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Briefing note

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Payment services: EU Parliament plenary adopts PSD 2

The EU Parliament has adopted the recast Payment Services Directive (PSD 2) at its plenary session. PSD 2 will repeal Directive 2007/64/EC and includes rules on:

- emerging payment services, including internet and mobile payments;
- payment security; and

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- harmonisation of the supervisory framework by national competent authorities (NCAs).

The proposals require formal adoption by the EU Council of Ministers prior to publication in the Official Journal. Once finalised, Member States will have two years to transpose the Directive into national laws.

Joint Committee of ESAs publishes 2016 work programme

The Joint Committee of the European Supervisory Authorities (ESAs), comprising the European Banking Authority (EBA), the European Securities and Markets Authorities (ESMA) and the European Insurance and Occupational Pensions Authority (EIOPA), has published its work programme for 2016. The ESAs will continue to prioritise consumer protection and cross-sectoral risk analysis. They also intend to continue work in regulatory areas including packaged retail and insurance-based investment products (PRIIPs) and anti-money laundering.

MiFIR: ESMA announces delay in submitting RTS on indirect clearing

ESMA has published a letter notifying the EU Commission of a delay in the submission of its draft regulatory technical standards (RTS) on indirect clearing for exchange-traded derivatives under the Markets in Financial Instruments Regulation (MiFIR) in order to ensure consistency with the European Market Infrastructure Regulation (EMIR) RTS on the indirect clearing of OTC derivatives. ESMA has concluded that amendments to the EMIR RTS need to be considered to address concerns raised by stakeholders and it intends to launch a consultation on these changes shortly. Both sets of draft RTS together will then be submitted to the Commission for endorsement at the same time.

CRR: EBA issues opinion on mortgage lending value

The EBA has issued an opinion on mortgage lending value (MLV), which is referred to in several areas of the Capital Requirements Regulation (CRR) relating to the Standardised Approach, credit risk mitigation framework, large exposures framework and indirectly in the context of eligibility criteria for the covered bond preferential risk weights. The EBA is mandated under the CRR to draft RTS to specify the criteria for the assessment of MLV, but in its opinion the EBA raises concerns about possible unintended consequences arising from a harmonised definition of MLV across the CRR on the EU covered bonds market, and highlights potential operational consequences of a change in the valuation of immovable property collateral and the fact that such valuation plays a central role in the calculation of capital requirements in covered bond markets.

The EBA has called on the Commission to clarify the scope of its mandate for drafting the RTS and has advised the Commission of its view that, if necessary, legislative steps should be taken to limit the scope of the draft RTS to the Standardised Approach, credit risk mitigation framework and large exposures framework. The EBA has confirmed that it intends to carry out no further work on the mandate until the Commission has clarified its position.

Committee on Payments and Market Infrastructures consults on correspondent banking

The Committee on Payments and Market Infrastructures (CPMI) has published a consultative report on correspondent banking.

The report provides some basic definitions, outlines the main types of correspondent banking arrangement, summarises recent developments and touches on the underlying drivers. The report then reviews certain technical measures relating to:

- know-your-customer (KYC) utilities;
- increased use of the Legal Entity Identifier (LEI);
- information-sharing mechanisms; and
- improvements in payment messages.

Following an assessment of the advantages and disadvantages of each of these technical measures, the report puts forward four recommendations for consideration by the industry and authorities.

Interchange Fees Regulation: UK Government publishes approach to national discretions

HM Treasury (HMT) has published its final approach to the Interchange Fees Regulation (MIF Regulation – 2015/751) following a consultation launched on 27 July 2015.

The MIF Regulation is directly applicable in EU Member States but includes national discretions in three areas. The paper sets out the Government's feedback to comments on the consultation and its final approach to each discretion relating to:

- caps on interchange fees for domestic credit card transactions, which the Government will set at 0.3% in line with the default position set out in the MIF Regulation;
- interchange fees for domestic debit card transactions, for which the Government will exercise the national

discretion to allow card schemes to set a weighted average rate that must not exceed 0.2% of the annual overall transaction value of all domestic card transactions within each payment card scheme; and

- three party schemes that use issuers or acquirers and have a market share below 3%, for which the Government will apply its national discretion to exempt from the regulations for up to three years.

The Government has also confirmed that the Payment Systems Regulator (PSR) will take the role of lead enforcer of the regulations. Caps on interchange fees will apply from 9 December 2015.

Whistleblowing: FCA and PRA publish final rules for new regime

The Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) have published their final policy statements on whistleblowing (FCA PS15/24 and PRA PS24/15) following a joint consultation, which was launched in February 2015. The policy statements outline feedback to responses received to the consultation and the final rules, which will apply to UK deposit-takers with assets of GBP 250 million or more, PRA-designated investment firms and insurance and reinsurance firms within the scope of Solvency II, the Society of Lloyd's and managing agents. Other firms may apply the rules on a voluntary basis.

The rules require firms to:

- appoint a senior manager to the role of whistleblower champion;
- put in place internal whistleblowing arrangements;
- put wording in settlement agreements that explain employees' right to blow the whistle; and
- inform UK-based employees about FCA and PRA whistleblowing services.

The FCA policy statement additionally requires firms to:

- report to the board on whistleblowing at least on an annual basis;
- inform the FCA if the firm loses a tribunal hearing with a whistleblower; and
- require appointed representatives and tied agents to inform UK-based employees about the FCA whistleblowing service.

In addition to its policy statement, the PRA has also published a supervisory statement (SS39/15) that sets out the PRA's expectations on how firms should comply with the PRA's rules on whistleblowing, including whistleblowing procedures and training.

Appointment of the whistleblowers champion is due by 7 March 2016, in order that the role is created to coincide with the Senior Managers Regime and Senior Insurance Managers Regime taking effect. Relevant firms will have until 7 September 2016 to comply with the remaining requirements, for which the whistleblowers champion will be responsible for overseeing the necessary steps to comply.

The FCA intends to launch a consultation on the application of the whistleblowing rules to UK branches of overseas banks soon. Moreover, the FCA intends to consider whether similar rules should be applied to other firms regulated by the FCA once the rules have been in place long enough for their effectiveness to be assessed.

FCA and PRA launch joint consultation on regulatory references

The FCA and PRA have launched a joint consultation (FCA CP15/31 and PRA CP36/15) on employer references that pass between firms when individuals move roles, known as regulatory references. The FCA and PRA previously consulted on employer references for candidates applying for certain positions at banks, building societies, credit unions and PRA investment firms, which are relevant authorised persons (RAPs) under the Financial Services (Banking Reform) Act 2013, and Solvency II insurers, but delayed making rules in order to reflect recommendations from the Fair and Effective Markets Review (FEMR). The consultation paper sets out proposed rules relating to specific disclosures that should be made in regulatory references for candidates applying for:

- senior management functions (SMFs) under the senior managers regime (SMR), PRA senior insurance management functions (SIMF) under the senior insurance managers regime (SIMR) and certified functions at RAPs;
- significant harm functions under the certification regime (CR);
- FCA insurance controlled functions;
- notified non-executive director (NED) roles;
- NED roles at credit unions; and
- key function holder (KFH) and notified NED roles at insurers.

The consultation paper sets out the main requirements for RAPs, Solvency II insurers and large non-Directive insurers (NDFs), which include:

- requesting regulatory references from former employers of candidates applying for SMR, SIMR and certified function roles in RAPs going back six years;
- modifying certain prescribed responsibilities for senior managers in RAPs and insurers to include compliance with regulatory references rules;
- mandating the inclusion of breaches of FCA and PRA conduct rules by approved persons, key function holders and notified NEDs going back six years; and
- requiring RAPs and insurers to update previous references given more than six years ago in cases where the firm is aware of matters that would have changed their original assessment.

Moreover, the PRA has set out proposals for all KFHs at insurers to have an up-to-date and agreed document setting out their scope of responsibilities (SoR) and for these insurers to retain SoR documentation along with associated governance maps for ten years for all Solvency II insurers and six years for all NDFs.

The regulators are also consulting on proposals applicable to all authorised firms relating to:

- requirements for firms not to enter into any arrangements or agreements limiting their ability to disclose necessary information;
- systems and controls for record retention; and
- policies and procedures for requesting and providing regulatory references.

Comments on the consultation are due by 7 December 2015. The FCA and PRA intend to publish final rules in early 2016 ahead of SMR and SIMR taking effect on 7 March 2016. The regulators have also announced that they intend to consider whether the specific proposals for RAPs and insurers should extend to all authorised firms.

BaFin publishes guidance on tasks and duties of depositaries

The German Federal Financial Supervisory Authority (BaFin) has published its Circular 08/2015 (WA) on the Tasks and Duties of the Depositary pursuant to Chapter 1 Section 3 of the German Capital Investment Act. The Circular clarifies specific questions pertaining to the tasks and duties of the depositary pursuant to Chapter 1 Section 3 of the German Capital Investment Act (KAGB) and Chapter IV of Commission Delegated Regulation (EU) No 231/2013 of 19 December 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision (Level 2 Regulation). The Circular covers, among other things, the requirements to be met by a depositary to be approved by BaFin, the safe-keeping of assets, sub-custody and inspection obligations.

The Circular replaces BaFin's former Circular 6/2010 (WA) on the Tasks and Duties of the Custodian pursuant to Sections 20 et seqq. InvG dated 2 July 2010.

The Circular does not yet include the requirements proposed by Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions (UCITS V Directive). The Circular will therefore have to be amended once the requirements of Directive 2014/91/EU have been implemented into German law.

The clarifications and obligations deriving from the Circular shall be implemented by 4 April 2016 at the latest.

Dutch Minister of Finance withdraws proposed legislation regarding change of auditor

The Dutch Minister of Finance has decided to withdraw proposed legislation regarding compulsory audit firm rotation every 10 years.

The Dutch legislator had intended to implement certain provisions of Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC before the Regulation entered into force. The proposed Dutch legislation applied the auditor rotation requirement with retroactive effect (i.e. the starting point of the 10 year period would have been the date that the auditor was last switched). The retroactive effect appeared to be in conflict with the Regulation. Therefore the Minister of Finance has withdrawn the proposed legislation regarding the change of auditor. As a consequence, the Regulation will determine when an auditor should be changed.

The Regulation will enter into force on 17 June 2016 and includes transitional provisions in Article 41.

Polish Financial Supervision Authority adopts assumptions for amendment of C Recommendation regarding management of concentration risk

The Polish Financial Supervision Authority (PFSA) has adopted assumptions for the amendment of the C Recommendation, addressed to banks and regarding the management of concentration risk.

The changes will primarily include the introduction of provisions regarding:

- having in place the policies, strategies and respective procedures for the management of concentration risk;
- determining the level of tolerance with respect to concentration risk;
- having in place the process of identification and measurement of concentration risk;
- having in place the mechanisms for active control, monitoring and mitigation of concentration risk;
- taking concentration risk into account in the internal capital adequacy assessment process (ICAAP) performed by the bank;
- taking concentration risk into account with respect to the exposure resulting from shadow banking as well as intra-group exposures; and
- understanding the principles for netting off exposures and the legal effectiveness of the net-offs.

The draft amendment of the C Recommendation will be submitted for public consultation in the fourth quarter of 2015.

FSTB publishes consultation response on establishment of an effective resolution regime for financial institutions in Hong Kong

The Hong Kong Government and the financial regulators, namely the Hong Kong Monetary Authority (HKMA), the Securities and Futures Commission (SFC) and the Insurance Authority (IA), have released a consultation response to the second stage of public consultation on proposals to establish a cross-sector resolution regime for financial institutions, including financial market infrastructure, in Hong Kong. The consultation response summarises respondents' views on the proposals, and sets out the government's responses along with its refined policy positions on certain aspects of the proposed resolution regime.

Taking into consideration respondents' comments and observations as well as ongoing developments in international practice, the consultation response contains further information on the latest policy position in relation to certain aspects of the proposed regime, including pre-resolution powers, loss absorbing capacity requirements to facilitate bail-in, resolution funding arrangements, the recognition of cross-border resolution actions and safeguards for those affected by resolution action, including appeal mechanisms.

The FSTB expects that a bill to establish the local resolution regime will be introduced into the Legislative Council by the end of 2015. Any interested party that wishes to raise substantive points regarding the contents of the consultation response should submit their comments to the relevant regulatory authorities as soon as possible. The government and the financial regulators will continue their dialogue with stakeholders throughout the legislative process and thereafter when rules, codes of practice and guidance are developed and issued.

SFC launches pilot initiatives to enhance fund authorisation process

The SFC has announced the launch of new initiatives to enhance the authorisation process for new fund applications (revamped process) and for new mandatory provident funds (MPF) and pooled retirement fund (PRF) products. Both initiatives will be implemented on 9 November 2015 for a six-month pilot period after which refinements may be made before the initiatives will be adopted as policy.

Under the revamped process, new fund applications will be bifurcated into two streams, namely 'standard applications' and 'non-standard applications', with a view to promoting fund providers' self-compliance and reducing the overall processing time. Under this approach, standard applications will be fast-tracked with the aim that SFC authorisation (if granted) will be given on average between one to two months from the take-up date of the applications. Non-standard applications will be processed under an enhanced process with the aim that SFC authorisation (if granted) will be given on average within two to three months from the take-up date of the applications.

The SFC has devised a set of minimum disclosure requirements for offering documents (which forms part of the Guide on Practices and Procedures for Application for Authorization of Unit Trusts and Mutual Funds issued by the SFC in support of the revamped process) and compiled a streamlined new information checklist. The SFC has also published a set of frequently asked questions (FAQs) on

application procedures for authorisation of unit trusts and mutual funds under the revamped process.

Separately, a six-month application lapse policy will be applied to applications for new MPF and PRF products seeking SFC authorisation following consultations with the Mandatory Provident Fund Schemes Authority (MPFA) and key industry stakeholders. This will bring the authorisation process of these products in line with the six-month application lapse period currently applied to other SFC-authorised investment products in order to enhance the overall efficiency of the authorisation process.

ASIC extends Phase 3B commencement date for reporting of OTC derivatives

The Australian Securities & Investments Commission (ASIC) has extended the commencement date for phase 3B reporting entities from 12 October 2015 to 4 December 2015. ASIC believes that the extension should provide sufficient time, for those who require it, to put in place final arrangements for the last phase of trade reporting in Australia. Phase 3B reporting entities are those Phase 3 reporting entities with less than AUD 5 billion gross notional outstanding OTC derivative positions as at 30 June 2014 and that were not required to report in Phase 1 or 2.

RECENT CLIFFORD CHANCE BRIEFINGS

Capital Markets Union – What's the plan?

The European Commission has issued its Action Plan on Capital Markets Union, outlining the steps to be taken in order to establish a single market for capital in all 28 member states of the EU. The Action Plan follows a Green Paper on Capital Markets Union which was issued in February 2015 and separate consultations issued at the same time on the Prospectus regime and the proposed EU framework on 'simple, transparent and standardised' securitisation.

This briefing paper summarises the main elements of the plan and outlines the indicative timeline and next steps.

http://www.cliffordchance.com/briefings/2015/10/capital_markets_unionwhatstheplan.html

Safe Harbor declared invalid – what it means for your business

The Court of Justice of the EU has published its judgment in the case of Schrems v Data Protection Commissioner (C-362/14), declaring the European Commission's decision on the EU/US 'safe harbor' arrangement to be invalid. This will have significant implications for transfers of European personal data to the US. European organisations making transfers, and US organisations participating in the safe harbor, need to be watching developments and developing their go-forward compliance strategies.

This briefing paper discusses the judgment.

http://www.cliffordchance.com/briefings/2015/10/safe_harbor_declaredinvalidwhatitmeansfo.html

BEPS – The Final Report

The OECD has published the final package of recommendations to reform the international tax system – the 'BEPS' Project.

Our initial view is that on the face of it the recommendations would have a profound impact on many businesses (even those that don't operate cross-border). The changes to treaty relief, interest deductibility and permanent establishment changes will have particularly wide implications and include:

- a proposal to cap interest deductibility to a % of EBITDA (with countries able to set a cap between 10% and 30%, with limited exceptions). Some countries (such as Germany) already have similar interest barrier rules; many others (e.g. the UK, The Netherlands, Ireland, Luxembourg) do not. If implemented this proposal would have very significant implications; and
- a proposal to counter 'treaty abuse', introducing a 'limitation on benefit' article that will make it very hard for SPVs and other non-bank lenders to take advantage of tax treaty relief.

However, despite being labelled as the 'final' recommendations, in reality much remains up in the air – the big questions are which countries will implement at all, which elements will they choose to implement, and which countries will ignore the process entirely.

This set of briefing papers provides an analysis of the recommendations and their likely practical impact

http://www.cliffordchance.com/briefings/2015/10/beps_-_the_finalreport.html

Insurance Global – Autumn 2015

Clifford Chance has prepared the first edition of Insurance Global, a new half yearly publication which highlights legal developments on the global horizon and outlines the key

challenges facing both established and emerging insurance markets in the coming months.

Although insurance and reinsurance is increasingly global, the underpinning infrastructure supporting these markets is often localised. Clifford Chance, using its international offices based in over twenty different countries, highlights local legal knowledge in this publication. And, by outlining jurisdictional specific developments, demonstrates Clifford Chance's unique ability to deliver exceptional and up-to-date solutions for our local and global insurance clients.

The Autumn 2015 edition focuses on developments in the European sphere, namely the forthcoming Solvency II legislative package and the Insurance Distribution Directive, and on the global stage with legal updates from Germany, Italy, Luxembourg, Poland, Spain, the United Arab Emirates, the United Kingdom and the United States.

http://www.cliffordchance.com/briefings/2015/10/insurance_global-autumn2015.html

Cyber crime – a growing threat to financial institutions

Combating cyber crime is now at the top of the agenda for government and industry alike. This is in recognition of the fact that in an increasingly cashless society, the opportunities for cyber-enabled fraud will increase and attract growing criminal interest. In turn this means that financial institutions need 'best-in-class' protection against cyber crime. The challenges in doing so however were spelt out by the UK National Strategic Assessment of Serious and Organised Crime 2015 published in June 2015: 'the pace of technological change and the adaptability of the cyber criminal means that law enforcement will always be playing catch-up.'

This briefing paper discusses the threat of cyber crime and the expectations on financial institutions.

http://www.cliffordchance.com/briefings/2015/10/cyber_crime_-_a_growingthreattofinancia.html

Cyber-Attack – Seeking refuge in the English Courts

Cyber attacks expose companies to many risks, including reputational damage and claims from employees and third parties. Companies need to plan how they will respond to an attack, and the possibility of court action must be part of any plan. Courts do not offer all the answers but, in appropriate circumstances, courts can restrict dissemination of confidential information or, if that is not possible, turning to the courts displays publicly that the victim is determined to respond seriously and openly to the attack.

This briefing paper discusses the role of the courts in businesses' responses to cyber attacks.

http://www.cliffordchance.com/briefings/2015/10/cyber-attack_seekingrefugeintheenglishcourts.html

Corporate Reporting under the Modern Slavery Act 2015

It is expected that from October 2015, certain commercial organisations will be required to report on steps that they have taken to ensure that slavery and human trafficking is not taking place in their business and supply chains. Accordingly, businesses need to consider now whether they are caught by the Act and if so, how to prepare to comply with the new reporting requirement.

This briefing paper discusses the implications of the Act and what it means for your business.

http://www.cliffordchance.com/briefings/2015/10/corporate_reportingunderthemodernslaveryac.html

US Supreme Court refuses to hear controversial insider trading case

On 5 October 2015, the US Supreme Court denied the US Solicitor General's petition for writ of certiorari to review the Second Circuit's controversial 2014 insider trading decision, United States v. Newman, 773 F.3d 438 (2d Cir. 2014). The Supreme Court's denial means that Newman will remain good law in the Second Circuit – a proposition that has far-reaching implications for future insider trading enforcement.

This briefing paper discusses the judgment.

http://www.cliffordchance.com/briefings/2015/10/u_s_supreme_courtrefusestohearcontroversia.html