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Briefing note

International Regulatory Update

18-22 May 2015

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MIF Regulation published in Official Journal

The Regulation on Interchange Fees for Card-based Payment Transactions (MIF Regulation) has been published in the Official Journal.

The Regulation sets maximum levels for interchange fees for transactions using:

- credit cards;
- debit cards;
- domestic debit cards; and
- universal cards, that is domestic payment transactions that are not distinguishable as debit or credit cards.

The Regulation will enter into force and apply from 8 June 2015, except for certain provisions which will apply either six months or one year after entry into force. Rules capping interchange fees for consumer debit and credit card transactions will apply from 9 December 2015.

European Long-Term Investment Funds: Regulation published in Official Journal

The Regulation on European Long-Term Investment Funds (ELTIFs) has been published in the Official Journal.

The creation of the ELTIF label is intended to help tackle barriers to long-term investment and stimulate employment and economic growth. ELTIFs will focus on alternative investments that fall within a defined category of long-term asset classes whose successful development requires a long-term commitment from investors.

Only EU alternative investment funds (AIFs) that are managed by alternative investment fund managers (AIFMs), authorised in accordance with the AIFMD, will be eligible to market themselves as ELTIFs. ELTIFs will be subject to additional rules requiring them, amongst other things, to invest at least 70% of their capital in clearly defined categories of eligible assets. Trading in assets other than long-term investments will only be permitted up to a maximum of 30% of their capital.

The Regulation will enter into force on 8 June and apply from 9 December 2015.

Benchmarks Regulation: EU Parliament agrees negotiating mandate

The EU Parliament has agreed on its negotiating mandate for the proposed regulation on indices used as benchmarks in financial instruments and financial contracts.

The proposed regulation aims to curb conflicts of interest in setting benchmarks, such as LIBOR and EURIBOR, which influence financial instruments and contracts and could affect the stability of financial markets across Europe.

Under the proposal:

- the setting of critical benchmarks that affect more than one country would be overseen by a college of supervisors, including the European Securities and Markets Authority (ESMA) and other competent authorities;
- critical benchmark administrators would have to have a clear organisational structure to prevent conflicts of interest, and be subject to effective control procedures;
- the final decision on whether a benchmark is ‘critical’ would be made by ESMA and national authorities, but a national authority could also deem a benchmark administered within its territory to be critical if it has a ‘significant’ impact on the national market;
- all benchmark administrators would have to be registered with ESMA and would have to publish a benchmark statement defining precisely what their benchmark measures and to what extent it is reliable; and
- administrators would also have to publish or disclose existing and potential conflicts of interest and meet accountability, record keeping, audit and review requirements.

The vote consolidates the EU Parliament’s position for trilogue negotiations with the EU Council and the EU Commission. The legislation is expected to be ready by the end of 2015.

EU Parliament plenary session approves recast Regulation on insolvency proceedings

The EU Parliament has adopted the recast Regulation on insolvency proceedings at its plenary session.

The revised rules are intended to improve the efficiency and effectiveness of cross-border insolvency and include:

- further clarification on jurisdiction and the concept of centre of main interest (COMI) to increase legal certainty;
- new rules relating to secondary proceedings and specific guidance on the circumstances under which they may be postponed or refused;
- establishment of interconnected electronic insolvency registers; and
- a new framework of procedural rules for insolvency proceedings concerning different entities within a group of companies.

The plenary endorsement concludes the legislative process. The Regulation will enter into force on the twentieth day following its publication in the Official Journal but will not apply until 2017 following a twenty-four month lead-in time, except where indicated in the Regulation.

AMLD 4: EU Parliament approves agreed text

The EU Parliament has adopted the fourth Anti-money Laundering Directive (AMLD 4) and Regulation on information accompanying transfers of funds (FATF 2 Regulation) at its Plenary session.

The new rules will implement recommendations by the Financial Action Task Force and include:

- a greater scope than the previous AMLD, such as a lower cash payment threshold, the inclusion of traders in goods and provisions to include providers of gambling services;
- tighter rules on customer due diligence, including a risk-based approach and requirements for gambling service providers on transactions of EUR 2,000 or more except in strictly limited circumstances;
- establishing central registers of information on beneficial ownership of companies that will be accessible to competent authorities, financial intelligence units and obliged entities such as banks – Member States will have the option to establish public registers if they wish; and
- rules on sanctions that establish the maximum pecuniary fine of at least twice the amount of the benefit derived from a breach or at least EUR 1 million, with a higher minimum for breaches involving credit or financial institutions.

The FATF 2 Regulation is intended to improve the traceability of payers and payees and their assets.

Once published in the Official Journal, Member States will have two years to transpose AMLD 4. The FATF 2 Regulation will apply twenty days after its publication in the Official Journal.

EMIR: EU Commission consults on implementation

The EU Commission has launched a public consultation on the implementation of and first experience with the European Market Infrastructure Regulation (EMIR). The consultation will inform the review the Commission is required to undertake under Article 85(1) of EMIR. In particular, the review is intended to assess the access of central counterparties (CCPs) to central bank liquidity facilities, the functioning of supervisory colleges for CCPs, and the margin practices of CCPs. The review will also assess the systemic importance of non-financial firms.

Comments are due by 12 August 2015.

ESMA publishes opinion on impact of EMIR on UCITS Directive

The European Securities and Markets Authority (ESMA) has published an opinion to the EU institutions on the impact of EMIR on the Undertakings for Collective Investment in Transferable Securities (UCITS) Directive.

In its opinion, ESMA calls for a modification of the UCITS Directive to take into account the clearing obligations for certain types of over-the-counter (OTC) financial derivative transactions under EMIR. Under EMIR certain OTC derivative transactions are subject to the clearing obligation, raising the question of how the limits on counterparty risk in OTC financial derivative transactions that are centrally cleared should be calculated by UCITS, and whether UCITS should apply the same rules to both OTC financial derivative transactions that are centrally cleared and exchange-traded derivatives (ETDs).

ESMA's opinion is that counterparty risk limits should be calibrated to the different types of segregation arrangements taking into account elements such as the portability of the position in the case of a default of the clearing member. In particular, ESMA believes that under individual segregation, UCITS should not apply counterparty risk limits to clearing members whereas under omnibus client segregation UCITS should apply some counterparty risk limits.

BRRD: EBA publishes guidance on implementation of resolution tools

The European Banking Authority (EBA) has published three sets of final guidelines aimed at facilitating the implementation of resolution tools in the banking sector across the EU. The guidelines, which stem from the EU Bank Recovery and Resolution Directive (BRRD), aim to foster convergence on resolution matters by giving detailed guidance to EU resolution authorities on the circumstances they should assess when taking their resolution decisions.

The guidelines are on:

- the sale of business tool – these guidelines specify that authorities may deviate from the standard marketing requirements for the sale of the business of an institution under resolution, if the failure of the institution represents a material threat to financial stability and there is a conflict between the effectiveness of the tool and the marketing requirements;

- the asset separation tool – these guidelines provide guidance on what assets may be transferred to an asset management vehicle; and
- the minimum list of services – these guidelines define a minimum list of necessary critical services that resolution authorities may require from institutions under resolution.

The guidelines are addressed to competent authorities and will apply from 1 August 2015. Following the publication of the English version, the EBA will make available the translations of the guidelines in all EU languages. Within two months from the publication of the translated guidelines, competent authorities shall confirm to the EBA their compliance status, which will be disclosed on the EBA website.

Resolution: BoE consults on draft Statement of Policy on power to direct institutions to address impediments to resolvability

The Bank of England (BoE) has launched a consultation on a proposed Statement of Policy regarding its use of the power to direct institutions to address impediments to resolvability, which was introduced as part of the transposition of the BRRD in the UK. The BoE is the UK resolution authority and the consultation paper sets out the context of the new power within the special resolution regime (SRR) and the Bank's policy proposals on its use.

The BoE is responsible for preparing resolution plans for all institutions within the scope of the SRR to ensure that institutions are resolvable without excessive disruption to the financial system or critical economic functions, or extraordinary public financial support. Resolution planning includes resolvability assessments by the BoE, which may lead to necessary actions for institutions to ensure that the BoE can effectively use its stabilisation powers contained in the SRR or wind up the institution. Where impediments to resolvability are identified, the BoE will work to address these with institutions but new powers also enable the BoE to direct institutions to take actions on resolvability. The draft Statement of Policy includes a non-exhaustive list of examples in which the BoE may exercise this power under its duties set out in Section 4 of the Banking Act 2009 and the special resolution objectives.

The draft Statement of Policy takes into account EBA guidelines on measures to reduce or remove impediments to the resolvability of institutions published on 19 December 2014. The BoE also intends to consult the Prudential Regulation Authority (PRA) as the competent authority with a statutory objective to ensure the orderly resolution of institutions that fail.

Comments on the consultation are due by 22 August 2015.

CSSF issues circular regarding documents to be submitted after end of financial year

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued circular 15/614 dated 13 May 2015 regarding documents to be submitted to the CSSF after the closure of the financial year by payment institutions and electronic money institutions.

The circular applies as from the financial year ending on 31 December 2015. In terms of timing, the circular distinguishes between documents which need to be submitted to the CSSF as soon as possible and:

- after the ending of and at the latest two weeks prior to the ordinary general meeting (short form report on annual accounts, proposed results allocation and final version of the periodic reporting tables);
- at the latest on the last day of the third month after the closing date (summary report drawn up and signed by the internal auditor, management report on internal control signed by the authorised management and signed annual report of the compliance officer); and
- at the latest one month after the ordinary general meeting (annual long form external auditor report and the minutes and attendance list of the ordinary general meeting).

Polish Council of Ministers adopts draft Act on financial market supervision

The Polish Council of Ministers has adopted a Bill amending the Act on Financial Market Supervision, the Act – Banking Law and Certain Other Acts. The objective of the Bill is to increase the level of protection for consumers using the services of firms granting consumer credits and loans which are not obliged to have a permit from the Polish Financial Supervision Authority to conduct such activity. The Bill is also intended to prevent entities conducting regulated activity on the financial market without a permit, i.e. unlawfully, from trading.

Capital Markets Union: Dutch government responds to Commission Green Paper and consultations

The Dutch government has submitted its response to the EU Commission's Capital Markets Union (CMU) Green

Paper and the related consultation documents on securitisation and the Prospectus Directive (PD).

The Dutch government agrees with the prioritised areas for short term action identified by the Commission. In particular, the government believes that lowering barriers for access to capital markets, while widening the investor base for small and medium enterprises, creating a high quality securitisation market, boosting long-term investment funds and developing private placement markets are all key priority areas. It adds that further priorities should be to ensure that retail investors have better access to capital markets, to remove investment barriers for institutional investors, to support the development of alternative financing and to establish an effective framework for the recovery and resolution of central counterparties.

The Dutch government is concerned about whether the PD is still fit for purpose, noting that despite the requirements in the PD that prospectuses should be easy to analyse, there are signs that investors (including professional investors) have difficulty understanding them. Several suggestions are made to make prospectuses more readable.

With respect to the consultation on an EU framework for simple, transparent and standardised securitisation, the Dutch government believes that urgent and clear steps are needed to ensure securitisation can contribute to the CMU and to safeguard the viability of the EU securitisation market as a whole. The response highlights standardisation as being of great importance in this area.

State Council removes approval requirement for offshore bond issuances

The State Council has issued the 'Notice on the Removal of Non-administrative Licensing Approval Items' to further simplify the current approvals regime. In particular, the Notice removes the approval requirement for offshore issuances of RMB or foreign currency bonds by domestic enterprises and authorises the National Development and Reform Commission (NDRC) to internally approve the size of foreign debts.

According to the Notice, the NDRC shall work together with other approval authorities (including the State Administration of Foreign Exchange and the People's Bank of China) in charge of offshore bond issuances to implement the Notice, and therefore it is anticipated that detailed rules will be worked out to clarify the subsequent monitoring regime.

Until detailed rules are issued, it is uncertain whether the NDRC (jointly with other approval authorities) will provide alternative aggregate quota/registration/filing requirements to monitor the offshore bond issuances of domestic enterprises or permit such offshore bond issuances without any limitation.

The Notice does not seem to affect the current foreign debt registration requirements or applicable restrictions on the use of proceeds under offshore bond issuances.

SFC and CSRC sign agreement on Mainland-Hong Kong mutual recognition of funds

The Securities and Futures Commission (SFC) and the China Securities Regulatory Commission (CSRC) have signed a Memorandum of Regulatory Cooperation on Mainland-Hong Kong Mutual Recognition of Funds, which will allow eligible Mainland and Hong Kong funds to be distributed in each other's market through a streamlined vetting process. The scheme will be implemented on 1 July 2015.

In their joint announcement, the SFC and CSRC set out, amongst other things, the following details of the Mainland-Hong Kong Mutual Recognition of Funds (MRF) initiative:

- through the MRF, the CSRC and SFC will allow Mainland and Hong Kong funds that meet the eligibility requirements to follow streamlined procedures to obtain authorisation or approval for offering to retail investors in each other's market;
- the MRF will lay the foundation for the CSRC and SFC to jointly develop a fund regulatory standard, provide more diverse fund investment products to Mainland and Hong Kong investors and enhance the international competitiveness of Mainland and Hong Kong fund management firms;
- the CSRC and SFC have respectively prepared the 'Provisional Rules for Recognised Hong Kong Funds' and 'Circular on Mutual Recognition of Funds between the Mainland and Hong Kong'. The documents set out the eligibility requirements, applications procedures, operational requirements and regulatory arrangements of the MRF. The documents will form the basis of regulation and enforcement, and market participants' business operations; and
- the CSRC and SFC will establish equivalent eligibility requirements for recognising Hong Kong and Mainland funds, to promote the mutually beneficial development of recognised funds and broadly balanced cross-border in and out fund flows. The initial investment quota for

the MRF will be RMB 300 billion for in and out fund flows each way.

SFC launches new register of cold shoulder orders

The SFC has launched a new public register of cold shoulder orders to facilitate compliance by intermediaries when dealing with clients who are subject to these sanctions. A cold shoulder order is a sanction that prevents a person from trading in Hong Kong for up to five years.

The new register, which can be accessed under the Alert List on the homepage of the SFC's website, contains the names of those who are the subject of current cold shoulder orders made by the courts, the Market Misconduct Tribunal (MMT) or the Takeovers Panel. Names on the list will be deleted once the period of prohibition or disqualification is completed.

The SFC has encouraged intermediaries to refer to the list from time to time to ensure compliance with the orders.

MAS responds to feedback on consultation on its proposed credit bureau regulatory framework and Credit Bureau Bill

The Monetary Authority of Singapore (MAS) has published its responses to the feedback it received on its August 2014 consultation on the proposed credit bureau regulatory framework and a draft Credit Bureau Bill (CBB) for Singapore.

Amongst other things, the MAS has confirmed that:

- the CBB will apply to credit bureaus that collect credit data from any licensed bank in Singapore;
- it will prescribe in regulations the turnaround time for various stages of dispute resolution such as investigation, updating of erroneous data, and informing other members of the update of erroneous data;
- it will amend the CBB to require licensed credit bureaus (LCBs) to provide, upon request by the consumer, a free credit report within 30 days from the date of credit approval or rejection; and
- while consumers are entitled to free credit reports, there are no restrictions against LCBs charging fees for value-added services such as an express mail service for credit reports.

RECENT CLIFFORD CHANCE BRIEFINGS

Another knock for unilateral jurisdiction clauses in Europe

Unilateral, or one-sided, jurisdiction clauses are common in financial agreements. Typically, they provide that the borrower can sue the finance parties in one specified court only, that the finance parties can sue the borrower in that same court, but that the finance parties can alternatively sue the borrower in any other court with jurisdiction if they wish. The French Cour de cassation decided in 2012 that jurisdiction clauses of this sort were unenforceable in their entirety as a matter of EU law, and it has recently reiterated that conclusion in another case.

Some other EU courts also take this line, while others have upheld unilateral clauses, and until the Court of Justice of the European Union resolves the issue, uncertainty over unilateral jurisdiction clauses will remain.

This briefing paper discusses the recent Cour de cassation decision and its implications.

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

BEPS Action 7 – what do the OECD's new permanent establishment proposals mean for business?

For almost a hundred years, OECD member countries have accepted that a non-resident's business will only become subject to tax in certain narrow circumstances. This has been widely criticised in recent years by the media and politicians – and it may now be changing.

In a revised discussion draft published on 15 May, as part of its 'BEPS' Project, the OECD are proposing that mere negotiation should create a taxable permanent establishment. This has wide implications for cross-border trade and business.

This briefing paper looks at the practical impact of the proposals on key industries and sectors (including the impact on financial services on page 4) and asks what steps businesses should be taking to anticipate these changes.

http://www.cliffordchance.com/briefings/2015/05/beps_action_7_whatdotheoecdsnewpermanen.html

Saudi Arabia opens stock market to Qualified Foreign Investors from 15 June 2015

Further to the publication by the Capital Market Authority of Saudi Arabia (CMA) of the Draft Rules for Qualified Foreign

Financial Institutions Investment in Listed Shares for public consultation on 21 August 2014, the CMA has recently approved the final version of the rules with a number of changes having been made to the Consultation Draft.

On 4 May 2015, the CMA approved the rules that will govern the investment by Qualified Foreign Investors (QFIs) into shares listed on the Saudi Arabian Stock Exchange, together with supplementary material that includes a helpful set of frequently asked questions (FAQs), which can be viewed on the CMA's website.

This briefing paper discusses the final version of the Rules.

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

The updated UAE Federal Anti-Money Laundering Framework

The UAE has recently brought its anti-money laundering (AML) and combating terrorism financing (CTF) legal arrangements into closer alignment with the OECD's Financial Action Task Force's Recommendations (FATF Recommendations) by implementing significant changes and enhancements to the law.

The new law is applicable to all financial institutions and other regulated entities. We recommend affected firms review their internal governance systems to ensure they are aligned with the increased requirements or risk significant penalties.

This briefing paper provides a summary of the changes, which fall into the two following categories:

- the widened scope of the UAE's money laundering (ML) and terrorism financing (TF) offences and higher penalties; and
- the UAE's new regulatory framework for the regulation of AML and CTF.

http://www.cliffordchance.com/briefings/2015/05/the_updated_uae_federalanti-moneylaunderin.html

Delaware Supreme Court rules independent directors may rely on section 102(b)(7) to dismiss claims against them in controlling stockholder squeeze-out mergers

On 14 May 2015, the Delaware Supreme Court, in an opinion authored by Chief Justice Strine, considered interlocutory appeals in two related cases, In re Cornerstone Therapeutics Inc. Stockholder Litigation, C.A. No. 8922-VCG and Leal v. Meeks, C.A. No. 7393–VCN, to decide a single legal question: Where a plaintiff challenges an interested transaction that is presumptively subject to entire fairness review (such as a squeeze-out merger by a controlling stockholder), must the plaintiff plead a non-exculpated claim against disinterested, independent directors in order to survive a motion to dismiss?

Resolving conflicting prior rulings in the Chancery Court, the Supreme Court ruled in the affirmative, holding that '[a] plaintiff seeking only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct – be it Revlon, Unocal, the entire fairness standard, or the business judgment rule.'

This briefing paper discusses the ruling.

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