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Briefing note

International Regulatory Update

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- Recent Clifford Chance Briefings: New ICMA sovereign collective action and pari passu clauses; Changes to the Russian Reporting Regime; and more. Follow this link to the briefings section.

BRRD: EBA consults on group financial support

The European Banking Authority (EBA) has launched a consultation on regulatory technical standards (RTS) and guidelines on the conditions for the provision of group financial support, and on implementing technical standards (ITS) relating to the disclosure of group financial support agreements. The EBA is mandated to provide technical advice on these issues under the Bank Recovery and Resolution Directive (BRRD).

Chapter III of the BRRD sets out provisions to enable groups to strengthen their group wide integrated risk management and allocate liquidity optimally when the group is in financial distress. The draft RTS and guidelines are intended to establish a clear and harmonised framework to facilitate group support and enhance legal certainty despite existing legal obstacles, in particular in cross border groups, while maintaining adequate safeguards for financial stability. The rules set out the framework for competent authorities to grant authorisation for support based on a number of conditions and require authorities and institutions to consider the possible reasons for the financial distress of the institution concerned including business model, current market situation and other possible adverse developments. The draft ITS set out the form and content of the disclosure of public support agreements to ensure transparency with regard to group support.

Comments on the consultation are due by 4 January 2014.

EBA reports on monitoring of Additional Tier 1 instrument

The EBA has published a report presenting the first results of its review of Additional Tier 1 (AT1) capital instruments under the Capital Requirements Regulation (CRR), which specifies that the EBA should monitor the quality of own funds instruments issued by EU institutions.

The report discusses the EBA's preliminary work in monitoring the issuance of AT1 capital instruments and provides the results for external stakeholders, but the report is not intended to be fully comprehensive. The EBA has focussed its work on selected AT1 issuances and assessed the terms and conditions of these against relevant regulatory provisions. The report highlights:

- areas where the EBA believes it necessary to revise the wording of some existing clauses for future issuances;
- recommendations for the avoidance of certain clauses in future issuances; and
- possible areas where further guidance may be necessary for the common interpretation of CRR provisions.

CRR/CRD 4: EU Commission adopts Delegated Acts on liquidity coverage requirement and leverage ratio and on methodology for identifying G-SIIs and subcategories of G-SIIs

The EU Commission has adopted two Delegated Regulations relating to requirements under the Capital Requirements Regulation (CRR).

The first Delegated Regulation relates to the liquidity coverage requirement (LCR) for credit institutions and supplements the CRR by setting out the detailed rules for the calculation of the LCR which the CRR established. The Delegated Regulation includes detailed quantitative liquidity rules to determine how to calculate net cash outflows expected in times of crisis and what liquid assets banks must hold to meet them. The LCR requires banks to hold sufficient liquid assets to withstand the excess of liquidity outflows over inflows that could be expected to accumulate over a 30 day stressed period. These rules take into account, among other things, the Basel III framework developed by the Basel Committee on Banking Supervision (BCBS).

Under Article 456 of the CRR, the Commission may amend the capital measure and total exposure measure of the leverage ratio (LR) through a delegated act if reporting by competent authorities identifies shortcomings in the way those measures are currently defined prior to 1 January 2015, the date from which institutions must start disclosing the LR. As such, the second Delegated Regulation amends the CRR with regard to the methodology for calculating banks' LR. It establishes a common definition of LR for EU banks to enhance the effectiveness and consistency of the LR. The rules form the basis for publishing the leverage ratio from the beginning of 2015, but do not introduce a binding LR as a decision on whether to introduce a binding LR will be made in 2016.

The Commission has also adopted a Delegated Regulation supplementing the Capital Requirements Directive (CRD 4) with regard to regulatory technical standards (RTS) for the specification of the methodology for the identification of global systemically important institutions (G-SIIs) and for the definition of subcategories of G-SIIs and the allocation of G-SIIs in subcategories. The Delegated Regulation takes into account international standards, in particular those developed by the Basel Committee on Banking Supervision (BCBS) for the methodology of assessing G-SIIs and for the higher loss absorbency requirement. It will enter into force on the twentieth day following that of its publication in the Official Journal and will apply from 1 January 2015.

Single Resolution Board: EU Commission adopts Delegated Regulation on provisional system for contributions to cover administrative expenditures

The EU Commission has adopted a Delegated Regulation on the provisional system of instalments for contributions to cover the administrative expenditures of the Single Resolution Board under the Single Resolution Mechanism (SRM) Regulation (Regulation EU (No) 806/2014). The contributions are to be made by entities within the scope of the SRM and the rules cover the system for the preliminary phase of the Single Resolution Board's existence between 1 January 2015 and 31 December 2015, or until the entry into force of the final system adopted by the EU Council for the payment of annual contributions if that date is later. Among other things, the Delegated Regulation sets out:

- the system for the payment of instalments during the provisional period, including the methodology for determining instalments to be paid in advance by each significant entity and procedure for collection;
- the general obligation to pay contributions to cover the administrative expenditures of the Board during the provisional period for all entities falling within the scope of the SRM;
- the arrangement for the settlement of any difference between the instalments paid in advance on the basis of the provisional system and the contributions as calculated under the final system for administrative contributions; and
- penalties applicable for late payment and enforcement of the payment obligation.

The Delegated Regulation will enter into force on the day of its publication in the Official Journal.

Basel Committee consults on revised standardised approach for measuring operational risk capital and publishes review of operational risk principles

The Basel Committee on Banking Supervision (BCBS) has published a consultation paper on a revised standardised approach for measuring operational risk capital. Alongside this, BCBS has also published its review of banks' implementation of the 2011 'Principles for the Sound Management of Operational Risk'.

The consultation paper discusses a replacement for the existing set of simple approaches for operational risk: the Basic Indicator Approach (BIA), the Standardised Approach (TSA) and the Alternative Standardised Approach (ASA), which use Gross Income (GI) as a proxy indicator for operational risk exposure. The consultation proposes a revised standardised approach which would include:

- the replacement of GI with a new Business Indicator (BI) comprising three macro-components of a bank's income statement and including items sensitive to operational risk that are omitted or netted from the GI definition; and
- improved calibration of the regulatory coefficients based on the results of quantitative analysis.

Comments on the consultation are due by 6 January 2015.

Alongside the consultation BCBS has also published the results of its review of its eleven principles for the sound management of operational risk, which are intended to provide guidance to banks on the management of operational risk. BCBS reviewed the implementation of the principles by sixty systemically important banks (SIBs) from twenty jurisdictions and has identified four principles that have been least thoroughly implemented:

- Principle 6 – operational risk identification and assessment;
- Principle 7 – change management;
- Principle 4 – operational risk appetite and tolerance; and
- Principle 11 – role of disclosure.

The review also assessed the 'three lines of defence', which comprises business line management, an independent corporate operational risk management function and an independent review, as also set out in the principles. BCBS reports that these are not being applied consistently and provides recommendations for banks on the implementation of the principles and guidance relating to the three lines of defence.

Basel Committee consults on revised guidelines on corporate governance for banks

The BCBS has launched a consultation on a revised set of guidelines on corporate governance at banks. The proposed guidelines build on existing principles published in 2010 and are intended to guide the actions of board members, senior managers, control function heads and supervisors of banks in both Committee member and non-member jurisdictions.

The proposed guidelines have been developed in order to:

- strengthen BCBS guidance on risk governance and risk management functions and the role of a bank's board of directors in overseeing the implementation of effective risk management systems;
- emphasise the board's collective competence and obligations on individual board members to dedicate sufficient time to their mandates and developments in banking;
- provide guidance for bank supervisors in evaluating the processes used by banks to select board members and senior management; and
- highlight the relationship between compensations systems and incentive structures with risk management.

Comments on the consultation are due by 9 January 2015.

IOSCO consults on principles for custody of collective investment schemes' assets

The International Organization of Securities Commissions (IOSCO) has published a consultation report aimed at gathering views on the development of a set of principles for the custody of collective investment schemes' assets.

The report proposes nine principles aimed at identifying the core issues that should be kept under review by the regulatory framework. While the first section focuses on general aspects relating to the custody function, the second part of the report is dedicated to principles relating more specifically to the appointment and ongoing engagement of custodians.

The deadline for comments is 8 December 2014.

PRA consults on implementation of ring-fencing, consumer protection and ensuring operational continuity in resolution

The Prudential Regulation Authority (PRA) has published four papers intended to contribute to its resolution and resilience agenda.

The first consultation paper (CP19/14) sets out the PRA's proposals on the implementation of ring-fencing, in particular the legal structure of banking groups, governance, and the continuity of services and facilities. The PRA is required under the Financial Services and Markets Act 2000, as amended by the Financial Services (Banking Reform) Act 2013, to prepare policy measures to implement a ring-fence of core activities in banking groups holding core deposits exceeding GBP 25 billion. This consultation is the first that the PRA will release in relation to its proposals for ring-fencing with the intention to implement the ring-fencing regime by 1 January 2019.

Two other consultation papers relate to rules relating to consumer protection through the Financial Services Compensation Scheme (FSCS), in particular:

- depositor protection (CP20/14), including the PRA's proposals for implementing the recast Deposit Guarantee Schemes Directive (2014/49/EU) and additional measures in relation to the continuity of access to accounts under the FSCS. Also included in the PRA's proposals are changes to the single customer view (SCV) requirements on firms including the removal of the opt out for firms with less than five thousand eligible accounts; and
- insurance policyholder protection (CP21/14), setting out proposals to increase the compensation limit to 100% in the event of an insurer failing for policyholders of annuities, pure protection, claims arising from death or incapacity and professional indemnity insurance. The PRA also proposes protection for policyholders with outstanding protected claims against an insurer that was covered by the FSCS prior to their policy being transferred to a successor firm after an insurer has failed.

The PRA has also invited views on a discussion paper (DP1/14) that sets out the PRA's preliminary views on the principles that firms' operational arrangements must satisfy in order to facilitate recovery actions, resolution or post-resolution restructuring of firms with a view to ensuring that any future draft rules released for consultation will be as effective as possible.

Comments on all four papers are due by 6 January 2015.

Competition and Markets Authority publishes proposals on payday lending

The Competition and Markets Authority (CMA) has published its provisional decision on remedies to the issues identified in its payday lending market investigation. The

recommendations follow provisional findings published in June 2014 and proposals for a price cap on payday lending announced by the Financial Conduct Authority (FCA) in July 2014. The CMA believes that the proposed price cap increases the need for effective remedial action in relation to potential risks to competition and associated detriment for consumers. The CMA has considered the effect on competition identified during its investigation and proposes:

- the development of multiple price comparison websites that would operate under an FCA-accreditation scheme in order to enable new entrants to enter the market more easily and provide clear and comparable information to consumers. The CMA has provisionally decided to prohibit payday lenders from supplying loans unless details of their prices and products are listed on at least one accredited site;
- greater transparency on fees and charges;
- measures to help borrowers shop around without unduly affecting their access to credit;
- measures to encourage the development of real-time data sharing; and
- a requirement for lenders to provide borrowers with a summary of the charges the borrower has paid on their most recent loan and any charges over the previous 12 months.

Alongside the provisional remedies, the CMA has published an addendum to the provisional findings previously published, which includes further information in relation to lead generators. The CMA also proposes to address issues highlighted in relation to transparency arising from lead generators, which are considered to include fee-charging brokers.

Comments on the CMA consultation are due by 30 October 2014. The CMA intends to work closely with the FCA in relation to the proposals and the FCA's proposals relating to borrower protection and a proposed price cap.

Ministerial Order implementing Law of 26 July 2013 on ring-fencing and resolution published

A Ministerial Order dated 9 September 2014, implementing Title I of Law no. 2013-672 of 26 July 2013 on Ring-Fencing and Resolution, has been published in the Journal Officiel.

The Ring-Fencing Law imposes on large French banks (which exceed certain thresholds) a requirement to separate the following trading and investment activities into dedicated subsidiaries:

- dealing on own account in financial instruments, except for the exempted activities listed in article L. 511-47-I of the French Code monétaire et financier (Financial Code), which can still be conducted by bank entities (such as providing investment services to clients or market-making); and
- any operation including investment in or providing unsecured or insufficiently secured financing to hedge funds or similar funds (either directly or through other funds).

The purpose of the Order is to specify the requirements applicable to the exempted activities, it being noted that the Order is subject to phase-in provisions.

As from 4 October 2014, bank entities falling within the scope of the Ring-Fencing Law separation requirements must identify the internal units (unités internes) conducting the exempted activities and classify each such unit in one of the categories set out in paragraphs (a) to (f) of article L. 511-47-I-1° of the Financial Code. Further, such bank entities must define through a mandate, the content of which is set out in the Order, each internal unit's activities (including the authorised transactions and counterparties) and the conditions on which these activities can be carried on (including risk thresholds). Compliance of each internal unit with the relevant mandate must be subject to an ongoing internal control.

Furthermore, the Order clarifies the scope of the exempted activities by specifying transactions which are neither client services nor market making and must, therefore, be separated into dedicated subsidiaries.

As from 1 April 2015, banks will be required to report to the Autorité de contrôle prudentiel et de résolution and to the Autorité des marchés financiers indicators (a list of which is appended to the Order) relating to market-making activity, both on an annual and a quarterly basis.

Finally, the Order provides for a list of funds which are not considered as being hedge funds or similar funds for the purposes of determining the transactions to be separated into dedicated subsidiaries (see second bullet point above). That provision will enter into force on 1 July 2015.

AMF and ACPR set out crowdfunding regulatory framework

The Autorité des Marchés Financiers (AMF) and the Autorité de contrôle prudentiel et de résolution (ACPR) have published a joint position on non-guaranteed placement and crowdfunding. The text provides for the

legal framework for crowdfunding in France, which entered into force on 1 October 2014. From this date, crowdfunding by securities subscription platforms should be registered as an investment services provider or registered to the French register of insurance intermediaries (ORIAS) as an equity investments advisor (conseiller en investissements participatifs).

The position also sets out conditions in which investment services providers (prestataires de services d'investissement/PSI) and equity investments advisors will be able to manage securities brokerage activities without applying for related authorisation.

The text provides for certain requirements investment services providers and equity investments advisors are subject to (according the AMF General Regulation), such as remuneration, advantages, conflict of interest, etc.

A Ministerial Order on the crowdfunding intermediary's professional capability, dated 30 September, has also been published in the Official Journal.

Decree setting out details of calculation and publication of legal interest rate published

A Decree setting out details of the publication and calculation of the legal interest rate, set by Article L.313-2 of the Monetary and Financial Code, as modified by Ordinance no 2014-947 of 20 August 2014, has been published in the Journal officiel. The rate is defined as the addition of the key rate of the European Central Bank (ECB) and a part of the difference between the representative rate for refinancing of the relevant category (private individuals or other cases) and the key rate of the Central Bank. Every six months, rates used as a benchmark will be published by Ministerial Order in the Journal officiel.

The decree entered into force on the day following its publication regarding this method of calculation, which will apply from 1 January 2015.

Settlement cycle on WSE shortened to T+2

From 6 October 2014 the settlement cycle on the Warsaw Stock Exchange (WSE) is to be shortened from three days (T+3) to two days (T+2). This change will align the Polish market with the standards in the EU. The new rules will apply to nearly all types of assets: shares, rights to shares, depository receipts, ETFs and investment certificates.

KRX announces amendments to enable listing and trading of RMB-denominated bonds

In an effort to develop the financial hub for Renminbi (RMB)-denominated financial products and services, the Korea Exchange (KRX) has amended relevant regulations and developed its IT infrastructure for the listing and trading of RMB-denominated bonds. The amendments are effective from 29 September 2014. The trading of RMB-denominated bonds is planned to start from the week commencing on 6 October 2014.

The KRX believes that Korean investors will not only be able to invest in Chinese bonds with relatively high return, but also to diversify their investment risk. In addition, it expects simplified investment procedures resulting from direct trading of RMB-denominated products to reduce the trading costs and foreign exchange risk.

Singapore government implements cash transaction reporting regime for precious stones and metals dealers

The Monetary Authority of Singapore (MAS) has announced that the government will implement a cash transaction reporting regime for precious stones and metals dealers (PSMDs) with effect from 15 October 2014. The Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act was amended in Parliament in July 2014 to enable the reporting requirement. The new regime is intended to reduce the risk of money laundering and terrorism financing associated with transactions involving precious commodities.

Under the new regime, PSMDs will now have to:

- file a cash transaction report (CTR) with the Suspicious Transaction Reporting Office of the Commercial Affairs Department within 15 business days when they conduct any cash transaction exceeding SGD 20,000, or its equivalent in foreign currency, which involves precious stones, metals or products;
- determine the identity of the customer and enquire if the customer was acting on behalf of a third party and if so, determine the identity of the third party who owns the cash;
- record the details of each cash transaction and maintain such records for a period of five years from the date of submission of the CTR; and
- put in place internal controls to prevent the financing of terrorism and proliferation.

The MAS has indicated that PSMDs that fail to comply with the new cash transaction reporting requirement will be fined up to SGD 20,000 and/or imprisoned for a term of up to two years.

MAS consults on effecting FAIR proposals and authorising inspections by foreign regulatory authorities under Financial Advisers Act

The MAS has launched a consultation on:

- draft legislation and proposed legislative amendments to effect the policy proposals under the Financial Advisory Industry Review; and
- proposed legislative amendments to authorise inspections by foreign regulatory authorities under the Financial Advisers Act.

On 5 March 2013, the MAS released a consultation paper seeking feedback on the recommendations of the Financial Advisory Industry Review (FAIR) Panel set out in a report submitted by the FAIR Panel to the MAS on 16 January 2013. The proposals were aimed at raising the standards of practice in the financial advisory industry and improving efficiency in the distribution of life insurance and investment products in Singapore.

The consultation closed on 4 June 2013 and the MAS published its response to the public consultation on the recommendations of the FAIR Panel on 30 September 2013. The majority of responses received by the MAS from the public consultation supported the recommendations made by the FAIR Panel.

The MAS is now consulting on proposed legislative amendments to the Financial Advisers Act and Insurance Act to implement the FAIR Panel's policy proposals.

Comments on the draft legislative provisions and proposed amendments are due by 3 November 2014. The MAS aims to implement the full suite of FAIR initiatives in 2015.

MAS launches consultation on enhancements to regulatory regime governing REITs and REIT managers

The MAS has published a consultation paper on a set of proposals to strengthen Singapore's real estate investment trust (REIT) market. The proposals are intended to enhance the transparency and corporate governance of the REIT market and improve its attractiveness to issuers and investors.

The key proposals include the following:

- the REIT manager and its directors will have the statutory duty to prioritise the interests of REIT investors over those of the REIT manager and its shareholders, in the event of a conflict of interests. The Board of a REIT manager will have a stronger independent element, to enhance its objectivity when considering the interests of REIT investors;
- REIT managers' performance fees will be computed based on a methodology that primarily takes into account the long-term interests of REIT investors, to better align the interests between the REIT manager and REIT investors;
- the development limit of a REIT will be increased from 10% to 25% of its deposited property. In addition, the leverage limit imposed on REITs will be increased from 35% to 45% of the REIT's total assets, while the provision for REITs with credit ratings to leverage up to 60%, will be removed; and
- the REIT manager will provide more comprehensive disclosure to REIT investors by including in the annual reports items such as:
  - the amount of income support payments received by the REIT;
  - more information on the lease expiry profile and refinancing needs of the REIT; and
  - its remuneration policy for directors and executive officers, and their remuneration.

Comments on the consultation paper are due by 10 November 2014.

RECENT CLIFFORD CHANCE BRIEFINGS

New ICMA sovereign collective action and pari passu clauses

ICMA's new model aggregated collective action clauses and pari passu clause for sovereign issuers offer flexibility to sovereigns wishing to restructure their debts while at the same time providing robust protection to noteholders through the procedures and majorities required in order to restructure those debts. The clauses will not solve immediately all the problems in sovereign debt restructuring, but they are a significant step in the right direction. The approach taken by ICMA's new CACs has the support of the IMF.

This briefing discusses these new clauses.

http://www.cliffordchance.com/briefings/2014/10/new_icma_sovereigncollectiveactionandpar.html

Changes to the Russian Reporting Regime – Real Improvement or Wishful Thinking?

This briefing discusses the recent changes to the trade reporting regime in Russia and their impact on the market and, in particular, the enforceability of close-out netting arrangements.

http://www.cliffordchance.com/briefings/2014/10/changes_to_the_russianreportingregimerea.html

MOFCOM unveils the new rules on outbound investments

The Ministry of Commerce (MOFCOM) has recently revised its regulations on outbound investment. This marks the continuing effort of China in gradually overhauling its outbound investment regime since 2013, aiming to streamline administrative procedures and facilitate more Chinese enterprises in 'going abroad'.

This briefing discusses the revisions.

http://www.cliffordchance.com/briefings/2014/10/mofcom_unveils_thenewrulesonoutboun.html

Changes to DFSA client classification regime

The Dubai Financial Service Authority (DFSA) has released a consultation paper outlining proposed changes to the client classification provisions of the Conduct of Business (COB) module of its rulebook.

The DFSA client classification regime was last modified in 2007 and these proposals are intended to address accumulated concerns and requests of firms and, in certain instances, to codify the basis upon which waivers and modifications have been granted to accommodate evolving market practices or structures.

This briefing discusses the proposed changes.

http://www.cliffordchance.com/briefings/2014/10/changes_to_dfsa_clientclassificationregime.html