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Briefing note

International Regulatory Update

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MiFID2 delay: EU Council adopts texts

The EU Council has adopted the amending Directive and amending Regulation on a one-year postponement of the transposition and application deadlines for MiFID2 and MiFIR. Under the adopted texts the deadline for Member States to transpose MiFID2 into national legislation will be 3 July 2017 and the date of application of both MiFID2 and MiFIR will be 3 January 2018.

Money Market Funds: EU Council Presidency publishes compromise proposal

The EU Council Presidency has published its proposal for a general approach with regard to the proposed Regulation on money market funds (MMFs). The Council has also published a report setting out the state of play of the negotiations on the proposal.

MiFID2: EU Commission adopts RTS 3, 5 and 8

The EU Commission has adopted three Delegated Regulations that set out regulatory technical standards (RTS) under MiFIR and MiFID2.

The RTS relate to:

- the volume cap mechanism and the provision of information for the purposes of transparency and other calculations – these RTS are based on final draft RTS 3 published by the European Securities and Markets Authority (ESMA) in September 2015;
- the types of contracts with third country counterparties that are subject to the trading obligation and cases where the trading obligation is necessary and appropriate to prevent avoidance of provisions in MiFIR (RTS 5); and
- the requirements on market making agreements and schemes under MiFID2 (RTS 8).

All three sets of RTS will enter into force on the twentieth day following that of their publication in the Official Journal.

MAR: Technical standards published in Official Journal

Six Commission Regulations setting out technical standards under the Market Abuse Regulation (MAR) have been published in the Official Journal.

In particular, the Regulations specify:

- RTS on the appropriate arrangements, systems and procedures as well as notification templates to be used for preventing, detecting and reporting abusive practices or suspicious orders or transactions (Commission Delegated Regulation (EU) 2016/957);
- RTS on technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest (Commission Delegated Regulation (EU) 2016/958);
- implementing technical standards (ITS) on market soundings with regard to the systems and notification templates to be used by disclosing market participants and the format of the records (Commission Implementing Regulation (EU) 2016/959);
- RTS on appropriate arrangements, systems and procedures for disclosing market participants conducting market soundings (Commission Delegated Regulation (EU) 2016/960);
- RTS for establishing an AMP, applicable procedures for AMP and requirements for maintaining, terminating or modifying the conditions for an AMP's acceptance (Commission Delegated Regulation(EU) 2016/908); and
- details of financial instruments to be included in the instrument reference data reported to competent authorities under Article 4, alignment of standards and formats and timeliness for submissions (Commission Delegated Regulation (EU) 2016/909).

MAR: ESMA publishes opinion on proposed amendments to ITS on inside information

ESMA has published an opinion in response to the EU Commission's proposed changes to the final draft implementing technical standards (ITS) on the disclosure of inside information under the Market Abuse Regulation, which were submitted by ESMA on 28 September 2015.

The EU Commission has proposed that compliance with the disclosure requirements for inside information under the Regulation on Energy Markets Integrity and Transparency (REMIT) should be sufficient for emission allowance market participants (EAMPs) that are also subject to MAR disclosure obligations.

ESMA's opinion disagrees with the Commission's proposals, arguing that they would remove two features of the system that ESMA views as essential, namely:

- the active dissemination of inside information; and
- the marking of that information as inside information under MAR.

ESMA is of the opinion that the proposed changes would put investors at a disadvantage. As such, ESMA has not proposed a revised draft ITS.

CRR: EBA publishes final draft RTS on specialised lending exposures

The European Banking Authority (EBA) has published final draft RTS on specialised lending exposures under the Capital Requirements Regulation (CRR). Specialised lending exposures relate to entities specifically created to finance or operate physical assets, where the primary source of repayment of the obligation is the income generated by the assets being financed.

The draft RTS detail how institutions should take into account various factors when assigning risk weights to specialised lending exposures. They are intended to harmonise the assignment of risk weights for institutions that use the 'supervisory slotting criteria' approach, under which specialised lending exposures are classified into five categories depending on the underlying credit risk. The RTS divide specialised lending into four classes: project finance; real estate; object finance; and commodities finance. For each class the RTS then specify how various factors, such as financial strength, political environment and asset characteristics, should be taken into account and how the factors should be combined in order to determine the final assignment to a category and the risk weight to be attributed to the exposure.

Basel Committee publishes implementation assessments on frameworks for systemically important banks

The Basel Committee on Banking Supervision has published reports assessing the implementation of the Committee's frameworks for global and domestic systemically important banks (G-SIBs and D-SIBs). The Committee has evaluated the G-SIB and D-SIB frameworks in the five jurisdictions that are currently home to G-SIBs:

- China;
- the European Union;
- Japan;
- Switzerland; and
- the United States.

The Committee has found the implementation of the Basel G-SIB framework to be 'compliant' in all five of the jurisdictions where G-SIBs are currently based. This is the highest of the four possible assessment grades. The reports also outline the D-SIB frameworks implemented in these jurisdictions and found that where detailed D-SIB frameworks have been implemented, those frameworks are broadly aligned with the Committee's D-SIB principles, although there is some variation in the additional requirements and policy measures.

These reports are part of a series of publications on Basel Committee members' implementation of Basel standards under the Committee's Regulatory Consistency Assessment Programme (RCAP).

BoE launches Fintech Accelerator

The Bank of England (BoE) has announced the launch of a Fintech Accelerator, which is intended to establish partnerships between the Bank and fintech firms to identify ways in which fintech innovations may be utilised for central banking.

The Accelerator will offer firms the chance to demonstrate solutions to the BoE through short Proof of Concept (PoC) projects, participants for which will be identified through a competitive selection process. The BoE will welcome expressions of interest from firms working in all areas of fintech that can demonstrate how their work relates to the BoE's mission, including in the area of analysis of large datasets, machine learning, cyber security and distributed ledger technology.

The Accelerator is one of five ways in which the BoE is exploring how financial technologies may support the BoE's policy objectives, as set out in the text of the Governor's intended Mansion House speech, which has been published on the BoE's website alongside the announcement. The text sets out that the BoE is also working to:

- widen access to the BoE's real time gross settlement (RTGS) system to a range of non-bank payment service providers (PSPs) to provide a level playing field between PSPs and banks, for which the Financial Conduct Authority (FCA) and HM Revenue and Customs (HMRC) will develop a strengthened supervisory regime for those who apply for an RTGS settlement account;
- provide access to central bank money for new forms of wholesale securities settlement;
- explore the use of distributed ledger (DL) technology in the bank's core activities, including the possible operation of RTGS, and the BoE will work with other central banks on this project; and

- engage with fintech firms to understand better the financial stability risks that could emerge through changes to the financial services industry.

FINMA consults on amendments to its circular on credit risks for banks

The Swiss Financial Market Supervisory Authority (FINMA) has launched a consultation on amendments to its 'Credit risks – banks' circular in order to align it with the enhanced Basel III capital adequacy requirements. In particular, the amendments relate to:

- derivatives risk position and the replacement of the current exposure method – according to the FINMA, the current exposure method for determining credit equivalent amounts for derivatives is outdated, because it does not distinguish between secured and unsecured derivative transactions and failed to adequately reflect the market volatility observed during the financial crisis. It will therefore be replaced by a standardised approach, which also applies to capital requirements for positions vis-à-vis central counterparties, i.e. capital requirements of default funds, replacing the temporary rules issued in 2013;
- improved capital requirements for fund investments by banks – capital requirements for fund investments by banks will also be enhanced. For instance, the revised rules would ensure that there is sufficient capital in respect of high-risk positions packed into funds. This adjustment is a result of the work undertaken by the Financial Stability Board (FSB) to closely monitor and regulate the shadow banking system;
- securitisations in banking book – new securitisation rules in banking books are also intended to eliminate shortcomings in the current regulation which came to light during the financial crisis, namely, mechanistic reliance on external ratings, excessively low risk weights for highly-rated securitisation exposures, or excessively high risk weights for low-rated senior securitisation exposures; and
- simplified rules for small banks – due to the complexity of some of the revised rules, FINMA will allow smaller banks (approximately 90% of all banks operating in Switzerland) to apply a simplified approach to the capital requirements in respect of derivative positions and fund investments. International standards will apply in full for the remaining approximately 35 Swiss banks.

The consultation period will run until 15 September 2015. The new circular will come into force on 1 January 2017 and the new securitisation rules will come into force on 1 January 2018.

FDF consults on amendments to Capital Adequacy Ordinance

The Swiss Federal Department of Finance (FDF) has launched a consultation on amendments to the Capital Adequacy Ordinance (CAO). The FDF proposes to implement two additional requirements under the international Basel III standard to strengthen capital adequacy requirements for derivatives and fund units held in banking books.

The revision was prepared by a national working group in 2015 and has been tested on a trial basis with individual banks in an impact study carried out by the Swiss Financial Market Supervisory Authority (FINMA). In particular, the revision covers the following:

- derivatives – currently, the calculation method of capital adequacy requirements does not distinguish between secured and unsecured derivatives transactions and none of the Swiss financial institutions has adopted the standardised method, which is the current method introduced by the Basel Committee on Banking Supervision to measure counterparty credit risk. It is therefore proposed that the CAO be amended to implement the new standardised approach published by the Basel Committee on Banking Supervision in March 2014;
- fund units – in respect of fund units held in banking books, securitisation positions required to be backed by equity capital to a large extent are being packed into funds in order to apply the lower capital rules for fund units. The FDF proposes to implement the enhanced capital requirements for banks' equity investments in funds issued by the Basel Committee on Banking Supervision in December 2013 in order to prevent the circumvention of capital rules; and
- simplified approach – the technicality of the new approaches to be implemented will likely entail additional work for many Swiss banks. However, it is envisaged that the additional work and the effect of the new capital adequacy requirements would be offset by the simplified approach developed by FINMA for small and medium-sized institutions, which account for approximately 90% of the entire Swiss bank population.

The consultation will last until 15 September 2016. The proposed amendments would come into force on 1 January

2017 and be fully implemented following a six-month period on 1 July 2017.

Dutch Minister of Finance outlines forthcoming evaluation of inducement prohibition for financial services providers

Jeroen Dijsselbloem, the Dutch Minister of Finance, has written a letter to Parliament outlining the focus points for the forthcoming evaluation of the inducement prohibition for financial services providers. Relevant rules, introduced in 2013, prohibit certain financial services providers, including advisors and intermediaries in mortgage credit, life insurances, and annuity savings and investment accounts, from receiving third party inducements (save for certain exceptions). The rules are flanked by other requirements, including a requirement to make a provision of services document available to customers, in which, among other things, advisory and distribution costs should be specified. These regulations are intended to move away from inducement driven sales and to make the change to consumer focused advice.

In his letter, Mr. Dijsselbloem states that the evaluation will address:

- whether the rules have led to such a desired change of culture;
- the accessibility of advice for customers, and whether advisory fees have increased; and
- the effectiveness of the provision of services document.

The results of the evaluation are expected to be submitted to Parliament in 2017. Pending the evaluation, the proposed abolition of insurance intermediaries' rights to collect premiums for the account of insurers (for products falling within the scope of the inducement prohibition) will be suspended.

China expands RQFII scheme to US

The People's Bank of China (PBoC) has announced that it has signed a memorandum of cooperation with the Board of Governors of the Federal Reserve System on RMB clearing in the United States and agreed to expand the RMB Qualified Foreign Institutional Investor (RQFII) scheme to the US with an initial quota of RMB 250 billion. This is one of the outcomes of the 8th round of Sino-US Strategic & Economic Dialogue and will further facilitate the cross-border trade and utilization of RMB.

So far the RQFII scheme is available in 17 countries/regions, including Hong Kong, Singapore, UK, France, Germany, South Korea, Australia, Luxembourg, Switzerland, Hungary, Canada, Qatar, Chile, Malaysia, United Arab Emirates, Thailand and the US.

PBoC and CBRC issue administrative measures for bank card clearing agencies

The State Council announced its decision to open the domestic bank card clearing market to foreign players from June 2015 as a move to resolve a longstanding trade dispute between China and the United States in relation to the former's restrictions on handling of RMB-denominated transactions by foreign electronic payment processors. The People's Bank of China (PBoC) and the China Banking Regulatory Commission (CBRC) have now jointly issued the 'Administrative Measures for Bank Card Clearing Agencies' to implement the State Council's Decision with immediate effect. These steps are intended to improve the country's card-clearing services through fair market competition.

In addition to providing a clearer regulatory framework for market access and ongoing compliance of bank card clearing agencies, the Measures also clarify the rules that enable foreign players to access the domestic bank card clearing market including the following:

- where a foreign player provides clearing services to domestic bank card holders for their cross-border transactions denominated in foreign currencies (not RMB) only, the foreign player will be required to submit a prior report to the PBoC and CBRC and, in principle, no onshore presence is needed. However, if the regulators deem that the abovementioned services have an important impact on the stability of the domestic bank card clearing system and public confidence in the payments system, the relevant foreign player shall establish an onshore presence with independent legal status and obtain a bank card clearing license in accordance with the Measures; and
- where a foreign player intends to provide RMB-denominated bank card clearing services, it shall establish an onshore bank card clearing agency in accordance with the Measures. The regulators have expressed their willingness to provide national treatment to foreign players in this regard.

SAFE reforms regulation of foreign exchange settlement for capital account transactions to further facilitate cross border investments and financings

The State Administration of Foreign Exchange (SAFE) has released the Circular on Reforming and Standardizing the Administrative Measures for Foreign Exchange Settlement

of Capital Account Transactions (Hui Fa [2016] No. 16) (Circular 16), which is intended to further facilitate cross border investments and financings. Amongst other things, the following points are worth noting:

- all onshore entities (with the exception of financial institutions) are now allowed to settle foreign exchange (FX) income from foreign debts into RMB on a discretionary basis (i.e. the entity can choose the timing and amount based on its own business demands), which was previously only available in four free trade zones;
- FX settlement of all kinds of capital account transactions on a discretionary basis are now regulated under a unified scheme. The relevant RMB proceeds should be deposited into a specific payment account, subject to standard credit and debit restrictions and bank verification requirements;
- Circular 16 provides that an onshore entity can use the relevant RMB settlement proceeds for current account transactions within its business scope and capital account transactions allowed by laws and regulations, subject to compliance with the following negative list: (i) no direct or indirect payment and expenditure that is out of the entity's business scope or otherwise prohibited by laws and regulations; (ii) no securities or asset management products investment (except for principal-protected bank wealth management products) unless otherwise permitted; (iii) no loan to non-affiliated companies, unless permitted by the business scope; and (iv) no non-self used real estate construction or purchase (except for property developers); and
- Circular 16 also emphasises the enhancement of monitoring and inspection by local SAFE bureaus, and specifies the punishment measures for violations.

KRX to introduce US dollar-denominated interest rate swaps clearing

The Korea Exchange (KRX) has announced that in November 2016 it will start clearing operations for interest rate swaps (IRS) denominated in US Dollar (USD IRS) as a central counterparty (CCP) for the clearing of over-the-counter (OTC) derivatives.

The KRX intends to expand its clearing services continuously as an expansion of its eligible clearing products, based on the 'Clearing of standardised OTC derivatives through CCPs', one of the objectives of the G20 reform of the OTC derivatives markets. Initially, it will provide a voluntary CCP clearing service for USD IRS and mandatory clearing will be reviewed later.

The KRX is planning to start providing the clearing service for non-deliverable IRS and non-deliverable forwards in 2017. Credit default swaps (CDS) is scheduled to be launched in the medium to long term.

CFTC proposes to subject additional interest rate swaps to mandatory clearing

The Commodity Futures Trading Commission (CFTC) has proposed to amend CFTC Rule 50.4(a) to specify additional swaps that would be subject to the requirement to clear through a derivatives clearing organization that is registered with the CFTC (or is exempted from registration). This proposal would apply the CFTC's clearing requirement to specified fixed-to-floating interest rate swaps that are denominated in the following currencies:

- Australian dollar;
- Canadian dollar;
- Hong Kong dollar;
- Mexican peso;
- Norwegian krone;
- Polish zloty;
- Singapore dollar;
- Swedish krona; and
- Swiss franc.

The CFTC is also proposing to amend its current clearing requirement determination with respect to certain overnight index swaps (OIS). For OIS denominated in US dollars, Euro or Sterling, the range of stated termination dates subject to the clearing requirement would be extended to include termination dates out to three years. In addition, clearing would be required for OIS denominated in Australian dollars or Canadian dollars for stated termination dates ranging from seven days to two years.

The CFTC is seeking public comments on these proposed amendments. The comment period will end 30 days after publication in the Federal Register.

CLIFFORD CHANCE BRIEFINGS

Clifford Chance International Mediation Guide – Second Edition

Mediation remains a hot topic in dispute resolution. Around the world, courts strain under growing backlogs of cases, motivating governments to look for ways of reducing the

burden, and inspiring prospective litigants deterred by the prospect of a lengthy court process to pursue alternative options. At the same time, with ever-increasing pressures on businesses' legal budgets, more and more companies are considering how to reduce litigation costs, with mediation set to grow in prominence as a result.

Against this backdrop, the new Second Edition of Clifford Chance's International Mediation Guide presents the broadest and most comprehensive summary to date of the current 'state of play' in relation to mediation worldwide. The Guide includes a survey of 47 jurisdictions covering six continents, with input from across Clifford Chance's global network as well as from respected local counsel in other jurisdictions.

https://www.cliffordchance.com/briefings/2016/06/international_mediationguide-secondedition.html

Clifford Chance Global Intellectual Property Newsletter

This is the latest issue of its Global Intellectual Property Newsletter, focusing on the following topics:

- UK: Rights in data in a Big Data/Internet of Things world – a new European consensus, or a step backwards?
- Germany: Reducing risks in the digital workplace – labour law aspects
- The Netherlands: Advocate-General opinion – Dynamic IP addresses to be considered personal data
- Germany: Cyber security and cyber crime – new challenges for companies in light of a changing legal landscape
- UK/Belgium: Standards Essential Patents in Europe – current status
- Italy: 3D-printing – An overview of intellectual property issues under Italian law
- France: The rule of exhaustion with regard to copyrighted works in digital form
- Spain: Proposal for a Directive on contracts for the online and other distance sales of goods – another step towards the Digital Single Market
- Spain: Geo-blocking practices and other forms of discrimination in online sales in the spotlight of the European Commission
- Germany: 'Implementation Day' – Green light for business deals after easing of Iran Sanctions?

https://www.cliffordchance.com/briefings/2016/06/global_intellectualpropertynewsletteratopi.html

Still a capital outcome – CoCos can be redeemed

The Supreme Court has, by a majority, upheld the Court of Appeal's decision that, on the interpretation of the relevant terms, a bank is entitled to redeem convertible contingent securities because they had ceased to help the bank to pass the PRA's stress tests. The Supreme Court perhaps took a more restrictive view as to what could be taken into account in determining what the words in question meant, but still reached the same conclusion.

This briefing discusses the decision.

https://www.cliffordchance.com/briefings/2016/06/still_a_capital_outcomecocoscanberedeemed.html

Contentious Commentary – a review for litigators

This is the latest edition of 'Contentious Commentary', a newsletter that provides a summary of recent developments in litigation. The newsletter is produced by lawyers in the litigation and dispute resolution practice at Clifford Chance. This edition covers the following key issues:

- A contract can be construed literally and purposively
- A required signature is not required
- Two out of three signatories will do
- Notification injunctions: a freezing injunction-lite
- Notification requirements for SPA claims must be strictly adhered to
- A contract for the sale of goods is not within the Sale of Goods Act
- A purpose must be a dominant purpose
- No duty of care owed to a disguised reference seeker
- Britons overseas denied Brexit vote
- A claim for a subsidiary's wrongs can be brought against its parent

https://www.cliffordchance.com/briefings/2016/06/contentious_commentary.html

Singapore's Choice of Court Agreements Act 2016 – A Network of International Commercial Courts as an Alternative to International Arbitration

Singapore passed the Choice of Court Agreements Act 2016 into law on 14 April 2016, implementing the obligations contained in the Hague Convention on Choice of Court Agreements which was ratified on 2 June 2016. The Act will allow judgments rendered by the Singapore High Court (including the Singapore International Commercial Court (SICC)) pursuant to choice of court agreements to be enforceable in all state parties to the

Convention. It is envisaged that this will allow the SICC to form part of a 'network of international commercial courts' with reciprocally enforceable judgments.

This briefing discusses the Act.

https://www.cliffordchance.com/briefings/2016/06/singapore_s_choiceofcourtagreementsact2016.html

Contentious Commentary Hong Kong – June 2016

This is the first edition of Contentious Commentary: Hong Kong, a newsletter that provides a summary of recent developments in litigation and dispute resolution.

This edition covers:

- Combatting fraudulent schemes in overseas-listed securities
- Defence struck out after failure to attend Pre-Trial Review
- Need for promptness in applying for anti-suit injunction
- No derivative action possible on behalf of dissolved company
- When a judge should remove himself from trial
- Court considers when court proceedings should be stayed in favour of arbitration
- Inspection of company records under the Companies Ordinance
- When mainland judgments can be set aside in Hong Kong
- Costs where petitioner withdraws winding-up petition
- Jail for husband, defeat for wife in court application
- How strike-out principles are applied to conspiracy claims
- Strict approach to applications for leave to serve out of jurisdiction

https://www.cliffordchance.com/briefings/2016/06/contentious_commentaryhongkong-june2016.html

United States v Fokker Services BV –- US District Court Dismisses Case After US Appellate Court Limited Judicial Review of Deferred Prosecution Agreements

On 10 June 2016, the U.S. District Court for the District of Columbia dismissed with prejudice the criminal Information against Fokker Services B.V., thus ending the litigation that began over two years ago with the filing of the Information pursuant to Fokker Services' deferred prosecution agreement (DPA) with the DOJ. This was the first district court action in the case since the U.S. Court of Appeals for the District of Columbia Circuit, in an appeal briefed and argued by Clifford Chance US LLP, issued an opinion that vacated the district court's earlier order refusing to approve the DPA, and created a new standard limiting the scope of judicial review of DPAs in the United States. Importantly, the new standard issued by the D.C. Circuit on 5 April 2016 (the first by any federal appellate court in the United States) limits the ability of lower courts to second-guess the validity of the DOJ's charging decisions, or to review the specific terms of any DPA settlement agreed to by the parties. This standard will allow parties seeking to resolve U.S. enforcement actions through DPAs greater flexibility in negotiating terms with the DOJ.

This briefing discusses the case.

https://www.cliffordchance.com/briefings/2016/06/united_states_v_fokkerservicesbvus.html