration to Britain from Europe;
- guaranteeing the rights of EU citizens who are resident in Britain and the rights of British nationals in other Member States as early as possible;
- protecting workers' rights under EU law;
- withdrawing from membership of the EU single market and pursing a free trade agreement (FTA) with the EU to allow for the freest possible trade in goods and services between Britain and EU Member States;
- ensuring the UK can establish trade agreements with countries outside of the EU. On the Customs Union the speech set out the intention to end British participation in the Common Commercial Policy and Common External Tariff while ensuring a customs agreement with the EU;
- continuing to collaborate with European partners on major science, research and technology initiatives;
- continuing to cooperate with the EU on crime, terrorism and foreign affairs; and
- a phased process of implementation, through which UK and EU institutions, Member States and business can prepare for the new arrangements that will exist.

BaFin establishes special contact address and form for foreign financial services firms considering moving their registered office or operations to Germany

The German Federal Financial Supervisory Authority (BaFin) has set up a special contact address (access@bafin.de) and a special contact form for foreign financial services firms considering moving their registered office or operations to Germany. While both contact facilities are aimed particularly at Brexit-related relocations, they can be used by any non-German financial firm. BaFin has announced its intention to respond to all enquiries within two business days.

Measures to regulate advertisements for speculative and risky financial contracts enshrined in French law

The Autorité des marchés financiers (AMF) has set out the specifics of its ban on the direct or indirect electronic advertising to retail investors covering financial contracts considered to be speculative and risky, while regulating such advertisements is enshrined in the Sapin II law on transparency, anti-corruption and economic modernisation, which introduces new framework legislation to prevent, detect and punish corruption in France and abroad.

Following amendments to the French Monetary and Financial Code and the Consumer Code, the AMF General Regulation implementing the new law and the AMF's Position (DOC-2017-01 in a Q&A format) now define the circumstances and categories of financial contracts targeted by this measure, namely: binary options, contracts for difference (CFDs), and foreign exchange contracts. In practice, this affects all stakeholders, such as investment services providers offering these contracts and all participants in the advertising chain (media buyers, ad space buyers, media or ad sales companies, ad broadcasters, etc.).

Responsibility for this new legal framework is shared by the AMF, whose staff will conduct active monitoring to identify banned advertisements, and the General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF), both empowered to sanction those involved pursuant to their respective powers.

French High Council for Financial Stability maintains countercyclical capital buffer for France at 0%

In light of both quantitative and qualitative available information and following consultation with the European Central Bank and notification to the European Systemic Risk Board, the French High Council for Financial Stability (Haut Conseil de stabilité financière (HCSF)) has published a Decision n° D-HCSF-2016-6 dated 30 December 2016 which maintains the countercyclical buffer rate at 0%, as that rate is provided for under articles L. 511-41-1 A, II, 1° and L. 631-2-1 of the French monetary and financial code and applicable to credit institutions and financing companies as referred to under article L. 612-2, I, A, 1° and 9°, and to the investment firms mentioned under article L. 533-2-1 of the same code.

The Autorité de contrôle prudentiel et de résolution (ACPR) has been entrusted with the implementation of the HCSF's decision, which entered into force on 2 January 2017.

Luxembourg Financial Intelligence Unit issues guideline on blocking of suspicious transactions

The Luxembourg Financial Intelligence Unit, the Cellule de renseignement financier, of the State Prosecutor's office to the Luxembourg District Court has issued a new guideline on the blocking of suspicious transactions.

The guideline is addressed to all professionals subject to the law of 12 November 2004 on the fight against money laundering and combating the financing of terrorism and aims to provide guidance on the status and management of blocked suspicious transactions.

The guideline sets out:

- the nature of transactions subject to an execution blocking;
- the rights and obligations of professionals in case of blocked transactions;
- the effects of a blocking; and
- the blocking procedure, i.e. in particular when a blocking occurs, how the FIU communicates its blocking instruction to the professional, and when such instruction ceases to have effect.

The guideline entered into force on 1 January 2017.

Polish Financial Stability Committee adopts recommendation concerning restructuring of portfolios of foreign currency mortgage loans

The Financial Stability Committee has adopted a resolution on a recommendation for the restructuring of portfolios of foreign currency mortgage loans. In the opinion of the Committee, the portfolio of foreign currency mortgage loans generates systemic risk in the context of the potential effects of the regulatory solutions assuming the mandatory conversion of the loans into PLN, as postulated in the public debate. Therefore, in the opinion of the Committee, the solutions relating to the restructuring of foreign currency loans must be voluntary, and the role of the institutions supervising the financial system is to implement regulatory solutions and to use the available supervisory instruments in a way that should promote the taking of decisions on the restructuring by banks and borrowers.

The Committee recommends, amongst other things:

- increasing the risk weight for exposures fully and entirely secured by mortgages over residential property to 150%, when the amount of the principal instalment or interest instalment depends on changes in foreign currency exchange rates or rates of currencies other than the currencies in which the debtor earns revenue;
- increasing the minimum loss given default (LGD) for exposures secured by mortgages over residential property purchased with a loan in a foreign currency;
- imposing a 3% systemic risk buffer to apply to all exposures in the Republic of Poland;
- developing, in justified cases, the relevant solutions neutralising excessive tax burdens, if any, for borrowers and lenders, which may occur as a result of the restructuring of foreign currency mortgage loans, taking into account just social considerations and their influence on public finances;
- the Polish Financial Supervision Authority (PFSA) issuing a regulatory recommendation concerning good practice in the restructuring of portfolios of foreign currency mortgage loans; and
- the PFSA supplementing additional capital adequacy requirements applicable in the second pillar and associated with operational risk, market risk and the risk of collective defaults with respect to risk factors associated with loans in foreign currencies.

FSC outlines financial policy direction for 2017

The Financial Services Commission (FSC) has outlined its financial policy direction for 2017, focused on:

- prompt and thorough response to financial market risks;
- financial support for the stabilisation of household livelihood; and
- financial reforms and innovation to revitalise the economy.

The key measures under the policy direction include:

- closely monitoring financial markets to keep risk factors under control through a 24-hour emergency response system;
- stabilising the corporate bond market to ensure stable funding conditions for companies in response to increased volatility in financial markets;
- carrying out corporate restructuring under consistent principles that emphasise a troubled company's self-rescue efforts and burden sharing;
- a new framework for corporate restructuring (Pre-packaged Plan), which combines advantages of creditor-led debt workout and court-led rehabilitation, will be promoted to expedite business normalisation of a troubled company;
- promoting more transparency in corporate management and financial transactions by improving the current accounting and audit system, encouraging the introduction of a 'stewardship code' to a wider range of companies and establishing sound financial market practice;
- injecting KRW 85 trillion into new growth engines such as high-tech manufacturing, cultural content or bio and healthcare industries;
- increasing loans and investments for tech start-ups, while channelling more risk capital into venture companies;

- helping small and medium enterprises (SMEs) raise funds through crowdfunding, KOSDAQ and KONNEX;
- pushing forward financial reforms to promote competition and innovation in the financial sector and continue to communicate with both financial institutions and consumers;
- encouraging financial institutions and fintech firms to further develop more innovative and convenient financial services for financial consumers; and
- launching a 'regulatory sandbox' in the first half of 2017 for fintech firms to test and experiment with their new services and business models free from regulatory burdens.

FSC identifies domestic systemically important banks for 2017

The FSC has identified four bank holding companies and one bank as domestic systemically important banks (D-SIBs) for 2017.

Under the Basel Committee on Banking Supervision's (BCBS's) D-SIB framework, the D-SIB higher loss absorbency requirement is phased in by 0.25% per year from 2016 to 2019. Therefore, those identified as D-SIBs for 2017 are required to set aside an additional common equity capital of 0.5%, and the higher loss absorbency requirement is effective from 1 January 2017.

The average BIS ratio for banks and bank holding companies – 14.76% for banks and 14.04% for bank holding companies – at the end of September 2016 exceeds the minimum capital adequacy ratio, and according to the FSC there is therefore no actual burden at present for the identified D-SIBs to set aside additional capital.

The FSC will identify D-SIBs every year in accordance with assessment criteria recommended by the BCBS.

SFC issues guidelines to fund managers on dealing disclosure obligations under Takeovers Code

The Securities and Futures Commission (SFC) has issued guidelines to fund managers on dealing disclosure obligations under Rule 22 of the Code on Takeovers and Mergers (Takeovers Code). The guidelines set out practical guidance on the steps a fund manager who is an 'associate' under the Takeovers Code might take to ensure timely and appropriate compliance with its dealing disclosure obligations. The guidelines cover the following areas:

- identifying relevant companies in an offer period;
- on-going training of staff; and
- proper compliance systems.

The SFC has emphasised that ultimately it is an obligation for each fund manager to take all appropriate measures to ensure compliance with the Takeovers Code. Fund managers are advised to remind appropriate persons in their overseas offices who are likely to deal in the relevant securities of Hong Kong-listed companies of the relevant provisions of the Takeovers Code, including the obligations under Rule 22.

MAS implements Asian Bond Grant Scheme for bond issuers to offset issuance costs in Singapore

The Monetary Authority of Singapore (MAS) has implemented the Asian Bond Grant Scheme, which is valid for a funding period of three years from 1 January 2017 to 31 January 2019 (both dates inclusive). The Asian Bond Grant Scheme seeks to broaden the base of issuers in Singapore's bond market by co-funding up to 50% of eligible expenses attributable to the issuance of Asian bonds in Singapore. The grant is open to applicants who are 'qualifying issuers', which are first-time Asian companies and non-bank financial institutions. These issuers can be based onshore and offshore, and include issuers who have not filed a Return on Debt Securities (RoDS) in the last 5 years (i.e. 2012 – 2016); companies with global headquarters in an Asian country including ASEAN, China/Hong Kong, India, South Korea, Japan, Australia and New Zealand and policy banks like EXIMs (but excludes institutions with a deposit-taking licence or licenced/regulated as a 'bank' by the relevant authority). Eligible expenses covered under a grant include business spending made to Singapore-based providers and incurred by the qualifying issuer that are directly attributable to a qualifying issuance. These include arranger fees, auditor fees, credit rating fees, legal fees and listing fees.

'Qualifying issuances' are issuances by a qualifying issuer in a qualifying currency (i.e. all local currency, as well as USD, EUR and JPY) and where (i) the debt securities are qualifying debt security (QDS) for the purpose of income tax; (ii) the debt securities have an initial principal amount on issuance of at least SGD 200 million (or its equivalent in another currency); (iii) the debt securities have a non-redeemable tenor of at least 3 years; (iv) more than half of the gross revenue from arranging the issue is attributable to Financial Sector Incentive (FSI) companies in Singapore;

and (v) the qualifying issuer is rated by an international credit rating agency if the currency of issuance is SGD.

The funding is subject to a grant amount of SGD 200,000 for qualifying issuances that are unrated or SGD 400,000 for qualifying issuances that are rated by an international credit rating agency (Standard & Poors, Moody's or Fitch Group). The co-funding would only apply on a one-time basis for each issuer and on such eligible expenses incurred by that issuer.

Ministry of Law launches public consultation on proposed amendments to Trustees Act

The Ministry of Law has launched a public consultation on proposed amendments to the Trustees Act. The proposed amendments form part of Singapore's whole-of-government ongoing review to ensure that corporate vehicles and trusts are not misused for improper purposes.

The proposed amendments are intended to empower the Minister for Law to enact such rules as may be necessary or desirable for the purposes of giving effect to the Financial Action Task Force (FATF) recommendations and Global Forum on Transparency and Exchange of Information for Tax Purposes requirements. Specifically, the objective of the amendments is to enhance the transparency of the ownership and control structures of trusts, and prescribe minimum standards for financial record keeping by trustees. The proposed new provisions to the Trustees Act seek to:

- empower the Minister to make rules concerning the following:
  - prescribe duties on trustees, to obtain, hold and keep updated information on the identity of all relevant parties to a trust (namely, the settlor, trustee, protector, beneficiary, or any other persons with power over the disposition of the trust property), and of the agents of and service providers to the trust;
  - prescribe duties on trustees to obtain, hold and keep updated accounting records relating to the trust;
  - prescribe measures which a trustee must take to discharge the duties with regard to maintaining information and keeping accounting records;
  - prescribe duties on trustees to disclose their status to business and service providers when transacting in their capacity as a trustee in any prescribed transaction;
- empower the Minister to prescribe the specific groups of trusts which are exempted from the proposed amendments;
- empower the Minister to designate any breach of such rules as an offence; and
- impose a penalty of a fine not exceeding SGD 1000 for any breaches of the obligations.

Comments on the Trustees (Amendment) Bill are due by 31 January 2017.

China State Council announces commitment to further market liberalisation

The State Council of China has issued the 'Notice on Relevant Measures to Further Promote the Opening up of the Market and Proactively Utilise Foreign Investments', setting out its commitment to and plan for taking further steps to open up the Chinese market and embrace foreign investments in a broad range of industrial sectors, including financial services, telecommunications, internet, culture, education, manufacturing, transportation and infrastructure construction.

Among other things, the following proposed reforms in the financial market are worthy of note:

- the current restrictions on foreign investments in banks, securities firms, mutual management firms, futures companies, insurance companies, and insurance brokerage companies will be further relaxed;
- more financing channels will be provided to foreign invested enterprises (FIEs) – for example, FIEs are encouraged to list on Chinese stock exchanges, and issue various debt instruments in China, including corporate bonds, enterprise bonds and convertible bonds;
- multinational companies are invited to establish functional institutions such as regional headquarters, procurement centres and settlement centres in China, and are permitted to centrally operate and manage their RMB and foreign exchange funds; and
- the current foreign debt policies for FIEs will be further amended to align them with those for domestic companies to promote the capability and accessibility of offshore financing by FIEs.
- However, the Notice does not give a timeline or specific action plans to carry out these reform proposals. More detailed implementing rules issued by the competent regulators in the relevant industrial sectors will be of significance to bring about meaningful

changes. It remains to be seen to what extent the proposals set out in the Notice will be implemented and how they will impact the investment arrangements and operations of foreign investors in both the short and the long run.

US House of Representatives passes bill intended to reduce regulatory burdens on swap end-users

The US House of Representatives has passed H.R. 238, a bill proposing the Commodity End-User Relief Act. If the US Senate approves it and the President signs it, this legislation would:

- reauthorize the Commodity Futures Trading Commission (CFTC);
- amend current law to provide the CFTC with general exemption authority regarding swaps;
- impose additional cost and benefit analysis requirements on the CFTC when it engages in rule making or issuing orders;
- prohibit the CFTC from modifying, except by affirmative rule or regulation, the threshold for de minimis swap dealing;
- require the CFTC to adopt specified regulation addressing cross-border swaps;
- exempt specified entities from certain clearing requirements applicable to swaps;
- repeal a provision in the Dodd Frank Act that required the CFTC to set position limits on energy, agriculture and metal contracts to prevent 'excessive' speculation; and
- authorize the CFTC to require that certain property of a commodity broker in a Chapter 7 bankruptcy be included in customer property to the extent that such property is insufficient to satisfy the net equity claims of the broker's public customers.

RECENT CLIFFORD CHANCE BRIEFINGS

UK government explores reform of corporate criminal liability

The UK government has issued a call for evidence examining whether or not the law on corporate criminal liability needs reform. Although it sets out potential options rather than concrete proposals at this stage (including one option of regulatory reform on a sector by sector basis, as an alternative to extending the criminal law), it is nonetheless an important acknowledgment of sustained political pressure as well as pressure from prosecuting authorities. It may lay the foundations for important changes to the way in which investigations and prosecutions concerning corporate wrongdoing may be conducted. The paper invites responses by 24 March 2017.

This briefing paper discusses possible changes to the law of corporate criminal liability.

https://www.cliffordchance.com/briefings/2017/01/uk_government_exploresreformofcorporat.html

Serious Fraud Office concludes its most significant corporate bribery settlement to date

On 17 January, the UK Serious Fraud Office (SFO) agreed a deferred prosecution agreement (DPA) with Rolls-Royce PLC and a subsidiary operating in the energy industry. This is the third such agreement to be agreed between the SFO and a cooperating corporate entity. The DPA marks the conclusion of the largest investigation ever undertaken by the SFO and provides further important indications about when it and the courts will entertain such settlements and how they will be concluded.

This briefing paper discusses the Rolls-Royce DPA.

https://www.cliffordchance.com/briefings/2017/01/serious_fraud_officeconcludesitsmos.html

Investment funds and REITs – new rules

Pursuant to the Act of 29 November 2016 on the Amendment of the Personal Income Tax Act, Corporate Income Tax Act and Act Amending the Act – Tax Ordinance and Certain Other Acts, which came into force on 1 January 2017, the Polish tax regime applicable to investment funds has changed. Closed-end investment funds (CIFs) and specialised open-end investment funds (SOIFs) operating in accordance with the rules and investment constraints applicable to CIFs are subject to corporate income tax at the rate of 19% and only certain of their income is exempt from taxation. Open-end investment funds (OIFs) and SOIFs operating in a standard way, i.e. applying the rules and investment constraints specified for OIFs, are still, as such, exempt from corporate income tax.

In parallel, the Polish government is planning to encourage long-term investment in real estate by introducing real estate investment trusts (REITs) in Poland. According to the new draft Act on Real Estate Rental Market Companies, companies which issue shares and invest the proceeds obtained from investors in the real estate market, are to be exempt under certain conditions from corporate income tax.

However, the draft Act has not been adopted yet and it is not certain when it will come into force and what its final wording will be.

This briefing paper discusses the new rules.

https://www.cliffordchance.com/briefings/2017/01/investment_fundsandreitsnewrules0.html

US moves to ease sanctions on Sudan

In one of his final acts as President, President Obama has signed a new Executive Order to ease comprehensive sanctions against Sudan. To give effect to the Order, the US Department of Treasury's Office of Foreign Assets Control (OFAC) has issued a general licence authorising all transactions previously prohibited by the Sudanese Sanctions Regulations (SSR), including transactions involving the Sudanese Government. As a result, there are now only five territories worldwide that remain subject to comprehensive US sanctions (Crimea, Cuba, Iran, North Korea and Syria).

This briefing paper discusses these sweeping actions by the President and OFAC.

https://www.cliffordchance.com/briefings/2017/01/us_moves_to_easesanctionsonsudan.html

Singapore High Court finds that foreign liquidators appointed in a voluntary liquidation abroad can be recognised in Singapore

The Singapore High Court held, in Re Gulf Pacific Shipping Ltd (in creditors' voluntary liquidation) and others [2016] SGHC 287, that liquidators appointed in a foreign voluntary liquidation can be recognised in Singapore, and that there should not be any distinction drawn between voluntary and compulsory liquidations. In coming to its decision, the Singapore Court reiterated its philosophical commitment to an internationalist (rather than territorial) approach towards cross-border insolvencies.

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2017/01/singapore_high_courtfindsthatforeig.html