

International Regulatory Update

3 – 7 February 2014

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Market abuse review: EU Parliament approves proposed directive on criminal sanctions

The EU Parliament's plenary session has [approved](#) the proposed directive on criminal sanctions for insider dealing and market manipulation. The vote follows the political agreement reached with the EU Council in December 2013.

The directive will oblige Member States to provide in their national legislation for criminal penalties in respect of insider dealing, market manipulation and unlawful disclosure of inside information. The directive will be applied taking into account the legal framework established by the Market Abuse Regulation (MAR) and will amend and replace Directive 2003/6/EC.

After publication of the Directive in the Official Journal, expected in June 2014, Member States will have two years to implement the Directive in national law.

Banking union: EU Parliament reconfirms negotiating position on single resolution mechanism and criticises Council for time wasting

The EU Parliament's plenary session has [endorsed](#) the Committee on Economic and Monetary Affairs (ECON) report on the proposed regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism (SRM) and a Single Bank Resolution Fund and amending Regulation (EU) No 1093/2010. The report, which the ECON Committee adopted on 17 December 2013, sets out the EU Parliament's negotiating position on the single resolution mechanism for banks.

Throughout negotiations to date with the Greek Presidency of the EU Council, the Parliament's negotiators have warned that the Member States' position has significant drawbacks, including an overly complex and politicised decision-making process for winding up banks and a bank-financed fund which MEPs say would struggle to be credible in the first years of its life. The Parliament's negotiators are also concerned about the EU Council's wish to build an intergovernmental chapter into the system.

SEPA: EU Parliament approves extension of deadline for migration

The EU Parliament's plenary session has [approved](#) the proposed regulation that postpones to 1 August 2014 the end-date in the euro area for the migration of domestic and intra-European credit transfers and direct debits in euros

towards Single Euro Payments Area (SEPA) credit transfers and SEPA direct debits.

The draft regulation, presented by the EU Commission on 9 January 2014, amends regulation 260/2012 on the migration to EU-wide credit transfers and direct debits, which had set a deadline of 1 February 2014. The postponement was proposed by the Commission for reasons of legal certainty and in order to avoid any discontinuity to the application of regulation 260/2012.

Formal adoption by the EU Council will take place in the coming days.

EU Parliament backs proposed regulation on insolvency proceedings

The EU Parliament's plenary session has [voted](#) on the EU Commission's proposal for a regulation amending Council Regulation (EC) No 1346/2000 on insolvency proceedings. The Parliament endorsed the main elements of the Commission's proposal, particularly as regards:

- extending the rules to cover rescue proceedings;
- the creation of an EU-wide system of web-based insolvency registers;
- the possibility of avoiding the opening of multiple proceedings; and
- the rules dealing with the insolvency of groups of companies.

The EU Council has welcomed the Commission proposal, but is still in the process of discussing the draft law. It is expected that Ministers will be able to reach a general agreement at their meeting in June 2014.

ECON Committee publishes report on IMD 2

EU Parliament's Committee on Economic and Monetary Affairs (ECON) has published its [report](#) on the EU Commission's proposal for a revision of the Insurance Mediation Directive (IMD2). Amongst other things, the report focuses on tying and bundling of insurance products and remuneration.

Banking union: ECB consults on draft SSM framework regulation and reports on progress

The European Central Bank (ECB) has published a [draft](#) of the ECB Single Supervisory Mechanism (SSM) Framework Regulation for public consultation. The draft framework regulation lays the basis for the work of the SSM when it takes over as supervisor of euro area banks in November 2014.

The draft framework regulation describes the rules and procedures governing the following aspects:

- assessment of a bank's significance to determine whether it falls under the ECB's direct or indirect supervision;
- the ECB's oversight of the whole system;
- cooperation between the ECB and the national competent authorities (NCAs) with a view to ensuring a smooth functioning of the SSM;
- language regime for the various processes within the SSM;
- general principles for the conduct of supervisory procedures by the ECB;
- procedures relating to the SSM's micro-prudential and macro-prudential tasks;
- arrangements for close cooperation with countries whose currency is not the euro; and
- administrative penalties for breaches of the relevant law.

Comments are due by 7 March 2014. The final version of the framework regulation will be published by 4 May 2014.

The ECB has also published its first [Quarterly Report](#) to the EU Parliament, the EU Council and the EU Commission on progress in implementing the Regulation on the Single Supervisory Mechanism. The report covers the three months up to 3 February 2014, as well as the preparatory work undertaken by the ECB in cooperation with national supervisors and central banks since the euro area summit of 29 June 2012.

In addition, the ECB has published a [decision](#) identifying the credit institutions that are subject to the comprehensive assessment it is conducting in preparation for assuming full responsibility for supervision as part of the SSM and [set out the progress](#) it has made to date. It also confirmed that it will apply the parameters for the stress test released by the European Banking Authority (EBA) on 31 January 2014. Together with the asset quality review (AQR), the stress test forms part of the comprehensive assessment. The assessment aims to enhance the transparency of the balance sheets of significant banks and to rebuild investor confidence prior to the ECB taking over its supervisory tasks in November 2014.

ESA Joint Committee publishes final report on mechanistic references to credit ratings in guidelines and recommendations

The Joint Committee of the European Supervisory Authorities (ESAs) has published its final [report](#) on mechanistic references to credit ratings in the ESAs' guidelines and recommendations.

In accordance with the Credit Rating Agencies Regulation (CRA 3), the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Insurance & Occupational Pensions Authority (EIOPA) have reviewed all their existing guidelines and recommendations in order to identify, and where appropriate remove, references to external credit ratings that could trigger sole or mechanistic reliance on such ratings. The final report includes amendments to ESMA's guidelines on money market funds (MMF) according to the definition of 'sole and mechanistic reliance' contained therein. This common definition aims at harmonising the different interpretations of 'sole and mechanistic reliance' in the ESAs' regulations and guidelines. The definition, to which the ESAs intend to refer to in all their future guidelines, recommendations and draft technical standards, was developed taking into account all the comments received during the public consultation that ended on 5 December 2013.

ESA Joint Committee consults on draft Implementing Technical Standards on the mapping of ECAIs credit assessments

The Joint Committee of the European Supervisory Authorities (ESAs) has launched a consultation on [draft Implementing Technical Standards](#) (ITS) on the mapping of the credit assessments to risk weights of External Credit Assessment Institution (ECAIs). These ITS will be part of the Single Rulebook in banking aimed at enhancing regulatory harmonisation across the EU. The EBA is expected to submit these draft ITS to the EU Commission by 1 July 2014.

Comments on the consultation are due by 5 May 2014.

ESMA issues opinion on MiFID practices for firms selling complex products

The European Securities and Markets Authority (ESMA) has published an [opinion](#) on practices to be observed by investment firms when selling complex financial products to investors. The opinion is intended to remind national supervisors and investment firms about the importance of

requirements governing selling practices under the Markets in Financial Instruments Directive (MiFID).

The areas covered by the opinion relate to:

- firms' organisation and internal controls;
- the assessment of the suitability or appropriateness of certain products;
- disclosures and communications in relation to products; and
- compliance monitoring of the sales functions.

ESMA has issued the opinion as it is concerned that firms' compliance with the MiFID selling practices when selling complex products may have fallen short of expected standards. ESMA's concerns relate mainly to the suitability and appropriateness of complex products that are increasingly within the grasp of retail investors. The opinion sets out ESMA's minimum expectations with respect to the conduct of firms when selling complex products to retail investors.

EU and US officials discuss financial regulatory developments

Participants in the US-EU Financial Markets Regulatory Dialogue have held a [meeting](#) to exchange information on regulatory developments and identify potential regulatory conflicts. EU officials included representatives of the EU Commission and the European Supervisory Authorities (ESAs). US officials included staff of the US Treasury and independent regulatory agencies, including the Board of Governors of the Federal Reserve System, Commodity Futures Trading Commission (CFTC), Federal Deposit Insurance Corporation, and Securities and Exchange Commission (SEC).

Amongst other things, officials discussed the implementation of Basel III capital and liquidity rules, the status of implementation of derivatives reforms (including a discussion of related cross-border issues), the development of resolution regimes and strategies, and structural proposals in their banking systems. They also discussed insurance, rating agencies, benchmarks, audit, accounting, money market funds, and data transfers and information sharing for supervisory and enforcement purposes. US officials welcomed the progress achieved in the EU with the finalisation of the Bank Recovery and Resolution Directive and work to establish a Banking Union. EU officials also reiterated their request to include a financial regulatory cooperation framework in the Trans-Atlantic Trade and Investment Partnership. The US officials reiterated that

financial regulatory cooperation should continue separately in existing global and bilateral fora.

The next Financial Markets Regulatory Dialogue will take place in Brussels in July 2014.

FSB consults on options to aggregate OTC derivatives trade repository data

The Financial Stability Board (FSB) has published a [consultation paper](#) on approaches to aggregate OTC derivatives data. The consultation paper discusses the key requirements and the legal considerations of three broad types of model for an aggregation mechanism:

- a physically centralised model;
- a logically centralised model; and
- the collection and aggregation by authorities of raw data from trade repositories.

Comments are due by 28 February 2014.

IOSCO reports on crowd-funding

The International Organisation of Securities Commissions (IOSCO) has published a [paper](#) providing a global overview of the crowd-funding industry. The paper seeks to identify investor protection issues and to determine whether crowd-funding poses a systemic risk to the global financial sector. It specifically analyses financial return crowd-funding, which refers to peer-to-peer lending and equity crowd-funding. The financial return crowd-funding market was worth an estimated USD 6.4bn in 2013, driven by an annual growth of 90% in peer-to-peer lending. The paper states that regulators should strike a balance between encouraging crowd-funding, which could help stimulate economic recovery by providing capital to small and medium-sized enterprises, and mitigating the risks associated with its growth. It concludes that the financial return crowd-funding market does not currently present a systemic risk to the global financial sector, but this may change if it is allowed to grow without proper management.

FCA issues guidance on AIFM remuneration code

The Financial Conduct Authority (FCA) has finalised its [guidance](#) on the AIFM remuneration code (SYSC 19B). Amongst other things, the guidance explains how an AIFM should:

- take into account proportionality;
- consider payments made to partners if the AIFM is structured as a partnership; and
- pay its relevant staff in units, shares or other instruments.

FCA issues policy statement on statutory regime for primary information providers

The FCA has issued a [policy statement](#) (PS14/2) setting out its rules on the new statutory regime for Primary Information Providers. PS14/2 also includes feedback on the responses the FCA received to its August 2013 consultation paper CP13/8 – Arrangements for the Disclosure of Regulated Information.

Regulated Information Services were brought into formal statutory regulation by the Financial Services Act 2012. Going forward, they will be known as Primary Information Providers. The FCA has indicated that the new statutory regime will be based largely on the existing framework for the approval and oversight of Regulated Information Services, set out in the Criteria for Regulated Information.

The new rules for Primary Information Providers are effective from 31 January 2014. Existing Regulated Information Services will have a six-month transitional period while applying for approval. They may apply for their approval to take effect from 1 August 2014. Existing Regulated Information Services that have not had their application approved by the end of the six-month transitional period will not be able to operate under the new regime.

LIBOR: ICE Benchmark Administration takes over administration

ICE Benchmark Administration Ltd [has taken responsibility](#) for administering the London Inter Bank Offered Rate (LIBOR). In September 2012, the Wheatley Review identified the need for a new independent administrator for LIBOR. Following a selection process conducted by the Hogg Tendering Advisory Committee, IBA was recommended as the new administrator in July 2013.

AIFMD: Charity Commission consults on Common Deposit Fund schemes

The Charity Commission has launched a [consultation](#) on the regulation of common deposit funds, setting out the alterations that it proposes to make to its model schemes, especially in establishing Common Deposit Funds, in order to comply with the Alternative Investment Fund Managers Directive (AIFMD).

Comments are due by 1 April 2014.

SAFE issues circular on further improving and adjusting foreign exchange policies on capital account items

The State Administration of Foreign Exchange (SAFE) has issued a '[Circular on Further Improving and Adjusting the Foreign Exchange Policies on Capital Account Items](#)' to further relax the control on foreign exchange capital account items.

Amongst other things, the circular:

- further eases regulation on cross-border lending extended by Chinese lenders by expanding the scope of offshore borrowers to include those overseas companies that are, directly or indirectly, affiliated with Chinese lenders by shareholdings, and removing the two-year term limit for the lending quota;
- simplifies the list of documents or evidencing materials required for remitting profits of domestic entities out of China and lifts the restriction on the current year's profit repatriation amount, which was previously set at an amount no more than the combination of 'dividend payable' and 'undistributed profits' attributed to the foreign shareholders in the most recent audited financial statement;
- requires that financial leasing companies regulated by the China Banking Regulatory Commission and the Ministry of Commerce shall register with SAFE's local branches the cross-border financing they extend to foreign entities within fifteen business days, which are not subject to the lending quota regime of the cross-border lending by domestic companies;
- removes certain pre-approval requirements during the process of transferring the distressed assets from domestic entities to foreign investors and streamlines the relevant registration procedures;
- relaxes the document submission requirements for the preliminary expense registration of overseas direct investment by domestic entities by revising the threshold amount of preliminary expense from USD 100,000 to USD 3 million (or 15% of the Chinese parties' investment amount) – domestic entities may conduct preliminary expense registration at SAFE's local branches by providing the business license and organisation code certificate if the total repatriation amount of the preliminary expense of overseas direct investment is no more than USD 3 million and 15% of the Chinese parties' investment amount; and

- simplifies the procedures and administration on transferring the individuals' assets out of China and removes the update requirements for securities companies to change the Securities Business Foreign Exchange Operation Certificate every three years.

The circular is effective as of 10 February 2014.

ASIC reports on regulating complex products

The Australian Securities and Investments Commission (ASIC), through a dedicated Complex Products Working Group, has recently conducted a review of the risks posed to investors by 'complex products' and a review of ASIC's approach to regulating such products.

Complex products include (among other things) agribusiness managed investment schemes (based on individual contracts), exchange-traded options strategies, hedge funds, hybrid securities, leveraged derivative products (such as contracts for difference (CFDs) and margin foreign exchange (margin FX) contracts), managed funds with complex non-standard or non-linear payoffs, structured products and non-vanilla warrants.

The group's findings can be found in [ASIC Report 384](#) Regulating complex products. The report, released by ASIC to facilitate discussion on the risks posed to investors by complex products and the effective management of those risks, sets out:

- the risks posed by complex products to retail investors;
- ASIC's recent and current work on complex products, including considering the whole of the product lifecycle – development, distribution, sale, and post-sale; and
- opportunities for further work, including working with industry.

Comments are due by 31 March 2014.

Australian Treasury releases draft amendments for FoFA legislation

The Treasury has released draft legislation and regulations intended to unwind some of the Future of Financial Advice (FoFA) regime that had been introduced under the previous government.

The [draft FoFA amendments](#) propose the following changes:

- removing 'opt-in' requirements for clients to renew their ongoing fee arrangement with their advisor every two years;

- removing the requirement for advisers to provide a fee disclosure statement only applicable to clients who entered into their arrangement after 1 July 2013;
- removing the 'catch-all' provision from the advisers' best interests duty;
- explicitly allowing for the provision of scaled advice;
- exempting general advice from the ban on conflicted remuneration;
- broadening the existing grandfathering provisions for the ban on conflicted remuneration; and
- allowing stamping fees to be paid in relation to capital raising activities in respect of investment entities such as REITs.

Some of the changes will be implemented by regulation as an interim measure prior to the Bill receiving Royal Assent, including the removal of the opt-in requirement, changes to fee disclosure statements, removal of the 'catch-all' provision under the advisers' best interests obligation and the facilitation of the provision of scaled advice.

On 20 December 2013, ASIC announced that it would be taking a facilitative approach to the FoFA reforms such that they will not take enforcement action in relation to the specific FoFA provisions that the government is to repeal.

The draft amendments are open to comment until 19 February 2014.

RECENT CLIFFORD CHANCE BRIEFINGS

A second chance for the European Insolvency Regulation – All change?

On 5 February 2014, 580 out of 668 MEPs in Strasbourg voted in favour of updating the European Regulation on Insolvency Proceedings. The Regulation provides the current legislative framework governing cross border insolvency cases in Europe. It is generally accepted that changes are required to ensure that the Regulation keeps apace with the economic times and the amendments are seen as opportunity to take on board lessons learnt since its original enactment in May 2002. The proposals have been billed as giving viable businesses a second chance.

This briefing discusses the proposals.

http://www.cliffordchance.com/publicationviews/publications/2014/02/a_second_chance_fortheuropeaninsolvenc.html

Essential tips for successful trading in Brazil, Russia, China and India

Supplying goods and services to [Brazilian](#), [Russian](#), [Indian](#) and [Chinese](#) customers is no different from supplying customers elsewhere in the world, but there are some practical steps that can help smooth the process.

These four briefings provide some essential tips that can help make your supply relationship a lasting and successful one.

Our Insights into M&A Trends – Global Dynamics

The latest edition of our Global M&A Trends report looks at the key trends currently impacting global M&A activity and contains our insights into the drivers and challenges for M&A activity for the year ahead.

The report highlights the following key trends into 2014:

- whilst uncertainties remain, the market is strengthening and the stars appear to be aligned for a steady recovery in the M&A market in 2014 and beyond;
- positive indicators include increased global stability, a calming of euro zone troubles and US fiscal problems, and China's strengthening commitment to becoming a market-driven economy, as well as increasing confidence and focus on growth in both the mature and emerging economies;
- we are starting to see a natural rebalancing of M&A activity as the developed, western markets come back into favour, and this is expected to continue as 2014 progresses; and

- debt markets are thriving, with acquirers accessing the leveraged loan and high yield bond markets, which had a record year in 2013.

http://www.cliffordchance.com/publicationviews/publications/2014/02/clifford_chance_sinsightsintomatrends2014.html

Polish Legislation Newsletter

Our Polish Legislation Newsletter for January 2014 summarises selected recent changes to Polish law.

http://www.cliffordchance.com/publicationviews/publications/2014/02/polish_legislationnewsletterjanuary2014.html

Global tax warming, or New Year presents from the State Duma (Russian)

On 28 December 2013 the President of the Russian Federation signed the Federal Law No. 420-FZ 'On the Incorporation of Amendments to Article 275-3 of the Federal Law 'On the Securities Market' and to Parts One and Two of the Tax Code of the Russian Federation'. The Law contains a wide range of amendments to the Russian Tax Code. Most of the amendments introduce new tax benefits and clarify provisions regarding formation of the tax base (including booking of losses) with respect to particular types of financial transactions.

This briefing discusses these amendments.

http://www.cliffordchance.com/publicationviews/publications/2014/02/global_tax_warmingornewyearpresentsfromth.htm
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