

# International Regulatory Update

8 – 12 September 2014

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### Jean-Claude Juncker announces details of new EU Commission

The President-elect of the EU Commission, Jean-Claude Juncker, has [announced details](#) of the new Commission and the portfolios to be assigned to the nominees from the Member States of the EU. The UK nominee, Lord Hill, has been appointed Commissioner-designate for Financial Stability, Financial Services and Capital Markets Union.

Mr. Juncker has unveiled a reshaped Commission in which six Vice Presidents will co-ordinate teams of several Commissioners in compositions that may vary over time according to need. Lord Hill's portfolio will contribute to projects steered and coordinated by the Vice-President for Jobs, Growth, Investment and Competitiveness and the Vice-President for the Euro and Social Dialogue; a new Directorate-General for Financial Stability, Financial Services and Capital Markets will be established and report to Lord Hill.

Other economic and financial services portfolios in the new Commission include:

- a new Internal Market, Industry, Entrepreneurship and SME portfolio to be held by Elżbieta Bieńkowska; and
- a new Economic and Financial Affairs, Taxation and Customs portfolio to be held by Pierre Moscovici.

The EU Commission has also published Mr. Juncker's [Mission Letter to Lord Hill](#), which sets out Mr. Juncker's main priorities for the Financial Stability, Financial Services and Capital Markets Union portfolio, which include:

- the continued implementation of the Commission's regulatory framework, including Banking Union and establishing the Single Resolution Board within the current timeframe;
- a mission to seek appropriate ways to revive sustainable securitisation markets;
- a focus on consumers and retail investors in financial services regulation;
- reviewing the functions of the European Supervisory Authorities (ESAs) and reforming their funding so that these regulators are wholly financed by the sectors they supervise;

- an integrated Capital Markets Union encompassing all Member States by 2019; and
- the development of a modernised regulatory framework for digital/electronic payments in order to facilitate online purchases.

The EU Parliament will hold hearings with all Commissioners-designate in the appropriate parliamentary committees before the Parliament gives its approval to the entire College of Commissioners, including Mr. Juncker as President.

### EU imposes reinforced restrictive measures against Russia

Strengthened EU sanctions against Russia have [entered into force](#) upon the publication of the relevant legal acts in the Official Journal.

Amongst other things, restrictions on Russia's access to EU capital markets have been strengthened. EU nationals and companies may no longer provide loans to five major Russian state-owned banks. At the same time, trade in new bonds, equity or similar financial instruments with a maturity exceeding 30 days, issued by the same banks, has been prohibited. The same restrictions have been extended to three major Russian defence companies and three major energy companies. Providing services related to the issuing of these financial instruments, e.g. brokering, is also included in the prohibition.

In addition, certain services necessary for deep water oil exploration and production, arctic oil exploration or production and shale oil projects in Russia may no more be supplied, for instance drilling, well testing or logging services.

At the same time, the ban on exporting dual use goods and technology for military use in Russia has been extended to include a list of nine mixed defence companies that must not receive dual use goods from the EU.

24 persons have been added to the list of those subject to a travel ban and an asset freeze. This brings the total of persons subject to sanctions to 119 while 23 entities remain under asset freeze in the EU.

### EU Commission consults on cross-border mergers and divisions

The EU Commission has launched a [consultation](#) on cross-border mergers and divisions in order to assess whether existing rules for cross-border operations of

companies under the Cross Border Merger Directive (2005/56/EC) (CBMD) should be changed.

The consultation focuses on possible improvements to the existing framework for cross-border mergers and a possible framework for cross-border divisions of companies and follows the 2012 Action Plan on Company Law and Corporate Governance.

Comments are due by 1 December 2014.

#### **CRD 4: EU Commission requests EBA final assessment of banks' use of remuneration allowances for key staff**

EU Commissioner Michel Barnier has [written](#) to Andrea Enria, Chairman of the European Banking Authority (EBA), in relation to the EBA's fact-finding exercise into plans by banks in certain Member States to introduce 'allowances' for key staff in response to variable remuneration rules under the Capital Requirements Directive (CRD 4).

Mr. Barnier's letter expresses strong concerns with regard to the continuing reports of the use of these allowances and requests that the final assessment of the EBA's study be issued as soon as possible and by the end of September 2014 at the latest in order that the EU Commission and the EBA can coordinate a policy response.

#### **Benchmarks Regulation: EU Council Presidency publishes compromise proposal**

The EU Council Presidency has published a [compromise text](#) for the proposed regulation on indices used as benchmarks in financial instruments and financial contracts.

#### **Multilateral Interchange Fees regulation: EU Council Presidency publishes compromise proposal**

The EU Council Presidency has published a [compromise text](#) for the proposed regulation on interchange fees for card-based payment transactions (MIF Regulation).

#### **Basel Committee and EBA publish results of Basel III monitoring exercise as of 31 December 2013**

The Basel Committee on Banking Supervision (BCBS) has published the [results](#) of its Basel III monitoring exercise as of 31 December 2013. The exercise is intended to provide the BCBS with an ongoing assessment of the impact of the Basel III capital and liquidity standards on banks. All 27 Committee member countries participated in the exercise comprising a total 227 banks which are split into Group 1 internationally active banks holding Tier 1 capital in excess of EUR 3 billion and Group 2 banks representing other participants.

Data as of 31 December 2013 show that most large internationally active banks now meet the Basel III risk-based capital minimum requirements, and capital shortfalls have been further reduced relative to the target levels. For example, at the Common Equity Tier 1 (CET1) target level of 7.0% (plus the surcharges on G-SIBs as applicable), the aggregate shortfall for Group 1 banks is EUR 15.1 billion, compared to EUR 57.5 billion on 30 June 2013. Under the same assumptions, the capital shortfall for Group 2 banks included in the sample is estimated at EUR 2.0 billion for the CET1 minimum of 4.5% and EUR 9.4 billion for a CET1 target level of 7.0%. This represents a decrease compared to the previous period of EUR 10.4 billion and EUR 18.3 billion, respectively. The average CET1 capital ratios under the Basel III framework across the same sample of banks are 10.2% for Group 1 banks and 10.5% for Group 2 banks.

The European Banking Authority (EBA) has also published the [latest results](#) of its Basel III monitoring exercise, which is run in parallel with the global exercise conducted by the BCBS.

#### **Basel Committee publishes results of trading book test portfolio exercise**

The BCBS has published the [preliminary findings](#) of its trading book test portfolio exercise that was conducted in parallel with the Basel III monitoring exercise as of 31 December 2013. As part of the BCBS' work to revise trading book standards it has conducted Quantitative Impact Studies (QISs) to better understand the effects of the proposed new framework on capital requirements and further refine the standards.

The preliminary findings highlight:

- variability in the proposed expected shortfall (ES) and incremental default risk (IDR) measures;
- implementation considerations for varying liquidity horizons;
- the impact of constraining diversification and hedging benefits;
- the aggregate impact of the proposed internal models approach and how this compares with current risk measures; and
- computation of non-modellable risk factors (NMRF) and the IDR model for equities.

### OTC Derivatives Regulators Group reports to G20 on cross-border implementation issues

The OTC Derivatives Regulators Group (ODRG) has published a [report](#) to the G20 on OTC derivatives cross-border implementation. The report highlights where legislation may be required to facilitate cross-border implementation and also provides an update on progress in resolving previously identified areas in which it is working to develop approaches to address issues in relation to:

- the treatment of branches and affiliates; and
- organised trading platforms and implementation of the G20 trading commitment.

The report also discusses progress on the implementation of the understandings set out by the group in its March 2014 report to the G20, which relate to:

- equivalence and substituted compliance;
- clearing determinations;
- risk mitigation techniques for non-centrally cleared derivatives transactions; and
- data in trade repositories and barriers to reporting to trade repositories.

The ODGR comprises relevant authorities from Australia, Brazil, the EU, Hong Kong, Japan, Ontario, Quebec, Singapore, Switzerland and the US. The ODGR will report next to the G20 in November 2014, which will include details of how the group intends to address the treatment of branches and affiliates and any further work on the implementation of the G20 trading commitment and a timetable for action.

### Commodity derivatives: IOSCO updates survey on supervisory principles

The International Organization of Securities Commissions (IOSCO) has published an [update](#) to its survey on the principles for the regulation and supervision of commodity derivatives markets, updating its 2012 review of the implementation of IOSCO's principles for commodity derivatives markets.

Consistent with the 2012 review of implementation of IOSCO's principles for commodity derivatives markets, the majority of respondents to IOSCO's 2014 update were broadly compliant with the principles. Where commodity derivative markets exist and market authorities were yet to be fully compliant, many of those market authorities had identified initiatives aimed at achieving full compliance over time.

### IOSCO reports on implementation of principles for oil price reporting agencies

IOSCO has published its [review](#) of the implementation of the Principles for Oil Price Reporting Agencies (PRA Principles). The Principles were prepared in response to a request by G20 leaders in November 2011 and final principles were published in 2013; this report meets IOSCO's commitment to review implementation within 18 months of publication. The Principles are intended to enhance the reliability of oil price assessments that are referenced in derivative contracts and were developed in collaboration with the International Energy Association (IEA), International Energy Forum (IEF) and the Organization of Petroleum Exporting Countries (OPEC).

The report considers the degree to which the PRA Principles have been implemented by PRAs and their impacts. It concludes that the implementation of the Principles remains an ongoing process but good progress has been made during the first year of implementation. IOSCO will continue to monitor this further.

IOSCO also intends to investigate the impact of the PRA Principles on physical markets and will report on this to the G20 summit in November 2014.

### IOSCO publishes proposed statement on non-GAAP financial measures

IOSCO has published a [proposed statement](#) on non-GAAP financial measures, which sets out IOSCO's expectations for issuers with respect to their presentation of financial measures other than those prescribed by Generally Accepted Accounting Principles (GAAP).

The statement is intended to assist issuers in providing clear and useful disclosure for investors and other users of non-GAAP financial measures, and to help reduce the risk that such measures are presented in a way that could be misleading.

Comments are due by 5 December 2014.

### FCA publishes Quarterly Consultation No.6

The Financial Conduct Authority (FCA) has published its quarterly [consultation paper](#) No.6 (CP14/18), setting out proposed miscellaneous amendments to the Handbook. CP14/18 proposes:

- changes to the procedure set out in the Supervision manual (SUP) for processing a direction or determination by the FCA waiving, varying or

disapplying requirements under the Consumer Credit Act 1974;

- minor amendments to the Listing Rules, Prospectus Rules, Disclosure and Transparency Rules and Fees manual in order to clarify existing provisions, correct and update guidance and propose a new fee for reviewing a material change to a published investment policy; and
- changes relating to the application of the Client Assets sourcebook (CASS) to certain alternative investment fund managers (AIFMs) in order that it applies to small AIFMs when carrying out certain activities not already specified in CASS 6 and extends to all assets held by depositories of authorised Alternative Investment Funds (AIFs).

Comments are due by 5 November 2014.

#### **AFM issues interpretation on scope of EMIR reporting requirement**

The Authority for the Financial Markets (AFM) has published [guidance](#) stating that the reporting obligation to trade repositories under the European Market Infrastructure Regulation (EMIR) applies in situations where a client instructs a broker to enter into an OTC or exchange traded derivative in its own name but for the account and risk of the client. This method of dealing is very common in The Netherlands and is known as the 'mandate' agreement (lastgeving).

The new interpretation applies (a) whenever the client and the broker are eligible counterparties or professional investors (including opt-down retail clients and opt-up professionals) under MiFID 1 and all the way through the chain of intermediaries and clients and (b) regardless of whether the relationship between client and broker would strictly qualify as an OTC derivative or an ETD under EMIR. For reporting purposes, each of the parties must report the position between them as though it was an OTC derivative or an ETD. Where the client is a true retail client the broker should complete the client's details in the beneficiary field for reporting purposes.

The new guidance is effective immediately.

#### **AMAC issues self-regulation rules and measures**

The Asset Management Association of China (AMAC) has issued a set of [pilot implementation rules and measures](#) concerning self-regulation of AMAC, including:

- the AMAC Rules on Mediation of Disputes Involving Investment Funds (Pilot), which provide AMAC's

procedures on mediation of disputes involving investment funds;

- the AMAC Measures on Handling of Complaints (Pilot), which provide AMAC's basic rules for handling complaints from individuals or institutions;
- the AMAC Rules on Self-disciplinary Inspection (Pilot), which provide procedures and rules of self-disciplinary inspections conducted by AMAC on relevant institutions, funds and staff thereof; and
- the AMAC Measures on Implementation of Disciplinary Sanctions (Pilot), which set out the types and procedures of AMAC's disciplinary sanctions.

All the above rules became effective as of their issuance.

#### **MOFCOM promulgates new ODI measures**

Following a public consultation period, the Ministry of Commerce (MOFCOM) has promulgated the new Administrative Measures for Outbound Investments ([ODI Measures](#)), which will take effect as of 6 October 2014.

The ODI Measures are intended to simplify the administrative procedures and promote outbound investments by domestic enterprises. Amongst other things, under the ODI Measures:

- only outbound investments related to sensitive countries and regions (e.g. those that have no diplomatic relationship with China, are sanctioned or are subject to war or civil unrest) or sensitive industries (e.g. those that use nationally restricted export products and technology or involve multinational interests) require approval by MOFCOM and all other outbound investments are subject to the filing process only;
- in addition to the defined 'sensitive countries and regions', MOFCOM reserves a right to publish a separate list of destinations for outbound investments that should be subject to the approval administration as it deems necessary;
- MOFCOM shall decide whether to grant an approval within 20 working days and the relevant provincial MOFCOM shall submit its preliminary review comments to the central MOFCOM within 15 working days and the central MOFCOM shall decide whether to grant an approval within another 15 working days upon receipt of the provincial MOFCOM's comments; and
- a certificate will be issued by MOFCOM upon the approval or filing of an outbound investment and such a certificate will automatically expire if the investment

has not been made by the relevant enterprise within 2 years of receiving the certificate.

#### **Ministry of Justice releases preliminary draft outline of Civil Code Reform bill**

The Ministry of Justice (MOJ) has published a [preliminary draft outline of the reform bill](#) of the Civil Code of Japan. The MOJ working group approved the draft reform bill on 26 August 2014.

The MOJ intends to carry out a comprehensive reform of contract law and the relevant general rules. Because of the far-reaching coverage of the draft reform bill, it could affect various types of contracts and business communities in Japan. Amongst many other items, the draft reform bill includes amendments to the following areas:

- assignment of claims;
- pre-contractual liabilities;
- statutory rate of interest;
- termination of contracts;
- guarantees; and
- set-off.

The bill is supposed to include new regulations on general terms and conditions, but the draft reform bill has a placeholder for this item only. The working group will continue to discuss this item.

The MOJ originally intended to submit the reform bill to the Diet (the Japanese Parliament) in 2015. Since the legislation process is slightly delayed, it is unclear whether the reform bill can be submitted next year.

Comments on the draft reform bill may be submitted to the MOJ.

#### **FSA publishes amendments to guidelines concerning disclosure of corporate information**

The Financial Services Agency (FSA) has published [amendments to the guidelines](#) concerning disclosure of corporate information.

The amendments clarify that, as long as certain conditions are satisfied, the following activities do not constitute a solicitation of securities under the Financial Instruments and Exchange Act (FIEA):

- pre-hearing of certain investors' prospective demand;
- distribution of information on issuers one month or more prior to the filing of a securities registration statement (SRS) or a shelf registration statement;
- disclosure made pursuant to law or exchange rules;

- issuers' periodic distribution of information on themselves or announcement of their new products or services in the ordinary course of their business;
- issuers' responses to unsolicited enquiries regarding the status of their business or finance; and
- distribution or publication by financial instruments business operators, etc. of analyst reports on listed issuers in the ordinary course of their business.

In addition, in general, securities cannot be acquired by or sold to investors for 15 days after the issuer of the securities files an SRS under the FIEA. The disclosure guidelines have been amended to provide that the regulator can eliminate the 15-day waiting period if certain issuers whose information is already well-known to the public (i.e. issuers who have listed their shares on Japanese exchanges and satisfy certain other conditions) solicit certain securities (e.g. listed shares) issued by such issuers

The amendments to the disclosure guidelines took effect on 27 August 2014.

#### **MAS proposes revisions regarding outsourcing arrangements of financial institutions**

The Monetary Authority of Singapore (MAS) has published two consultation papers proposing revisions to the outsourcing arrangements of financial institutions in Singapore.

The [first consultation](#) paper proposes revisions to the guidelines on outsourcing which were issued in 2004 to promote sound risk management practices for outsourcing arrangements of financial institutions. The updated guidelines provide further guidance on sound practices relating to the responsibility of the board and senior management, and monitoring and control of outsourcing arrangements.

The [second consultation](#) paper proposes to issue a Notice that defines a set of minimum standards for outsourcing management. The Notice, which is intended to enhance the MAS's regulatory framework regarding outsourcing arrangements, sets out requirements for the assessment of service providers, access to information, conduct of audits on a service provider, protection of customer data and termination of and exiting from an outsourcing arrangement.

Comments on both the consultation papers are due by 7 October 2014.

### **DFSA publishes corporate governance thematic review**

The Dubai Financial Services Authority (DFSA) has published a [thematic review](#) of the corporate governance arrangements of regulated firms in the DIFC.

The DFSA found that governance arrangements were generally compliant with statutory obligations and proportionate to the scale and complexity of firms' businesses. An area identified for improvement was the frequency of structured reviews carried out by firms of the effectiveness of their Governing Bodies and committees. The DFSA emphasised that corporate governance arrangements should change with the evolution of business plans and strategies and found that firms could do better in this regard. The DFSA also found that firms generally failed to provide adequate ongoing education and training to Directors and Governing Bodies.

The DFSA will continue to monitor the governance practices of regulated firms with particular reference to the findings of the review.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **European Account Preservation Orders are coming**

The EU has passed a Regulation that will allow a court in one member state to freeze bank accounts in another. These orders will, however, be significantly less readily available, less easily obtainable and less uniform in application than under the Commission's original proposal. The claimant will have to show that there is a real risk that the defendant will dissipate its assets through unusual action outside the normal course of business. The claimant will also usually need to provide security unless it has already obtained judgment. The scope of bank accounts covered by the Regulation is restricted to cash accounts, and only claimants who already have judgment will be able to search across Europe for bank accounts held by the defendant. The effect, including the ranking, of these orders will not be the same in each EU member state since it will depend upon national law.

This briefing discusses the new European Account Preservation Order.

<http://www.cliffordchance.com/briefings/2014/09/european-accountpreservationordersarecoming.html>

### **European Account Preservation Orders – must try harder**

The European Commission has achieved its aim of creating a European Account Preservation Order that will allow the

cross border freezing of bank accounts. But the instrument that has emerged is a pale shadow of what the Commission wanted. For example, the instrument is limited to bank accounts as conventionally understood rather than extending to just about any transaction a bank might enter into with its customers, the availability of the instrument will no longer be near automatic in cross-border litigation, and the applicant will usually be required to provide security in order to protect the defendant.

This briefing discusses whether the instrument will really be used in practice and whether it is worthwhile those EU member states, like the UK, that have not opted into the instrument now doing so.

<http://www.cliffordchance.com/briefings/2014/09/european-accountpreservationordersmusttr.html>

### **Expanded EU Sectoral Sanctions Targeting Russia**

On 12 September 2014, the EU implemented an expanded set of sectoral sanctions targeting Russia. The new sanctions are set out in Council Regulation (EU) No. 960/2014, which amends existing Council Regulation (EU) No. 833/2014 that had been in effect since 1 August 2014.

A press release issued by the President of the European Council on 11 September 2014 stated that the measures will be reviewed within a month, to determine whether they should be repealed, suspended or expanded further in view of the extent to which the peace plan in eastern Ukraine has been implemented.

This briefing discusses the new sanctions.

<http://www.cliffordchance.com/briefings/2014/09/expanded-eu-sectoralsanctionstargetingrussia.html>

### **US Banking Regulators Implement the Basel III Liquidity Coverage Ratio**

On 3 September 2014, the Federal Reserve Board, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation adopted a final rule implementing a quantitative minimum liquidity coverage ratio requirement for the largest, internationally active US banking organizations. The Final Rule is generally consistent with the LCR standard established by the Basel Committee on Banking Supervision, although it differs in some respects from the standard adopted by the Basel Committee. Under the Final Rule, 'covered companies' generally will be required to maintain a minimum amount of unencumbered high-quality liquid assets that is equal or

exceeds estimated net cash outflows over a 30-day standardised supervisory liquidity stress scenario.

This briefing discusses the impact of the Basel III Liquidity Coverage Ratio in the US.

[http://www.cliffordchance.com/briefings/2014/09/us\\_bankin\\_g\\_regulatorsimplementthebaselii.html](http://www.cliffordchance.com/briefings/2014/09/us_bankin_g_regulatorsimplementthebaselii.html)

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