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BRRD/SRMR: EU Commission reports on resolution framework

The EU Commission has published a [report](#) on the application and review of the Bank Recovery and Resolution Directive (BRRD) and the Single Resolution Mechanism Regulation (SRMR).

The report provides an overview of:

- the resolution framework established by the BRRD and SRMR;

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- the progress of national transposition and implementation by resolution authorities;
- forthcoming changes to the EU resolution framework made by the recently adopted banking package, particularly the provisions on minimum requirement for own funds and eligible liabilities (MREL), moratorium powers and the recognition of bail-in for liabilities governed by third-country law (likely to become applicable in 2020); and
- cases of when the framework has been applied.

Noting the limited application of the framework so far, the report also sets out issues requiring further assessment, including:

- further development of best practices on aspects of precautionary recapitalisation;
- the application of early intervention powers;
- the introduction of the common backstop to the Single Resolution Fund (SRF);
- support for the ongoing reflections on other sources and solutions for the provision of liquidity support in resolution, and a call that these be agreed upon and implemented in 2019;
- the assessment of the interaction between resolution and insolvency, and the potential need for harmonisation; and
- the functioning of the Single Resolution Mechanism (SRM) and Single Resolution Board (SRB).

The Commission intends to continue monitoring the application of the framework and discuss the above issues with experts appointed by the EU Parliament, Member States and relevant stakeholders.

EMIR: Delegated Regulation extending dates of deferred application of clearing obligation for certain OTC derivative contracts published in Official Journal

[Commission Delegated Regulation \(EU\) 2019/667](#), which amends various regulatory technical standards (RTS) under EMIR to extend the dates of deferred application of the clearing obligation for certain OTC derivatives, has been published in the Official Journal.

Under EMIR, intragroup transactions with a third country entity may be exempted from the clearing obligation if the EU Commission has adopted an equivalence decision under EMIR Article 13(2) for the third country where the group entity is established. Three Delegated Regulations on the clearing obligation (Commission Delegated (EU) 2015/2205, 2016/592 and 2016/1178) include a provision which provides for a deferred date of application of up to three years in the absence of the relevant equivalence decision. To date no such decisions have been adopted and therefore Delegated Regulation 2019/667 introduces a modification to:

- Article 3(2) of Delegated 2015/2205 regarding interest rate derivative classes, by extending the deferred date of application of the clearing obligation for intragroup transactions with a third country group entity from 21 December 2018 to 21 December 2020;

- Article 3(2) of Delegated Regulation 2016/592 regarding credit derivative classes, by extending the deferred date of application of the clearing obligation for intragroup transactions with a third country group entity from 9 May 2019 to 21 December 2020; and
- Article 3(2) of Delegated Regulation 2016/1178 regarding interest rate derivative classes, by extending the deferred date of application of the clearing obligation for intragroup transactions with a third country group entity from 9 July 2019 to 21 December 2020.

The Regulation will enter into force on 30 April 2019.

EMIR: Commission Implementing Decision on equivalence of derivatives transactions supervised by Japan Financial Services Agency published in Official Journal

[Commission Implementing Decision \(EU\) 2019/684](#) on the recognition of the legal, supervisory and enforcement arrangements of Japan for derivatives transactions supervised by the Japan Financial Services Agency (JFSA) as equivalent to the valuation, dispute resolution and margin requirements of Article 11 of EMIR has been published in the Official Journal.

The decision recognises the JFSA rules on valuation and dispute resolution for OTC derivative contracts not cleared by a central counterparty (CCP) as equivalent to EMIR and the JFSA rules on obligations on margins between counterparties as equivalent to EU rules.

The decision will enter into force on 22 May 2019.

CRR2: EBA consults on RTS on standardised approach for counterparty credit risk

The European Banking Authority (EBA) has launched a [consultation](#) on draft RTS on the standardised approach for counterparty credit risk (SA-CCR) under the amended Capital Requirements Regulation (CRR2).

The draft RTS specify three methodologies for mapping derivative transactions to risk categories, namely:

- a qualitative approach suitable for simple derivative transactions, which refers to certain criteria that must be satisfied;
- a quantitative approach, which involves an assessment of the sensitivities related to each possible risk driver in order to identify the material ones; and
- a conservative approach, which classifies all possible risk drivers as material and allocates the transaction to all relevant risk categories.

The EBA is also seeking feedback on its proposed calculation of the supervisory delta of options mapped to the interest rate risk category, in particular the methodology for determining the shift to be included in the formula. Finally, the consultation sets out the EBA's proposed methodology for determining whether derivative transactions are long or short in their risk drivers, which uses the same elements, such as cash flows and sensitivities, that institutions use for mapping derivatives to risk categories.

Comments are due by 2 August 2019.

Contracts for differences: ESMA decision renewing temporary restriction on marketing, distribution or sale to retail clients published in Official Journal

European Securities and Markets Authority (ESMA) [Decision \(EU\) 2019/679](#) renewing the temporary restriction on the marketing, distribution or sale of contracts for differences (CfDs) to retail clients has been published in the Official Journal. ESMA has reviewed the temporary intervention measure and found that a significant investor protection concern related to the offer of CFDs continues to exist.

The measure will apply for a further three month period from 1 May 2019.

ECB publishes supervisory fees for 2019

The European Central Bank (ECB) has set its supervisory [fees](#) at EUR 576 million for 2019, comprising EUR 559 million on the prudential supervision of banks, a EUR 15.3 million deficit carried forward from 2018, and EUR 1.7 million in adjustments to individual fees resulting from changes in banking structures. 91% of the fees will be paid by banks that are directly supervised by the ECB and 9% by those indirectly supervised.

The ECB notes that the increase in cost estimate from EUR 503.5 million in 2018 to EUR 559 in 2019 is primarily due to staff increases for banks relocating or expanding as a result of Brexit and the related preparatory assessments. Other factors include the restructuring of the Italian cooperative banking sector and an ongoing assessment of six Bulgarian banks with a view to conducting negotiations on close cooperation with Bulgaria.

FSB publishes thematic peer review on bank resolution planning

The Financial Stability Board (FSB) has published the [third thematic review](#) on bank resolution planning as part of its peer review series.

The report evaluates the progress FSB jurisdictions have made since the second resolution peer review in 2016 in implementing the resolution planning standard set out in the Key Attributes and related guidance.

The report broadly finds that planning is most advanced for global systemically important banks (G-SIBs) and in their home jurisdictions, while resolution planning varies widely for banks other than G-SIBs or domestic systemically important banks (D-SIBs).

The report makes three recommendations aimed at addressing remaining challenges, including:

- further adoption and operationalisation of resolution planning frameworks, with jurisdictions without a framework by June 2020 reporting to the FSB on the actions they have taken, or intend to take, to adopt such a framework;
- the FSB to undertake work to support resolution planning for banks other than G-SIBs that could be systemic in failure, reflecting their less complex nature and in keeping with the principle of proportionality; and
- enhancing cross-border cooperation and information sharing, particularly for non-G-SIBs and with non-Crisis Management Group (CMG) host jurisdictions for G-SIBs.

FCA publishes call for input on evaluation of financial advice market

The Financial Conduct Authority (FCA) has published a [call for input](#) on its proposed approach to evaluating the Retail Distribution Review (RDR) and Financial Advice Market Review (FAMR).

To help structure its assessment of whether the market is meeting consumer needs, the FCA seeks feedback on, among other things:

- the types of evidence to be used to review RDR and FAMR outcomes and indicators;
- issues facing consumers in their access to advice and guidance, including affordability;
- the provision of advice and guidance services, including the development of new business models;
- the impact of regulation on the market; and
- market developments and emerging trends impacting advice and guidance services.

The call for input closes on 3 June 2019. The FCA intends to conduct further research through 2019 and expects to publish its findings in 2020.

BaFin consults on guidance note on external bail-in implementation

The German Federal Financial Supervisory Authority (BaFin) has launched a [consultation](#) on a draft guidance note on the implementation of bail-in of an institution in the systems of financial market infrastructures such as central securities depositories (external bail-in implementation).

The draft guidance note has been developed in cooperation with the Deutsche Börse Gruppe (especially Clearstream Banking Frankfurt and Frankfurt Stock Exchange) and WM Datenservice. It describes the parties involved in the process, their responsibilities, communication channels and communication interfaces, as well as timelines and information requirements.

In addition, the guidance note further specifies the requirements set out in BaFin's circular on minimum requirements for the feasibility of bail-in (MaBail-in) in relation to the support by the institution of the external implementation of bail-in measures.

In a first step, the process described in the guidance note addresses a defined base scenario only and is intended to be supplemented by more complex scenarios, further parties and cross-border matters at a later stage.

Comments on the draft guidance note may be submitted to BaFin until 11 June 2019.

Order amending Order EHA/1718/2010 on control and regulation of banking services and products advertising and Order EHA/2899/2011 on transparency and protection of banking services clients published

[Order ECE/482/2019](#), of 26 April, amending Order EHA/1718/2010, of 11 June, on control and regulation of banking services and products advertising,

and Order EHA/2899/2011, of 28 October, on transparency and protection of banking services clients, has been published. The Order develops several provisions of Law 5/2019, of 15 March, regulating real estate credit agreements in order to complete the implementation in Spain of Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No. 1093/2010.

In particular, the Order establishes:

- criteria for determining the representative example regarding the basic information that must appear in the advertising of credit agreements relating to immovable property;
- minimum requirements on knowledge and competence required of the employees of the lender, intermediary or representative; and
- the term and conditions to provide information to the borrower of a foreign currency agreement.

The Order also expands the scope of Order EHA/1718/2018 so that it is applicable to lenders and intermediaries of credit agreements relating to immovable property.

In addition, the Order introduces certain provisions regarding reverse mortgages to eliminate any legal uncertainty regarding the maintenance of the protection regime with regard to such products, which was regulated by several provisions that are no longer in force.

The Order also removes article 16 of Order EHA/2899/2011 in light of the Spanish National Securities Markets Commission being given power to supervise the commercialisation of structured products.

The Order will enter into force on 16 June 2019, maintaining until that date the obligation of providing the Personalised Information Form (FIPER), with the exception of sections seven and twelve of article 2, which will enter into force three months after the publication in the Spanish Official Gazette.

Swiss Federal Council launches consultation on new Financial Market Supervision Ordinance

The Swiss Federal Council has launched a [consultation](#) on a new Financial Market Supervision Ordinance relating to the Financial Market Supervision Act (FINMASA). The draft Ordinance details the tasks of the Swiss Financial Market Supervisory Authority (FINMA) in international matters, its role and activities in regulatory matters and the cooperation between FINMA and the Federal Department of Finance. The Swiss Federal Council has emphasized that the current regulatory tools of FINMA remain unchanged and its independence is not in question.

The consultation closes on 7 August 2019.

SFC consults on further enhancements to OTC derivatives regime

The Hong Kong Monetary Authority (HKMA) and the Securities and Futures Commission (SFC) have issued a [joint consultation](#) on further enhancements to the over-the-counter (OTC) derivatives regulatory regime in Hong Kong.

To align with global standards, the regulators propose that transactions to be submitted to the Hong Kong Trade Repository (HKTR) for the reporting obligation would be required to be identified by unique transaction identifiers with the structure and format set out in the technical guidance issued by the Committee on Payments and Market Infrastructures and the International Organization of Securities Commissions in February 2017.

The regulators also propose to remove 17 jurisdictions from the list of designated jurisdictions for the masking relief of the reporting obligation in view of the recent clarification by the FSB, and to update the list of financial services providers under the OTC derivatives clearing regime. The proposals are intended to ensure that the Hong Kong reporting and clearing regimes keep up with international developments and remain relevant and appropriate.

Comments on the updated list of financial services providers are due by 25 May 2019 and on the other proposals by 25 June 2019.

RECENT CLIFFORD CHANCE BRIEFINGS

EMIR Refit – An Overview

The EU co-legislators have agreed targeted amendments to EMIR addressing issues identified in the Commission's initial review of EMIR. The EMIR Refit amendments aim to simplify and take a more proportionate approach to certain existing requirements, particularly for smaller firms. However, EMIR Refit will also require in-scope entities to revisit decisions on categorisation and may also require changes in the information that they obtain from counterparties and the documents that they have in place with those counterparties.

This briefing paper reviews the changes that EMIR Refit will bring and the impact that these changes are likely to have on derivatives transactions, including the need to refresh counterparty categorisations and amend counterparty documentation.

https://www.cliffordchance.com/briefings/2019/04/emir_refit_an_overview.html

Initial margin implementation for 2019 and 2020

In August 2018 the United Kingdom's FCA published a research note which identified a likely ten-fold increase in firms needing to comply with the initial margin requirements for uncleared derivatives (IM) following the final stage of the phased-in implementation in September 2020. Many smaller banks and investment firms (including non-EU firms) will be impacted and will need to implement for IM over the next two years and those firms need to start preparing now to avoid the inevitable bottleneck closer to the implementation deadlines.

This briefing paper highlights the key implementation challenges for in-scope entities and the importance of preparing early.

https://www.cliffordchance.com/briefings/2019/04/initial_margin_implementation_for_2019_and_2020.html

Hong Kong International Arbitration Centre wins approval to become the first foreign arbitral institution to administer disputes in Russia

Following the important development of the new arrangement between Hong Kong and Mainland China which means that parties can apply to Mainland courts for interim measures in support of Hong Kong arbitral proceedings, the Hong Kong International Arbitration Centre (HKIAC) has now enhanced its position in relation to Russian related disputes. The HKIAC has become the first foreign arbitral institution to be designated as a 'permanent arbitral institution' (PAI) in Russia following approval granted by the Russian Ministry of Justice. Most significantly, this means that the HKIAC can now administer international commercial arbitrations seated in Russia as institutional rather than ad hoc arbitrations and certain corporate disputes relating to Russian legal entities.

This briefing paper discusses the HKIAC's designation as a PAI.

https://www.cliffordchance.com/briefings/2019/04/hong_kong_internationalarbitrationcentrewin.html

Russian tax authorities clarify application of VAT to B2B supplies of e-services

As we anticipated in our [December 2018 alert](#), following the extension of the B2C e-services VAT regime to B2B supplies with effect from 1 January 2019, concerns regarding the application of the new rules have been raised by Russian businesses.

After holding consultations with the business community, the Russian Federal Tax Service (FTS) issued clarifications in its letter No. SD-4-3/7937@ of 25 April 2019. Some of the positions taken by the FTS are rather controversial, and their consistency with the Russian Tax Code is questionable.

This briefing paper summarises the FTS's position as stated in the clarification letter.

https://www.cliffordchance.com/briefings/2019/04/russian_tax_authoritiesclarifyapplicationo.html

C L I F F O R D C H A N C E

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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