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Briefing note

International Regulatory Update

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European Council publishes conclusions on UK referendum outcome and Capital Markets Union

The European Council has published its conclusions following a meeting on 28 June 2016. At the meeting, the UK Prime Minister informed the European Council of the outcome of the UK referendum. Among other things, the European Council also adopted an agenda calling for progress on:

- moving forward with the Capital Markets Union agenda, in particular progress on agreeing the proposal for simplification of prospectus requirements and the proposals for simple, standardised and transparent securitisation by the end of 2016;
- bringing the benefits of the Digital Single Market to all stakeholders; and
- pursuing efforts towards better regulation.

The Heads of State or Government of 27 Member States, as well as the Presidents of the European Council and EU Commission, have also published a statement following an informal meeting on the outcome of the referendum on 29 June. The statement calls for the UK Government to notify the European Council of the UK's intention to leave the EU as quickly as possible. Once such a notification has been given the European Council intends to adopt guidelines for the negotiations of an agreement with the UK. Moreover, the statement has announced the start of a political reflection to give an impulse to further reforms, in line with the European Council's Strategic Agenda, to the development of the EU with 27 Member States.

EU Commission announces replacement portfolio holder for Financial Stability, Financial Services and the Capital Markets Union

The EU Commissioner for Financial Stability, Financial Services and the Capital Markets Union, Lord Hill, has announced his resignation following the outcome of the UK referendum vote.

The EU Commission President, Jean-Claude Juncker, has announced that Valdis Dombrovskis, Vice-President for the Euro and Social Dialogue, will take over Lord Hill's portfolio with effect from 16 July 2016. Lord Hill's resignation will take effect at midnight on 15 July to allow for an orderly transition.

MiFID2 delay: amending legislation published in Official Journal

The MiFID2 Amending Directive (2016/1034) and MiFIR Amending Regulation (2016/1033), which postpone the transposition and application deadlines for MiFID2 and MiFIR by one year, have been published in the Official Journal.

The Directive and Regulation both entered into force on 1 July 2016. 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.

MiFID2/MiFIR: EU Council publishes corrigenda

The EU Council has adopted corrigenda to MiFID2 and MiFIR, which make minor corrections to the legislative texts.

The corrigendum to MiFID2, published 24 June 2016, amends point 43 of Article 4(1) in relation to the meaning of a structured deposit and the corrigendum to MiFIR amends Article 2(1)(18) in relation to the definition of competent authority.

Both corrigenda have been transmitted to the EU Parliament. Member States have an eight day objection period.

MiFID2/MiFIR: EU Commission adopts RTS

The EU Commission has adopted Delegated Regulations setting out regulatory technical standards (RTS) under MiFID2 and MiFIR. In particular, the RTS relate to:

- clearing access in respect of trading venues and central counterparties, in particular conditions under which trading venues and central counterparties (CCPs) may deny, or have to provide, access in a non-

discriminatory way, in order to allow for open and effective competition between market infrastructures (RTS 15);

- the details and format of order records to be maintained by trading venues for the purposes on transmitting them to competent authorities (RTS 24);
- information to be notified by investment firms, market operators and credit institutions to relevant competent authorities (RTS on passporting); and
- requirements to ensure that cleared derivatives are submitted and accepted for clearing as quickly as technologically practicable, also referred to as straight-through-processing (RTS 26).

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

PRIIPs: EU Commission adopts RTS on key information documents

The EU Commission has adopted RTS specifying the content of key information documents (KIDs) for Packaged Retail and Insurance-based Investment Products (PRIIPs). The RTS specify the exact contents of the KID, including the risks, rewards, and costs of the product.

The EU Parliament and Council have a two month period to review the draft RTS, which they may extend for a further month. The RTS will enter into force on the twentieth day following that of its publication in the Official Journal and will apply from 31 December 2016.

IORPs: EU Council confirms agreement with Parliament

The Permanent Representatives Committee (Coreper) has approved, on behalf of the EU Council, an agreement with the EU Parliament on institutions for occupational retirement provision (IORPs). The proposed directive aims to facilitate the development of IORPs and better protect pension scheme members and beneficiaries by improving the governance and transparency of IORPs and facilitating their cross-border activity.

The directive has four objectives:

- clarifying cross-border activities of IORPs;
- ensuring good governance and risk management;
- providing clear and relevant information to members and beneficiaries; and
- ensuring that supervisors have the necessary tools to effectively supervise IORPs.

The directive is expected to be approved by the Parliament at first reading. It will then be submitted to the Council for adoption. Member States will have two years to transpose the directive into their national laws and regulations.

Market abuse: RTS on buy-back programmes and stabilisation measures and ITS on disclosure of inside information published in Official Journal

The following Level 2 Acts under the Market Abuse Regulation (MAR) have been published in the Official Journal:

- Commission Delegated Regulation (EU) 2016/1052 of 8 March 2016 supplementing MAR with regard to regulatory technical standards for the conditions applicable to buy-back programmes and stabilisation measures; and
- Commission Implementing Regulation (EU) 2016/1055 of 29 June 2016 laying down implementing technical standards with regard to the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information in accordance with MAR.

Both Regulations entered into force on 1 July and applied from 3 July 2016.

CRR: Amending Regulation regarding exemptions for commodity dealers published in the Official Journal

A Regulation (2016/1014) amending the Capital Requirements Regulation (CRR) as regards exemptions for commodity dealers has been published in the Official Journal.

Provisions of the CRR exempting commodity dealers from large exposures requirements and own funds requirements were scheduled to expire on 31 December 2017. The amending Regulation has extended this exemption until 31 December 2020.

The Regulation will enter into force on 19 July 2016.

EBA consults on disclosure requirement guidelines for EU banking sector

The European Banking Authority (EBA) has launched a consultation on a set of guidelines on regulatory disclosure requirements, following an update of the Pillar 3 requirements by the Basel Committee in January 2015.

The revised Pillar 3 framework, which applies as of 31 December 2016, provides for a common format and harmonised frequencies for the disclosure of existing requirements as well as adding certain new requirements. The aim of these guidelines is to provide guidance to institutions to enable them to comply with the CRR

provisions while implementing the revised Basel Pillar 3 requirements. The EBA intends to publish the finalised guidelines by the end of 2016, with the aim for them to apply for the year-end 2017 disclosures.

Comments on this consultation are due by 29 September 2016.

ESMA Chair discusses recovery and resolution of CCPs

The Chair of the European Securities and Markets Authority (ESMA), Steven Maijoor, has delivered a speech on regulatory issues concerning the recovery and resolution of central counterparties (CCPs). Mr. Maijoor set out how EU CCPs are systemically important for EU financial markets and should be resilient to market shock to avoid the creation of systemic risk.

The speech discussed the legislative proposal for the new EU regime for recovery and resolution for CCPs, which is due at the end of 2016 and is expected to set out common principles on recovery and resolution plans without specifying what tools should be included in either plan. Mr. Maijoor put forth his view that RTS should define the tools that CCPs and resolution authorities should consider and, eventually, establish a sequence for use of those tools. The speech also made the case for the establishment of resolution colleges to mirror existing supervisory colleges to facilitate coordination and cooperation among relevant authorities across the EU, and to clearly assign roles and responsibilities of both resolution authorities and resolution colleges.

CPMI-IOSCO publish guidance on cyber security

The International Organization of Securities Commissions (IOSCO) and the Committee on Payments and Market Infrastructures (CPMI) have published guidance on cyber security in financial markets. The guidance contributes to the industry's ongoing efforts to enhance financial market infrastructures' (FMIs') ability to pre-empt cyber-attacks, respond rapidly and effectively to them, and achieve faster and safer target recovery objectives if the attacks succeed. It also aims to harmonise efforts to build resilience against attacks from one country to another.

The key concepts highlighted by CPMI-IOSCO in the guidance include:

- board and senior management attention is critical to a successful cyber resilience strategy;
- the ability to resume operations quickly and safely after a successful cyber attack is paramount;
- FMIs should make use of good-quality threat intelligence and rigorous testing;
- FMIs should aim to instil a culture of cyber risk awareness and demonstrate ongoing re-evaluation and improvement of their cyber resilience at every level within the organisation; and
- cyber resilience cannot be achieved by an FMI alone; it is a collective endeavour.

Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016 published

The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016 (SI 2016/680) have been laid before Parliament. The Regulations amend UK law to ensure it is compatible with the Market Abuse Regulation (MAR) and make changes to UK law to give effect to those parts of MAR which require implementing legislation by Member States and to ensure MAR is fully effective and enforceable in the UK.

The Regulations will come into force on 3 July 2016.

Market abuse: FCA sets out changes to Decision Procedure and Penalties manual and Enforcement Guide

The FCA has issued a policy statement (PS16/18) on changes to the Decision Procedure and Penalties manual (DEPP) and the Enforcement Guide for the implementation of MAR. Amongst other things, PS16/18 sets out:

- changes to the FCA's decision-making procedure in DEPP 2 to include the new powers that it will have under the Financial Services and Markets Act 2000 (FSMA);
- changes to the FCA's statements of policy in DEPP 6 and DEPP 6A to set out how its policy would apply to contraventions of MAR and the FCA's new sanctioning powers; and
- other consequential changes necessary to DEPP and EG in light of MAR.

The changes will apply from 3 July 2016.

PRA publishes amendments to contractual recognition of bail-in rules

The Prudential Regulation Authority (PRA) has published a policy statement (PS17/16) setting out the final rules on contractual recognition, and a supervisory statement (SS7/16), which sets out the PRA's expectations on Bank Recovery and Resolution Directive (BRRD) firms with

regard to impracticability in the context of the contractual recognition requirement.

The publications follow a consultation on the draft rules (CP8/16), and the policy statement summarises the feedback received. It also sets out changes made to the definitions in the PRA Rulebook.

The supervisory statement addresses the broad scope of the contractual recognition requirement and acknowledges that the inclusion of contractual recognition language is in some instances impracticable. It sets out the PRA's expectations on BRRD firms in the context of the contractual recognition requirement and the considerations BRRD firms could take into account when determining impracticability.

The rules will come into force on 1 August 2016.

Polish Council of Ministers adopts amendment to the Banking Law

The Council of Ministers has adopted a Bill amending the Act on Banking Law and Certain Other Acts. The amendment is intended to improve the supervision of the financial market and its security.

Amongst other things, the amendment provides for:

- granting the Polish Financial Supervision Authority (PFSA) authority to order a re-examination of the valuation of security for receivables with regard to all entities conducting deposit and credit activities;
- extending the list of reasons for the PFSA to appoint an administration board in a bank, including a cooperative bank, and authorising the PFSA to appoint an administration board also in cases of:
- risk that a bank may cease to pay its liabilities; and
- a gross or persistent violation of law by a bank in the conduct of its activity; and
- introducing the possibility of an alternative appointment of an administration board or an administration board in cooperative savings and loan societies – depending on the scale of the activity conducted.

The Bill will now be forwarded to the Sejm.

MAR: PFSA publishes statement on Polish law situation

The Polish Financial Supervision Authority (PFSA) has presented its standpoint with regard to the failure to adjust Polish law to the provisions of MAR by 3 July 2016, the date of its application.

The PFSA highlights that if national legislation is in conflict with the provisions of MAR from 3 July 2016, the national legislation will continue to be valid but the scope of its application will be narrower. The PFSA views it as necessary to apply the provisions of MAR and overlook the provisions in the acts of law referred to in the standpoint and secondary legislation issued on the basis thereof where they are contrary to MAR.

Furthermore, until appropriate legislation comes into force specifying the electronic means for sending notifications of transactions entered into by persons with managerial duties and persons closely related to them to the supervision authority, the notifications may be sent by using any electronic means. In this respect, the PFSA has recommended using e-mail for this purpose and sending notifications to the supervision authority to an address dedicated for this purpose, which is set out at the end of the statement.

Bank of Spain maintains countercyclical capital buffer at 0%

The Bank of Spain has decided to maintain at 0% the value of the countercyclical capital buffer applicable to credit exposures in Spain in the third quarter of 2016.

CNMV issues communication on liquidity agreements under its Circular 3/2007

As provided under MAR, the Spanish Securities Market Commission (CNMV) has notified the ESMA that liquidity agreements entered into under CNMV Circular 3/2007, of 19 December, on liquidity agreements are an accepted market practice.

Consequently, Circular 3/2007 will still be applicable, both for liquidity agreements currently in force as well as for those that are executed before the CNMV adopts a new decision in connection with this market practice (on which it is currently working).

CSSF issues regulation on setting of countercyclical buffer rate for third trimester of 2016

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has published a new Regulation (No. 16-03) dated 28 June 2016 on the setting of the countercyclical buffer rate (taux de coussin contracyclique) for the third trimester of 2016.

The new Regulation follows the Luxembourg Systemic Risk Committee's recommendation of 9 June 2016 (CRS/2016/003) and maintains a 0% countercyclical buffer

rate for relevant exposures located in Luxembourg for the third trimester of 2016.

The new Regulation entered into force on 1 July 2016.

BaFin consults on implementing EBA guidelines on limits on exposures to shadow banking entities

The German Federal Financial Supervisory Authority (BaFin) has published a draft circular on limits on exposures to shadow banking entities (Runschreiben – Obergrenzen für Risikopositionen gegenüber Schattenbankunternehmen).

The circular, which has been published for consultation, is intended to implement guidelines published by the EBA on 3 June 2016 on limits on exposures to shadow banking entities which carry out banking activities outside a regulated framework under Article 395(2) of the CRR (EBA/GL/2015/20) into national administrative practice.

The understanding of the term shadow bank in the circular includes credit institutions from third countries if the country's supervisory and legal standards are not equivalent to EU standards. The circular sets out several principles that institutions should follow and limits which they should determine when dealing with shadow banks.

Comments on the consultation are due by 8 July 2016.

MAS consults on proposed legislative amendments to exempt execution-related advice in respect of listed excluded investment products from the Financial Advisers Act

On 29 December 2015, the MAS published its response to consultation feedback on the proposed exemption of execution-related advice in respect of listed excluded investment products from the Financial Advisers Act.

The MAS has now published a consultation paper on the draft legislative amendments under the Financial Advisers Regulations (FAR) to effect the exemption, as well as consequential amendments to the Notice on Recommendations on Investment Products (Notice No. FAA-N16). The MAS will also make consequential amendments to the Guidelines for Conduct of Business for Execution-Related Advice (Guideline No. FAA-G08). The proposed amendments are expected to take effect in the third quarter of 2016.

Draft amendments to the FAR and the Notice on Recommendations on Investment Products are set out in Annex 1 and 2 of the consultation paper respectively.

Comments on the proposed amendments are due by 28 July 2016.

Financial Institutions (Resolution) Ordinance gazetted

The Hong Kong Government has gazetted the Financial Institutions (Resolution) Ordinance. The Ordinance establishes a resolution regime in Hong Kong to mitigate risks posed by the non-viability of systemically important financial institutions to the stability and effective working of the financial system of Hong Kong. The resolution regime established under the Ordinance is designed to comply with the latest international standards set by the Financial Stability Board in its Key Attributes of Effective Resolution Regimes for Financial Institutions.

Under the Ordinance, the Hong Kong Monetary Authority (HKMA), the Insurance Authority and the Securities and Futures Commission (SFC) are designated as resolution authorities. They are vested with a range of necessary powers to effect orderly resolution of a failed systemically important financial institution, which means maintaining continuity of access to the essential financial services it provides by imposing losses on creditors, whilst minimising the risks posed to public funds.

The Ordinance was passed by the Legislative Council on 22 June 2016. It will commence operation on a date to be appointed by the Secretary for Financial Services and the Treasury pending the Legislative Council's passing of certain of the regulations to be made as subsidiary legislation under the Ordinance.

The Government has indicated that it, along with the HKMA, the Insurance Authority and the SFC, will maintain close liaison with the industry and the relevant stakeholders in the formulation of regulations, rules and codes of practice.

SFC publishes annual review of SEHK's performance in regulating listing matters

The Securities and Futures Commission (SFC) has published its annual review on the performance of the Stock Exchange of Hong Kong Limited (SEHK) in its regulation of listing matters during 2014. The report reviews the operational procedures and decision-making processes adopted by the SEHK's Listing Division in 2014, to assess whether they are adequate to enable the SEHK to meet its statutory obligation under the Securities and Futures Ordinance (SFO).

Overall, the report highlights that the SEHK's operational procedures and decision-making processes were appropriate to enable it to discharge its statutory obligations

during the review period. However, the SFC has made certain recommendations to the SEHK in relation to:

- guidance relating to the listing rules, in particular that the SEHK should review the process for determining when post-listing matters, such as waiver applications, rule interpretations or decisions should be escalated to the listing committee for consideration and endorsement, and that relevant information and rationale for decisions should be clearly set out in published guidance materials to facilitate the public's understanding of the issues; and
- liquidity performance of structured product issuers, recommending that the SEHK adopt a more stringent approach towards repeated non-compliance of the active quote requirements under the guide on enhancing regulation of the listed structured products market.

CSRC allows wholly foreign-owned enterprises and joint ventures to engage in domestic private fund management

The China Securities Regulatory Commission (CSRC) has issued a questions and answers (Q&A) document to confirm that eligible wholly foreign-owned enterprises (WFOEs) or joint venture enterprises (JVs) can engage in domestic private securities investment fund management business. The CSRC has also authorised the Asset Management Association of China (AMAC) to issue relevant FAQs to set out implementing details on the eligibility requirements and registration matters. The CSRC has also highlighted that such investment management WFOEs and JVs may only privately raise funds in China for onshore investment, without involving any cross-border funds flow.

The AMAC's FAQs were issued on the same day. According to the FAQ, in order to conduct private securities investment fund management in China, the relevant WFOE or JV should register with the AMAC as a private securities investment fund manager and satisfy the following eligibility requirements:

- it is incorporated in China;
- its foreign shareholder is licensed by the financial regulatory authority of the home jurisdiction and such financial regulator has signed the MOU on securities regulatory cooperation with the CSRC or another agency recognised by CSRC; and
- it or its foreign shareholder has no record of major punishment imposed by the regulatory and judicial authorities in the past three years.

A detailed registration process is also set out in the AMAC's FAQs.

CLIFFORD CHANCE BRIEFINGS

Hong Kong Court of Appeal confirms win for bank in mis-selling case

The Court of Appeal recently unanimously upheld the first instance decision in DBS Bank (Hong Kong) Ltd v Sit Pan Jit, handed down in April 2015. In rejecting every ground of appeal raised by the appellant, the Court of Appeal found that the approach adopted by the judge at first instance was 'impeccable' and that there was nothing to indicate that the trial judge's decision should be overturned. However, with the introduction of a 'suitability requirement' in client agreements, cases like this may become academic and banks will need to document their interactions with customers even more closely.

This briefing paper discusses the Court of Appeal's decision.

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

US Federal Trade Commission announces revised (and much higher!) civil penalties

The US Federal Trade Commission (FTC) announced on 29 June 2016 that it is raising the maximum civil penalties for violations of the laws that the FTC is tasked with enforcing. These laws include, among others, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). Violations of the HSR Act will jump from a maximum of USD 16,000 to USD 40,000. All changes to the FTC's civil fines will take affect for any penalties assessed after 1 August 2016.

This briefing discusses the new civil penalties.

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