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Briefing note

International Regulatory Update

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- Recent Clifford Chance briefings: MiFID2 – UK implementation update; New UAE Bankruptcy Law; and more. Follow this link to the briefings section.

Prospectuses: Proposed regulation agreed in trilogue

The EU Commission, Council and Parliament have informally agreed on the revised Prospectus Regulation. The new Prospectus Regulation aims to reduce burdens, deliver shorter prospectuses and provide better and more concise information for investors and a fast track regime for companies that frequently tap capital markets.

The agreement provides for the following changes:

- the smallest capital raisings and crowdfunding projects up to EUR 1 million will not need to issue a prospectus at all;
- the EU prospectus will only be mandatory from EUR 8 million in capital raised. For offerings below that threshold, issuers can raise capital according to local market rules issued by growth markets;
- there will be a new EU growth prospectus that will be available for SMEs, mid-caps admitted to an SME Growth market or small issuances by non-listed companies;
- an alleviated corporate bond prospectus will be available for admission to wholesale debt markets;
- frequent participants in the capital markets will have a frequent issuer regime that they can activate once an opportunity to raise funds arises;
- a shorter prospectus for secondary issuances will allow issuers already admitted to stock markets and SME growth markets to benefit from a lighter prospectus for any 'follow-up' issuances;
- prospectus summaries will become shorter and the language used will be easier to understand for investors;
- no more paper prospectuses will be required, except if a potential investor explicitly requests one; and
- a new European online prospectus database will be operated free of charge by the European Securities and Markets Authority (ESMA).

The agreed text must be formally approved by the EU Parliament and EU Council before publication in the Official Journal.

Money Market Funds: EU Council approves agreement with Parliament

The Permanent Representatives Committee (COREPER) has approved, on behalf of the EU Council, an agreement with the EU Parliament on the proposed regulation on money market funds (MMFs). The proposed regulation is expected to be approved by the Parliament at first reading. It will then be submitted to the Council for formal adoption.

PRIIPs: EU Council adopts regulation delaying application date

The EU Council has adopted a proposed regulation postponing the application date of rules on packaged retail and insurance-based investment products (PRIIPs) by twelve months to 1 January 2018.

The regulation will enter into force the day after its publication in the Official Journal.

EuSEF and EuVECA funds: EU Council publishes Presidency compromise proposal

The EU Council has published the latest Presidency compromise proposal for a negotiating mandate regarding the proposed regulation amending the regulation on European venture capital (EuVECA) funds and European social entrepreneurship (EuSEF) funds.

The Council has recommended that COREPER agree on this text and has invited the incoming Maltese Council Presidency to begin negotiations with the EU Parliament on the basis of the mandate with a view to reaching an agreement at first reading.

PSD2: EBA consults on draft guidelines on reporting operational or security incidents

The European Banking Authority (EBA) has launched a consultation on draft guidelines for the reporting of operational or security incidents under the recast Payment Services Directive (PSD2).

In particular, the draft guidelines set out the criteria, thresholds and methodology for payment service providers (PSPs) to classify operational or security incidents as major in order to make necessary notifications to competent authorities as well as the templates for these notifications. The EBA allows for the possibility that PSPs may delegate incident reporting obligations to a third party, provided a number of conditions are met, or report incidents through a

technical service provider. The draft guidelines also specify the indicators that competent authorities should use when assessing the relevance of such incidents.

Comments are due by 7 March 2017.

PRA publishes statement of policy on systemic risk buffer

The Prudential Regulation Authority (PRA) has published a statement of policy (SoP) on its approach to the implementation of the systemic risk buffer (SRB). The SoP follows publication of the Financial Policy Committee's (FPC's) framework for the SRB in May 2016 and the two documents form the Bank of England's (BoE's) wider SRB framework.

The SoP is relevant to SRB institutions, which are either ring-fenced bodies (RFBs) within the meaning of s.142A of the Financial Services and Markets Act 2000 (FSMA) and large building societies that hold more than GBP 25 billion in deposits (where one or more of the accountholders is a small business) and shares (excluding deferred shares).

The PRA is required to apply the framework set out by the FPC on the SRB from 1 January 2019. In advance of this date the PRA will review the SoP in 2018 (or earlier) once the FPC has reviewed its framework.

FCA consults on conduct of business rules for retail CfDs

The Financial Conduct Authority (FCA) has launched a consultation on enhancing conduct of business rules for firms providing retail contract for difference (CfD) products. The consultation proposes a package of policy measures designed to address risks identified by the FCA in relation to investor protection and conduct of firms. The FCA also anticipates that binary options will be brought within its supervisory scope and, as such, the consultation also sets out early policy considerations with respect to the sale and distribution of binary options to retail clients.

The FCA's proposals include:

- enhanced disclosure requirements for all retail CfD firms through standardised risk warnings and mandatory profit-loss disclosures to illustrate the risks of CfD products;
- lower leverage limits for inexperienced retail clients, a maximum leverage cap for all retail clients and introducing lower leverage caps across different assets according to their risks;
- prohibiting trading or account opening bonuses or benefits to promote retail CfD products and platforms; and
- restrictions on financial promotions from incoming EEA firms that do not adopt comparable measures when offering retail CfD products to UK consumers.

Comments on the consultation are due by 7 March 2017.

PSR consults on remedies for competitiveness in payment infrastructure

The Payment Systems Regulator (PSR) has published a consultation paper (MR15/2.4) on its proposed remedies following its market review into the ownership and competitiveness of infrastructure provision. In its final report (MR15/2.3), which was published in July 2016, the PSR set out three potential remedies to address the competition issues identified. The PSR is now consulting on two of the three proposed remedies:

- mandating competitive procurement exercises for Bacs, FPS and LINK when the operators of these systems purchase central infrastructure services; and
- introducing the ISO 20022 messaging standard in future procurements for Bacs and FPS.

The PSR has decided not to pursue the divestment remedy for Vocalink due to a possible merger. However the PSR notes its intention to pursue this remedy if the Competition and Markets Authority (CMA) does not grant regulatory approval.

The PSR intends that the remedies will enable new infrastructure providers with different technology to enter the market and drive new and innovative products and services.

Comments are due by 1 February 2016.

Fintech: FCA and HKMA sign cooperation agreement

The Financial Conduct Authority (FCA) and Hong Kong Monetary Authority (HKMA) have signed a cooperation agreement aimed at promoting innovation in financial services. The agreement provides a framework for cooperation, and sets out how the FCA and HKMA plan to share and use information to promote innovation in their respective markets, including the referrals of innovative firms and joint innovation projects.

The agreement also aims to reduce the barriers for authorised firms looking to grow to scale overseas and to assist non-UK innovators interested in entering the market the FCA oversees.

BaFin publishes draft General Administrative Act on prohibition of marketing, distribution and sale of financial CFDs to retail clients

The German Federal Financial Supervisory Authority (BaFin) has published the draft of a General Administrative Act pursuant to section 4b para. 1 of the German Securities Trading Act on the prohibition of the marketing, distribution and sale of contracts for difference (CFDs) to retail clients. BaFin has invited market participants to submit written comments on the draft until 20 January 2017.

Polish Financial Stability Committee holds meeting on macroprudential supervision of financial system

The Financial Stability Committee has adopted a resolution on a recommendation concerning maintenance of the countercyclical capital buffer at a level of 0%, and also decided to send the European Systemic Risk Board information on that buffer.

In addition, the Committee assessed the sources of risk in the Polish financial system and, as a result of that analysis, found the portfolio of foreign currency facilities to be a systemic risk. The following were considered potential systemic sources of risk:

- the decreasing resilience of banks associated with decreasing profitability;
- the growing portfolio of zloty-denominated mortgage loans with a floating interest rate, in the context of the historically low level of interest rates and credit policy of banks; and
- the difficult situation in the sector of savings and loans societies and certain cooperative banks.

PFSA sets out position on dividend policy of banks, insurance and reinsurance companies, general pension companies, brokerage houses and investment fund companies in 2017

The Polish Financial Supervision Authority (PFSA) has issued a statement recommending that financial institutions should maintain, and in some cases should further strengthen, a strong capital base.

The PFSA recommends that dividends be paid out only by banks that:

- are not implementing a remedial programme;
- have been assessed positively as part of the supervisory review and evaluation process (SREP), with a final SREP grade not worse than 2.5 (master scale – grade 1 or 2);
- have a leverage ratio (LR) higher than 5%;
- have a T1 capital ratio higher than the minimum value of that ratio plus the safety capital, i.e.:
  - OSII (other systemically important institutions) banks with the Tier 1 (T1) capital ratio higher than 13.25% + 0.75%*add-on + OSII buffer;
  - other commercial banks with the Tier 1 (T1) capital ratio higher than 11.25% + 0.75%*add-on; and
- have a total capital ratio higher than 13.25% + add-on + OSII buffer.

The PSFA has additionally recommended that banks fulfilling the supervisory review criteria in terms of the minimum level of the total capital ratio (TCR), taking into account the safety capital, should be able to pay out up to 100% of their profits, i.e.:

- OSII banks with the total capital ratio (TCR) higher than 16.25% + add-on + OSII buffer;
- other commercial banks with the total capital ratio (TCR) higher than 14.25% + add-on.

In addition, for banks with material exposures in foreign currency household mortgage loans, i.e. with such loans accounting for over 5% of their portfolio of non-financial sector receivables, a requirement has been introduced to adjust the dividend rate based on two additional criteria:

- criterion 1 (K1) based on the share of foreign currency household mortgage loans in their entire non-financial sector receivables portfolio;
- criterion 2 (K2) based on the share of foreign currency mortgage loans granted in 2007 and 2008 (loans that will be a determining factor in terms of the banks' losses if any statutory regulations are implemented) in the foreign currency household mortgage loan portfolio.

Royal Decree-law on urgent measures on financial matters published in Spain

Royal Decree-law 4/2016, of 2 December, on urgent measures on financial matters has been published in the Spanish Official State Gazette. The Royal Decree-law sets out:

- an authorisation for Spain to enter into the facility agreement to temporarily finance the EU Single Resolution Fund (Fondo Único de Resolución);
- a change in certain accounting rules applicable to SAREB (Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria); and
- an extension to seven years of the term in which the FROB (Fondo de Reestructuración Ordenada Bancaria)

must divest its holding acquired through restructuring or resolution proceedings.

The Royal Decree-Law entered into force on 3 December 2016.

CSSF issues regulation on systemically important CRR institutions authorised in Luxembourg

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has published Regulation No 16-08 dated 8 November 2016 on systemically important institutions authorised in Luxembourg.

The new regulation sets out that none of the institutions within the meaning of the Capital Requirements Regulation (EU) No 575/2013 (CRR) authorised in Luxembourg is identified as a global systemically important institution (G-SII), within the meaning of the Luxembourg law of 5 April 1993 on the financial sector, as amended.

The new regulation further identifies six CRR institutions authorised in Luxembourg as other systemically important institutions (O-SIIs), as well as the capital buffer rates applicable to each of them with a gradual implementation over three years, as of 1 January 2016.

The new regulation will enter into force on 1 January 2017.

CSSF issues circular regarding survey on amount of covered deposits held quarterly during 2016

The CSSF, acting in its function as depositor and investor protection council (conseil de protection des déposants et des investisseurs) (CPDI), has issued circular CSSF-CPDI 16/04 dated 23 November 2016 to conduct a survey on the amount of covered deposits held quarterly during 2016.

The circular is addressed to all members of the Luxembourg deposit protection scheme Fonds de garantie des dépôts Luxembourg (FGDL). Members are requested to provide the data:

- at the level of their legal entity, comprising branches located within other Member States, for the 18 January 2017 at the latest; as well as
- for each and any branch located within other Member States separately, by 28 February 2017.

In order to transmit the data, institutions have been requested to complete the table attached to the circular, also available on the CSSF website.

The collected data will enable the CPDI to establish the FGDL's annual target level for 2017. The average amount of covered deposits calculated quarterly will further be transmitted to the Single Resolution Board by 31 January 2017 and will be used to determine the Single Resolution Fund's annual target level for 2017.

FINMA publishes partially revised circular on acting as a financial intermediary under AMLA

The Swiss Financial Market Supervisory Authority (FINMA) has published the partially revised Circular 2011/1 'Acting as a financial intermediary under the Anti-Money Laundering Act (AMLA)'.

The circular has been revised in line with the new Anti-Money Laundering Ordinance (AMLO), which replaced the former Ordinance on the Professional Practice of Financial Intermediation from 1 January 2016. The main change to the circular is to elaborate on the geographical scope of financial intermediaries which are subject to the AMLO.

Financial intermediaries are now deemed to operate in or from Switzerland if they:

- are domiciled in Switzerland;
- are entered in the Swiss Commercial Register; or
- have a de facto branch office in Switzerland (including persons who permanently assist foreign financial intermediaries in carrying out key aspects of their financial intermediation activities in or from Switzerland).

The revised circular will come into force on 1 January 2017.

FINMA consults on revised outsourcing circular

The FINMA has launched a consultation on the fully revised circular on outsourcing by banks and insurers, which will replace Circular 2008/7 'Outsourcing – banks'.

Under the revised circular:

- intra-group outsourcing by banks will be subject to the same requirements as external outsourcing, as is already the case for insurers;
- systematically important banks must:
  - no longer outsource critical services to banks in the same financial group;
  - ensure that outsourcing does not hinder the continuity of critical services in the event of insolvency; and
  - meet additional requirements for outsourcing contracts involving critical services to prevent any detrimental impact on potential restructuring and resolution activities;

- banks must maintain an inventory of outsourced services, as is already the case for insurers;
- all information required in the event of restructuring, resolution and liquidation must be accessible in Switzerland at all times; and
- provisions on data protection under the old circular have been deleted to avoid duplication with the Data Protection Act.

The consultation will end on 31 January 2017.

Tax arrangements for Shenzhen-Hong Kong Stock Connect scheme announced

The Ministry of Finance (MOF), the State Administration of Taxation (SAT) and the China Securities Regulatory Commission (CSRC) have jointly issued the 'Circular on the Relevant Tax Policies concerning the Shenzhen-Hong Kong Stock Connect Pilot Programme'. The key tax positions for the Shenzhen-Hong Kong Stock Connect scheme (Shenzhen Connect) under the Circular include the following aspects, which largely follow the arrangements under the Shanghai-Hong Kong Stock Connect scheme (Shanghai Connect):

- Mainland individual investors are temporarily exempted from individual income tax (IIT) on transfer price difference gains from trading the relevant shares under the Shenzhen Connect (trading gains) from 5 December 2016 to 4 December 2019;
- Mainland individual investors are subject to the withholding of IIT on dividends from the relevant HKEX-listed shares under the Shenzhen Connect at a rate of 20% (tax paid outside China can be deducted). This rule applies to Chinese securities investment funds by reference;
- Mainland enterprise investors are subject to enterprise income tax (EIT) on the trading gains and dividends from the relevant shares under the Shenzhen Connect. Where a Mainland enterprise continuously holds H-shares for more than 12 months, it is exempted from the EIT on dividends;
- Hong Kong investors are temporarily exempted from EIT or IIT on the trading gains from the relevant A shares under the Shenzhen Connect;
- Hong Kong investors are temporarily subject to EIT or IIT on dividends from the relevant A shares under the Shenzhen Connect at the same rate of 10%. Tax refunds can be applied based on the applicable tax treaties;
- during the pilot period of replacing the business tax (BT) by value added tax (VAT), trading by Hong Kong investors and Mainland individual investors of shares under the Shenzhen Connect are temporarily exempted from the VAT in Mainland China and Hong Kong;
- during the pilot period of replacing BT by VAT, trading by Mainland enterprise investors of the shares under the Shenzhen Connect are subject to the currently applicable rules on VAT; and
- title transfer of shares by Hong Kong and Mainland investors under the Shenzhen Connect because of sale, inheritance and gift should be subject to stamp duty in Mainland China and Hong Kong according to the respectively applicable rules.

The Circular is effective as of 5 December 2016.

HKMA to implement margin and risk-mitigation standards for non-centrally cleared OTC derivatives

The Hong Kong Monetary Authority (HKMA) has announced that it intends to begin both the phase-in of initial margin (IM) requirements for phase 1 institutions and the exchange of variation margin (VM) for all covered entities from 1 March 2017. The HKMA notes that there will be a 6-month transitional period from 1 March 2017 to 31 August 2017 during which authorised institutions (AIs) will be expected to begin exchanging margin as soon as practicable and in any event to make reasonable and continuous progress towards the required margin exchange. Progress during this period will be closely monitored by the HKMA, but there will be no retrospective application of margining requirements in respect of transactions entered into during the transitional period.

MAS issues guidelines on margin requirements for non-centrally cleared OTC derivatives contracts

The Monetary Authority of Singapore (MAS) has issued guidelines on margin requirements for non-centrally cleared OTC derivatives contracts pursuant to section 321 of the Securities and Futures Act.

The guidelines follow the policy consultation on margin requirements for non-centrally cleared OTC derivatives published by the MAS in October 2015. The MAS has also published its responses to the feedback it received on the policy consultation.

The guidelines will take effect on 1 March 2017 and, amongst other things, they cover the following topics:

- entity scope;

- product scope;
- exchange of margins;
- margin calculations and methodologies;
- eligible collateral and haircuts;
- managing collateral risks;
- deemed compliance;
- implementation schedule for margin requirements; and
- keeping of books and other information.

A six-month transition period will apply from 1 March 2017, during which MAS covered entities will be expected to make progress to satisfy the requirements of the guidelines as soon as practicable. As and when the necessary documentation and arrangements with respect to a counterparty are in place during that period, a MAS covered entity should start exchanging margins for contracts entered into with that counterparty from that point on.

Singapore and Japan sign bilateral local currency swap agreement

The MAS and the Bank of Japan have signed a bilateral local currency swap agreement. This agreement allows for the exchange of local currencies between the two central banks of up to SGD 15 billion or JPY 1.1 trillion. It will enable the MAS to provide Japanese Yen liquidity to eligible Singapore financial institutions in support of their cross-border operations. The swap agreement is effective as of 30 November 2016, for a term of three years.

APRA publishes implementation timetable for margin rules in Australia

The margin rules for Australia, as set out in CPS 226, will commence on 1 March 2017, with a multi-year phase-in that reflects the internationally agreed timetable. The risk mitigation requirements in CPS 226 take effect from 1 March 2018.

The Australian Prudential Regulation Authority (APRA) has also granted a six-month transition period for variation margin requirements, which commences on 1 March 2017. While all new transactions entered into from 1 March 2017 are in-scope for the variation margin requirements, the transition period will provide additional time for entities to finalise their implementation and reach full compliance for all transactions executed from 1 March 2017.

RECENT CLIFFORD CHANCE BRIEFINGS

MiFID2 – UK implementation update

As the MiFID2 juggernaut rolls into the national implementation phase the UK authorities are now in fourth gear on the production of UK implementation measures. While MiFIR and most of the accompanying Level 2 delegated acts and technical standards will apply directly in Member States, requiring no national implementation, the MiFID2 Directive itself is not directly applicable and will require amendment of national laws. The MiFID2 delegated Directive (dealing with the safeguarding of financial instruments and client funds, product governance and fees and commissions) also requires national transposition measures.

This briefing paper provides an overview of the changes the UK will make in order to implement the MiFID2 package of reforms and focuses in particular on key aspects of the new conduct of business regime where the changed UK landscape is likely to have a significant impact for a wide range of firms.

https://www.cliffordchance.com/briefings/2016/12/mifid2_uk_implementationupdate.html

Urgent tax measures

On 2 December 2016, Spain's Council of Ministers approved Royal Decree-Law 3/2016 (RDL 3/2016) which adopts urgent tax measures. The main measures, in addition to other relevant sector-specific changes, affect Corporation Tax in relation to:

- restrictions on offsetting negative tax bases;
- tax losses deriving from the transfer of the stake in companies;
- impairments of the stake held in companies; and
- limits on applying deductions to avoid international double taxation.

In addition, various other measures have been approved which affect other taxes and investment vehicles (Real Estate Tax, Tax on the Increase in Value of Urban Land, Wealth Tax, SOCIMIs), with a view to increasing tax revenue.

This briefing paper discusses the measures.

https://www.cliffordchance.com/briefings/2016/12/urgent_tax_measures.html

New Law on Pledges Over Movable Assets in Commercial Transactions

On 27 October 2016, the Law on Pledges over Movable Assets in Commercial Transactions (Law No. 6750) was published in the Official Gazette, abolishing the Commercial Enterprise Pledge Law (Law No. 1447) (CEP Law). The New Law will enable a pledge to be established over movable assets in commercial transactions through a registration system without the transfer of possession.

This briefing paper discusses the law.

https://www.cliffordchance.com/briefings/2016/11/new_law_on_pledgesovermovableassetsi.html

India – A new Insolvency and Bankruptcy Code 2016

On 28 May 2016, the Insolvency and Bankruptcy Code 2016 (IBC) received Presidential assent in India and was published in the Official Gazette. The Government of India has notified several sections of the IBC for commencement since then. On 1 December 2016, the sections of the IBC related to resolution of corporate insolvency and corresponding regulations made by the Insolvency and Bankruptcy Board of India became operational. While several critical provisions of the IBC (including those on liquidation) are yet to be notified, the IBC signals a radical change in how future reorganisations and formal liquidation will be conducted in India.

This briefing paper discusses the IBC.

https://www.cliffordchance.com/briefings/2016/12/india_a_new_insolvencyandbankruptcycode2016.html

New UAE Bankruptcy Law – Analysis and highlights

The New UAE Bankruptcy Law was published on 29 September 2016 and will enter into force on 29 December 2016. The objective of the New Law is to modernise and streamline the bankruptcy procedures available onshore for UAE companies in line with international best practice, and to destigmatise business failure whilst maintaining a backdrop of accountability for directors of failed enterprises.

This briefing paper discusses the law.

https://www.cliffordchance.com/briefings/2016/12/new_uae_bankruptcylawanalysisandhighlights.html

US Supreme Court Unanimously Holds that Insider's Gift of Confidential Information to Trading Relative or Friend Is Sufficient To Establish 'Personal Benefit' Under Insider-Trading Law

In a much anticipated decision announced on the 6 December 2016, that reaffirms traditional boundaries for insider-trading liability, the US Supreme Court unanimously held in United States v. Salman that, consistent with its decision in Dirks v SEC, 463 US 646 (1983), a gift of confidential information by an insider to a relative or close friend, who then trades on that information, is sufficient to establish the existence of a 'personal benefit' (and thus a breach of the tipper's fiduciary duty), which is a key element of insider trading liability under Section 10(b) of the Securities Exchange Act of 1934 and US Securities and Exchange Commission Rule 10b-5. Moreover, in affirming the conviction in the Salman case, the Court clarified that last year's Second Circuit decision in United States v Newman is inconsistent with Dirks to the extent it required a showing 'that the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends', 773 F.3d3d 438, 452 (2d Cir. 2014), cert. denied, 577 US (2015). Thus, even though the ultimate result of the holding in Newman – which overturned the convictions of two tippees with no familial relationship to the tippers because there was insufficient evidence of the tipper's 'personal benefit' – stands, the Salman decision establishes that the heightened standard the Second Circuit adopted does not apply to insider-trading cases involving tippers and tippees who are family or close friends.

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2016/12/u_s_supreme_courtunanimouslyholdstha.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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