

International Regulatory Update

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- Monetary Authority of Singapore (Amendment) Bill passed
- Recent Clifford Chance briefings: Securities Law Reform; the meaning of establishment under the EUIR; and more. [Follow this link to the briefings section.](#)

ESMA delays technical standards on MAR and MiFID2/MiFIR

The Chair of the European Securities and Markets Authority (ESMA), Steven Maijor, [has written](#) to the Director General for Financial Stability, Financial Services and Capital Markets Union at the EU Commission, Jonathan Faull, about a preliminary agreement reached between ESMA and the EU Commission on the procedure for drafting technical standards under the Market Abuse Regulation (MAR), MiFID2/MiFIR, the Central Securities Depositories Regulation (CSDR), the UCITS V Directive, and the Transparency Directive.

The preliminary agreement relates to carrying out an early legal review of draft technical standards to ensure they are legally sound, a process which has previously taken place once ESMA's Board of Supervisors have adopted final draft technical standards and submitted these to the Commission. Under the preliminary agreement, the EU Commission will review draft technical standards from a legal perspective prior to their adoption, which is intended to reduce a potentially lengthy re-approval process should legal concerns be identified.

ESMA has notified the Commission that due to the extra step introduced by the early legal review process, submission of final draft technical standards under MiFID2/MiFIR and MAR will be delayed from July 2015 to September 2015. In particular, this includes the MiFID2 RTS on measuring liquidity and transparency. ESMA has indicated that it is capable of delivering all final draft technical standards to the Commission within the legal deadlines.

Mr. Faull [has acknowledged](#) the additional procedural step in this process and agreed with the timetable set out by ESMA.

EMIR: ESMA consults on clearing obligation

ESMA has published a [consultation paper](#) on draft regulatory technical standards (RTS) on clearing obligations under the European Market Infrastructure Regulation (EMIR).

This consultation follows three previous consultation papers on the clearing obligation on interest rate derivative classes, credit derivative classes, foreign-exchange non-deliverable forward classes, as well as the publication of a final report on the clearing obligation on interest rate derivative classes and a feedback statement on non-deliverable forward classes.

This consultation provides explanations on the RTS establishing a clearing obligation on additional classes of OTC interest rate derivatives that were not included in the first RTS on the clearing obligation for interest rate swaps. The addition consists of the following classes:

- fixed-to-float interest rate swaps denominated in CZK, DKK, HUF, NOK, SEK and PLN; and
- forward rate agreements denominated in NOK, SEK and PLN.

Comments are due by 15 July 2015.

CRR: EBA consults on draft RTS on assigning risk weights to specialised lending exposures

The European Banking Authority (EBA) has launched a [consultation](#) on draft Regulatory Technical Standards (RTS) on assigning risk weights to specialised lending exposures under Article 153(9) of the Capital Requirements Regulation (CRR).

The proposed RTS aim to specify how institutions should take into account several factors when assigning risk weights to specialised lending exposures and how they should treat these factors. The proposed RTS define four classes of specialised lending:

- project finance;
- real estate;
- object finance; and
- commodities finance.

For each of these four classes, the draft RTS specify a list of factors that institutions shall take into account and propose two options on how these factors should be combined in order to determine the risk weight assigned to the specialised lending exposure.

Comments are due by 11 August 2015.

BRRD: EBA publishes final guidelines on early intervention measures

The EBA has published [final guidelines](#) for competent authorities on triggers for the use of early intervention measures under the Bank Recovery and Resolution

Directive (BRRD). The guidelines establish supervisory practices, in particular the link between ongoing supervision by competent authorities under the Capital Requirements Directive (CRD 4) and early intervention powers under the BRRD.

The guidelines identify triggers within the supervisory review and evaluation process (SREP) framework and many triggers are closely linked to SREP outcomes, while certain other guidelines identify that early intervention measures may also be triggered on the basis of other circumstances not immediately factored into the outcomes of the SREP assessment.

The guidelines will apply from 1 January 2016.

BRRD: EBA consults on RTS for valuation of derivatives

The EBA has launched a consultation on [draft Regulatory Technical Standards \(RTS\)](#) for the valuation of derivatives under the Bank Recovery and Resolution Directive (BRRD). In particular, the draft RTS specify conditions to be complied with by resolution authorities when bailing-in the derivative liabilities of an institution under resolution. Under the BRRD, resolution authorities may close-out and terminate derivative contracts for the purpose of bail-in, which will take place upon or after close-out, and resolution authorities must be able to value derivative liabilities as part of the general valuation of assets and liabilities.

The draft RTS set out a series of tools for valuation in a short time frame, including:

- a statutory valuation methodology;
- a valuation principle whereby derivatives liabilities will be assessed as an early termination amount based on the costs or gains that would be incurred by the counterparty in replacing the contract;
- the process for close-out notification to counterparties, which would be provided with a deadline for providing commercially reasonable replacement trades in order to be taken into account by the resolution authority in determining the close out amount;
- the process for resolution authorities to carry out their own valuation should counterparties fail to provide commercially reasonable trades;
- circumstances in which resolution authorities may exempt contracts from close-out and bail-in due to destruction of value exceeding bail-in potential; and
- treatment of central counterparties (CCPs), building on processes implemented under the European Market

Infrastructure Regulation (EMIR) for authorised EU CCPs and designated third-country CCPs.

Comments on the consultation are due by 13 August 2015.

Securitisation: Joint Committee of ESAs makes recommendations on transparency rules

The Joint Committee of the European Supervisory Authorities (ESAs) has published a [report](#) assessing the regulatory framework around transparency rules for structured financial instruments (SFIs). The report constitutes the Joint Committee's response to the EU Commission consultation on an EU framework for simple, transparent and standardised securitisation.

Among other thing, the report discusses:

- the content of due diligence and disclosure requirements;
- parties to which requirements apply; and
- disclosure methods, reporting and enforcement in cases of non-compliance.

The report makes recommendations that could be implemented at an EU level to enhance the framework where inconsistencies have been identified. The recommendations are intended to be considered alongside requirements for disclosure, due diligence and reporting for comparable instruments and include:

- harmonisation of EU due diligence requirements;
- standardisation of investor reports and enhanced public access; and
- a comprehensive framework for supervision and enforcement regarding SFIs.

Transparency Directive: Delegated Regulation on major holdings published in Official Journal

[Commission Delegated Regulation \(EU\) 2015/761](#) of 17 December 2014, supplementing the Transparency Directive (2004/109/EC) with regard to certain regulatory technical standards on major holdings, has been published in the Official Journal.

The Regulation will enter in to force on 2 June and apply from 26 November 2015.

BaFin issues circular regarding minimum safety requirements for internet payments

The German Federal Supervisory Authority (BaFin) has issued a [draft circular](#) regarding minimum safety requirements for internet payments. The circular is relevant for client payments made through online banking. The

circular is intended to implement the European Banking Authority's (EBA's) guidelines on the security of internet payments on a one on one basis. Among various measures aimed at more efficient and secure internet payments across the EU, the circular requires in particular that Payment Service Providers (PSP) carry out strong customer authentication in order to verify the customer's identity before proceeding with an online payment.

Furthermore, the circular includes the following:

- the protection of sensitive payment data;
- the improvement of client protection; and
- the requirement for PSPs to initiate customer awareness programmes to ensure that their users understand risks and best practices in internet payments.

BaFin permits lending business for the account of AIFs

BaFin has [announced](#) a change in its administrative practice regarding lending business which is conducted for the account of a German investment fund (Investmentvermögen).

Until now, BaFin took the view that licensable granting of money loans (lending business) for the account of investment funds was not permitted, as it qualifies as licensable banking business pursuant to the German Banking Act (KWG).

As of 12 May 2015, BaFin takes the view that lending business conducted by AIFs which are licensed pursuant to the German Capital Investment Code (KAGB) qualifies as collective asset management (kollektive Vermögensverwaltung) and may therefore be undertaken by such AIFs. Consequently, the restructuring and prolongation of loans by AIFs does not qualify as licensable banking business within the meaning of the KWG if the KAGB does not provide for specific product requirements for such AIFs. In this respect the following AIFs in particular may generally conduct lending business as collective asset management:

- open-ended special-AIFs;
- hedge funds; and
- closed-ended special AIFs.

Italian Banking Act: Ministry of Economy and Finance publishes regulation on business of financing and financial intermediaries

The final text of the regulation ([Ministerial Decree no. 53/2015](#)) intended to implement certain legislative changes

made to Legislative Decree no. 385/1993 (the Italian Banking Act) in 2010 has been published in the Official Gazette. Amongst other things, the regulation provides for an amended set of provisions governing the business of financing in Italy and the regime applicable to financial intermediaries (intermediari finanziari).

The regulation repeals Ministerial Decree no. 29/2009 and comes into force on 23 May 2015.

CSSF publishes 2014 Annual Report

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF) has published its [Activity Report for 2014](#).

In addition to statistical information concerning the Luxembourg financial sector and information on legal and regulatory developments in the last twelve months, the report contains information on the CSSF's exercise of its regulatory powers. Points of attention for banks and other actors of the financial sector include (i) new specifications by the CSSF of its supervisory practice in relation to IT systems (including regarding outsourcing, professional confidentiality and threats resulting from the use of the internet) and capital markets (including regarding prospectuses, takeover offers and squeeze-outs) as well as (ii) decisions or other actions taken in reaction to customer complaints in the past year (including in the area of information obligations of the bank vis-à-vis its customers, asset management and investment advice, residential mortgage lending and account searches by heirs).

CSSF issues updating circular on reporting requirements of credit institutions

The Luxembourg financial sector supervisory authority, the CSSF, has issued [circular 15/613](#) dated 6 May 2015 providing an update on CSSF circular 14/593 on the reporting requirements applicable to credit institutions for the reporting period of 2014.

The update reflects the latest developments and requirements at EU and Single Supervisory Mechanism (SSM) level for credit institutions in relation to prudential reporting, starting from the reporting period of 2014 and provides practical details and requirements of the CSSF in this respect.

The circular further draws the attention of credit institutions to the fact that the requirements in relation to European prudential reporting are subject to change in the future and asks credit institutions to monitor the draft implementing and/or regulatory technical standards and consultation

papers published on the European Banking Authority's website in this area and the implementing technical standards adopted by the EU Commission in relation to prudential reporting.

Swiss Federal Council promulgates Federal Act on extension of criminal offences for violation of professional duties of confidentiality

The Swiss Federal Council has [promulgated](#) the Federal Act on the extension of criminal offences for violation of professional secrecy with effect from 1 July 2015. The Act is intended to improve the protection of bank customer data and provides for increased penalties for persons who violate banking secrecy or other professional duties of confidentiality in financial affairs for a profit. The Act also introduces an offence for persons who use or disclose information received through a violation of professional duties of confidentiality.

FSTB publishes consultation conclusions on enhancements to deposit protection scheme

The Financial Services and the Treasury Bureau (FSTB) has published the [consultation conclusions](#) in relation to its proposals to enhance the Deposit Protection Scheme (DPS) to achieve a faster payout and better banking stability. The proposals include:

- adopting a gross payout approach to determine compensation (i.e. a depositor will be compensated an amount up to the DPS protection limit, without setting off the depositor's liabilities against his/her deposits owed to the same bank);
- providing more certainty to determine the quantification date used for the compensation calculation; and
- enabling the use of electronic communication channels by the Hong Kong Deposit Protection Board (HKDPB), in addition to the conventional paper-form communications, to notify depositors of the compensation arrangements, in case the DPS is triggered.

The government has indicated that it received broad support from the industry for its proposals. In particular, the banking industry expects the proposed adoption of the gross payout approach to accelerate any compensation process and streamline banks' work on information management regarding depositors' liabilities. The respective proposal to enhance the clarity of determining the quantification date and to empower the HKDPB to notify affected depositors by electronic means is also expected to improve the compensation process.

The government is in the process of drafting a bill to amend the Deposit Protection Scheme Ordinance, with a view to introducing it into the Legislative Council later in 2015.

SFC enhances regime to regulate alternative liquidity pools

The SFC has published its [consultation conclusions](#) on proposals to enhance and unify the regulatory regime for alternative liquidity pools (ALPs). The consultation on the regulation of ALPs was launched in February 2014.

The highlights of the enhanced regime include the following:

- no individual investors (including individual professional investors and their wholly owned investment holding corporations) will be allowed to use ALPs;
- client facilitation orders will be treated as proprietary orders, which will have a lower execution priority in ALPs than agency orders; and
- there will be no mandatory 'opt-in' requirement before client orders can be routed to ALPs, but ALP operators should permit their clients to opt out of having their orders transacted in ALPs.

The SFC has indicated that it will closely monitor market and regulatory developments, and may propose further policy refinements and rule changes in the future to maintain an appropriate balance between market innovation and investor protection.

The new regime, which involves amendments to the Code of Conduct for Persons Licensed by or Registered with the SFC, will come into effect on 1 December 2015.

SFC and HKMA publish conclusions of further consultation on mandatory reporting and related record keeping obligations under new OTC derivatives regime

The SFC and the Hong Kong Monetary Authority (HKMA) [have published the conclusions](#) of their November 2014 further consultation on mandatory reporting and related record keeping obligations under the new over-the-counter (OTC) derivatives regime. Proposals on certain aspects of the reporting regime have been revised after taking into account the market feedback.

Amongst other things, the changes include:

- daily valuation reporting – the requirement to submit daily valuation reports will be deferred to a later stage after additional consultation and discussion with market participants;

- jurisdictions for masking relief – the previously proposed list of 18 jurisdictions for masking relief will remain unchanged;
- markets and clearing houses to be prescribed – a further 15 operations will be added to the list of markets and clearing houses to be prescribed in view of market feedback, and products traded on and cleared through these operations will not be regarded as OTC derivatives and will fall outside the new regime;
- definition of affiliate – the term 'affiliate' will be amended to expressly exclude collective investment schemes, i.e. funds; and
- record keeping obligations – records will have to be readily accessible, but they will not be required to be readily searchable and identifiable by reference to a particular transaction and counterparty, and it will no longer be a requirement to keep records which evidence communications and instructions that result in the transaction being executed.

The revised Securities and Futures (OTC Derivative Transactions – Reporting and Record Keeping Obligations) Rules have been gazetted and will be tabled before the Legislative Council on 20 May 2015 for negative vetting. The SFC has also published a set of frequently asked questions ([FAQs](#)) to help market participants better understand how the rules operate.

Bankruptcy (Amendment) Bill moved for first reading in Parliament

The [Bankruptcy \(Amendment\) Bill](#) has been moved for its first reading in Parliament.

The Bill seeks to introduce reforms to the bankruptcy regime to create a more rehabilitative regime for bankrupts, ensure better utilisation of public resources and encourage institutional creditors to exercise financial prudence when extending credit. The proposed reforms will apply to bankruptcy applications filed after the Bill comes into effect.

The reforms proposed under the Bill include:

- increasing the bankruptcy debt threshold from SGD 10,000 to SGD 15,000;
- the introduction of a differentiated discharge regime, where bankrupts can be discharged at fixed exit points;
- a new requirement imposed on institutional creditors to appoint private trustees to administer the bankruptcy when applying to make a debtor bankrupt; and
- the keeping of permanent records (on a publicly available register maintained by the Official Assignee)

of bankrupts who fail to pay their target contribution in full prior to discharge.

Financial Advisers (Amendment) Bill 2015 and Insurance (Amendment) Bill 2015 moved for first reading in Parliament

The Financial Advisers (Amendment) Bill 2015 and the Insurance (Amendment) Bill 2015 [have been moved](#) for their first reading in Parliament.

On 26 March 2012, the Monetary Authority of Singapore (MAS) launched the Financial Advisory Industry Review (FAIR) to raise standards and professionalism in the financial advisory industry and to enhance market efficiency in the distribution of life insurance and investment products in Singapore. Following the review, the panel made 28 recommendations on 16 January 2013, most of which were accepted by the MAS on 30 September 2013, following a three-month consultation period.

To implement the FAIR proposals made by the panel, the following key amendments have been set out in the Bills:

- implementation of a balanced scorecard remuneration framework for representatives of financial advisers and supervisors, and regulation of payment and receipt of remuneration;
- the MAS will be vested with powers to prescribe restrictions and conditions on the types of business (other than the provision of financial advisory services) that financial advisers and their representatives are allowed to carry on;
- the MAS will be empowered to prescribe or vary the financial requirements or the limit and deductible requirements of a professional indemnity insurance policy, for registered insurance brokers which carry on a business of providing financial advisory services;
- to facilitate the comparison of life insurance products, the MAS will be empowered to prescribe requirements on information to be submitted for life insurance companies participating in the web aggregator for life insurance products; and
- life insurance companies that serve the retail market will be required to offer direct purchase insurance products (DPI), and provide consumers with a DPI factsheet and checklist that set out important information that consumers should consider when buying any DPI.

Monetary Authority of Singapore (Amendment) Bill passed

The Monetary Authority of Singapore (Amendment) Bill [has been passed in Parliament](#).

The proposed amendments set out in the Bill are intended to strengthen the Monetary Authority of Singapore's (MAS') supervisory powers in relation to anti-money laundering (AML) and countering the financing of terrorism (CFT). The amendments also seek to enhance the MAS' ability to cooperate with its foreign supervisory counterparts and align Singapore's regime with the international standards set by the Financial Action Task Force and the Basel Committee on Banking Supervision.

The Bill provides for the following key amendments to the MAS Act:

- the requirements for financial institutions to conduct customer due diligence and to maintain records;
- the MAS will be vested with the power to inspect financial institutions for compliance with directions or regulations relating to Singapore's international obligations; and

the MAS will be allowed to share information with its foreign AML/CFT counterparts to facilitate the AML/CFT supervision of financial institutions originating from other jurisdictions – any information shared with the MAS counterpart may only be used by them for AML/CFT supervisory purposes.

RECENT CLIFFORD CHANCE BRIEFINGS

Capital Markets Union – Securities Law Reform: Necessary or Not?

The European Commission has unveiled its plan to boost funding and growth across Europe by the creation of a Capital Markets Union.

The Green Paper on Building a Capital Markets Union was issued on 18 February 2015, to stimulate debate on the measures needed to achieve the Commission's 'top priority of jobs and growth', by removing the many obstacles to deeper and more integrated capital markets.

To this end, the US capital markets are often seen as the 'gold standard' that the European markets should aspire to and certain of the proposals seek to emulate that market. One of these priority actions identified in the Green Paper is to develop the European private placement market. A fully

functioning private placement market is seen as key to the development of capital markets union as it allows issuers swift and relatively inexpensive access to the capital of professional investors. The Green Paper indicates the need for securities law reform as a step to achieve this, but is not clear why as the current legislation would allow such a market to develop.

This briefing paper argues that no change in securities law, but perhaps in other laws and practices, is needed and compares the US approach to private placements under Regulation D to the existing European securities laws governing private placements.

http://www.cliffordchance.com/briefings/2015/05/capital_markets_unionsecuritieslawreform.html

Supreme Court decides Olympic Airlines case – and the meaning of establishment for EU Regulation on Insolvency

On 29 April 2015, the English Supreme Court declined an appeal by the trustees of a pension scheme in relation to Olympic Airlines SA, the former state-owned Greek airline. The trustees sought to argue that the English court did have jurisdiction to wind up Olympic Airlines SA as a secondary insolvency proceeding (it was already the subject of Greek main insolvency proceedings).

This briefing paper discusses the Supreme Court decision.

http://www.cliffordchance.com/briefings/2015/05/supreme_court_decidesolympicairlinescasean.html

New BaFin Practice on Lending Business conducted by Alternative Investment Funds

The German Federal Financial Supervisory Authority (BaFin) has declared in a statement dated 12 May 2015 that it intends to modify its existing administrative practice to permit the granting, restructuring and prolongation of loans by alternative investment funds (AIFs). It is likely that this permission will only extend to closed-ended special AIFs (geschlossene Spezial-AIFs) as further legislation is on its way.

This briefing paper discusses the BaFin's statement.

http://www.cliffordchance.com/briefings/2015/05/new_bafin_practiceonlendingbusinessconducted.html

SEC proposes to regulate security-based swap activities of non-US parties conducting dealing activity in the US

The US Securities and Exchange Commission (SEC) has re-proposed regulations relating to security-based swap activity between two non-US persons where at least one is conducting dealing activity within the US. The proposed rules would require unregistered dealers to include security-based swaps in their de minimis calculations, and would impose external business conduct and reporting

requirements, if a security-based swap is arranged, negotiated or executed by personnel in the US.

This briefing paper discusses the proposal.

http://www.cliffordchance.com/briefings/2015/05/sec_proposes_to_regulatesecurities-basedswa.html

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

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