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Briefing note

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HM Treasury publishes draft Banking Reform Bill

The UK government has published the draft Financial Services (Banking Reform) Bill, which is intended to implement the recommendations of the Independent Commission on Banking. Amongst other things, the Bill provides for the Treasury to set (in secondary legislation) the scope of ring-fencing policy, i.e. which activities are to be undertaken within ring-fenced banks, and which are to be prohibited or excluded and to whom ring-fencing applies. The Treasury may confer powers upon the appropriate regulator to determine technical matters, according to the purposes set out in primary and secondary legislation. The government has indicated that it will consult fully with the regulator before conferring any such powers. In addition, the Bill requires the regulator to use its existing powers to make rules governing the legal, economic and operational independence of the ring-fenced bank, according to the policy set by the government.

While the draft Bill is primarily focused on banking reform, other broader changes will also be brought forward, including reform of the Payments Council and changes to the governance structure of the Financial Services Compensation Scheme (FSCS), which will be included in the Bill when it is formally introduced to Parliament.

The draft Bill will now be scrutinised by the Parliamentary Commission on Banking Standards, chaired by Andrew Tyrie, prior to its formal introduction into Parliament. The Tyrie Commission will report by 18 December 2012 and the Bill will be introduced into Parliament early in 2013.

MiFID review: EU Council Presidency publishes compromise texts; ECON Committee publishes amendments to Commission proposal

The Cyprus EU Council Presidency has published new compromise texts for the proposals for a directive on markets in financial instruments repealing Directive 2004/39/EC (MiFID 2) and a regulation on markets in financial instruments and amending the regulation on OTC derivatives, central counterparties and trade repositories (MiFIR).

Separately, the European Parliament's ECON Committee has published its amendments to the European Commission's proposals, which the Committee adopted on 26 September 2012. The Parliament's plenary session is expected to vote on the proposals on 26 October 2012.

EU Council Presidency compromise – proposed directive
EU Council Presidency compromise – proposed regulation
ECON Committee report on MiFID 2
ECON Committee report on MiFIR

Market abuse: EU Council Presidency publishes compromise texts; ECON Committee sets out position on Commission proposals

The Cyprus EU Council Presidency has published new compromise texts for the proposals for a regulation on insider dealing and market manipulation (market abuse) and a directive on criminal sanctions for insider dealing and market manipulation.

In addition, the European Parliament's ECON Committee has voted on the European Commission's proposals for a regulation on insider dealing and market manipulation (market abuse) and a directive on criminal sanctions for insider dealing and market manipulation.

The Committee has issued a press release setting out its position as follows:

- all Member States should ensure that maximum jail sentences for the most serious forms of insider dealing or market manipulation are at least five years throughout the EU;
- to ensure that they act as a deterrent, sanctions should be made public and offenders named unless this would jeopardise ongoing official investigations;
- insider dealing and market manipulation should be punishable regardless of whether they were intended or reckless, attempted or committed;
- all trading venues should adopt effective and transparent procedures aimed at preventing and detecting abusive practices, such as suspicious transactions or orders;
- it should be mandatory to exchange information between countries to tackle cross-border market abuse; and
- Member States should designate watch dogs empowered to seize documents and records of telephone conversations, electronic communications and data traffic records for use as evidence of insider dealing and to establish the identities of those responsible.

EU Council Presidency compromise – proposed regulation
EU Council Presidency compromise – proposed directive
Parliament press release

Short selling: ESMA publishes net short position notification thresholds for sovereign issuers and updates Q&As; European Commission delegated regulations published in Official Journal

ESMA has published a list of the thresholds applicable to the sovereign issuers for the purpose of the notification to competent authorities of significant net short position in sovereign debt under the regulation on short selling and certain aspects of credit default swaps (CDS).

The table of thresholds contains the name of the sovereign issuer, the amount of outstanding debt duration adjusted, the initial threshold amount and the relevant percentage, the incremental threshold amount and the relevant percentage. At this stage, the figures are indicative and intended to assist investors in preparing implementation. ESMA will publish the definitive thresholds by 1 November 2012.

ESMA has also updated its Q&As on the implementation of the regulation on short selling and certain aspects of credit default swaps (CDS). The Q&As are designed to promote common supervisory approaches and practices amongst the EU's national securities markets regulators on the requirements of the short selling regulation once it comes into force on 1 November 2012. The Q&As are also intended to provide clarity on the requirements of the new regime to market participants and investors.

The additional Q&As relate in particular to the duration adjustment issue for calculating net short positions in sovereign debt, and to the calculation and reporting for the specific situation of group and fund management activities.

Furthermore, the following European Commission implementing measures in relation to the regulation on short selling and credit default swaps (CDS) have been published in the Official Journal:

- Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to definitions, the calculation of net short positions, covered sovereign credit default swaps, notification thresholds, liquidity thresholds for suspending restrictions, significant falls in the value of financial instruments and adverse events; and
- Commission Delegated Regulation (EU) No 919/2012 of 5 July 2012 supplementing Regulation (EU) No 236/2012 of the European Parliament and of the Council on short selling and certain aspects of credit default swaps with regard to regulatory technical standards for the method of calculation of the fall in value for liquid shares and other financial instruments.

Both regulations will apply from 1 November 2012.

Basel Committee sets out framework for dealing with domestic systemically important banks

The Basel Committee on Banking Supervision has published its finalised framework for dealing with domestic systemically important banks. The framework is intended to complement the framework for global systemically important banks published by the Basel Committee and endorsed by the G20 Leaders in November 2011.

Global systemically important banks will be subject to an additional loss absorbency requirement over and above the Basel III requirements that are being introduced for all internationally active banks. This additional requirement is intended to limit the cross-border externalities on the global financial system and economy associated with the most globally systemic banking institutions. However, the Basel Committee notes that similar externalities can apply at a domestic level. Against this backdrop, the Committee has developed a set of principles on the assessment methodology and the higher loss absorbency requirement for domestic systemically important banks.

Given that the domestic systemically important banks framework complements the global systemically important banks framework, the Committee considers that it would be appropriate if banks identified as domestic systemically important banks by their national authorities are required by those authorities to comply with the principles in line with the phase-in arrangements for the global systemically important banks framework, i.e. from January 2016.

IOSCO publishes policy recommendations for money market funds

IOSCO has published its final report on 'Policy Recommendations for Money Market Funds', which proposes recommendations to be the basis for common standards for the regulation and management of money market funds across jurisdictions. These recommendations are articulated around key principles for valuation, liquidity management, use of ratings, disclosure to investors, and repos.

IOSCO proposes to conduct a review of the application of the recommendations within two years with a view to assessing whether the recommendations should be revised, complemented or strengthened. At this time, IOSCO will also consider other market or regulatory developments which may have had an impact on money market funds over this period.

UK Financial Services and Markets Act 2000 (Short Selling) Regulations 2012 published

The Financial Services and Markets Act 2000 (Short Selling) Regulations 2012 (SI 2012/2554) have been published. The regulations implement in part the EU regulation on short selling and certain aspects of credit default swaps, which requires notification of certain short positions and positions in sovereign credit default swaps, contains measures in relation to short selling and gives enforcement powers to national competent authorities and ESMA. The regulations amend the Financial Services and Markets Act 2000 to repeal provisions which are inconsistent with the short selling regulation or no longer required. Rules made by the FSA under repealed sections are also to be revoked.

The regulations will enter into force on 1 November 2012.

Regulations
Explanatory memorandum
Impact assessment

OTC derivatives and market infrastructures regulation: German Federal Government agrees on draft implementing Act

The German Federal Government has agreed on a draft Act to implement the EU regulation on OTC derivatives, central counterparties and trade repositories (EMIR), which entered into force on 16 August 2012. The draft Act contains rules on the administrative implementation of EMIR regarding notifications to and supervision by the Federal Financial Services Supervisory Authority (BaFin) and, in particular, licensing requirements for central counterparties (CCPs).

The draft Act also proposes a change in German insolvency laws, by addressing the enforceability of measures taken under Art. 48 of EMIR including close-out netting, porting and the enforcement of collateral in case of an insolvency proceeding. The proposal further excludes such measures from insolvency clawback, but stipulates a compensation payment by the CCP if the administrator proves that the estate would have been in a better position in case of a close-out netting under the German statutory netting provision.

In addition, under the draft Act, non-financial counterparties would be obliged to have compliance with clearing and risk management obligations under EMIR verified and certified by appropriate auditors, if during a financial year they entered into more than 100 OTC derivatives or concluded OTC derivatives the notional value of which exceeds EUR 10 million.

The draft Act will now enter the legislative procedure and will need to be passed by the German Federal Parliament.

New Polish secondary legislation on omnibus accounts enters into force

New secondary regulations (which repeal existing regulations issued in 2009) on the technical and organisational conditions and procedures required for banks, investment companies and custodian banks to operate in trading of financial instruments have entered into force.

Amongst other things, the regulations introduce secondary legislation relating to omnibus accounts and set out technical measures relating to the operation and the maintenance of omnibus accounts.

CSRC issues pilot measures on fund management companies' asset management business for selected clients

The China Securities Regulatory Commission (CSRC) has issued the amended 'Pilot Measures on Asset Management Business for Selected Clients by Fund Management Companies', which are intended to further support the development of special asset management business by fund management companies (FMCs).

Amongst other things, under the measures: (1) the investment scope of the asset management scheme will be expanded; (2) the limits on the investment ratio will be removed; (3) the limit on the performance fees will be removed; and (4) while the requirement on asset custody remains mandatory, the custodians no longer need to be commercial banks only.

The amended measures will be effective as of 1 November 2012.

CSRC issues administrative measures and implementing regulation on securities investment fund management companies

The China Securities Regulatory Commission (CSRC) has issued the 'Administrative Measures on Securities Investment Fund Management Companies' and the 'Regulation on Relevant Issues Concerning the Implementation of Administrative Measures on Securities Investment Fund Management Companies', which are intended to relax the supervision of fund management companies (FMCs) in order to further stimulate the development of the asset management industry. Other updated requirements on risk control, compliance and protection of unit-holders are also set out in the measures and regulation.

The measures and regulation are effective from 1 January 2012 and 1 November 2012 respectively.

MAS simplifies and enhances requirements on disclosure of interests in listed entities

The Monetary Authority of Singapore (MAS) has published the Securities and Futures (Disclosure of Interests) Regulations 2012, which introduce a new disclosure of interests regulatory regime for listed entities. The new regime, which takes effect on 19 November 2012, is intended to streamline and enhance the existing disclosure of interests requirements in listed entities by directors and substantial shareholders.

FAQs

ASIC consults on constitutions of registered managed investment schemes

The Australian Securities and Investments Commission (ASIC) has published a consultation paper, 'Managed investments: Constitutions – Updates to RG 134' (CP 188), outlining proposals to update the guidance relating to the content requirements of constitutions of registered managed investment schemes. The consultation paper contains proposals about ASIC's views on the requirements in s601GA and s601GB of the Corporations Act 2001, and how it will apply them in deciding to register a managed investment scheme.

Comments are due by 13 November 2012. ASIC is proposing to release the updated regulatory guide in March 2013 with a commencement date of May 2013.

FDIC adopts final rule on enforcement of subsidiary and affiliate contracts by FDIC as receiver of systemically important financial companies

The FDIC's Board of Directors has approved a final rule on the enforcement of subsidiary and affiliate contracts by the FDIC. The Dodd-Frank Act permits the FDIC, as receiver for a financial company whose failure would pose a significant risk to the financial stability of the United States, to enforce contracts of subsidiaries or affiliates of the covered financial company despite contract clauses that purport to terminate, accelerate or provide for other remedies based on the insolvency, financial condition or receivership of the covered financial company.

As a condition to maintaining these subsidiary or affiliate contracts in full force and effect, the FDIC as receiver must either: (1) transfer any supporting obligations of the covered financial company that back the obligations of the subsidiary or affiliate under the contract (along with all assets and liabilities that relate to those supporting obligations) to a bridge financial company or qualified third-party transferee by the statutory one-business-day deadline; or (2) provide adequate protection to such contract counterparties.

The Final Rule is expected to be published in the Federal Register shortly.

Federal Reserve publishes final rules on stress testing

The FRB has issued final rules implementing the supervisory and company-run stress testing requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The FRB proposed supervisory and company-run stress test requirements as part of its January 2012 proposed rules to implement the enhanced prudential standards required under section 165 of the Dodd-Frank Act. The FRB is issuing final stress testing rules in advance of the other enhanced prudential standards and early remediation requirements in order to address the timing of when the stress testing requirements will apply to various banking organizations and to require large bank holding companies to publicly disclose the results of their company-run stress tests conducted in the fall of 2012.

The FRB will administer supervisory stress tests pursuant to the final rules this fall for the 19 bank holding companies that took part in the 2009 Supervisory Capital Assessment Program and Comprehensive Capital Analysis and Reviews. In addition, these companies must conduct their own company-run stress tests, with the results to be disclosed in March 2013. The FRB intends to release the scenarios for

this year's supervisory and company-run stress test no later than 15 November 2012.

Other companies subject to the Board's final stress testing rules must comply beginning October 2013.

RECENT CLIFFORD CHANCE BRIEFINGS

Linking Prices – Risky Relationships?

Agreements which set prices by reference to other transactions – such as sales of rivals' products, sales to other customers, or sales on different platforms – are of increasing interest to antitrust authorities on both sides of the Atlantic. Price relationship agreements (PRAs) – including most favoured nation (MFN) clauses – are not new. They have been present in contracts and accordingly subject to competition law for decades.

Recently, however, competition authorities in both the UK and US have shown renewed interest in these agreements in the online world. On 10 September 2012, the UK's OFT published a report it had commissioned from Laboratorio di economia, antitrust, reglamentazione (Lear) which examines the possible competition concerns that may arise from PRAs. In the US, the Department of Justice and the Federal Trade Commission held a joint workshop entitled 'Most-Favored-Nation (MFN) Clauses and Antitrust Enforcement and Policy'.

This briefing summarises the conclusions of the Lear report, as well as the recent cases which have been the object of scrutiny of the antitrust authorities in the EU, UK and US.

http://www.cliffordchance.com/publicationviews/publications/2012/10/linking_prices_riskyrelationships.html

UK Employment Update

The October 2012 edition of the UK Employment Update considers the new concept of the employee-owner contract announced at the Conservative Party conference. In addition we review two decisions in relation to redundancy: addressing whether a reduction in hours can give rise to a redundancy and whether it is reasonable for an employer to choose a redundancy pool of one. Finally this briefing examines the government's consultation on settlement agreements and a High Court decision on the point in time at which the enforceability of a restrictive covenant must be considered.

http://www.cliffordchance.com/publicationviews/publications/2012/10/uk_employment_update-october2012.html

Employee Benefits News

The October 2012 edition of Employee Benefits News highlights the opportunity for the deferral of income to take advantage of the reduction in the 50% income tax rate to 45% from 6 April 2013. In addition, this edition outlines new plans announced by the Chancellor to provide for CGT relief on employee-shares acquired in return for the waiver of certain employment rights. It also provides an update on HMRC's EBT Settlement Opportunity, which is HMRC's approach to resolving what they view as the historic abuse of (in particular) EBT sub-trust arrangements. At the present time, it remains far from certain whether the opportunity to settle will appeal to many employers.

Finally, earlier this year we reported that the Office of Tax Simplification had commenced its review of unapproved share arrangements. The OTS has now published its interim report following a fact-finding exercise. This edition of Employee Benefits News summarises some of the key tax-related difficulties the OTS has identified so far.

http://www.cliffordchance.com/publicationviews/publications/2012/10/employee_benefitsnewsletteroctober20120.html

SEC Announces New 'Presence Examinations' Targeted at Newly Registered Investment Advisers

The Office of Compliance Inspections and Examinations (OCIE) of the US Securities and Exchange Commission (SEC) announced last month that it would soon begin conducting 'presence examinations' of newly registered investment advisers to hedge funds, private equity funds and real estate funds. On 9 October 2012, the SEC began mailing a form letter to select, newly registered advisers to notify them of the new examination program and to prepare them for possible examination. Unlike traditional OCIE examinations, the new presence examinations are expected to be risk-based and cover two to three topic areas, selected on the basis of each registered adviser's business.

This briefing discusses the implications of the new examinations.

http://www.cliffordchance.com/publicationviews/publications/2012/10/sec_announces_newpresenceexaminations.html