

International Regulatory Update

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UCITS V: EU Parliament and Council reach agreement

EU Parliament and Council negotiators have [reached an agreement](#) on the proposed directive amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities as regards depositary functions, remuneration policies and sanctions (UCITS V).

Amongst other things, the proposed directive introduces specific provisions on the depositary's safekeeping and oversight duties, and defines the conditions in which safekeeping duties can be delegated to a sub-custodian. It sets out a list of entities that are eligible to act as UCITS depositaries, and clarifies the depositary's liability in the event of the loss of a financial instrument held in custody. It also includes provisions on redress.

As concerns remuneration, the proposed directive introduces a requirement for the UCITS management company to implement a policy that is consistent with sound risk management and complies with minimum principles. According to the agreement, fund managers would be required not to take investment risks beyond what is accepted by their UCITS investors. At least half of the variable part of their remuneration would be paid in the assets of their UCITS, unless the management of UCITS accounts for less than half of the total portfolio. Payment of at least a further 40% of this variable remuneration would be deferred for at least 3 years, to encourage managers to take a long-run view. On sanctions, it lists the main breaches to Directive 2009/65/EC and lays down the administrative sanctions and measures that the authorities should be empowered to apply.

Central securities depositories: EU Council confirms agreement with EU Parliament on proposed regulation

The Permanent Representatives Committee has [approved](#), on behalf of the EU Council, an agreement reached with the EU Parliament in December 2013 on the proposed regulation on improving securities settlement in the European Union and on central securities depositories (CSDs) and amending Directive 98/26/EC. The agreement will enable adoption of the regulation at first reading.

The regulation needs to be in place for the European Central Bank's Target2-Securities initiative to begin operating as planned in 2015. The regulation introduces an obligation to represent all transferable securities in book entry form and to record them in CSDs before trading them on regulated venues. It harmonises settlement periods and settlement discipline regimes across the EU and introduces a common set of rules addressing the risks of CSDs' operations and services.

Mortgage Credit Directive published in Official Journal

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 has [been published in the Official Journal](#).

The directive is intended to create an efficient and competitive single market for mortgage credit in the EU. It sets out principles for marketing and advertising, and obligations for pre-contractual information, as well as requirements for information concerning credit intermediaries and for information on the borrowing rate. The directive includes provisions requiring the creditor to assess the creditworthiness of the consumer, as well as imposing disclosure obligations on the part of the consumer. It also includes regulatory and supervisory principles with regard to credit intermediaries, as well as provisions to enable adequate regulation and supervision of non-credit institutions.

The directive will enter into force on 20 March 2014 and Member States have to transpose it by 21 March 2016. The directive does not apply to credit agreements existing before 21 March 2016.

CRR/CRD 4: EU Commission Delegated Regulation on calculation of specific and general credit risk adjustments published in Official Journal

EU Commission Delegated Regulation No 183/2014 supplementing the Capital Requirements Regulation (CRR) with regard to regulatory technical standards for specifying the calculation of specific and general credit risk adjustments has [been published in the Official Journal](#).

The Delegated Regulation will enter into force on 19 March 2014.

EU Council Presidency publishes revised compromise text for proposed new Anti-Money Laundering Directive

The EU Council has published a [revised version](#) of the third Presidency compromise text for the proposed directive on

the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

EU Parliament Committees publish report on proposed regulation on information accompanying transfers of funds

The EU Parliament's Committees on Economic and Monetary Affairs (ECON) and Civil Liberties, Justice and Home Affairs (LIBE) have published their joint [report](#) on the proposed regulation on information accompanying transfers of funds.

ECON Committee sets out recommendations for review of European System of Financial Supervision

The EU Parliament's ECON Committee has published a [report](#) with recommendations to the EU Commission on the review of the European System of Financial Supervision (ESFS). The report calls on the Commission to submit legislative proposals for the revision of the ESFS by 1 July 2014.

Single Supervisory Mechanism: ECB decision on close cooperation with national competent authorities of non-euro area Member States enters into force

The European Central Bank's (ECB's) [decision](#) of 31 January 2014 on close cooperation with the national competent authorities of participating Member States whose currency is not the euro has entered into force.

Member States whose currency is not the euro may wish to participate in the Single Supervisory Mechanism (SSM). For this purpose, they may request the ECB to enter into a close cooperation in relation to the tasks referred to in Articles 4 and 5 of the SSM Regulation with regard to all credit institutions established in that Member State. The close cooperation will be established by a decision of the ECB, provided that the conditions laid down in Article 7 of the SSM Regulation are met.

The decision specifies the procedural aspects relating to:

- requests by Member States whose currency is not the euro to enter into a close cooperation;
- the assessment of these requests by the ECB;
- the ECB decision establishing close cooperation with the specific Member State; and
- potential suspension and termination of a close cooperation by the ECB.

G20 Finance Ministers and Central Bank Governors issue communiqué on recent developments in global economy

The G20 Finance Ministers and Central Bank Governors have issued a [communiqué](#) on recent developments in the global economy, following their meeting in Sydney on 22-23 February 2014.

In 2014 the G20 intends to focus, amongst other things, on substantially completing by the Brisbane summit key aspects of the core reforms agreed in response to the global financial crisis: building resilient financial institutions; ending too-big-to-fail; addressing shadow banking risks; and making derivatives markets safer. The G20 intends to implement these reforms in a way that promotes an integrated global financial system, reduces harmful fragmentation and avoids unintended costs for business.

The Finance Ministers and Central Bank Governors have committed to cooperate across jurisdictions with a renewed focus on timely and consistent implementation supported by meaningful peer reviews. In relation to OTC derivatives reform, they agreed that jurisdictions and regulators should be able to defer to each other when it is justified by the quality of their respective regulatory and enforcement regimes, based on similar outcomes, in a non-discriminatory way, paying due respect to home country regulatory regimes. The Financial Stability Board (FSB) is due to report in September 2014 on jurisdictions' established processes to enable them to defer to each other's OTC derivatives rules in cross-border contexts where these achieve similar outcomes. The communiqué notes that this will inform deliberations on whether flexible outcomes-based approaches to resolving cross-border market regulation issues could be used more widely.

The Finance Ministers and Central Bank Governors also asked the G20 Anti-Corruption Working Group for an update by their April 2014 meeting on concrete actions that the G20 can take to meet the Financial Action Task Force (FATF) standards regarding the beneficial ownership of companies and other legal arrangements such as trusts by G20 countries leading by example.

ISDA publishes 2014 Credit Derivatives Definitions

The International Swaps and Derivatives Association (ISDA) has [published](#) the 2014 ISDA Credit Derivatives Definitions, a revised version of the 2003 ISDA Credit Derivatives Definitions. The 2014 ISDA Credit Derivatives Definitions introduce several new terms, including:

- bail-in/financial terms for credit default swap (CDS) contracts on financial reference entities;
- sovereign CDS asset package delivery for CDS contracts on sovereign reference entities; and
- a standard reference obligation.

In addition to these new terms, the 2014 ISDA Credit Derivatives Definitions contain several amendments to standard credit derivatives trading terms.

The 2014 ISDA Credit Derivatives Definitions do not apply automatically to credit derivatives transactions. On 3 February 2014 ISDA announced that its Credit Steering Committee had determined that the appropriate implementation date for the new Definitions would be the September 2014 CDS roll date. ISDA expects market participants to begin confirming transactions using the 2014 Credit Derivatives Definitions starting on the implementation date. The Definitions will only apply if parties reference them in their trade documentation for new trades, or agree to amend the documentation for existing transactions via the use of a protocol.

PRA consults on its approach to supervising international banks

The Prudential Regulation Authority (PRA) has published a consultation paper ([CP4/14](#)) on its approach to supervising international banks. CP4/14 sets out how the PRA will supervise UK branches of banks based outside the European Economic Area (EEA) and also explains in more detail the PRA's approach to EEA branches and subsidiaries.

The PRA has a framework for all types of firm it supervises, which takes into account the different legal requirements for branches and subsidiaries. For branches from outside the EEA, this framework focuses on two main tests:

- whether the supervision of the firm in its home state is equivalent to that of the PRA; and
- whether the PRA has assurance from the home supervisor over the firm's resolution plan in a way that reduces the impact on financial stability in the UK.

In line with these tests, the PRA will determine whether the firm undertakes any critical economic functions in the UK. Depending on what these are, and their potential impact on UK financial stability, the PRA will make a judgement about whether it is content for the firm to operate as a branch in the UK. This will impact both new and existing branches of non EEA banks.

For subsidiaries, the PRA has the same legal powers and follows the same supervisory model as for UK headquartered firms. For branches of EEA banks, the PRA's approach is set out under EU law which means that, once CRD 4 is fully implemented, the home supervisor is fully responsible for prudential supervision.

Comments on CP4/14 are due by 27 May 2014.

FCA publishes report into mortgage lenders' arrears management and forbearance

The Financial Conduct Authority (FCA) has published a [report](#) summarising the key findings of its [thematic review](#) of mortgage lenders' arrears management and forbearance. The review found that firms had improved practices, placing greater emphasis on the need to treat customers fairly, but identified areas on which the industry should now focus. To build on the progress so far, the FCA has challenged firms to do more to deliver consistently good outcomes for borrowers. The report reiterates the importance of firms making decisions that take account of the specific personal and financial circumstances of borrowers and reminded firms to deal sensitively with borrowers who have particular vulnerabilities. The FCA is particularly concerned about the risks to borrowers from potential interest rate rises and wants firms to take proactive steps to identify borrowers who may be susceptible to these risks and ensure that they have strategies to treat them fairly.

FCA sets out consumer credit regime

The Financial Conduct Authority (FCA) has issued a policy statement ([PS14/3](#)) setting out detailed rules for the FCA regime for consumer credit, including feedback on its 2013 consultation papers in this area (CP13/10 and CP13/18). The FCA will take over the regulation of consumer credit firms from the Office of Fair Trading (OFT) on 1 April 2014. Amongst other things, the new rules will result in changes for how payday lenders and debt management companies treat their customers including mandatory affordability checks for payday borrowers and giving the FCA the power to ban any misleading adverts from payday lenders.

The FCA intends to consult on proposals for a cap on the cost of high-cost short-term credit in Summer 2014.

FCA sets out its role in regulating commodity markets

The Financial Conduct Authority (FCA) has published a [guide](#) to how it regulates the commodity markets, as well as a [market update](#) setting out its views on the current regulatory challenges of the commodity derivative markets and how it intends to address them. The Financial Services Authority published a similar overview in 2007. The FCA's new guide considers how the regulatory framework has evolved since then, and also outlines some of the changes that are expected from developments, primarily at the European level. The FCA has emphasised that the guide does not constitute formal guidance.

Financial Services (Banking Reform) Act 2013 (Commencement No. 1) Order 2014 published

The Financial Services (Banking Reform) Act 2013 (Commencement No. 1) Order 2014 (SI 2014/377) [has been published](#). The Order brings into force certain provisions of the Financial Services (Banking Reform) Act 2013. Provisions entering into force on 1 March 2014 include those for bank ringfencing, ringfencing transfer schemes, and the bail-in stabilisation tool. However, some are enabling provisions which require secondary legislation to be tabled. This is the first commencement order to be made under the Act.

BaFin issues guidance on requirements for exemption from licence requirements and certain duties under German Banking Act for German-based institutions

The German Federal Financial Services Supervisory Authority (BaFin) has published a [guidance note](#) regarding the requirements for an exemption from licence requirements and certain duties under the German Banking Act for German-based institutions. The exemption can be granted upon application if a German-based institution does not require supervision in this respect given the nature of the business which it conducts. The guidance note clarifies the requirements and procedure for such an exemption. The guidance note does not alter the requirements under which an entity located in a non-EEA state may be granted such an exemption.

SFC consults on strengthening regulation of alternative liquidity pools

The Securities and Futures Commission (SFC) has published a [consultation paper](#) concerning the future

regulation of alternative liquidity pools (ALPs), which are also known as alternative trading systems and 'dark pools'.

The SFC proposes to enhance and standardise the regulatory obligations imposed on Hong Kong licensed corporations that operate ALPs, by including within the Code of Conduct comprehensive requirements governing their operation. As a consequence of doing this, the SFC will cease its current practice of imposing conditions on the licences of ALP operators on a case-by-case basis.

The proposals set out in the SFC's consultation paper cover the following key areas:

- restricting access to ALPs to institutional investors only;
- enhancing the level of disclosure to ALP users;
- ensuring the priority of agency orders over proprietary orders initiated by ALP operators and their affiliates;
- limiting the level of visibility of trading information available to the staff of ALP operators;
- maintaining system adequacy; and
- introducing additional control, record keeping and reporting requirements.

The proposals aim to strike a balance between market development, market integrity and investor protection, taking into account the needs and circumstances of the Hong Kong market.

Comments are due by 25 April 2014.

HKEx welcomes government proposals to waive stamp duty for all ETFs

Hong Kong Exchanges and Clearing Limited (HKEx) has [welcomed](#) the proposals outlined in the Hong Kong SAR government budget for the April 2014 to March 2015 fiscal year aimed at strengthening the competitiveness of the Hong Kong financial market.

In particular, HKEx believes that the proposals to waive the stamp duty on the trading of all exchange traded funds (ETFs) will reduce the trading cost of ETFs with a higher percentage of Hong Kong stocks in their portfolios, help promote the development, management and trading of ETFs in Hong Kong, and benefit the overall development of the market.

SEC re-opens comment period on Regulation ABII proposals

The Securities and Exchange Commission (SEC) has [re-opened the public comment period](#) for its 'Regulation ABII' proposals until 28 March 2014. Specifically, it is

seeking comments regarding dissemination of potentially sensitive asset-level data in connection with offerings of asset backed securities, as discussed in a recently published staff memorandum. The SEC is considering requiring ABS issuers to make asset-level information directly available to investors and potential investors through websites that would allow issuers to restrict access as necessary to address privacy concerns.

RECENT CLIFFORD CHANCE BRIEFINGS

Game over for Goldacre and Luminar

On 24 February 2014, the Court of Appeal issued a unanimous judgment ([2014] EWCA Civ 180) that companies in administration will be liable to pay rent for the period during which leasehold premises are used for the purpose of the administration.

This briefing discusses the impact of the decision.

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

Is Japanese PPP/PFI set to take off?

Recent policy initiatives are expected to lead to a pipeline of new Japanese PPP/PFI projects. A concession for the operation of Sendai Airport will be launched within the next few months and the procuring authority has recently released the basic policy and the draft outline of the basic scheme.

This briefing discusses the Sendai Airport project and the government's current thinking, as well as further opportunities in the Japanese PPP/PFI market.

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

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