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Briefing note

# International Regulatory Update

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**EU Parliament approves directive on actions for antitrust damages**

The EU Parliament's plenary session has approved a directive on antitrust damages actions for breaches of EU competition law.

The directive is intended to help individuals and companies claim damages following infringements of EU antitrust rules, including those related to cartels and dominant market

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positions, and aims to remove national procedural obstacles, legal uncertainty and divergent national rules.

The directive preserves and safeguards key tools used by competition authorities to enforce antitrust rules, in particular so-called leniency and settlement programmes, recognising the importance of cooperation between companies and authorities in discovering infringements. The directive makes provision for:

- national courts to order companies to disclose evidence when victims make a compensation claim;
- the automatic recognition of national competition authorities' final decisions as proof before courts in Member States where the infringement occurred;
- a window of one year for victims to claim damages following a final infringement decision by a national competition authority;
- compensating those who suffer harm at the end of a distribution chain in instances where an infringement has led to price increases being passed along the chain; and
- clarifying the interplay between court actions and consensual settlements between victims and infringing companies.

The directive will now go to the EU Council for final approval. Once the directive has been officially adopted, Member States will have two years to transpose the provisions.

**MiFID 2: EU Commission requests technical advice from ESMA on possible delegated and implementing acts**

The EU Commission has issued a request to the European Securities and Markets Authority (ESMA) for technical advice on possible delegated and implementing acts concerning the Markets in Financial Instruments Directive (MiFID 2) and Regulation (MiFIR).

The deadline set for ESMA to deliver its technical advice is six months after the entry into force of MiFID 2 and MiFIR, which is expected in June 2014.

**ECB publishes SSM Framework Regulation**

The European Central Bank (ECB) has published the SSM Framework Regulation for the Single Supervisory Mechanism (SSM). The SSM 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 identification of significant banks, which will be subject to direct supervision by the ECB, will take place according to criteria set out in the SSM Council Regulation and further developed in the SSM Framework Regulation. The result of this process is due to be announced in September 2014.

**German regulation on short selling notifications published**

A revised regulation on short selling notifications (Leerverkaufs-Anzeigeverordnung) has been published in the German Federal Gazette (Bundesgesetzblatt).

The regulation sets out the details to be provided when notifying the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht) (BaFin) of the intention to use the market making or the primary dealer exemptions under the EU Short Selling Regulation.

The revised regulation entered into force on 26 April 2014.

**Swiss Federal Tax Administration provides update on Swiss banks' FATCA compliance**

The Swiss Federal Tax Administration (FTA) has provided an update on the compliance of Swiss banks with the US Foreign Account Tax Compliance Act (FATCA), which comes into effect in Switzerland on 1 July 2014. From that date, banks will be required to disclose information relating to US accounts to the US Internal Revenue Service (IRS). US bank clients will therefore receive a request for consent from their bank to authorise the disclosure of such information to the IRS. Banks will be asked to include an information letter from the FTA that will outline the process by which the US government may request administrative assistance from a competent Swiss authority, based on the US account information disclosed. The United States can request administrative assistance only after it has received the aggregated reports from the relevant bank and once the Protocol of Amendment to the double taxation agreement of 23 September 2009 has entered into force.

**CBRC and CSRC issue detailed guidelines on banks' preferred share issuance**

The China Banking Regulatory Commission (CBRC) and the China Securities Regulatory Commission (CSRC) have issued the 'Guidelines on Issuance of Preferred Shares by Commercial Banks for Supplementing Tier 1 Capital', which are intended further to clarify the eligibility requirements and approval procedures for PRC banks to issue preferred shares and key elements for inclusion in Additional Tier 1 Capital.

Under the guidelines, banks shall satisfy all eligibility requirements provided by the State Council and the CSRC regarding the issuance of preferred shares and those provided by the CBRC regarding the offering of capital instruments. Banks must also have a qualified Core Tier 1 CAR.

Banks shall submit the required documents to, and seek approval from, the CBRC. To simplify the approval process, the CBRC will approve the capital supplemental plan and amendments to the AOA in one go. Then, the bank shall seek a separate approval from the CSRC.

The criteria for inclusion in Additional Tier 1 Capital are as follows:

- dividend/coupon discretion – the bank must have full discretion at all times to cancel distributions/payments and cancellation of discretionary payments must not be an event of default. The unpaid distributions/payments cannot be accumulated in the next year. Cancellation of distributions/payments must not impose restrictions on the bank except in relation to distributions to common stockholders;
- repurchase mechanism – the bank cannot contain any repurchase clauses in respect of preferred shares. It may only be callable at the initiative of the bank in accordance with the relevant capital requirements; and
- equity conversion – in a private issue, the bank shall allow preferred shares to be converted into common shares at pre-specified trigger points. The bank and investors can agree on the conversion price and volumes.

**Chinese regulators initiate new joint annual reporting for foreign-invested enterprises in 2014**

The Ministry of Commerce, the Ministry of Finance, the State Administration of Taxation, the State Administration of Foreign Exchange and the National Bureau of Statistics have jointly issued the 'Notice on Carrying out the 2014 Joint Annual Operation Reporting Programme for Foreign-invested Enterprises', to officially change the joint annual inspection to joint annual reporting for all foreign-invested enterprises (FIEs). The Notice is intended to implement the 'Reform Plan on Registered Capital Registration System' issued by the State Council on 7 February 2014.

Amongst other things, the Notice states that:

- all FIEs are required to submit the annual report on their operations in 2013 and file any changes to their basic information via the National Foreign-invested Enterprises Annual Operation Information Online Reporting and Sharing System within the period from 21 April 2014 to 30 June 2014;
- the annual reporting information submitted by FIEs will be made public on the online reporting system to the extent appropriate and the reporting information will be shared among the relevant regulators;
- an FIE will be subject to close attention or further actions from the regulators if it fails to submit the reporting information in a timely and accurate manner or engages in any activity in violation of laws or regulations; and
- FIEs are encouraged to engage qualified accounting firms to prepare and submit the annual reporting information on behalf of the FIEs.

**MOFCOM consults on revised administrative measures on outbound investment**

The Ministry of Commerce (MOFCOM) has published a consultation draft of the revised 'Administrative Measures on Outbound Investment'. Amongst other things, the consultation draft proposes the following changes:

- only outbound investments related to sensitive jurisdictions (e.g. those that have no diplomatic relationship with China, are sanctioned or are subject to war or civil commotion) or sensitive industries (e.g. those that use nationally restricted export products and technology or involve multinational interests) require approval of MOFCOM and all other outbound investments are subject to the filing process only; and
- for the filing process, MOFCOM and its provincial counterparts should issue filing certificates to investors within three working days as long as the required filing forms are filled in completely and in the mandatory format.

Comments are due by 15 May 2014.

**HKEx revises FAQs relating to listing rule changes to complement new sponsor regulation**

Hong Kong Exchanges and Clearing Limited (HKEx) has revised its series of frequently asked questions (FAQs) relating to listing rule changes to complement new sponsor regulation, which took effect on 1 October 2013, by adding a new question 23A. The new question relates to the redaction of information in an application proof or a Post Hearing Information Pack (PHIP) by a listing applicant.

**Indian government allows foreign direct investment in limited liability partnerships**

The Reserve Bank of India (RBI) has issued a circular announcing the government's decision to allow limited liability partnerships (LLPs) formed and registered under the Limited Liability Partnership Act 2008 to accept foreign direct investment (FDI) subject to the conditions set out in Annex I of the circular. Previously, only a company incorporated under the Companies Act 1956 or a Venture Capital Fund was eligible to accept FDI.

The RBI has indicated that the provisions of the circular are effective from 20 May 2011. However, the reporting requirements in relation to FDI in an LLP are only effective from the date of issue of the circular. LLPs which have received FDI in terms of Foreign Investment Promotion Board (FIPB) approval between 20 May 2011 to 16 April 2014 need to comply with the reporting requirements in respect of such FDI within 30 or 60 days, as applicable, from 16 April 2014.

**FSC plans to overhaul net capital ratio rules for securities companies**

The Financial Services Commission (FSC) has announced its plan to overhaul the net capital ratio (NCR) rules for securities companies. The FSC believes that it is difficult exactly to evaluate securities firms' financial soundness or loss absorbing capacity with the current method of computing NCR. In particular, the plan provides for:

- a modification to the NCR formula – securities companies will be allowed to use either of the two formulas (new or old) until the end of 2015, and the new NCR formula will be fully implemented starting from 2016;
- consolidated computations of NCR – the FSC will introduce consolidated computations of NCR for all securities firms with subsidiaries under the Korea International Financial Reporting Standards (K-IFRS) starting from 2016 (prior to the full implementation in 2016, the consolidated NCR rule will be first applied to large securities companies in 2015 as a pilot operation; and
- adjustment of items subtracted from net operating capital – securities firms' corporate loans will be reflected into credit risks, instead of being subtracted from net operating capital.

Considering the impact of new NCR rules on the industry, the FSC intends to implement the modification to the NCR formula and consolidated computations after gathering opinions from the industry and then revise the relevant regulations. Adjustment of items subtracted from net operating capital will be implemented as soon as the relevant regulations are revised by the FSC (presumably in the third quarter of 2014).

**FSC enacts regulation on supervision of covered bond issuance**

The FSC has approved a draft regulation on supervision of covered bond issuance, completing a legal framework for covered bond issuance. The regulation on supervision of covered bond issuance is enacted to stipulate further details mandated by the Covered Bond Act and its Enforcement Decree. In particular, the regulation is intended to:

- specify qualifications of underlying assets – home mortgage loans in underlying assets need to be composed of at least 20% of loans with a debt-to-income (DTI) ratio 70% or lower in a bid to contribute to improving structural soundness of household debt, and out of the home mortgage loans in underlying assets, fixed-rate loans must account for more than 30%, by which banks would be pushed toward extending more fixed-rate loans;
- establish standards for evaluation of underlying assets – in principle, the underlying assets in a cover pool are to be evaluated by market prices (in the absence of such prices, the assets can be evaluated by book value computed by international accounting standards); and
- require market-making roles of issuers – issuers are required to register their role to make markets for covered bonds when they register their issuance plan.

The regulation took effect on 23 April 2014.

## RECENT CLIFFORD CHANCE BRIEFINGS

**Upcoming EU restrictions on contractual auditor controls – implications for loan documentation**

Lenders seek to monitor their borrower's performance over the lifetime of a lending transaction. Fundamental to this is an analysis of a borrower's audited annual accounts. These are helpful only if properly audited and lenders frequently seek to control the auditor's identity by using so called auditor clauses, particularly on riskier credits. These give lenders comfort as to the quality of the auditors and typically require the borrower to use either specified audit firms or one otherwise approved by the lenders. Upcoming

EU legislation will mean that such clauses in their current form will be banned and become unenforceable.

This briefing examines the ban and considers the likely consequences for loan facility documentation.

http://www.cliffordchance.com/content/cliffordchance/briefings/2014/04/upcoming_eu_restrictionsoncontractualaudito.html\

**Arbitration, corruption, and voluntary self-disclosures – What are the options?**

A company in the midst of arbitration proceedings that discovers potential bribery related to the contract at issue faces inherently irreconcilable conflicts – does it attempt to confine the allegations within the arbitration proceeding or does it disclose them to anti-corruption authorities to stave off potentially astronomical fines? It is critical to understand how the corruption issues will impact the arbitration and vice versa in order to make the appropriate strategic decisions. As often happens, timing is everything … and nothing.

This briefing discusses potential options when such a situation arises.

http://www.cliffordchance.com/content/cliffordchance/briefings/2014/04/arbitration_corruptionandvoluntar.html

**New orderly resolution regimes for financial institutions under the amended Deposit Insurance Act of Japan – JFSA releases response in public consultation process**

The Financial Services Agency of Japan (JFSA) recently responded to questions posed by the public regarding the government enforcement order and ordinances connected to the amended Deposit Insurance Act of Japan (DIA).

This briefing summarises the main points under the amended DIA, which came into effect on 6 March 2014, highlighting the views expressed by the JFSA in its responses during the public consultation.

http://www.cliffordchance.com/content/cliffordchance/briefings/2014/04/new_orderly_resolutionregimesforfinancia0.html

**Developments in the Japanese renewable energy sector – solar continues to cool as wind picks up**

METI has published a set of new tariffs for renewable energy power projects approved this year. As expected, the downward trend in tariffs for solar projects has continued, while tariffs for other renewable energy projects remain the same as for last year. Further, a new tariff for wind power has been set to encourage the development of offshore wind power.

This briefing highlights opportunities for global renewable market players in the growing Japanese renewables market.

http://www.cliffordchance.com/content/cliffordchance/briefings/2014/04/developments_in_thejapaneserenewableenerg.html

**The Volcker Rule – Key Considerations for Non-US Banks and their Private Funds Teams**

In December 2013, US financial regulators published joint final regulations to implement Section 13 of the Bank Holding Company Act, originally enacted as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and commonly referred to as the 'Volcker Rule'.

There has since been significant commentary on the application of the Volcker Rule, much of which has understandably focused on the restrictions relating to banks' proprietary trading operations. However, the Volcker Rule also impacts significantly on banks which hold interests in private equity funds (and similar funds such as infrastructure, real estate and debt funds). Its provisions relating to such interests are in some ways more complex than the proprietary trading restrictions.

Although primarily designed to limit the activities of US banks, the Volcker Rule will also affect non-US banks that have a connection to the United States and which hold or intend to acquire interests in private funds which have been or will be marketed in the United States. Many of these banks will be required to divest the private fund portfolios held on their balance sheets by July 2015 and will be restricted in their ability to make new private fund investments.

This briefing addresses some of the key issues facing investment professionals within non-US banks who are managing investments in private funds which are held on the bank's balance sheet.

http://www.cliffordchance.com/briefings/2014/04/the_volcker_rulekeyconsiderationsfornon-us.html