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Briefing note

International Regulatory Update

23 – 27 January 2017

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EMIR: Amended technical standards on reporting to trade repositories published in Official Journal

Two amended technical standards on data to be reported to trade repositories (TRs) under the European Market Infrastructure Regulation (EMIR) have been published in the Official Journal.

Commission Delegated Regulation (EU) 2017/104 amends Delegated Regulation (EU) 148/2013 with regard to regulatory technical standards (RTS) on the minimum details of the data to be reported to trade repositories. Amongst other things, the revised RTS aim to clarify data fields, and introduce new values to reflect market practice or other necessary regulatory requirements.

Commission Implementing Regulation (EU) 2017/105 amends Implementing Regulation (EU) 1247/2012 laying down implementing technical standards (ITS) with regard to the format and frequency of trade reports to TRs.

Both sets of technical standards will enter into force on 10 February 2017. The RTS on data reporting will apply from 1 November 2017. The ITS on trade reports to TRs will apply from 1 November 2017 with the exception of Article 1(5), which applies from 10 February 2017.

FSB reports on re-hypothecation of client assets and collateral re-use

The Financial Stability Board (FSB) has published two reports on the re-hypothecation of client assets and collateral re-use. The FSB notes that these practices have the effect of increasing the availability of collateral in the financial system and reducing the cost of using collateral but it is also concerned that, as highlighted during the global financial crisis, re-hypothecation and collateral re-use may also pose potential risks to the financial system.

The FSB's first report covers financial stability issues, market evolution and regulatory approaches to re-hypothecation and collateral re-use. The report describes different regulatory approaches in various jurisdictions, highlights improvements in risk management practices and work by regulators to strengthen relevant client asset protection regimes. Overall, the FSB has concluded that there is no immediate case for harmonising regulatory approaches to re-hypothecation. However, the FSB encourages jurisdictions to implement Recommendation 7 in its policy framework for addressing shadow banking risks in securities lending and repos, which was published in August 2013. With respect to collateral re-use, the FSB has set out its view on the importance of monitoring collateral re-use at a global level in order to understand the impact on securities financing markets.

The FSB has also published a report which finalises the measures and metrics of non-cash collateral re-use in securities financing transactions, which authorities will monitor for financial stability purposes. The report follows a consultation published in February 2016 and forms part of the FSB's work to transform shadow banking into resilient market-based finance, in particular its work to improve reporting and transparency of securities financing markets.

Special Administration Regime: FCA consults on amendments to CASS 7A

The Financial Conduct Authority (FCA) has launched a consultation on the client assets sourcebook (CASS) 7A and the special administration regime (SAR).

The consultation follows the FCA's March 2016 discussion paper on possible changes to CASS and HM Treasury's publication of amendments to the SAR regulations. Among other things, the consultation is intended to seek feedback on the FCA's proposed changes to the CASS rules in light of the amendments to the SAR regulations and set out why the FCA has decided not to take forward certain proposals published in its discussion paper and previous consultation. In particular, the CP sets out details of amendments, including:

- rules to allow certain transfers of the client money pool (CMP) not permitted under current rules;
- requirements that work with the bar date mechanisms in the SAR regulations to ensure an appropriate level of client protection prior to final distribution of client assets;
- applying hindsight to the valuation of cleared margin transactions for the purpose of determining a client's entitlement to the CMP; and
- which CASS requirements cease to apply or are modified following firm failures and other primary pooling events (PPEs).

Moreover, the consultation seeks feedback on minor consequential changes to the client money rules (CASS 7) and CASS 7A to address forthcoming indirect clearing requirements under the European Market Infrastructure Regulation (EMIR) and MiFIR regulatory technical standards (RTS). The FCA has acknowledged that the RTS have not yet been published in the Official Journal and, as such, intends to review its proposals once the RTS have been finalised.

Comments on the RTS proposals are due by 23 February 2017. Comments on the other elements of the consultation are due by 24 April 2017.

BaFin publishes amended draft of remuneration ordinance for institutions

The German Federal Financial Supervisory Authority (BaFin) has published an amended draft of the

remuneration ordinance for institutions (Institutsvergütungsverordnung). The primary purpose of the amendment is the implementation of the European Banking Authority (EBA) guidelines on sound remuneration policies, which apply from 1 January 2017. The key aims of the amended ordinance are, amongst other things, to better reflect the different remuneration types, to differentiate in detail between the various forms of variable remuneration, as well as to specify the risk adjustment and claw-back clauses. Variable remuneration by means of bail-in instruments and group-wide remuneration policy are also covered by the amendment.

The ordinance is intended to be issued in February and to come into force on 1 March 2017.

BRRD: Ministerial order modifying solvency assessment criteria applied by ACPR Resolution College published

A Ministerial order dated 4 January 2017 modifying the solvency assessment criteria applied to credit institutions and investment firms as implemented by the Resolution College of the French Autorité de contrôle prudentiel et de résolution (ACPR) has been published in the French Journal Officiel.

Regarding global systemically important institutions, it is now provided that one solvency assessment criterion to be taken into account for such entities or the group to which they belong is their entering into a standard-form contract (contrat-type) aimed at implementing effective measures of temporary suspension of payment obligations pursuant to financial contracts governed by the laws of a non-EU Member State.

The absence of such a standard-form contract (contrat-type) may thus be considered as an obstacle to resolution which it is for the ACPR to lift, notably by specifying the relevant standard-form contracts (contrats-types).

The Ministerial order entered into force on 26 January 2017, i.e. the day following that of its publication.

AMF and ACPR update their policies on marketing complex financial instruments to retail customers

The French Autorité des marchés financiers (AMF) and the ACPR have updated their respective policies regarding the marketing of complex financial instruments to retail customers, in response to their observation that new indexes are being created and more regularly used as underlyings of complex financial instruments marketed to such investors in France, in addition to a shift in the complexity of calculation formulas towards more sophisticated financial engineering.

The ACPR and the AMF have respectively updated ACPR Recommendation 2016-R-04 (regarding the marketing of unit-linked life insurance contracts) and AMF position (DOC-2010-05) on the marketing of complex financial instruments and AMF guides (DOC-2011-24 and DOC-2013-13) on drafting marketing documents of UCIs and structured debt instruments, notably by adding information and specific examples to determine objective criteria to assess the complexity of an index in light of the criteria used by the AMF, and/or to avoid any risk of mis-selling to retail investors, in which case related marketing documents should contain a deterrent warning.

The AMF has drawn the attention of professionals to non systematic indexes, complexities lying with underlying indexes, as well as the discretionary aspects of (underlying) indexes involving entities unregulated for collective or individual management also requiring enhanced vigilance and warnings.

AMF consults on possibility of regulating corporate finance advice on capital structure and mergers and acquisitions

The AMF has launched a consultation on the possibility of regulating entities that advise businesses on company mergers and transfers, external growth transactions and the opening up of capital. These corporate finance advisory services are not currently regulated as such in France.

Even though there are no plans to create a new regulated profession grouping together all of the relevant non-regulated professionals and regulated players providing this type of service, the consultation document addresses the possibility of reshaping the regulatory framework through two alternative proposals:

- the current status quo: the provision of a ‘corporate finance advisory’ service is governed by common law and any disputes fall under the competency of the commercial courts; or
- the introduction of an ‘optional’ regulation for professionals – those players having opted in undertake to comply with a code of conduct and organisational rules for their business to be conducted competently, carefully and diligently, and in the best interest of their customers. Any failure to do so could result in sanctions from a professional organisation or the AMF.

Comments are due by 28 February 2017.

French Decree modifying ceilings on payment of debts or pawn loans in cash or e-money published

Decree no. 2016-1985, dated 30 December 2016, modifying the relevant ceilings on payment of debts or pawn loans in cash or e-money has been published in the French Journal Officiel.

The Decree increases the maximum amount for settlement of a debt in e-money from EUR 1000 to EUR 3000 where the debtor has its tax residence in France or acts within the framework of its professional activity, while leaving the ceiling for payments in cash unchanged at EUR 1000.

In addition, and by way of derogation, the Decree specifically sets a EUR 3000 ceiling for payments of pawn loans on tangible assets in cash or e-money by municipal savings banks (Caisses de crédit municipal).

The Decree entered into force on 1 January 2017.

People's Bank of China issues circular on macroprudential management of fully covered cross-border financing

The People's Bank of China (PBOC) has promulgated the 'Circular on Issues concerning the Macroprudential Management of Fully Covered Cross-border Financing' (Yin Fa [2017] No. 9) which, following the existing regulatory framework, widens the scope of application and increases the funds that a corporate or a financial institution may raise. Among other things, the circular brings about the following key changes:

- in addition to non-financial corporates (excluding government financing vehicles and real estate enterprises) and financial institutions incorporated in China, PRC branches of foreign banks are included as being subject to the fully-covered cross-border financing regime;
- the upper limit of risk-weighted outstanding cross-border financing for corporates has doubled and thus the cross-border financing leverage ratio has increased from 1 to 2;
- financing under more items of business is not counted in the risk-weighted outstanding cross-border financing of a corporate or a financial institution. These additional items of business are foreign-currency-denominated debts arising out of the investments by offshore entities in the bond market in China, foreign-currency-denominated savings of offshore entities in China, funds of QFIIs and RQFIIs under custody of financial institutions, funds raised through 'Panda Bonds' and put into custody in a financial institution in China, foreign-currency-denominated trade financing from offshore financial institutions, loans to intragroup offshore entities regardless of the purpose of credit, and lending from onshore banks to offshore banks. 'Nei Bao Wai Dai' or financing provided by offshore financial institution upon guarantee by onshore financial institution is counted in the risk-weighted outstanding cross-border financing at a discount of 20%.

The circular sets out a one-year transitional period from 11 January 2017 for foreign-invested enterprises and financial institutions in China. During the transitional period, foreign-invested enterprises and financial institutions may decide at their discretion to comply with the existing rules or the rules under the circular with regard to management of fully-covered cross-border financing. After the transitional period, foreign-invested financial institutions will automatically be subject to the circular, while foreign-invested enterprises will be subject to future determination by the PBOC and the State Administration of Foreign Exchange.

CBRC issues guidance on supervision of privately owned banks

Having approved five pilot privately owned banks (POBs) and approved another twelve to prepare their establishment, the China Banking Regulatory Commission (CBRC) has issued guidance on the supervision of privately owned banks, which for the first time sets out specific rules for the supervision of POBs.

Among other things, the following provisions are worth noting:

- POBs are expected to focus on small and medium-size enterprises as well as agriculture and community related business, in order to meet the financing demand in market segments that are differentiated from those of traditional banks, and to employ 'fintechs', such as big data, cloud computing and mobile internet, so as to contribute to an inclusive financial service system;
- among other requirements on corporate governance, capital management, and risk management, a POB is encouraged to specify in its articles of association that a major shareholder may not obtain a credit facility from the POB (for itself or for its affiliates) and may not

pledge its shares in the POB to secure its or any third party's debts;
- the actual controller(s) of the shareholders of a POB must be a Chinese national(s) who does not hold, and should undertake not to apply during the shareholder period for, any non-Chinese citizenship, permanent resident status or other similar status;
- a POB's shareholders should assume residual risk, provide credit enhancement to the POB, and assume the corresponding responsibilities should the bank be subject to administrative take-over and/or insolvency proceedings;
- a POB's shareholders are also required to file the relevant information about themselves with the CBRC; and
- the board of directors of a POB is required to carry out a self-assessment of its shareholders' performance of the relevant undertakings and compliance with the obligations in the articles of association and the shareholders' agreement at least semi-annually, and file the assessment results with the CBRC.

China Insurance Regulatory Commission exercises tightened control over insurance firms' investments in stock market

The China Insurance Regulatory Commission (CIRC) has issued the 'Circular on Certain Matters regarding further Regulating the Stock Investments by Insurance Funds'. The circular reaffirms the CIRC's determination to exercise more tightened control over investments in the stock market by insurance firms such as insurance companies, insurance holding companies and insurance assets management companies (collectively, 'insurance firms') in response to recent cases of insurance funds actively attempting to acquire and control well known listed companies (e.g. prominently, Baoneng's proposed acquisition of Vanke).

The circular classifies insurance funds' stock investments into three categories:

- ordinary stock investment – an insurance firm (or acting in concert with a non-insurance investor) acquires less than 20% of the total shares of a listed company and does not have control over it. The insurance firm's solvency ratio must be no less than 100% In addition to complying with the relevant disclosure of interest rules, the insurance firm must report to CIRC within 5 working days after the disclosure;
- major stock investment – an insurance firm (or acting in concert with a non-insurance investor) acquires 20% or more of the total shares of a listed company and does not have control over it. The insurance firm's solvency ratio must be no less than 150% and it must have completed a filing with CIRC on its investment management capability before a major stock investment. After a major stock investment, the insurance firm must make a filing with CIRC within 5 working days after it makes disclosure according to the stock exchange rules. Any subsequent investments in the same listed company must be made using the insurance firm's proprietary funds;
- takeover of listed companies – an insurance firm obtains control over a listed company. The insurance firm's solvency ratio must be no less than 150% and it must have completed a filing with CIRC on its investment management capability before the takeover. Only the insurance firm's proprietary funds can be used for a takeover and the insurance firm may not act in concert with other non-insurance investors. A takeover requires prior approval from CIRC, and the target listed company is limited to insurance institutions, non-insurance financial institutions or an insurance-related entity which complies with the national industrial policy and has a prospect of stable cash-flow returns. After the takeover, the insurance firm may not pledge acquired shares to finance further stock investments.

The circular further requires that the book value of an insurance firm's holding in all equity investments may not exceed 30% of its total assets as of the end of the preceding quarter. For an insurance firm's holding in a single listed company, if the target is not a listed bank or if the investment is not a takeover, the book value of the insurance firm's investment in a single stock may not exceed 5% of its total assets as of the end of the preceding quarter.

The circular came into effect upon issuance, and applies to an insurance firm's investments in overseas listed stocks by reference.

SAFE issues new circular on foreign exchange administration

The State Administration of Foreign Exchange (SAFE) has issued the `Circular on further Promoting Foreign Exchange Administration Reform and Enhancing Authenticity and Compliance Checks',

setting out certain foreign exchange-related policies covering a wide spectrum of cross-border trades, cross-border security, foreign direct investment, outbound direct investment, overseas loans extension etc. The circular reflects the unwritten philosophy of 'promoting inwards and restricting outwards funds flows' recently adopted by the Chinese government and is viewed as one of the measures intended to increase China's foreign exchange reserves and pursue the stability of the value of RMB.

Among other things, the following policies set out in the circular are worthy of note:

- cross-border trades – the settlement of domestic foreign exchange loans with a genuine goods trading background is permitted and such loans should be repaid using the foreign exchange funds obtained in the debtor's export transactions rather than foreign exchange funds bought in the domestic market;
- cross-border security – the proceeds under Nei Bao Wai Dai are permitted to be remitted back to China via lending, equity investments and other methods;
- foreign direct investments – banks should conduct a review of the submitted documents (including the internal resolution, tax filing form and audited financial statement) when processing the outwards remittance of profits earned by a relevant foreign invested entity the amount of which exceeds USD 50,000. No such remittance will be facilitated before the deficit of such entity in the preceding fiscal years has been covered in full;
- outbound direct investments – the domestic investor(s) should, besides submitting the relevant documents previously required, make a statement in respect of the source and usage plan of the investment funds, the internal resolution, the investment agreement and other documents evidencing the authenticity of the transaction, and the relevant bank should enhance its authenticity and compliance checks;
- centralised operation and management of foreign exchange funds by multinational companies – the maximum usable amount of the deposits received via the international foreign exchange funds principal account of a domestic bank has been lifted to 100% (previously 50%) of the daily average deposits balance in the preceding 6 months of such bank;
- settlement of foreign exchange accounts – the funds in the domestic foreign exchange accounts of foreign institutions in the relevant free trade zone are permitted to be settled; and
- overseas loans extension – total outstanding overseas loans (denominated either in RMB or other non-RMB currency) may be no higher than 30% of the ownership interests of the domestic company (as the lender) as set in the audited financial statement as of the end of the preceding fiscal year.

The circular came into effect upon issuance.

CFTC Commissioner Giancarlo sets out intended changes

Commodity Futures Trading Commission (CFTC) Commissioner J. Christopher Giancarlo has delivered a keynote address before SEFCON VII, a conference organized by the Wholesale Markets Brokers' Association Americas. In his comments Commissioner Giancarlo, who is slated to become acting chairman of the CFTC under the new presidential administration, highlighted areas in which he intends to take action after he takes office, including:

- providing choice in the execution of swaps;
- making improvements in swap data reporting;
- achieving cross-border harmonization;
- encouraging fintech innovation; and
- cultivating a culture of 'forward thinking' at the CFTC.

Among other things, Giancarlo criticized the CFTC's implementation of the Dodd-Frank Act's swap trade execution mandate. He particularly criticized current CFTC rules that limit the execution methods available for swaps subject to the trading execution mandate to an order book or request for quote sent to at least three market participants. Giancarlo argued that the Dodd-Frank Act contains no such requirement and that this limitation on flexibility ignores the nature of the swaps market. Giancarlo stated he plans to move ahead with a proposed alternative regulatory framework detailed in his 2015 white paper.

RECENT CLIFFORD CHANCE BRIEFINGS

The Asia Pacific Top Ten FCPA Cases of 2016

Asia-Pacific played a significant role in 2016's record-breaking enforcement actions of the US Foreign Corrupt Practices Act (FCPA), regionally contributing the largest percentage of cases in terms of both numbers and penalties and accounting for almost one-third of the total fines and penalties assessed. Many of the companies charged were operating in China, but some of the alleged misconduct also took place in Bangladesh, India, Indonesia and Thailand.

This briefing paper discusses the Asia Pacific top ten FCPA cases of 2016.

https://www.cliffordchance.com/briefings/2017/01/the_asia_pacifictoptenfcpacasesof2016.html

Legislation required to trigger Brexit

The Supreme Court has upheld the High Court's decision in R (oao Miller) v DExEU that the Government needs prior authorisation from Parliament to give the article 50 notice that will initiate the process leading to the UK's withdrawal from the EU. The Government must therefore secure the passage of legislation through Parliament before the process can begin, with the potential loss of control that this can bring.

To the surprise of no one who sat through the oral hearings last month, in R (on the application of Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 the Supreme Court has resoundingly rejected the Government's case that the Government has power on its own to give notice to the European Council under article 50 of the Treaty on European Union of the UK's decision to withdraw from the EU. By a majority of 8-3 (adding to the 3-0 first instance decision), the Supreme Court decided that legislation is required in order to authorise the Government to give the article 50 notice.

The Government must now engage fully with Parliament before the withdrawal process can begin, not, as it wanted, only after the departure trigger has already been pulled. The Government remains outwardly confident that it can get legislation through Parliament in time to start the withdrawal process by its target date of the end of March 2017, but there are inevitably uncertainties in the Parliamentary process – uncertainties that the Government has, through its appeal, shown itself anxious to avoid.

This briefing paper looks at the Supreme Court's decision, where the Government must go next, the difficulties the Government might face, and the possible implications of other litigation for Brexit.

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

Third-Party Funding in Singapore – The Dawn of a New Era

Third-party funding is the funding of costs of legal proceedings by an entity that has no direct interest in the outcome of the dispute. Recent changes to Singapore law now allow third-party funding in respect of international arbitration proceedings, and provide parties with a new tool for financing claims.

On 10 January 2017, Parliament passed into law the Civil Law (Amendment) Bill that allows third-party funding for international arbitration and related proceedings before the Singapore courts. The enactment of these widely anticipated legislative amendments confirms that new sources of funding will now be available to parties that are involved in or are contemplating international arbitration proceedings.

This briefing paper discusses the changes.

https://www.cliffordchance.com/briefings/2017/01/third-party_fundinginsingaporethedawnof.html

US Federal Trade Commission announces annual revisions to the thresholds of the HSR Act and prohibition against interlocking directors

Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act), parties to an acquisition or merger meeting certain annually adjusted thresholds must make a pre-closing notification to the US antitrust authorities and abide by a mandatory waiting period, barring the applicability of one of numerous exemptions. These adjusted thresholds also determine the HSR filing fee that the parties must pay. On 19 January 2017, the US Federal Trade Commission (FTC) announced this year's revised thresholds for the HSR Act. The new thresholds will apply to any transaction that closes on or after a currently unspecified date, which we expect to likely be mid-February 2017. As is traditional practice, the announcement also included the annual revision to the thresholds applicable to Section 8 of the Clayton Act, which prohibits interlocking directors.

This briefing paper discusses the revised thresholds.

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

VW Charges Renew Focus on US Arrests of Foreign Nationals

On 7 January 2017, Oliver Schmidt, a German citizen and former general manager of Volkswagen's US Engineering and Environmental Office, was unexpectedly arrested at Miami International Airport shortly before he was scheduled to board a flight to Germany. Following his arrest, a criminal complaint was unsealed, charging Schmidt with several offenses in connection with the Volkswagen emissions scandal. Schmidt's arrest, which came just days

before the United States Department of Justice (DOJ) announced a USD 4.3 billion settlement of the criminal investigation into Volkswagen and unsealed charges against several other Volkswagen executives, exemplifies the increasing focus by the DOJ on prosecuting non-US citizens in connection with alleged corporate wrongdoing. While grand jury investigations in the United States are confidential, and indictments are typically returned under seal, counsel for individuals who may be the subject of or otherwise involved in an investigation can often gain insight into the focus and progress of the investigation through direct inquiry with the appropriate authorities.

This briefing paper discusses the Volkswagen case and other recent cases of the DOJ pursuing foreign executives for alleged misconduct committed in large part outside of the United States.

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

Recent SEC Enforcement Proceeding Highlights Disclosure Obligations of Publicly Traded Companies Exploring Alternatives to Unsolicited Offers – Those Explorations Can't Always be Kept Secret

On 17 January 2017, the SEC issued an Order providing for a consent decree in a proceeding it initiated against Allergan, Inc. In the proceeding, the SEC alleged (and Allergan admitted) that Allergan failed to make timely disclosures in 2014 of Allergan's attempts to negotiate business combination transactions that could serve as alternatives to the hostile takeover proposal made to Allergan by Valeant, first publicly announced in early 2014. Those alternatives, explored by Allergan after Valeant launched a tender offer for Allergan's shares in June 2014, included a possible acquisition by Allergan that if consummated would make Valeant's hostile bid more difficult to complete, and a possible 'white knight' transaction in which Allergan would combine with Actavis. The potential acquisition by Allergan ultimately was not completed; the combination with Actavis was completed. The Order imposes a cease and desist order and a penalty of USD 15 million.

The Order provides an important reminder of the various exceptions to the general rule that, under US law, public companies are not required to disclose discussions or negotiations regarding business combination transactions until a definitive agreement for a transaction is entered into. The Order also raises some interesting policy considerations, because arguably the disclosure the SEC found should have been made would not have helped market participants trading Allergan's stock and could have impaired the efforts by Allergan's board to maximize shareholder value.

This briefing paper discusses the Order.

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

São Tomé e Príncipe – New investment regulations

The government of São Tomé e Príncipe (STP) recently adopted two regulations that are intended to improve the conditions for investment in STP. These are:

- Decree-law No 19/2016, including the investment code for private investment; and
- Decree-law No 15/2016, including the Tax Benefits Code.

The new rules are intended to make STP more attractive to foreign investors and create a regime that takes account of the needs of STP as well as an investor that wishes to invest in STP. The Tax Benefits Code for example promotes private investment in public infrastructure through tax reductions. Equally, investments in key sectors for the economy of STP (such as agriculture, tourism and international commerce) as well as investments in lesser developed parts of the country are incentivised. The new rules are already in force.

This briefing paper describes the main features of the two codes.

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

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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