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Briefing note

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Capital Markets Union: EU Commission launches project

The EU Commission has launched its project to create a Capital Markets Union (CMU) across the EU with a first orientation debate at the College of Commissioners. The project is intended to create a single market for capital across the EU by removing barriers to cross-border investment and lower costs of funding within the EU. A statement released by the Commission indicates that the orientation debate highlighted, among other things, that:

- EU stock markets, equity markets and venture capital markets have the potential to play a greater role in the financing of European businesses; and
- the CMU should be a single market project created for all the 28 Member States.

The Commission intends to adopt a Green Paper in February 2015 in order to consult with a broad range of stakeholders on further progress and establish areas for potential action. An Action Plan will be published in the third quarter of 2015.

FTT: Participating Member States target 2016 implementation date

Ministers from EU Member States participating in enhanced cooperation in the area of financial transaction tax – Austria, Belgium, Estonia, France, Germany, Italy, Portugal, Slovakia, Slovenia and Spain – have issued a joint statement renewing their commitment to reach an agreement on the proposed FTT. The Ministers decided that the tax should be based on the principle of the widest possible base and low rates, while taking full consideration of the impacts on the real economy and the risk of relocation of the financial sector.

As in their 6 May 2014 joint statement, the Ministers reiterated their willingness to create the conditions necessary to implement the European FTT on 1 January 2016. They intend to report on progress at one of the next meetings of the ECOFIN Council.

AMLD 4: EU Parliament committees vote in favour of proposals

The EU Parliament's Economic and Monetary Affairs (ECON) and Civil Liberties, Justice and Home Affairs Committees have voted in favour of the proposed text of the fourth Anti-money Laundering Directive (AMLD 4) and the proposed Regulation on information accompanying transfers of funds. Provisional agreement on the proposals was reached between the EU Parliament and EU Council in trilogue negotiations in December 2014.

The Economic and Financial Affairs Council (ECOFIN) has also endorsed the agreement. A statement issued by the Council and the EU Commission calls for efforts to be made to speed up national implementation of the proposed rules.

The proposals still need to be formally approved at an EU Parliament plenary session and by the Council of Ministers before publication in the Official Journal and entry into force. The EU Parliament plenary vote on the proposals will take place in either March or April 2015.

MIF Regulation: ECON Committee confirms agreement on compromise text

The ECON Committee has voted in favour of the proposed Regulation on interchange fees for card-based payment transactions (MIF Regulation) agreed between the EU Parliament and EU Council in trilogue negotiations on 17 December 2014. The Regulation still needs to be formally approved by both the EU Parliament and the Council before it is published in the Official Journal and enters into force. The EU Parliament will hold a plenary vote on the Regulation in April 2015.

CRR: EU Commission adopts Delegated Regulation on own funds requirements

The EU Commission has adopted a Delegated Regulation amending Delegated Regulation (EU) No 241/2014 on regulatory technical standards for own funds requirements for institutions under the Capital Requirements Regulation (CRR). In particular, the Delegated Regulation specifies whether and when multiple distributions would create a disproportionate drag on capital and clarifies the meaning of preferential distributions – namely preferential rights to payments of distributions and order of payments of distribution.

CRR: EBA publishes revised version of its final draft technical standards on prudent valuation

The European Banking Authority (EBA) has published a revised version of the final draft Regulatory Technical Standards (RTS) on prudent valuation it published on 31 March 2014.

In the revised version, all occurrences of 'volatility' in Article 9 and Article 10 of the final draft RTS published on 31 March 2014 are replaced by 'variance' for the purposes of computing market price uncertainty and close-out costs additional valuation adjustments (AVAs).

This amendment, which affects only institutions using the Core approach, is intended to result in a slight relaxation of the calibration of the volatility test performed under these two articles, in order to avoid unwanted side-effects in the first year implementation of the Core approach. However, while allowing for this flexibility in the context of the first implementation of the Prudent Valuation framework, the EBA has also suggested reassessing the calibration of the volatility test within the first two years of implementation of the RTS.

EMIR: ESMA publishes opinion on draft RTS on clearing obligation for interest rate swaps

The European Securities and Markets Authority (ESMA) has published an opinion on the draft RTS on the clearing obligation on interest rate swaps. This is in response to the EU Commission's notification of 18 December 2014 of its intention to endorse, with amendments, the draft RTS submitted by ESMA on 1 October 2014.

In accordance with the ESMA Regulation, within a period of six weeks from the notification, ESMA may amend the draft RTS and resubmit it in the form of a formal opinion to the Commission. The opinion:

- explains ESMA's support of the Commission's intention to extend the initial approach with the objective of postponing the start date of the frontloading obligation, as this should provide counterparties with sufficient time to determine whether their contracts are subject to the frontloading obligation;
- raises concerns on the process envisaged to exempt non-EU intragroup transactions from the clearing obligation; and
- confirms that ESMA is ready to provide technical advice on exempt non-EU intragroup transactions, if requested, in order to find an alternative solution, both in the interest of an efficient implementation and to avoid any delays in the roll-out of the clearing obligation.

SSM: ECB publishes recommendation on dividend policies

The European Central Bank (ECB) has published a recommendation with regard to banks' dividend distribution policies within the Single Supervisory Mechanism (SSM). The recommendation is addressed to significant entities and significant groups supervised directly by the ECB and national competent authorities (NCAs) and designated authorities that supervise less significant supervised entities and less significant supervised groups.

The ECB recommends a risk-based approach to dividend distributions that distinguishes between three categories of bank:

- category one banks, which fulfil capital requirements as at 31 December 2014 and have already reached their 'fully loaded' capital ratios for January 2019 requirements, should conservatively distribute dividends;
- category two banks, which fulfil capital requirements as at 31 December 2014 but are yet to reach their 'fully loaded' capital ratios for January 2019 requirements, should conservatively distribute dividends but only to the extent that the path towards the required fully loaded ratio is secured; and
- category three banks, which under the 2014 comprehensive assessment have a capital shortfall or are in breach of their capital requirements, should not distribute dividends.

Banks whose dividend policies do not follow the ECB's recommendations must provide additional information and an explanation to the ECB. They will also be required to submit plans for fulfilling the required 'fully loaded' capital ratios. The ECB may take individual decisions as part of its Supervisory Review and Evaluation Process (SREP).

Separately, the ECB has notified banks that it will thoroughly examine their policy on variable remuneration.

SSM: ECB sets out approach to existing supervisory processes and practices

The Chair of the ECB's Supervisory Board, Danièle Nouy, has written to the management of significant banks with regard to the ECB's approach to existing supervisory processes and practices in SSM Member States. The letter sets out that existing processes and practices related to competences now assigned to the ECB in the SSM Regulation apply until further notice by the ECB in order to minimise disruption and to allow the ECB to assess the merits of different approaches. It adds that the contact point for all requests, applications and notifications of significant entities is the relevant Joint Supervisory Team (JST) Coordinator at the ECB, with copy to the national JST

sub-coordinators, except where the SSM Framework Regulation stipulates otherwise.

Basel Committee publishes work programme for 2015/2016

The Basel Committee on Banking Supervision (BCBS) has published its work programme for 2015 and 2016.

The work programme is structured around four themes:

- policy development;
- ensuring an adequate balance between simplicity, comparability and risk sensitivity across the regulatory framework;
- monitoring and assessing implementation of the Basel framework; and
- improving the effectiveness of supervision.

On policy development, the BCBS will focus on restoring confidence in capital ratios, including revisions to existing methods of risk-weighted assets, and continuing its work on simple, transparent and comparable criteria for securitisations and on the loss-absorbing capacity of globally systemically important banks (G-SIBs) in resolution.

The Committee's work on measures related to simplicity, comparability and risk sensitivity as outlined in the Committee's report to the G20 leaders will continue, and its monitoring of member implementation of the Basel framework by way of the Regulatory Consistency Assessment Programme (RCAP) will be expanded to cover Basel III liquidity standards. The Committee also plans to improve the effectiveness of its supervision by focusing on practices relating to stress testing, valuation practices and the role of Pillar 2 in the capital framework.

Basel Committee publishes final standard for revised Pillar 3 disclosure requirements

The BCBS has published the final standard for the revised Pillar 3 disclosure requirements.

The revised disclosure requirements will enable market participants to compare banks' disclosures of risk-weighted assets. The revisions focus on improving the transparency of the internal model-based approaches that banks use to calculate minimum regulatory capital requirements.

The revised standard retains the structure of the Committee's June 2014 consultative paper. Compared with the consultative version, the key changes involve:

- rebalancing the disclosures required quarterly, semi-annually and annually;
- streamlining the requirements related to disclosure of credit risk exposures and credit risk mitigation techniques; and
- clarifying and streamlining the disclosure requirements for securitisation exposures.

The revised requirements will take effect from the end of 2016. They supersede the existing Pillar 3 disclosure requirements first issued as part of the Basel II framework in 2004 and the Basel 2.5 revisions and enhancements introduced in 2009.

ISDA publishes proposals for recovery and continuity framework for CCPs

The International Swaps and Derivatives Association (ISDA) has published a position paper that sets out a proposed recovery and continuity framework for central counterparties (CCPs). The proposals relate to cases when the default of one or more clearing members threatens the viability of the CCP and is consistent with recommendations made by the Committee on Payments and Markets Infrastructure and the International Organisation of Securities Commissions (CPMI-IOSCO) in October 2014.

The paper sets out ISDA's view that:

- the recovery of a CCP is preferable to closure and that recovery efforts should continue while the CCP's default management process is effective;
- recovery measures should be clearly defined in clearing service book rules; and
- clearing services should be segregated and structured to be of limited recourse to the clearing provider to mitigate the potential for contagion across other clearing services of the CCP.

IOSCO publishes final report on risk mitigation standards for non-centrally cleared OTC derivatives

The International Organization of Securities Commissions (IOSCO) has published a final report on risk mitigation standards for non-centrally cleared OTC derivatives, setting out nine standards aimed at mitigating the risks in the non-centrally cleared OTC derivatives markets.

The standards, which were developed in consultation with the Basel Committee on Banking Supervision and the Committee on Payments and Market Infrastructures, aim to:

- further strengthen the non-centrally cleared OTC derivatives market;

- encourage the adoption of sound risk mitigation techniques to promote legal certainty over the terms of the non-centrally cleared OTC derivatives transactions;
- foster effective management of counterparty credit risk; and
- facilitate timely resolution of disputes.

The standards cover the following key areas:

- trading relationship documentation and trade confirmation;
- process and/or methodology for determining valuation;
- portfolio reconciliation;
- portfolio compression; and
- dispute resolution.

Payment Systems Regulator consults on further competition powers

The Payment Systems Regulator (PSR) has launched a consultation on new competition powers that it will obtain on 1 April 2015. The PSR already holds competition powers under the Enterprise Act 2002, which allows the regulator to carry out market studies and make market investigation references to the Competition and Markets Authority (CMA), with which it is a concurrent regulator. The further powers that it will obtain from 1 April 2015 will enable the PSR to enforce prohibitions for anti-competitive behaviour in relation to participation in payment systems under the Competition Act 1998.

The consultation paper sets out:

- draft guidance on the PSR's powers under the Competition Act 1998; and
- draft guidance on market reviews and making market investigation references under the Financial Services (Banking Reform) Act 2013 and for carrying out market studies under the Enterprise Act 2002.

Comments on the consultation are due by 20 March 2015. The Financial Conduct Authority (FCA), of which the PSR was incorporated as a subsidiary on 1 April 2014, launched its own consultation on its concurrent competition powers in relation to the provision of financial services on 15 January 2015. Joint comments on both consultations may be submitted by the FCA's deadline of 13 March 2015.

The PSR will become fully operation from 1 April 2015 and intends to publish finalised guidance documents and issue a feedback statement on the consultation as soon as possible after this date.

Mortgage Credit Directive: HM Treasury publishes draft statutory instrument on implementation

HM Treasury has published the draft Mortgage Credit Directive Order 2015, which will incorporate new European rules on mortgage lending into UK law. The rules, which are set out in the EU Mortgage Credit Directive, set common standards that EU Member States need to meet in order to protect consumers taking out loans to buy residential property.

The draft SI contains some changes, including:

- bringing the regulation of second charge mortgage lending into line with first charge mortgage lending; and
- introducing a new set of regulations for buy-to-let lending, where the lending is to consumers rather than for business purposes.

The changes will not come into effect until March 2016.

PRA consults on depositor, dormant account and policyholder protection

The Prudential Regulation Authority (PRA) has published a consultation paper (CP4/15) setting out proposals for transitional provisions and new rules in the PRA Rulebook and consequential amendments to the PRA Handbook that arise as a result of the rules being proposed in both the Depositor Protection and Policyholder Protection consultation papers published in October 2014 (CP20/14 and CP21/14).

The package of measures across the PRA's consultations (CP4/15, CP20/14 and CP21/14) is intended to minimise the adverse impact the failure of a PRA-authorised deposit-taker, dormant account fund operator or PRA-authorised insurer would have on UK financial stability and to deliver effective compensation or continuity to eligible depositors, dormant account holders and policyholders.

The consultation closes on 27 February 2015.

German Federal Government presents draft law to implement new Deposit Guarantee Schemes Directive

The German Federal Government (Bundesregierung) has presented a draft law to implement the new Deposit Guarantee Schemes Directive (2014/49/EU) to the German Federal Parliament. By implementing the revised Directive the German Federal Government intends to increase the protection afforded by deposit guarantee schemes (DGS).

Amongst other things, under the proposal:

- all CRR credit institutions are obliged to be a member of a DGS. This obligation now also includes the German saving institutions (Sparkassen) and cooperative banks (Genossenschaftsbanken) which used to be exempt from this obligation due to their membership in an institution guarantee scheme (Institutssicherung);
- upon application, BaFin may recognise the institution guarantee schemes as DGS;
- the repayment deadline is reduced from 20 to 7 working days as of 1 June 2016;
- there is increased protection of deposits resulting from certain transactions (e.g. selling of private residential real estate) or serving certain social or other purposes (e.g. payout of a life insurance policy) of up to EUR 500,000; and
- there is an obligation for DGS to make repayments without prior application by depositors and an obligation for DGS to ensure that the amount of their available funds reaches 0.8% of covered deposits by 3 July 2024.

Short selling: Act Amending Act on Trading in Financial Instruments and Certain Other Acts enters into force

The Act Amending the Act on Trading in Financial Instruments and Certain Other Acts regarding short selling has entered into force. The objective of this amendment is to implement the following EU regulations into Polish law:

- Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (Short Selling Regulation); and
- Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (EMIR).

SAFE issues guidance on cross-border foreign exchange payment services for e-commerce

The State Administration of Foreign Exchange (SAFE) has issued its 'Guidance on Cross-border Foreign Exchange Payment Services of Payment Institutes', which expands the pilot programme of foreign exchange payment services for cross-border e-commerce to a nation-wide scheme. The services include collective payments/receipts for cross-border e-commerce and the relevant foreign exchange purchase/settlement. Amongst other things, the following aspects are worth noting:

- the guidance clarifies that a payment institute needs to be registered in the Trade-related Foreign Exchange Payments and Receipts Enterprise Registry to provide these services. Specific conditions and procedures are provided to complete the registration;
- the single-payment cap under these services is raised from USD 10,000 to USD 50,000;
- the restrictions on the number of foreign exchange payment institute accounts (PIAs) are lifted; and
- the guidance enhances risk management requirements and local SAFE bureaus shall conduct
- prudent supervision regarding these services.

The guidance took effect upon promulgation.

MAS consults on proposed amendments to MAS Notice 648 on issuance of covered bonds by banks incorporated in Singapore

The Monetary Authority of Singapore (MAS) has launched a consultation on proposed amendments to MAS Notice 648 on the issuance of covered bonds by banks incorporated in Singapore. The proposed amendments are intended to further facilitate the issuance of covered bonds in Singapore and relate to the following aspects of MAS Notice 648:

- structure of the covered bond programme – the MAS proposes to allow an additional type of covered bond programme structure whereby a trust is declared over the residential mortgage loans used as collateral for the covered bonds, and for the beneficial interest in the declared trust to be transferred to a special purpose vehicle set up for the purpose of holding the cover pool;
- cap on cash and cash equivalents – the MAS proposes to allow cash and cash equivalents to be accumulated up to an amount equal to 12 months of payment obligations under a covered bond programme, and implement a one-month carve-out from the 15% cap on cash and cash equivalents to account for operational timing differences; and
- loan-to-value (LTV) limit of residential mortgage loans – the MAS proposes to amend the Notice to clarify that the LTV limit of 80% applies at the point of inclusion of residential mortgage loans into the cover pool. Subsequently, residential mortgage loans with LTV in excess of 80% may be retained in the cover pool, subject to certain requirements.

The proposed amendments to the Notice are set out in Annex A of the consultation paper. Comments on the proposed amendments are due by 28 February 2015.

RECENT CLIFFORD CHANCE BRIEFINGS

The European Long-Term Investment Fund Regulation

A new type of European fund is expected to come into force in mid-2015, targeted at institutional and retail investors seeking long-term investments in illiquid assets such as real estate and infrastructure projects. The European Long-Term Investment Fund Regulation is one of a series of measures proposed by the European Commission to boost growth in Europe and to increase the amount of non-bank funding available to companies investing in the real economy. The new regulation creates a legislative framework for EU funds which will only invest in businesses that need long-term capital, thereby complementing UCITS which focuses on liquid securities. It is hoped that European Long- Term Investment Funds (ELTIFs) will prove attractive to investors seeking steady, long-term returns, such as smaller pension funds and insurance companies.

This briefing discusses the ELTIFs Regulation.

http://www.cliffordchance.com/briefings/2015/01/the_european_long-terminvestmentfundregulation.html

Corporate Update January 2015

Clifford Chance has produced the January 2015 edition of its bi-annual Corporate Update, which provides a round-up of developments in company law and corporate finance regulation over the last six months and looks ahead to forthcoming legislative and regulatory changes.

In this edition, we consider the potential impact of the Autumn 2014 Budget Statement, the effect of which may reduce the popularity of 'B share schemes' as a means of returning cash to shareholders. We also look at the Chancellor's proposals to prevent the use of cancellation schemes to implement takeovers so as to remove a bidder's ability to avoid paying stamp duty on these transactions. These measures, along with the Government's proposals to introduce a new so-called 'Google tax', aimed at ensuring multinationals that do business in the UK pay their fair share of UK taxes, might be perceived by cynics as an attempt by the incumbent Government in advance of a May 2015 election to show that it will take a hard line on the taxation of businesses in the UK. Regardless of any electoral propaganda however, these proposals will have a real impact on multinational companies doing businesses in the UK.

We also look ahead to new narrative reporting requirements on the horizon for large companies, in particular, proposals requiring companies to report on anti-corruption and bribery matters in their strategic report, along with proposals for companies to make a statement on their website about the steps they are taking to eliminate slavery and human trafficking from their supply chain and their own business.

In addition, we take a look at the first nine months of operation of the Competition and Markets Authority, and their activity levels with regard to merger control work and market and criminal cartel investigations, as well as looking ahead to what we might expect from them in 2015.

http://www.cliffordchance.com/briefings/2015/01/corporate_update-january2015.html

Russian loan documentation and sanctions – the current state of play

The introduction of the sanctions imposed by the US and the EU in connection with the situation in Ukraine in March 2014 was followed by a period of uncertainty in the Russian loan market. Never before had the US or the EU targeted a major world economy with such strong links to the international financial and energy markets. Many difficult questions arose as to the impact of the Ukraine Related Sanctions on new or pending loan transactions, as well as with respect to the implications under existing loan documentation. This uncertainty was exacerbated by developments in the summer of 2014 when the US and the EU unveiled the so called 'sectoral' sanctions; a type of sanctions regime that had never before been implemented by the US or the EU. These unique aspects of the Ukraine Related Sanctions, coupled with a rapidly evolving geopolitical situation and escalation of the Ukraine Related Sanctions throughout 2014, quickly led to sanctions becoming one of the most hotly negotiated issues on loan transactions in Russia; a trend that is expected to continue throughout 2015 and beyond.

This briefing discusses the impact of the 2014 sanctions on the Russian loan market.

http://www.cliffordchance.com/briefings/2015/01/russian_loan_documentationandsanctionsth.html

Another step towards the opening up of China – the domestic futures market

To realise its commitment to open up the domestic capital market, China has, in different phases, introduced the QDII, QFII, RQFII and more recently the Shanghai-Hong Kong Stock Connect program. Yet China's domestic futures market is still largely closed to foreign investors. To address this gap, the China Securities Regulatory Commission (CSRC) issued a consultation draft on 31 December 2014 on the measures that provide the regulatory framework for foreign traders and brokerage firms to trade designated domestic futures products.

This briefing looks at the access channels, eligibility criteria, risk control measures, and liabilities and enforcement measures under the draft, as well as how the CSRC is likely to designate futures products available to such foreign participants. It further identifies certain outstanding issues, such as whether there would be coordination among all relevant PRC regulators to supervise futures trading, and whether futures trading by asset managers for the account of their clients would also be regulated.

http://www.cliffordchance.com/briefings/2015/01/clifford_chance_clientbriefing-anotherste.html

Uncertain future for VIE structures in China

MOFCOM issued a consultation draft of the Foreign Investment Law on 19 January 2015. If passed into law, the draft would have some far-reaching implications on the foreign investment legal regime in the PRC. For example, the Consultation Draft envisages a 'negative list' concept (currently adopted in the Shanghai pilot free trade zone) – if a foreign investor proposes to invest in an underlying business which falls outside the 'negative list', then the foreign invested enterprise can be established without MOFCOM approval, which is a radical change from the current regime for foreign investment.

This briefing highlights the potential implications of the consultation on foreign investment in China.

http://www.cliffordchance.com/briefings/2015/01/clifford_chance_clientbriefing-uncertainfutur.html

Second round of consultation on a resolution regime for financial institutions in Hong Kong is launched

In setting out the conclusions reached by the authorities after the first stage of consultation (CP1), this second consultation paper (CP2) provides an overview of what the new regime will look like. It also seeks input on a number of specific areas, whilst explicitly reserving several key issues for a third, likely shorter, stage of consultation (CP3) later this year. The stated intention remains to put legislation before Hong Kong's Legislative Council by the end of 2015: the timing is tight but important, as this is the deadline set by the Financial Stability Board (FSB) for local implementation of its Key Attributes of Effective Resolution Regimes for Financial Institutions by its member states, of which Hong Kong is one.

This briefing looks at what can be deduced so far about the likely form and scope of the new regime. It also provides an overview of the topics which are proposed for discussion now and touches upon those which have been reserved for the third consultation.

http://www.cliffordchance.com/briefings/2015/01/_reform_too_big_tofailsecondroun.html

DIFC Court confirms that forum non conveniens does not apply between the different courts of the UAE

By the Order of Justice Sir David Steel dated 15 January 2015, the DIFC Court of First Instance confirmed that the common law concept of forum non conveniens (FNC) does not apply between the DIFC Courts and other courts of the UAE (in this case, Sharjah). FNC provides that, where a forum in another state is clearly a more appropriate forum to try the case, a court should grant a stay of proceedings before it in favour of the alternative forum. While FNC has been recognised by the DIFC Courts in cases where there is a connection with the UAE and another sovereign state, its applicability in cases that have connections to two emirates within the UAE was less clear.

This briefing discusses the Court of First Instance's decision.

http://www.cliffordchance.com/briefings/2015/01/difc_court_confirmsthatforumnonconvenien.html