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Briefing note

International Regulatory Update

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- Recent Clifford Chance briefings: Australian Insolvency Law Reform; European Commission presses for progress on Multilateral Investment Court; and more. Follow this link to the briefings section.

Capital Markets Union: EU Commission issues legislative proposals to strengthen financial supervision

The EU Commission has adopted a package of legislative proposals that aims to adjust and upgrade the framework of the European Supervisory Authorities (ESAs), comprising the European Banking Authority (EBA), European Insurance and Occupational Pensions Authority (EIOPA) and European Securities and Markets Authority (ESMA). The amendments are intended to equip the ESAs with new powers, governance and funding in order to support their enhanced responsibility for financial market supervision. The Commission has reconsidered the scope of the ESAs' mandate in light of the policy objectives of the Capital Markets Union (CMU) project and the UK's decision to leave the EU.

Key features of the proposed changes include:

- extending ESMA's supervisory powers to include responsibility for:
  - authorising and supervising the EU's critical benchmarks and endorsing non-EU benchmarks for use in the EU;
  - approving certain EU prospectuses and all non-EU prospectuses drawn up under EU rules;
  - authorising and supervising European venture capital funds (EuVECA), social entrepreneurship funds (EuSEF) and long-term investment funds (ELTIFs); and
  - coordinating market abuse investigations;
- giving the ESAs responsibility for reviewing the consistency of the work programmes of individual supervisory authorities and monitoring authorities' practices in allowing banks, fund managers, investment firms and other market players to delegate business functions to non-EU countries;
- giving EIOPA a greater role in coordinating the authorisation of insurance and reinsurance companies' internal risk measurement models to avoid the risk of divergent supervisory standards and outcomes;
- the creation of executive boards that will allow the ESAs to take decisions independently from national interests;
- the ESAs budget to be partly funded by contributions from the financial sector, making them independent from national supervisors; and
- prioritising fintech and coordinating national initiatives to promote innovation and strengthen cybersecurity.

The legislative proposals will be sent to the EU Parliament and Council for consideration and adoption.

MiFIR: EU Commission adopts Delegated Regulations on indirect clearing

The EU Commission has adopted two Delegated Regulations on indirect clearing arrangements for exchange traded derivatives (ETD) under the Markets in Financial Instruments Regulation (MiFIR).

In December 2012 the Commission adopted a Delegated Regulation specifying the types of indirect clearing arrangements that can be used to fulfil the clearing obligation set out in Article 4 of the European Market Infrastructure Regulation (EMIR) for the over-the-counter (OTC) derivatives pertaining to a class that has been declared subject to that obligation.

The Commission has adopted a Delegated Regulation amending the earlier Delegated Regulation to reflect recent developments and experience gained in the area of clearing. The amendment also relates to the adoption of regulatory technical standards (RTS) to be developed under Article 30 of MiFIR specifying the types of indirect clearing arrangements for exchange-traded derivatives (ETDs).

The second Delegated Regulation adopted by the Commission specifies the types of indirect clearing arrangements that can be used for ETDs. Together, the two new Delegated Regulations are intended to:

- simplify and clarify the requirements that relate to the management of the default of a client providing indirect clearing services;
- adapt account structures in order to rationalise the offering of indirect clearing services;
- allow indirect clearing services to be provided in chains going beyond the client of a direct client provided that

appropriate and equivalent protection is ensured throughout the chain; and

- set out homogeneous requirements for indirect clearing arrangements relating to both OTC and ETD derivatives.

Both delegated acts will enter into force on the twentieth day following that of their publication in the Official Journal and will apply from 3 January 2018.

ESAs report on risks and vulnerabilities in EU's financial system

The Joint Committee of the ESAs has published its autumn report on risks and vulnerabilities in the EU financial system.

The report focuses on ongoing political and economic uncertainties, including:

- Brexit, particularly if withdrawal terms remain inconclusive or end in a disorderly fashion;
- persistent valuation risks in the context of an uncertain outlook for yields, which could generate substantive volatility bouts in asset prices and result in capital losses;
- low profitability of financial institutions, which is aggravated by the need to adapt business models to a rapidly evolving operating environment; and
- the proliferation of advances in fintech.

Policy actions in light of these risks are also set out, including the need to decide on the post-Brexit legal framework for cross-border financial services, and the possibility of rolling out stress tests for the wider investment fund sector.

MiFIR: ESMA sets out procedure for ETDs opt-out of access provisions

ESMA has issued its procedure for verifying and approving notifications from trading venues for the temporary opt-out of exchange-traded derivatives (ETDs) from the access provisions under the Markets in Financial Instruments Regulation (MiFIR).

The procedure is aimed at trading venues whose annual notional amount traded in ETDs falls below a certain threshold (annual notional amount traded of EUR 1 000 000 million in the calendar year preceding the date of application of MiFIR) and therefore qualify for the time-limited exemption to provide central counterparties (CCPs) with access to trade feeds.

If a trading venue wishes to opt-out, it must notify ESMA and its competent authority (CA) of its intention before 3 January 2018.

CRD 4: EBA consults on ITS on supervisory disclosure

The EBA has published a consultation paper on amendments to the implementing technical standards (ITS) on supervisory disclosure under the Capital Requirements Directive (CRD 4). The ITS specify the format, structure, contents list and annual publication date of the supervisory information to be disclosed by competent authorities and the consultation aims to clarify the level of consolidation and the approach to be taken when aggregating data.

In addition, the consultation aims to clarify the scope and division of supervisory responsibilities regarding the disclosure of information between the European Central Bank (ECB) and national competent authorities (NCAs) as agreed in the Banking Union.

Comments are due by 22 December 2017.

CRR: EBA consults on significant risk transfer in securitisation

The EBA has published a discussion paper on significant risk transfer in securitisation. The proposals in the discussion paper respond to the mandate on significant risk transfer laid down in the Capital Requirements Regulation (CRR) and are based on the newly agreed EU securitisation legislation. The discussion paper aims to strengthen the regulation and supervision framework of significant risk transfer and to improve regulatory certainty for institutions transferring risk through securitisation.

Comments are due by 19 December 2017.

Benchmarks: EU working group on risk-free reference rate launched

The Financial Services and Markets Authority (FSMA) of Belgium, the European Central Bank (ECB), ESMA and the EU Commission have launched a new working group tasked with the identification and adoption of a risk-free overnight rate, which can serve as a basis for an alternative to current benchmarks used in a variety of financial instruments and contracts in the euro area.

The working group intends to consult regularly and gather feedback from market participants, end-users and public authorities. It also intends regularly to report on its meetings and to make its terms of reference public to ensure transparency on all steps in the identification and adoption of a new risk free rate.

Once the group has made a recommendation on its preferred alternative risk-free rate, it will also explore possible approaches for ensuring a smooth transition to this rate, if needed.

The ECB has also announced that it aims to provide an overnight unsecured index before 2020. This would widen the set of options for the choice of such alternative rates for the euro area and is in line with the recommendation of the Market Participants Group of the Financial Stability Board Official Sector Steering Group (FSB OSSG) to identify and adopt one or more risk-free rates in each main currency area.

FSB and IMF report to G20 on post-crisis data gaps

The Financial Stability Board (FSB) and the International Monetary Fund (IMF) have published their second progress report on the second phase of the G20 Data Gaps Initiative (DGI-2) on post-crisis data gaps. The main objective of DGI-2 is to implement the regular collection and dissemination of reliable and timely statistics for policy use and sets out recommendations relating to monitoring risk in the financial sector, vulnerabilities, interconnections and spillovers and data sharing and communication of official statistics.

Amongst other things, FSB and IMF report that:

- substantial progress has been made during the first year of DGI-2;
- a new monitoring framework aimed at assessing and tracking the progress of the implementation of DGI-2 recommendations has been agreed with the G20 economies;
- the 2018 DGI-2 work programme will continue to include thematic workshops intended to support participating economies in implementing the most challenging recommendations; and
- high-level political support is crucial to ensure all DGI-2 recommendations are fully implemented by 2021.

Basel Committee updates FAQs on Basel III definition of capital

The Basel Committee on Banking Supervision has published an updated set of frequently asked questions (FAQs) on the Basel III definition of capital.

The FAQs provide guidance on the definition of capital and the loss absorbency of capital at the point of non-viability, and update the FAQs published in December 2011. The FAQs are intended to promote consistent global implementation of Basel III by providing technical elaboration of the rules text and interpretative guidance.

FCA and PSR confirm approach to UK implementation of PSD23

The Financial Conduct Authority (FCA) and Payment Systems Regulator (PSR) have published documents confirming their approach to implementing the revised Payment Services Directive (PSD2). The majority of PSD2 requirements must be implemented by 13 January 2018 and have been transposed in the UK through the Payment Services Regulations 2017 (PSRs 2017).

The FCA has published a policy statement (PS17/19), which sets out changes to its Handbook and Approach Document guidance, as well as new non-Handbook directions for excluded firms, to reflect PSD2 and the PSRs 2017. It has also published the 'Payment Services and Electronic Money: Approach Document', which is intended to assist firms in navigating payment services and e-money regulatory requirements. These documents follow consultations issued by the FCA in April (CP17/11) and July (CP17/22) and some amendments were made to their content and the FCA's approach as a result of consultation feedback.

The PSR has also published an approach document, which sets out its intended approach to monitoring and enforcing the four regulations within the PSRs 2017 for which it has been appointed the competent authority. These are:

- regulation 61: information on ATM withdrawal charges;
- regulation 103: prohibition on restrictive rules on access to payment systems;
- regulation 104: indirect access to designated payment systems; and
- regulation 105: access to bank accounts (the PSR and FCA are both competent authorities for this regulation).

Bank of Italy consults on supervisory provisions concerning cooperative banks

The Bank of Italy has published a consultation document containing a new set of supervisory provisions intended to integrate Bank of Italy Circular no. 285/2013, which will repeal and replace Bank of Italy Circular no. 299/1999.

Amongst other things, the proposed amendments are as follows:

- an increase of the minimum number of shareholders from 200 to 500;

- an increase of the maximum value of shares that can be held by each shareholder from EUR 50,000 to 100,000;
- the possibility for the articles of association to request a minimum number of shares to be subscribed for as an eligibility requirement; and
- the possibility to transform into a different type of bank.

Comments need to be submitted by 10 November 2017.

CSSF issues circular on ESMA guidelines on calibration of circuit breakers and publication of trading halts under MiFID2

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a new circular (17/668) on ESMA's guidelines on the calibration of circuit breakers and publication of trading halts under Directive 2014/65/EU (MiFID2) to implement the guidelines into Luxembourg regulation.

The aim of the guidelines is to develop common standards to be taken into consideration by trading venues for the calibration of their circuit breakers and, more generally, to ensure consistent application of the provisions in Article 48(5) of MiFID2. They set out a non-exhaustive list of elements to be taken into account by trading venues when performing calibration of volatility parameters necessary for the implementation of circuit breakers and provide guidance on the publication by trading venues in case of trading halts under Article 48(5) of MiFID2.

In the circular, the CSSF draws the attention of trading venues subject to its supervision to the fact that (i) they need to notify the CSSF of the circuit breakers parameters used on the first trading day of the current year at the latest on 15 January of each year, and (ii) any future substantial change to these parameters needs to be notified to the CSSF in a timely manner. The circular further provides additional guidance as to the forms to be used for such reporting.

The circular applies to all regulated markets, market operators, credit institutions, investment firms and operators of MTF or OTF markets, and entered into force on 22 August 2017. Trading venues have to apply the provisions of the circular from 3 January 2018.

CSSF issues circular on ESMA guidelines on CSD participants default rules and procedures

The CSSF has issued a new circular (17/667) on ESMA's guidelines on central securities depositories (CSDs) participants default rules and procedures to implement the guidelines into Luxembourg regulation.

The aim of the guidelines is to ensure common, uniform and consistent application of the provisions in Article 41 of the Central Securities Depositories Regulation (EU) No 909/2014 (CSDR). In particular, they aim at ensuring that CSDs define and apply clear and effective rules and procedures to manage the default of any of their participants.

The guidelines explain:

- how a CSD should define its default rules and procedures and acknowledge a participant's default;
- which type of actions a CSD may take in case of default, as well as how the CSD should implement them;
- how the CSD should communicate about the implementation of such rules and procedures; and
- how a CSD should test and periodically review its default rules and procedures.

The circular applies to all CSDs and entered into force on 18 August 2017.

CSSF issues circular on ESMA guidelines on access by a CSD to transaction feeds of CCPs and trading venues

The CSSF has issued a new circular (17/666) on ESMA's guidelines on access by a central securities depository (CSD) to the transaction feeds of central counterparties (CCPs) and trading venues to implement the guidelines into Luxembourg regulation.

The aim of the guidelines is to specify the legal, financial and operational risks to be taken into account by a CCP or a trading venue when carrying out a comprehensive risk assessment following a CSD's request for access to the transaction feed of the CCP or trading venue. These risks are also taken into account by the competent authority of the CCP or trading venue, when assessing the grounds for refusal to provide services to a CSD.

The circular applies to all CCPs and trading venues, and entered into force on 18 August 2017.

SFC issues circular on common instances of non-compliance in managing funds and discretionary accounts

The Securities and Futures Commission (SFC) has issued a circular to licensed corporations engaged in asset management business on common instances of non-compliance in managing funds and discretionary accounts.

Following an earlier circular issued on 31 July 2017, which covered a number of potential regulatory concerns identified in the course of the SFC's supervision of licensed corporations engaged in managing private funds and discretionary accounts, the new circular highlights various other issues noted amongst asset managers in general.

Whilst inspecting asset managers, the SFC has identified many instances of non-compliance with relevant provisions of the Fund Manager Code of Conduct, the Code of Conduct for Persons Licensed by or Registered with the SFC and/or the Internal Control Guidelines. The circular advises asset managers that when they follow instructions from or otherwise assist their clients in setting up dubious arrangements and/or executing suspicious transactions such as those described in the circular of 31 July 2017, they could potentially be implicated in any associated market misconduct or other illicit activities.

The SFC advises asset managers with discretionary management authority to perform their role responsibly, always with due skill, care and diligence, in the best interests of their clients and the integrity of the market. Asset managers should also be vigilant and report to the SFC any material breach, infringement or non-compliance with the market misconduct provisions of the Securities and Futures Ordinance (SFO) which they reasonably suspect may have been committed by their clients. Moreover, asset managers should take note that if they only provide investment advice when executing transactions as directed by their clients, they would not be regarded as conducting asset management activities and as such are not eligible for the incidental exemption for dealing in securities (e.g. distribution of funds and placing orders with brokers for funds under their management).

The SFC has urged asset managers to review their existing internal control procedures and operational capabilities, and enhance them as needed so as to ensure that standards of conduct and control procedures meet its expectations as elaborated in the appendix to the circular.

SFC and SEHK conclude joint consultation on listing regulation

The SFC and the Stock Exchange of Hong Kong Limited (SEHK), a wholly-owned subsidiary of Hong Kong Exchanges and Clearing Limited (HKEX), have published the conclusions to their June 2016 joint consultation on proposed enhancements to the SEHK's decision-making and governance structure for listing regulation.

Amongst other things, the SFC and the SEHK have confirmed that:

- the Listing Regulatory Committee will not be established. The authority and powers delegated by SEHK's board to the Listing Committee (and in turn by the Listing Committee to the Head of Listing) will remain unchanged. In other words, the Listing Committee will retain its existing role under the Listing Rules; and
- the SFC will adopt a new and enhanced approach to performing its dual-filing function in respect of both initial public offering (IPO) applications and post-IPO matters. Under this approach, the interpretation of the Listing Rules (including 'suitability' for listing) is determined solely by SEHK, whereas the SFC's focus is on the grounds for objection under section 6(2) of the Securities and Futures (Stock Market Listing) Rules (SMLR) or the Securities and Futures Ordinance more generally.

To enhance governance within the SEHK's structure for reviewing the Listing Committee's decisions, the SEHK will conduct a separate consultation in 2018 on the review system for decisions of the Listing Committee.

SFC updates FAQs on publicly offered investment products

The Securities and Futures Commission (SFC) has updated its series of frequently asked questions (FAQs) on publicly offered investment products by:

- adding a new Question 34A to the FAQs on advertising materials of collective investment schemes authorised under the Product Codes – the new question provides clarification with regard to the presentation of past performance information of an unauthorised scheme, managed by the same fund management group, in advertisements of the SFC-authorised scheme;
- adding a new Question 39G to the FAQs on advertising materials of collective investment schemes authorised under the Product Codes – the new question explains under what circumstances a fund can highlight or advertise any incentives (e.g. reduction or waiver) of fees and charges in the marketing materials; and
- updating answer to Question 16B1 under Section 2 of the FAQs on post authorisation compliance issues of SFC-authorised unit trusts and mutual funds – the question provides guidance on the key information or disclosure expected to be set out in the notice(s) for

scheme change(s) pursuant to 11.1 of the Code on Unit Trusts and Mutual Funds (UT Code).

MAS responds to feedback on review of mandatory audit firm rotation for local banks

The Monetary Authority of Singapore (MAS) has published its responses to the feedback it received on its 30 September 2016 public consultation on the review of mandatory audit firm rotation for local banks.

Amongst other things, the MAS has provided responses relating to:

- the proposal to discontinue mandatory audit firm rotation for local banks – the MAS has responded that it will discontinue this policy;
- the proposal to implement mandatory audit re-tendering as a compensating safeguard to mitigate risks arising from potential erosion of audit independence – the MAS will require local banks to perform a re-tendering exercise every ten years; and
- the proposal that banks with incumbent auditors in place for ten consecutive years or more should perform a re-tendering exercise for an audit firm to carry out the duties specified in section 58 of the Banking Act for the financial year ending 31 December 2018. The MAS is of the view that there could be systemic audit risks if all three local banks were to co-ordinate their re-tendering process and change their auditors at the same time and the MAS will adopt a staggered implementation timeline. The MAS will also defer proposed implementation timelines.

MAS publishes monograph on its approach to resolution of financial institutions in Singapore

The MAS has published a monograph on its approach to resolution of financial institutions in Singapore. The monograph sets out the MAS' approach for operationalising the enhanced resolution framework in the Monetary Authority of Singapore (Amendment) Act 2017.

The Amendment Act was passed in Parliament on 4 July 2017. Regulations to operationalise the provisions of the Amendment Act will be promulgated in due course. A commencement notice will be published in the Gazette when the amendments are brought into force.

MAS and Securities Commission Malaysia sign co-operation agreement to foster fintech innovation and cross-border activities

The MAS and the Securities Commission Malaysia (SC) have signed a co-operation agreement to foster closer cooperation on fintech and innovation in financial services between Singapore and Malaysia. The MAS and SC share similar objectives of developing robust fintech ecosystems that support the needs of the financial industry and promote innovation in their respective markets.

The co-operation agreement establishes a strategic framework for both regulators to assist innovator businesses to better understand the regulatory regime in each jurisdiction, and provide support through the application and authorisation process. Both authorities will also undertake to consider participating in joint innovation projects that leverage technologies such as blockchain and distributed ledgers.

FSS proposes amendments to regulations on supervision of corporate governance of financial companies

The Financial Supervisory Service (FSS) has proposed amendments to the Regulations on Supervision of Corporate Governance of Financial Companies. The proposed amendments are intended to further strengthen financial firms' internal controls for anti-money laundering and combating the financing of terrorism (AML/CFT) by making it compulsory to incorporate key AML provisions into their internal controls standards.

The proposed amendments will require financial firms to:

- institute an internal controls system that identifies, analyses, and assesses money-laundering risks inherent in financial transactions by their degree of severity and manages them accordingly;
- set up an internal audit office independent of offices performing AML/CFT works and provide for an internal operational system for monitoring and evaluating the performance and effectiveness of the firm's AML/CFT and implementing improvement measures; and
- take prevention measures to ensure officers and employees who perform AML/CFT duties do not engage in any money-laundering activity themselves and provide appropriate training on an on-going basis.

Public comments on the proposed rule changes are due by 25 October 2017.

SEC issues guidance on advertising rule compliance

The Office of Compliance Inspections and Examinations (OCIE) of the US Securities and Exchange Commission (SEC) has published a National Exam Program Risk Alert which identifies the most common compliance violations of Rule 206(4)-1 under the Investment Advisers Act of 1940,

as amended (the Advertising Rule) by registered investment advisers (RIAs).

Under that rule, RIAs may not, directly or indirectly, publish, circulate or distribute any 'advertisement' that contains any untrue statement of material fact, or that is otherwise false or misleading. 'Advertisements' are interpreted broadly and include materials in which an RIA provides information about its past performance or investments.

Highlighted deficiencies include:

- misleading performance results in which certain fees and expenses were not adjusted;
- presentations with inconsistent content (e.g. lacking appropriate disclosure);
- misleading claims of compliance with voluntary performance standards (e.g. GIPS);
- 'cherry picking', in which only favorable investments or recommendations were presented;
- lack of compliance policies and procedures to ensure proper presentation of performance information;
- misleading use of professional rankings; and
- use of prohibited client testimonials.

RECENT CLIFFORD CHANCE BRIEFINGS

European Commission presses for progress on Multilateral Investment Court

This briefing paper discusses the EU Commission's recent recommendation to negotiate a free-standing Multilateral Investment Court (MIC) to resolve investor-State disputes arising under investment agreements.

https://www.cliffordchance.com/briefings/2017/09/european_commissionpressesforprogresso.html

The implications for Australian companies navigating the new section 46 misuse of market power test after the CJEU decision in Intel

This briefing paper provides guidance on the practical steps to be undertaken by companies subject to the new section 46 test in the Competition & Consumer Act 2010 (Cth) to ensure regulatory compliance. Regard is also had to the recent decision of the Court of Justice of the European Union (CJEU) in Intel (C-413/14P) that clarified the EU law on abuse of dominance, the equivalent of Australia's section 46.

https://www.cliffordchance.com/briefings/2017/09/the_implicationsforaustraliancompanie.html

Australian Insolvency Law Reform – Expectations for the future

This briefing paper discusses the significant changes to Australia's insolvency landscape introduced by the Insolvency Law Reform Act 2016 (Cth). Particular consideration is given to the power of external administrators to sell a company's legal rights to action, and to the increased powers of creditors to remove external administrators and make requests for information.

https://www.cliffordchance.com/briefings/2017/09/australian_insolvencylawreformexpectation.html