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Briefing note

International Regulatory Update

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- Bill implementing AMLD 4 and FATF 2 Regulation in Luxembourg published
- HKMA issues circular on phase two of OTC derivative transactions reporting regime
- MAS consults on draft Securities and Futures (Markets) Regulations 2017
- MAS consults on proposed amendments to Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005
- Recent Clifford Chance briefings: Non-Payment Insurance as Credit Risk Mitigation Under Regulation Q; and more. Follow this link to the briefings section.

EMIR: EU Commission publishes legislative proposal for amendment and communication on future proposals

The EU Commission has published a proposal on targeted reforms to the European Market Infrastructure Regulation (EMIR), which are intended to improve the functioning of the derivatives market in the EU and provide simpler and more proportionate rules for OTC derivatives.

Overall, the Commission has concluded that the framework functions well and the proposal is intended to make amendments in a limited number of areas while maintaining all key elements of the framework. The legislative proposal follows the Commission's decision to include a review of EMIR in its Regulatory Fitness and Performance Programme (REFIT) in 2016.

In particular, the Commission proposes:

- streamlined reporting requirements for all counterparties;
- changes for non-financial counterparties (NFCs) so that they will clear only the asset classes for which they have breached the clearing threshold;
- a new clearing threshold for small financial counterparties; and
- a three year temporary exemption for pension funds from central clearing.

Alongside the proposal, the Commission has also adopted a communication setting out its intention to present further legislative proposals to address other issues in derivatives clearing by summer 2017. The further proposal is intended to enhance the common supervisory arrangements for CCPs in relation to, among other things, enhanced supervision at EU level and/or location requirements. The communication deals with challenges for critical financial market infrastructures and further development of the Capital Markets Union (CMU). Among the challenges foreseen by the Commission is the UK's forthcoming withdrawal from the EU and, in particular, the communication highlights euro-denominated interest rate derivative clearing in the UK and clearing of derivatives denominated in other Member States' currencies as being transactions that directly impact the responsibilities of relevant EU and Member States' institutions and authorities.

EMIR: Delegated Regulation amending clearing obligation deadline for certain counterparties published in Official Journal

A Commission Delegated Regulation (2017/751) amending Delegated Regulations under EMIR as regards the deadline for compliance with clearing obligations for certain counterparties dealing with OTC derivatives has been published in the Official Journal.

Commission Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 determine four categories of counterparties for the purposes of setting out the dates on which their respective clearing obligations take effect. Counterparties are categorised according to their level of legal and operational capacity and by their trading activity in relation to OTC derivatives. In order to ensure a timely and orderly application of the clearing obligation, staggered phase-in periods were applied to those different categories of counterparties.

Following the submission of draft regulatory technical standards (RTS) by the European Securities and Markets Authority (ESMA) to the Commission, Delegated Regulation 2017/751 amends the specified regulations with regard to the application date for Category 3 counterparties.

The Delegated Regulation will enter into force on 19 May 2017.

Single Resolution Fund: Delegated Regulation on ex ante contributions published in Official Journal

A Commission Delegated Regulation (2017/747) on ex ante contributions to the Single Resolution Fund (SRF), which specifies the criteria relating to ex-ante contributions and provisions on the deferral of ex-post contributions, has been published in the Official Journal.

The Regulation supplements the Single Resolution Mechanism Regulation (806/2014 – SRMR) and will enter into force on 19 May 2017.

Recovery and resolution of CCPs: EU Council Presidency publishes compromise proposal

The Presidency of the EU Council has published a compromise text on the proposal for a regulation on a framework for the recovery and resolution of central counterparties (CCPs).

Fintech: EU Parliament publishes report on influence of technology on future of financial sector

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published a report on the influence of technology on the future of the financial sector. The report calls on the EU Commission to develop an action plan to enable new and innovative technologies to develop in the framework of the Capital Markets Union and Digital Single Market.

The report outlines key priorities such as:

- cybersecurity and data protection;
- interoperability and passporting of fintech services within the EU;
- providing a level playing field for traditional companies and start-ups; and
- controlled experimentation with new technologies and fostering financial education and IT skills.

The EU Parliament's plenary session is expected to vote on this report on 16 May 2017.

CRD 4: EBA issues amended technical standards on benchmarking of internal approaches

The European Banking Authority (EBA) has published its amended implementing technical standards (ITS) on benchmarking of internal approaches EU institutions use to calculate own funds requirements for market and credit risk, as required by the Capital Requirements Directive (CRD 4). The amendments, which reflect changes to the Single Rulebook, include more precise reporting instructions and definitions and updates to the benchmarking portfolios to facilitate the 2018 assessment of internal approaches for credit and market risks and ensure they remain relevant for supervisors.

The amended ITS are intended to improve the quality of submitted data and to assist the EBA and competent authorities in running their 2018 benchmarking exercise. They are expected to apply to the submission of initial market valuation data by November 2017 and the submission of other market and credit risk data by April 2018.

BoE publishes estimates of interim and final consolidated MREL requirements

The Bank of England (BoE) has published two tables setting out indicative MRELs (minimum requirements for own funds and eligible liabilities) for each of the UK's global systemically important banks (G-SIBs) and domestic systemically important banks (D-SIBs) and certain other banks and building societies that currently have a resolution plan that involves the use of resolution tools by the BoE.

UK firms will be subject to interim requirements on MREL from 1 January 2020, prior to the final requirements coming into force in 2022. From 2022, firms will be expected to hold both their going-concern requirements together with additional MREL of an amount equal to those going concern requirements. The BoE intends to review its approach to calibration of the 2022 MREL for all firms before the end of 2020, before setting final MRELs.

The information published for systemically important banks sets out the estimates of the interim and final consolidated MREL requirements that the BoE has sent to G-SIBs and D-SIBs, which are based on the calibration methodology set out in the BoE's statement of policy published on 8 November 2016 with reference to firms' minimum capital requirements and balance sheets as at December 2016. For the other banks, the BoE has provided an average, in order not to reveal the firm-specific element of their capital assessments, many of which have not previously been disclosed.

FCA sets out final rules on whistleblowing requirements for UK branches of foreign banks

The Financial Conduct Authority (FCA) has published a policy statement containing feedback and final rules following its consultation on proposed whistleblowing requirements for UK branches of overseas (EEA and third-country) banks (CP16/25). The new requirements proposed were:

- that UK branches of overseas banks must tell their UK-based employees about the FCA and Prudential Regulation Authority (PRA) whistleblowing services; and
- that UK branches of overseas banks that have a sister or parent company that is subject to the FCA's whistleblowing rules must inform their UK-based staff that they are able to make use of that company's whistleblowing arrangements.

Overall respondents supported the proposed requirements and the FCA intends to implement them as consulted on,

with one amendment to add guidance to the instrument reminding branches that they may continue to have concurrent reporting obligations to their home state regulator.

The final rules will come into effect on 7 September 2017.

FCA publishes policy statement on extending conduct rules to all non-executive directors in banking and insurance sectors

The FCA has published a policy statement on final rules extending the Code of Conduct sourcebook (COCON) to standard non-executive directors (NEDs) in banks, building societies, credit unions, dual-regulated investment firms and insurance firms.

The new rules on the COCON are part of the FCA accountability regimes introduced in March 2016 for banks and insurers designed to help raise standards of conduct and reduce the risk of future misconduct and mis-selling in firms.

CRD 4: FCA publishes Handbook changes on remuneration rules

The FCA has published a policy statement setting out its final guidance and changes to the FCA Handbook in relation to remuneration rules for CRD 4 firms (PS17/10). The policy statement will affect all firms within the scope of CRD 4 who are to comply with the FCA's Remuneration Code under the Senior Management Arrangements, Systems and Controls Sourcebook (SYSC) 19A and 19D rules, as well as some firms subject to the FCA's remuneration code under SYSC 19C.

The FCA consulted on proposed changes to the Handbook and minor changes to proportionality guidance intended to ensure that the FCA's rules comply with European Banking Authority (EBA) guidelines on CRD 4 rules, which were published in December 2015 and came into force on 1 January 2017. The policy statement sets out the FCA's feedback on responses received, clarifications and the consultation and the final rules.

The EBA guidelines came into force on 1 January 2017 and are directly addressed to firms. The FCA calls on firms to ensure that they comply with the EBA guidelines for the 2017 performance year onwards, as well as the FCA's rules which took effect upon publication of the policy statement.

PRIIPs: FCA sets out amendments to Handbook disclosure rules

The FCA has published a policy statement containing feedback and final rules following its consultation on proposed amendments to the disclosure provisions in the FCA Handbook to reflect the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation (CP16/18). In particular the statement sets out how the disclosure requirements will change to reflect the requirement that firms prepare and publish a Key Information Document (KID) for each PRIIP manufactured.

The rules will apply from 1 January 2018, the same day on which the PRIIPs Regulation is expected to take effect.

Senior Managers Regime: FCA publishes final guidance on duty of responsibility

The FCA has published a policy statement setting out guidance on the duty of responsibility (PS17/9), which sets out amendments to the Decision Procedure and Penalties Manual (DEPP) in relation to the Senior Managers Regime (SMR).

The accountability regimes – the SMR, Certification Regime and Conduct Rules – came into force on 7 March 2016 and the duty of responsibility, which was introduced by the Bank of England and Financial Services Act 2016, came into force on 10 May 2016. Under the duty of responsibility, the FCA and the Prudential Regulation Authority (PRA) can take action against senior managers if they are responsible for the management of any activities in their firm in relation to which their firm contravenes a regulatory requirement, if the senior manager does not take such steps as a person in their position could reasonably be expected to take to avoid the contravention occurring, or continuing. The duty of responsibility is supported by Conduct Rules, which set a standard of good conduct for certain staff. The FCA has made no substantive amendments to the proposals set out in its consultation on amendments to DEPP in September 2016 (CP16/26).

The amendments will apply from 3 May 2017.

Amendment to Ministerial Order dated 27 October 2015 on financial resources of Resolution and Deposit Guarantee Fund published

A Ministerial Order, dated 13 April 2017, amending the Ministerial Order dated 27 October 2015 on the financial resources of the Resolution and Deposit Guarantee Fund (Fonds de Garantie des Dépôts et de Résolution) has been published. The Ministerial Order sets out the procedure by

which the Ministerial Order of 27 October 2015 applies to contributions of the fund members under the Investor Guarantee mechanism and the Securities Guarantee mechanism.

In accordance with paragraphs 3 and 5 of Article L. 312-16 of the Monetary and Financial Code, it sets out the legal characteristics of certificates of associates and certificates of association and the conditions and limits subject to which a portion of the contributions may not be paid to the Fonds de Garantie des Dépôts et de Résolution.

The Ministerial Order also repeals Regulation 99-15 of 23 September 1999 of the Banking and Financial Regulation Committee (Comité de la Réglementation Bancaire et Financière) relating to the resources and operation of the securities guarantee scheme and Title II and the annex of Regulation 2000-06 of 6 September 2000 relating to the membership and resources of the guarantee mechanism.

The Ministerial Order entered into force on 27 April 2017, the day following its publication.

CNMV approves new circular on liquidity agreements

The Spanish National Securities Market Commission (CNMV) has approved a new circular on liquidity agreements (Circular 1/2017). The new circular follows the EU Market Abuse Regulation, which sets out 'accepted market practices'.

The new regulation, which replaces and revokes CNMV Circular 3/2007, introduces specific rules, limits and new mechanisms. Among other things, it specifically establishes the following:

- conditions for the insertion or modification of orders during auction periods with regard to price and volume;
- volume thresholds for the level of liquidity of the shares (in accordance with MiFID criteria) that are the subject matter of the liquidity agreement (15% for those with higher levels of liquidity and 25% for the remainder);
- maximum levels of resources that may be assigned to the liquidity agreement, in relation to the level of liquidity of the shares in question (in accordance with MiFID criteria);
- an extension of the scope of application of the market practice to multilateral trading facilities; and
- circumstances under which the liquidity agreement should be suspended.

The circular will enter into force two months after its publication in the Official State Gazette. Issuing companies that wish to operate under liquidity agreements regulated by the circular must sign a new agreement and submit it to the CNMV prior to its entry into force.

Italian Council of Ministers passes final draft bill delegating power to Government to implement various EU Directives into national law

The Italian Council of Ministers has approved the final draft bill of the European Law 2016 (Legge di Delegazione Europea 2016). This follows a proposal from the first minister, Paolo Gentiloni, and a favourable opinion from the 'Permanent Conference for the relationship between the State, the Regions and the Independent Provinces of Trento and Bolzano'.

The law entrusts the Government with powers to implement 26 EU Directives into Italian national law and implement six EU Regulations by adjusting Italian legislation accordingly.

Amongst other things, the draft law provides for new rules intended to regulate tourist packages, trade marks, insurance distribution, insider dealing and market abuse matters, reference indexes for financial contracts and investment funds' performance, protection of personal data in investigations and exchange of information for tax purposes.

Furthermore, the draft law empowers the Government to introduce, in the next two years, criminal and administrative penalties for the violation of EU Directives and Regulations which the Italian national system has already implemented.

CONSOB and Bank of Italy approve amendments to CONSOB regulation on issuers and joint regulation implementing UCITS V

Following two consultations with the market, the Commissione Nazionale per le Società e la Borsa (CONSOB) and the Bank of Italy have approved amendments to the CONSOB Regulation on Issuers (Resolution dated 27 April 2017 no. 19974) and to the Bank of Italy/CONSOB Joint Regulation (Resolution dated 27 April 2017) implementing Directive 2014/91/EU (UCITS V). These amendments are intended to give full implementation to UCITS V and in particular to the new legal framework governing remuneration matters.

Italian Council of Ministers approves draft legislative decree implementing MiFID2 and adapting national legislation to MiFIR

The Italian Council of Ministers has, following a preliminary examination, approved a first draft legislative decree

intended to implement MiFID2 and adapt domestic legislation to the provisions of MiFIR.

MiFID2 and MiFIR replace the previous legal and regulatory framework introduced by MiFID1 and also regulate new areas not previously covered. The key objective remains the creation of a single market in financial services in Europe, which also guarantees transparency and protection to investors.

Amongst other things, European and local authorities will have the power to deny or limit distribution of certain financial products which may affect market stability and integrity, negotiations, and investors' interests.

With the transposition of MiFID2, a uniform system of rules relating to whistleblowing in the financial system has been adopted.

Bill implementing AMLD 4 and FATF 2 Regulation in Luxembourg published

A new bill (no. 7128) implementing the fourth Anti-Money Laundering Directive (AMLD 4 – Directive (EU) 2015/849) and the second Regulation on information accompanying transfers of funds (FATF 2 Regulation – Regulation (EU) 2015/847) has been published.

The bill implements the AMLD 4 and ensures the correct implementation of the FATF 2 Regulation in the Luxembourg legal framework. The AMLD 4 aims to align the European regulatory framework to the modifications brought about by the recommendations of the Financial Action Task Force (FATF) in 2012. The new rules, setting out a risk-based approach, provide further details on the scope of obligations required for all relevant national and international actors in order to ensure better comprehension of the risks and vulnerabilities in relation to anti-money laundering and counter-terrorist financing (AML/CTF).

The bill provides for an obligation to perform an in-depth risk evaluation which should allow the relevant professionals to adapt their level of monitoring depending on the risks identified. In order to facilitate this task, the AMLD 4 contains three annexes which list client-inherent risk variables, and risk factors indicating potential money laundering/terrorist financing risks. On this basis, professionals will be able to evaluate the adequate individual level of monitoring of their clients. The AMLD 4 contains no list of situations and transactions where professionals may systematically apply simplified monitoring and professionals are therefore required to perform a risk evaluation of the respective transactions based on the risk criteria provided for in the annexes to the AMLD 4. The AMLD 4 further provides a certain number of situations entailing higher risks, for which professionals shall implement reinforced monitoring measures. Finally, the AMLD 4 sets out detailed rules as to the supervisory mechanisms available to Member States by providing for a minimum level of sanctions which should be imposed by the competent authority in case of violation by a professional of its AML/CTF obligations. The Directive also foresees the setting up of mechanisms for the reporting of breaches of the professional's obligations, both at the level of the professional as well as at the level of the competent authority.

The FATF 2 Regulation aims to guarantee asset traceability throughout the entire payment chain by requiring payment service providers to ensure that asset transfers, including electronic credit transfers, are accompanied by complete information on the payer and the beneficiary and, under certain conditions, requires them to verify the correctness of such information. The rules contained in the FATF 2 Regulation apply both to payment service providers and electronic money issuers.

The bill proposes to introduce the changes foreseen by the AMLD 4 and the FATF 2 by modifying a number of laws, including, amongst others, the amended law of 12 November 2004 on AML/CTF.

The publication of the bill constitutes the start of the legislative procedure.

HKMA issues circular on phase two of OTC derivative transactions reporting regime

The Hong Kong Monetary Authority (HKMA) has issued a circular to clarify its expectations regarding authorised institutions' preparatory work, testing and contingency planning for compliance with the over-the-counter (OTC) derivative transaction reporting requirements set out in the Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) (Amendment) Rules 2016. The Rules are scheduled to take effect from 1 July 2017.

Regulated entities that intend to report directly to the Hong Kong Trade Repository (HKTR), apart from fulfilling other requirements of the HKTR, are required to complete a simulation test on or before 31 May 2017.

Entities intending to report via an agent are reminded that the reporting obligation rests with the regulated entity.

Authorised institutions using an agent are expected to take all reasonable measures to ensure that such reporting meets the requirements under the Rules.

MAS consults on draft Securities and Futures (Markets) Regulations 2017

The Monetary Authority of Singapore (MAS) has launched a public consultation on the draft Securities and Futures (Markets) Regulations 2017, which is to replace the existing Securities and Futures (Markets) Regulations 2005 after they are repealed. The new Securities and Futures (Markets) Regulations 2017 are intended to support the implementation of the legislative amendments under the Securities and Futures (Amendment) Act 2017 (SF(A)A 2017), which was passed by the Parliament on 9 January 2017 and when the relevant provisions are operative.

The new Securities and Futures (Markets) Regulations 2017 are intended to operationalise the new Part II of the SFA, which provides for the regulation of approved exchanges (AEs) and recognised market operators (RMOs). The new regulations will apply the regulatory regime to operators of all 'organised markets', including those for the trading of OTC derivatives. The new regulations set out requirements on the admission of corporations operating organised markets as AEs and RMOs, as well as the ongoing requirements on AEs and RMOs.

In particular, the MAS seeks comments on:

- the proposed minimum admission requirements for AEs and RMOs;
- the proposed requirements on AEs and RMOs to have in place measures to:
  - ensure the handling and execution of bids and offers on a fair and objective basis, taking into account the interests of market participants; and
  - facilitate execution of customer orders in the customer's interest;
- the exemption of an entity from Part II of the SFA (regulation of organised markets) if it is subject to Part IV of the SFA (regulation of capital market intermediaries) in respect of its activity of broking of 'block futures' or 'negotiated large trades' for exchange-traded derivatives contracts; and
- the transitional arrangements for operators of OTC derivatives organised markets. In this regard, the MAS has proposed a 3-month period from the commencement of the relevant provisions of the SF(A)A 2017 for entities to assess if they carry out the operation of an organised market, and if so, another 9 months for such entity to submit its application to the MAS. An entity whose activities constitute the operation of an organised market will have to cease operations by 12 months after the commencement of the SF(A)A 2017, if such entity has not submitted a completed application by the end of 12 months.

The MAS intends to operationalise the amendments to the SFA by 2018. As part of this process, the MAS will consult the public on significant draft regulations in two phases. This is the first of two phases, and the MAS will issue the second consultation paper on other draft regulations in May 2017.

Comments on this consultation are due by 2 June 2017.

MAS consults on proposed amendments to Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005

The Monetary Authority of Singapore (MAS) has launched a public consultation on proposed amendments to the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005. The amendments are mainly intended to support the implementation of the legislative amendments under the Securities and Futures (Amendment) Act 2017, which was passed by the Parliament on 9 January 2017 and when the relevant provisions are operative.

The proposed amendments to the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005 (the CIS Regulations) include:

- listing the additional factors that the MAS may take into account when recognising a foreign fund for offer to retail investors; and
- specifying the conditions for exempting physical asset funds (i.e. funds that do not invest in 'capital markets products') that are offered to accredited investors from fund authorisation and prospectus registration requirements.

In addition, the MAS also seeks comments on other proposed changes to the CIS Regulations pertaining to collective investment schemes (that did not arise from the Securities and Futures (Amendment) Act 2017), in order to improve operational efficiency.

These amendments are intended to:

- allow real estate investment trusts (REITs) to publish pro forma financial information; and

- allow restricted schemes in the form of REITs to have managers who are licensed or regulated to carry out REIT management activities in their principal place of business.

Comments on the consultation are due by 2 June 2017.

RECENT CLIFFORD CHANCE BRIEFINGS

Non-Payment Insurance as Credit Risk Mitigation Under Regulation Q

Following the 2008 financial crisis, bank regulators around the world enacted wide-ranging reforms to reduce the risk of future crises. These reforms were predominantly drawn from a comprehensive set of post-crisis reform measures developed by the Basel Committee (Basel III) and have been implemented in substantially similar fashion by the European Union, Japan and the United States.

Most notably, the Basel III reforms have resulted in steep increases in bank and bank holding company capital requirements. The reforms have effectively increased the cost of extending credit, as financial institutions must now hold additional capital against each counterparty credit exposure. Many financial institutions have begun to explore solutions that meet regulatory capital requirements while maximising opportunities to offer credit products to customers and counterparties.

This briefing paper outlines how US financial institutions can utilise non-payment insurance policies as one such solution.

https://www.cliffordchance.com/briefings/2017/05/non-payment_insuranceascreditriskmitigatio.html

An Uptick In DOJ Antitrust Dawn Raids – Is The US Dipping Into The EU Antitrust Enforcement Toolkit And Is Your Company Prepared?

Investigatory raids of corporate offices are a common tool in many parts of the world. The European Commission frequently employs dawn raids to gather evidence of collusive activity among competitors and often raids multiple competitors simultaneously. However, at least in the antitrust context, the practice has been far less frequent in the US. Until recently, the Antitrust Division of the US Department of Justice (DOJ) has turned to civil processes (civil investigatory demands and subpoenas) to gather evidence. However, two recent dawn raids by the DOJ may signal a tactical change.

This briefing paper discusses what to expect with a US dawn raid and what to do if one occurs.

https://www.cliffordchance.com/briefings/2017/05/an_uptick_doj_antitrustdawnraidsistheu.html