

Transaction Services Newsletter

Santa's Christmas Sack

At this time of year the young and innocent can look forward to the possibility of a smiling man in a red coat delivering lots of goodies. At the Clifford Chance office in London there is a big Christmas tree in the entrance hall, and it appears that Santa has already made his delivery, since there are gaudily wrapped parcels lying all around the bottom.

Transaction Services providers may not be young or innocent, and it might be rash to cast any particular EU Commissioner into the role of Santa Claus, but there are certainly a number of gifts which are going to be delivered to you all at around the turn of the year. In this final edition of Transaction Services Newsletter for 2011, we take a look at the presents which Santa is putting round the tree.

Winter wonderland

Implementing the post-crisis legislative agenda has proved very challenging for the EU institutions, and many key directives are behind schedule. Nevertheless, there is plenty going on, and more legislation of vital relevance to payment services and securities services is about to be proposed. Here is a brief overview:

In the bag

- EMIR, or the OTC derivatives and clearing Regulation. This Regulation will spell out which OTC derivatives have to be cleared, and will regulate CCPs (and thereby modify various aspects of clearing services). This is still proving to be troublesome in the three-way negotiations between the European Parliament, the European Council, and the European Commission. But in early 2012 it will be finished, and when it is published in the Official EU Journal the implementation effort has to begin. Being a regulation, it

will have direct effect as law in the Member States, without the need for local transposition.

- SEPA Regulation. This Regulation is intended to bring about the closure of non-SEPA euro payment schemes in Europe, and it will also modify some of the conduct-of-business aspects of providing payment services. As to where it currently stands, the story is the same as EMIR, essentially.
- Capital Requirements Directive and Regulation. This is the one introducing the new Basel 3 metrics, in particular liquidity coverage measures, which are going to require a re-think of the costs and benefits of all sorts of financial products and services. It has begun its legislative journey, but it's unlikely to attract as much controversy and delay as EMIR.
- AIFMD level 2. If you're a custodian, you know all about this: it is the subordinate legislation to be made by the European Commission, based on the advice given by ESMA, which will include the detailed provisions on depositary liability. Liability is definitely one of the gifts Santa is doling out this year.
- EAPOs. We reported on "European Account Preservation Orders" in our October edition. They're still out there, though the UK has now decided to opt out.

Up the chimney

- CSDs Regulation. This one has been expected for some time: a regulation to harmonize the regulatory position of central securities depositories. If CCPs have got to be regulated, then why not CSDs. The regulation might include a few oddments like harmonisation of settlement cycles and rules about settlement discipline, which will affect a wider community than CSDs.



Contents

Santa's Christmas Sack	1
Market Developments	3

Editor



Dermot Turing
E: dermot.turing@cliffordchance.com

Transaction Services Contacts



Simon Crown
E: simon.crown@cliffordchance.com



Nick O'Neill
E: nick.oneill@cliffordchance.com



Simon Gleeson
E: simon.gleeson@cliffordchance.com



Bert Verdoodt
E: bert.verdoodt@cliffordchance.com



Caroline Meinertz
E: caroline.meinertz@cliffordchance.com

- Data Protection Directive. A new legal framework is promised. The European Commission says it wants to “modernise the EU legal system for the protection of personal data..., strengthen individuals’ rights, and at the same time reduce administrative formalities to ensure a free flow of personal data within the EU and beyond, and... achieve a consistent and effective implementation and application of the fundamental right to the protection of personal data.”
- Green Paper on card-, e- and m-payments. A green paper is expected on this subject. The European Commission says “The integration of the European market for electronic retail payments is one of the priorities defined in the Digital Agenda, more specifically of the Digital Single Market. The follow up to the Green Paper will aim to help creating a more competitive, efficient, innovative and secure payments market in Europe.”
- Crisis Management. This package of legislation will try to upgrade the way that authorities deal with bust banks – essentially extending the toolkit currently available to US regulators to EU authorities, enabling troubled banks to be split up and dealt with before they cause a crisis. As well as requiring banks to pre-stress their structures (sometimes called having “recovery and resolution plans”) so they can be split up more easily, counterparties of financial institutions subject to the new legislation may need to think about how they deal with a default, and the credit protection devices which are relied on.

On the way from Lapland (or somewhere nearby)

- FATCA. This piece of US tax legislation will have massive effects on account providers outside the US. Details are emerging of what non-US

banks will be expected to do, though many questions will need to be answered in 2012. Our hot pick for a major compliance effort for the next 12 months.

- FATF. The Financial Action Task Force is reviewing (among other things) Special Recommendation VII on wire transfers (implemented in the EU as Regulation 1781/2006) and standards on who you can rely on to conduct AML checks. The likelihood is that full information on the recipient of funds will have to accompany a wire transfer, and that the standards could be extended to cover all types of electronic funds transfers.
- CPSS-IOSCO. The final regulatory Principles for financial market infrastructures (CSDs, payment systems, CCPs and trade repositories) are due to be issued in the first half of 2012. These are likely to lead to enhanced requirements imposed by infrastructures on their direct participants, as the infrastructures react to a stiffening of their own regulatory environment.

Ho-ho-ho?

- Securities Law Directive. Some commentators thought that Santa had left this one behind, but there have been recent renewals of interest suggesting that the Commission is proceeding with its proposal for a directive attempting to harmonise the law on what you get when your entitlement to securities exists only as an entry on someone’s books.
- Review of the Payment Services Directive and Regulation 924. By 1 November 2012 the Commission must report to other EU institutions on the impact of the PSD and whether it should be widened in scope; it must also report on various aspects of Regulation 924, which regulates charges applicable to cross-

border payments in euro and imposes an obligation of “reachability” in relation to SEPA direct debits. The Commission has commissioned a study on these matters, which is to be completed by late summer 2012.

Empty boxes

Much to the disappointment of the editorial team here, if you pick up the glittering parcels underneath the Clifford Chance tree, you discover that they are empty. The legislative programme for Transaction Services might have elements of disappointment too, unless you look carefully. And the boxes that rattle might be ones you’d prefer not to have opened.

European Commissions’ work programme for 2012 (and beyond):
http://ec.europa.eu/atwork/programmes/index_en.htm

ESMA’s AIFMD page:
<http://www.esma.europa.eu/page/AIFMD>

UK opt-out from EAPOs:
<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111031/wmstext/111031m0001.htm>

Market Developments

Payments and cash management

1. Ghosts of Christmas past, and Christmas yet to come

You thought this one had gone away, now that the UK Payments Council decided not to do away with the cheque. But the UK Parliament's Treasury Committee likes to raise a good ghost, and has reported again on the subject. This time, the Committee dislikes the idea of getting rid of cheque guarantee cards, and considers that the UK Payments Council should be brought within the scope of financial regulation. Meanwhile the UK Payments Council issued an updated payments plan for the UK.

Treasury Committee Report:

<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmtreasy/1645/1645.pdf>

Payments Plan:

http://www.paymentscouncil.org.uk/files/payments_council/pc_npp_report_2011_final-pdf.pdf

2. Winter sports

We thought Poland was last over the line in implementing the PSD. Not so: Iceland was even later. They've done it, though.

Implementation law (in Icelandic):

<http://althingi.is/lagas/nuna/2011120.html>

3. Client money

The Financial Markets Law Committee, which identifies areas of legal uncertainty in the UK market, has issued a paper on the difficulties with the client assets sourcebook arising from the Lehman collapse. You guessed it: the client money rules are pretty unclear.

FMLC paper:

<http://www.fmlc.org/papers/Issue147PaperOct11.pdf>

4. Christmas cards

The Wolfsberg Group, a group of banks which sets the international agenda for anti-money laundering, has issued guidance on pre-paid cards.

Wolfsberg Group guidance:

http://www.wolfsberg-principles.com/pdf/Wolfsberg_Guidance_on_Prepaid_and_Stored_Value_Cards_Oct_14,_2011.pdf

Securities services

1. I Saw Three Ships

The European Commission's Expert Group on Market Infrastructure delivered its report in October. They have a vision, not exactly of three ships coming sailing in, but at least of an improved post-trade environment. The paper reviews the pitches and rolls experienced on the voyage so far, and explains some of the navigational problems which still beset the sailors. The report then proposes three different ways forward: re-booting Giovannini; going a bit further than Giovannini; and "creating a frictionless financial market infrastructure".

EGMI Report:

http://ec.europa.eu/internal_market/financial-markets/docs/clearing/egmi/101011_report_en.pdf

2. MF Global

MF Global went into Investment Bank Special Administration in the UK late on 31 October 2011. One might expect that market infrastructures operate to minimise the disruption caused by failed trades and other unwanted side-effects of the implementation of an insolvency procedure. But an odd thing about unsettled UK equities trades which are in the CREST system operated by Euroclear UK & Ireland is that EUI requires them to be "match-deleted" from the system, so that they fail.

EUI statement:

https://www.euroclear.com/site/publishedFile/Operational_Bulletin_1819+_tcm87-240057.pdf?title=Operational+bulletin+1819+-+MF+Global+UK+Limited+in+special+administration+%E2%80%93+matched+deletion+and+settlement+discipline+%2B+more

3. Tidy up

The London Stock Exchange is having a tidy-up of its settlement, clearing and corporate actions rules. Comments on the proposed rules revisions were due by 16 December.

LSE consultation:

http://www.paymentscouncil.org.uk/files/payments_council/pc_npp_report_2011_final-pdf.pdf

© Clifford Chance LLP, December 2011.

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571.

Registered office: 10 Upper Bank Street, London, E14 5JJ.

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications.

This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to nomorecontact@cliffordchance.com or contact our database administrator by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ.