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Briefing note

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EMIR: EU Commission adopts Delegated Regulation extending clearing obligations deadline for Category 3 counterparties to 21 June 2019

The EU Commission has adopted a Delegated Regulation with regard to the deadline for compliance with clearing obligations for certain counterparties dealing with OTC derivatives under the European Market Infrastructure Regulation (EMIR). The new Delegated Regulation amends Delegated Regulations Nos. 2015/2205, 2016/592 and 2016/1178.

The Delegated Regulation amends point (c) of Article 3(1) of each of the three previous Delegated Regulations so that the phase-in periods for counterparties in Category 3 are extended to 21 June 2019. This aligns the date on which all three clearing obligations take effect with respect to counterparties in Category 3.

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

CRD 4: Commission Implementing Regulation on information exchanges between authorities regarding qualifying holdings published in Official Journal

Commission Implementing Regulation (2017/461) laying down implementing technical standards (ITS) on common procedures, forms and templates for the consultation process between the relevant competent authorities for proposed acquisitions of qualifying holdings in credit institutions, in accordance with the Capital Requirements Directive (CRD 4), has been published in the Official Journal.

The objective of the draft ITS is to ensure effective and efficient communications between concerned authorities, both on a cross-border basis and across sectors. The ITS set out a streamlined process, which consists of a single notice to send an information request and respond to it, when competent authorities across the EU consult each other on acquisitions and increases of qualifying holdings in credit institutions. The standards also specify the timeframe for submitting the consultation notice and responding to it and provide a set of templates for this purpose.

The Implementing Regulation will enter into force on 6 April 2017.

CSDR: ESMA publishes Q&A

The European Securities and Markets Authority (ESMA) has published its first set of questions and answers (Q&A) on the Central Securities Depositories Regulation (CSDR). The Q&A follow the publication in the Official Journal of the CSDR Level 2 package.

The focus of the Q&As is CSD requirements provisions, which enter into force on 30 March 2017 and trigger the CSD authorisation process. Prospective CSD applicants can apply for authorisation at the end of September 2017.

Basel Committee consults on proposed guidelines for identification and management of step-in risk

The Basel Committee on Banking Supervision (BCBS) has published a consultative document on the identification and management of step-in risk.

The aim of the proposed framework included in the consultative document is to mitigate potential spillover effects from the shadow banking system to banks.

The proposed guidelines define the step-in risk that is potentially embedded in banks' relationships with unconsolidated entities. Step-in risk is the risk that a bank might support entities beyond its contractual obligations in order to protect itself from any adverse reputational risk stemming from its connection to the entities.

The guidelines propose criteria for the identification of step-in risk that cover the risk characteristics of the entities in addition to banks' relationships with them. In terms of prudential response, the Committee recognises the necessity of a tailored rather than a standardised approach. To this end, the proposed framework entails no automatic Pillar 1 capital or liquidity charge additional to the existing Basel standards; instead it leverages existing prudential tools by informing or supplementing them.

Comments are due by 15 May 2017.

FSB consults on unique transaction identifier governance arrangements

The Financial Stability Board (FSB) has launched a consultation on proposed governance arrangements for a global unique transaction identifier (UTI), which is the key harmonised identifier designed to facilitate effective aggregation of transaction reports about OTC derivatives markets.

The FSB recommended the creation of the UTI in 2014 and it is intended to uniquely identify individual financial transactions in reports to trade repositories (TRs), in particular to help ensure the consistent aggregation of OTC derivatives transactions by minimising the likelihood that the same transaction will be counted more than once, such as when it is reported by more than one counterparty to a transaction or to more than one TR.

Following the publication of the UTI technical guidance by the Committee on Payments and Market Infrastructures (CPMI) and International Organization of Securities Commissions (IOSCO), the FSB is consulting on certain proposals and options for UTI governance arrangements.

Comments are due by 5 May 2017.

HMT consults on draft Money Laundering Regulations and announces new AML/CFT oversight body

Following the Government's call for information on the anti-money laundering (AML) supervisory regime and the Cutting Red Tape Review of the UK's AML and counter financing of terrorism (CFT) regime, the Government has announced that it intends to create a new Office for Professional Body Anti-Money Laundering Supervision (OPBAS). The new body will be housed within the Financial Conduct Authority (FCA) and will operate within the FCA's existing governance arrangements. Alongside the announcement, the Government has published a report setting out a summary of the views and evidence submitted to the Cutting Red Tape Review on AML/CFT.

OPBAS is intended to ensure consistent standards across the regime and set out how professional body AML supervisors should comply with their obligations under new Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, which have been published for consultation by HM Treasury (HMT). The HMT consultation on the draft Regulations follows a previous consultation on the transposition of the Fourth Money Laundering Directive (AMLD 4), feedback from which has been summarised in the consultation paper. Among other things, the draft Regulations include provisions on the treatment of politically exposed persons (PEPs). The FCA has published a separate consultation on draft guidance on the treatment of PEPs under the draft Regulations to coincide with the HMT consultation, which is relevant to all persons subject to supervision by the FCA.

Comments on the HMT consultation are due by 12 April 2017 and comments on the FCA consultation are due by 18 April 2017. The Regulations are expected to come into force on 26 June 2017.

German Federal Government publishes draft law to implement PSD2 in Germany

The German Federal Government has published a draft law to implement the revised Payment Services Directive (EU) 2015/2366 (PSD2) in Germany.

In particular, under the draft law:

- payment initiation service providers require a payment service licence from the German Federal Supervisory Authority;
- payees shall not request charges for the use of payment instruments for which interchange fees are regulated under Chapter II of Regulation (EU) 2015/751 and for payment services to which Regulation (EU) No 260/2012 applies; and
- strong customer authentication is required where the payer (i) accesses its payment account online; (ii) initiates an electronic payment transaction; or (iii) carries out any action through a remote channel which may imply a risk of payment fraud or other abuses.

The law is intended to enter into force on 13 January 2018, subject to changes made by the German parliament.

Public hearing held on draft law implementing MiFID2 and EU Commission Delegated Directive of 7 April 2016

The draft law implementing the Markets in Financial Instruments Directive (MiFID2) and Commission Delegated Directive of 7 April 2016 supplementing MiFID2 with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits will be subject to a public hearing until 10 April 2017.

In general, the proposed draft law aims to address the following challenges:

- regulatory fragmentation in connection with the financial markets within the European Union;
- growth in complexity of financial instruments and services;
- limited application of the regulatory framework to certain products and markets;
- the necessity of strengthening the internal management system of financial institutions (i.e. corporate governance) and their basic principles for the development and marketing of products; and

- the improvement of behaviour and investor protection rules.

Public hearing held on draft law amending Royal Decree Law 4/2015 approving recast text of Securities Market Law

The General Secretariat of the Treasury and Financial Policy (Secretaría General del Tesoro y Política Financiera) is holding a public hearing on the draft law amending Royal Decree Law 4/2015, of 23 October, approving the recast text of the Securities Market Law (texto refundido de la Ley del Mercado de Valores (TRLMV)), which is intended to adapt the TRLMV to the EU Market Abuse Regulation (MAR) and Commission Implementing Directive (EU) 2015/2392 on reporting to competent authorities of actual or potential infringements of MAR.

The principal objective of the proposed draft law is the establishment of the standard conditions, agreed within the European Union, to be applied in order to detect and prevent market abuse practices.

The mid-term objectives required to adapt the TRLMV to such standard conditions can be divided into three different categories:

- introducing in the TRLMV an infringements and sanctions framework adapted to the prohibitions and obligations contained in the standard conditions;
- ascribing new administrative measures and powers to the Spanish supervisor (i.e. the Spanish National Securities Commission (Comisión Nacional del Mercado de Valores)) in order to guarantee adequate compliance with the standard conditions; and
- facilitating the discovery and sanction of infringements in connection with market abuse and financial instruments markets (under MiFID2) through: (i) secure and confidential communication channels within the Spanish supervisor; and (ii) the protection of the informer against potential negative consequences within his/her work environment or contractual position.

This draft law will be subject to a public hearing until 27 March 2017.

Preliminary public hearing held on Royal Decree in connection with application of reform of securities clearing, settlement and recording system

The General Secretariat of the Treasury and Financial Policy is holding a preliminary public hearing on Royal Decree XX/2017 in connection with the application of the reform of the securities clearing, settlement and recording system.

Royal Decree 878/2015, of 2 October, established a set of rules to develop the reform of the Spanish securities clearing, settlement and recording system. The reform was structured into two phases: the first one, already completed, in connection with equity securities and the second one, regarding the incorporation of fixed income securities to the TARGET-2 platform, which is expected to take place in September 2017.

In line with the above, the preliminary Royal Decree is intended to adapt the legal regime applicable to activities on the securities clearing, settlement and recording system specific for fixed income securities so that Iberclear (as Spanish central securities depositary) can modify and adapt its internal regulation (i.e. Iberclear's Regulation, Circulars and corresponding instructions).

The principal aims of the preliminary regulation are as follows:

- activating the reform of the Spanish securities clearing, settlement and recording system for fixed income securities, establishing specific timings and terms in connection with its application;
- identifying elements of Royal Decree 878/2015 that require specific treatment, among others, the issuance document, information system regarding trading supervision, or securities clearing, settlement and recording system; and
- allowing flexibility of the rule requiring participating entities to always maintain the securities that they hold in its own securities accounts within the central registry managed by Iberclear.

This preliminary Royal Decree will be subject to public hearing until 27 March 2017.

Preliminary consultation held on proposed Bank of Spain circular amending Circular 1/2013 on Risk Information Centre

The Bank of Spain is holding a preliminary consultation on a proposed circular amending Circular 1/2013, of 24 May, on the Risk Information Centre (Central de Información de Riesgos).

The financial crisis highlighted deficiencies in the financial information available in connection with the level of indebtedness and credit risks assumed by different economic agents and the importance of risk centres as a source of information. In response to this, the European

Central Bank (ECB) adopted Decision ECB/2014/2016, which established a set of preparatory measures in order to build a common regulatory framework on analytical data gathering.

In 2016, the ECB approved Regulation (EU) 2016/867 of the European Central Bank, of 18 May 2016, on the collection of granular credit and credit risk data (ECB/2016/13) (AnaCredit). In order to comply with AnaCredit's reporting obligations, the Bank of Spain will disclose the data obtained through its Risk Information Centre (CIR) to the ECB. This procedure will avoid the duplication of reporting obligations; entities subject to such reporting requirements (i.e. credit institutions resident in a euro area Member State and foreign branches of credit institutions, provided that these branches are resident in a euro area Member State) will just have to present one single report.

In general terms, the principal aims of the Bank of Spain's proposed circular are to incorporate the reporting obligations covered under AnaCredit into the reporting framework under the CIR (i.e. credit and credit risk information). The changes required to adapt to such regulation can be divided into three different categories:

- requesting information on new credit transactions;
- gathering new information on interest rates and accounting situations in connection with transactions declared as well as financial data and received guarantees; and
- harmonising the set of definitions and concepts included in Circular 1/2013 with the ones included in AnaCredit.

The proposed circular will be subject to public hearing until 25 March 2017.

Public hearing held on preliminary Royal Decree to make constitution of Reserve Fund more flexible

The General Secretariat of the Treasury and Financial Policy is holding a public hearing on Royal Decree XX/2017, modifying Royal Decree 877/2015, of 2 October, which develops Law 26/2013, of 27 December, on savings banks and banking foundations by which the Reserve Fund that certain banking foundations shall constitute is to be regulated; modifying Royal Decree 1517/2001, of 31 October, by which the regulation developing the recast text of the Auditing Law (approved by Royal Decree Law 1/2011, of 1 July) is approved; and modifying Royal Decree 1082/2012, of 13 July, approving the development Regulation of Law 35/2003, of 4 November, of Collective Investment Institutions.

Law 26/2013, of 27 December, on savings banks and banking foundations established a set of rules to regulate the divestment process of the banking business of banking foundations in savings banks. This law aimed to avoid that banking foundations controlled savings banks and, if such control existed, to guarantee that potential economic resources that savings banks may need were covered through the constitution of a Reserve Fund.

In line with the above, Royal Decree 877/2015, of 2 October, developed Law 26/2013. Among other things, this regulation set the maximum period to constitute the Reserve Fund. At this moment, the disconnection procedure is taking place effectively. Accordingly, the General Secretariat of the Treasury and Financial Policy considers it reasonable to modify the regulation to make the constitution of the Reserve Fund more flexible. In line with the above, Royal Decree XX/2017 is intended to:

- set the maximum period to constitute the Reserve Fund at 7 years, starting from the entry into force of a Bank of Spain Circular developing this Royal Decree or in the event that a banking foundation has a participation in a savings bank higher than a 50%;
- extend by 2 years the maximum period referred to in the first bullet point above (i.e. a maximum of 9 years to completely constitute the Reserve Fund) due to the deterioration of the Spanish economic-financial situation; and
- require banking foundations to assign a minimum 30% of the received amounts from the partially-owned entities to the Reserve Fund as distribution of cash dividends.

This preliminary Royal Decree will be subject to public hearing until 17 March 2017.

Resource Utilisation Support Fund levy reduced for TRY loans to be extended to Turkish residents from abroad

Decision No. 2017/9973 of the Council of Ministers, which introduces a new Resource Utilisation Support Fund levy (RUSF) amount for TRY loans, has been published in the Official Gazette (dated 15 March 2017 and numbered 30008). Previously, any TRY loan to be granted from abroad to Turkish residents (other than banks and financing companies) would be subject to RUSF at a rate of 3% over the interest amount. The new RUSF amount under the Council of Ministers' Decision is calculated based on the

average maturity of the TRY loan. Accordingly, if a TRY loan to be extended to Turkish residents (other than banks and financing companies) from abroad (save for fiduciary transactions) has an average maturity of less than 1 year, it will be subject to RUSF at a rate of 1% over the interest amount. On the other hand, the RUSF amount will be 0% for TRY loans with an average maturity of at least 1 year.

KRX amends enforcement rules regarding multipliers for KOSPI200 index derivatives

The Korea Exchange (KRX) has announced amendments to the enforcement rules regarding 'multipliers' for KOSPI200 Index derivatives. The amendment is intended to decrease the multipliers for KOSPI200 Index derivatives by half with effect from 27 March 2017.

Consequently, the number of open interests of KOPSI 200 Index derivatives will be doubled on 27 March 2017. The position limit, quotation quantity limit, accumulated quotation limit and the threshold for the excessive quotation charge will be doubled accordingly. The minimum margin per contract will be decreased by 50% as well.

Singapore and Japan establish FinTech co-operation framework

The Monetary Authority of Singapore (MAS) and the Financial Services Agency (FSA) of Japan have announced the establishment of a co-operation framework to enhance FinTech linkages between both countries.

The framework enables the MAS and the FSA to refer FinTech companies in their countries to each other's markets. It also outlines how the referred companies can initiate discussions with the regulatory bodies in the respective jurisdictions and receive advice on their regulatory frameworks, such as required licences. This is intended to help reduce regulatory uncertainty and barriers to market. In addition, the framework sets out how the regulators plan to share and use information on financial services innovation in their respective markets.

CFTC extends comment period regarding proposed capital requirements for swap dealers and major swap participants

The US Commodity Futures Trading Commission (CFTC) has announced that it is extending the public comment period for its proposal to establish minimum levels of qualifying capital for swap dealers (SDs) and major swap participants (MSPs) that are not subject to the capital rules of a prudential regulator (covered swap entities). The comment period for the proposed capital requirements, which was to expire on 16 March 2017, has been extended until 15 May 2017.

The proposed rules address a covered swap entity's qualifying capital and the minimum levels of such qualifying capital that it would be required to maintain. The proposed rules would also:

- address when internal models may be used for purposes of the required capital calculations;
- subject certain SDs to liquidity requirements; and
- impose related recordkeeping, reporting and notification requirements.

These capital requirements are intended to complement US margin requirements and implement Section 731 of the Dodd Frank Wall Street Reform and Consumer Protection Act.

RECENT CLIFFORD CHANCE BRIEFINGS

Brexit – Legislation passed allowing the UK to give notice under Article 50

The European Union (Notification of Withdrawal) Act 2017 gives the UK Government the authority the Supreme Court decided it required in order to notify the European Council under Article 50 of the Treaty on European Union of the UK's intention to leave the EU. The Government can therefore deliver the UK's withdrawal notice by its self-imposed deadline of the end of March 2017. The UK will then leave the EU on the entry into force of a withdrawal agreement between the UK and the EU or, failing that, in late March 2019.

This briefing paper highlights a number of important issues and points about the period leading to departure.

https://www.cliffordchance.com/briefings/2017/03/brexit_legislationpassedallowingtheukt.html

Ninth Circuit Holds that Internal Whistleblowers Are Protected from Retaliation

On 8 March 2017, the United States Court of Appeals for the Ninth Circuit held that individuals who make internal disclosures of potential securities law violations – like those who report wrongdoing directly to the Securities Exchange Commission (SEC) – are protected as 'whistleblowers' under the Dodd Frank Act. This decision, which follows the 2015 decision by the United States Court of Appeals for the Second Circuit in Berman v. Neo@Ogilvy LLC, reinforces

the need for companies to ensure that internal whistleblowers are adequately protected from retaliation.

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2017/03/ninth_circuit_holdsthatinternalwhistleblower.html

Infrastructure in Mexico – USD 3 Billion Public Private Partnership Projects Plan Unveiled

On 9 March 2017, the Mexican government announced the highly anticipated Mexican Public Private Partnership Projects Plan for the construction, rehabilitation, operation and maintenance of several infrastructure projects in the country, with an overall estimated investment of USD 3 billion.

This briefing paper provides an overview of the plan.

https://www.cliffordchance.com/briefings/2017/03/infrastructure_inmexicous3billionpubli.html

Proposed changes to Australia's foreign investment regime

On 8 March 2017 the Australian Government released a Foreign Investment Framework 2017 Legislative Package Consultation Paper containing proposed changes to Australia's foreign investment framework. The proposals seek to address some of the unintended consequences of the new foreign investment law introduced at the end of 2015 and are expected to be welcomed by foreign investors.

This briefing paper discusses the proposals.

https://www.cliffordchance.com/briefings/2017/03/proposed_changestoaustraliasforeig.html