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Briefing note

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- Recent Clifford Chance Briefings: Amendments to Russian Civil Code on pledge; Hong Kong and USA tax agreements; and more. Follow this link to the briefings section.

EU Council adopts MiFIR/MiFID 2

The EU Council has formally approved 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).

Amongst other things, under the new rules:

- firms will be required to trade on organised venues, including regulated markets (RMs) such as stock exchanges, multilateral trading facilities (MTFs) controlled by approved market operators or larger investment firms and organised trading facilities (OTFs) for non-equities, such as interests in bonds, emission allowances or derivatives
- firms will be required to design investment products for specified groups of clients according to their needs, withdraw products deemed to be 'toxic' from trading and ensure that any marketing information is clearly identifiable as such and not misleading – clients should also be informed whether the advice offered is independent or not and about the risks associated with proposed investment products and strategies;
- positions in commodity derivatives (traded on trading venues and over the counter), will be limited, to support orderly pricing and prevent market distorting positions and market abuse – the European Securities and Markets Authority will determine the methodology for calculating these limits, to be applied by the competent authorities;
- any investment firm engaging in algorithmic trading in financial instruments will have to have effective systems and controls in place, such as 'circuit breakers' that stop the trading process if price volatility gets too high; and
- third countries whose rules are equivalent to the new EU rules will be able to benefit from the EU passport when providing services to professionals.

The publication of the new rules in the Official Journal is foreseen for the second quarter of 2014, with entry into application 30 months later.

EU Council adopts European Account Preservation Order

The EU Council has formally approved the regulation establishing a European Account Preservation Order procedure, which is intended to facilitate cross border debt recovery in civil and commercial matters and establishes a new and self-standing European procedure for the preservation of bank accounts to enable a creditor to prevent the transfer or withdrawal of his debtor's assets in any bank account located in the European Union. The European procedure would be available to citizens and companies as an alternative to procedures existing under national law.

The regulation will enter into force on the twentieth day following that of its publication in the Official Journal. It will apply from thirty months after its entry into force with the exception of Article 48 which will apply six months before its date of application.

Banking Union: SSM Framework Regulation published in Official Journal

The SSM Framework Regulation has been published in the Official Journal. It entered into force on 15 May 2014. Also published in the Official Journal were an amending ECB Regulation on the powers of the European Central Bank to impose sanctions and an ECB Recommendation for a Council Regulation amending Regulation (EC) No 2532/98 concerning the powers of the European Central Bank to impose sanctions.

EMIR: Commission Implementing Regulation on hypothetical capital of a central counterparty published

Commission Implementing Regulation (EU) No 484/2014 of 12 May 2014 laying down implementing technical standards with regard to the hypothetical capital of a central counterparty according to the European Market Infrastructure Regulation has been published in the Official Journal.

EU Commission reports on implementation of Consumer Credit Directive

The EU Commission has published a report on the implementation of the Consumer Credit Directive, which aims to offer consumer protection and increase consumer confidence in relation to credit, enable free movement of credit offers and remedy competition imbalances arising from differences among Member States' national laws.

Among other things, the report considers:

- transposition of the Directive in the Member States;
- relevance to the consumer credit markets of thresholds set out in the directive;
- the impact on consumer credit markets; and
- the impact on consumer protection.

The report discusses, in particular, further efforts creditors should make to ensure that consumer rights under the CCD are upheld, particularly in relation to advertising and pre-contractual information. The Commission recommends raising awareness among consumers and creditors of their rights and obligations and assessing the application and enforcement of rights particularly among vulnerable consumers.

EU Commission publishes review of financial regulation reform agenda

The EU Commission has published a Communication entitled 'A reformed financial sector for Europe', which presents the Commission's first comprehensive review of the European financial regulation agenda as a whole. Following the financial crisis more than forty reform measures have been proposed, with most adopted, changing the financial regulation framework in the EU. The review sets out the effect of reforms on:

- market confidence;
- financial stability;
- strengthening the single market for financial services; and
- improving market integrity and efficiency.

Alongside the review the Commission has released a staff working document entitled 'Economic Review of the Financial Regulation Agenda', which provides more detail. This document considers the overall coherence of the reform agenda and the expected or actual economic impact, including the interactions and synergies between different reforms.

Rating agencies: FSB publishes peer review report on reducing reliance on CRA ratings

The Financial Stability Board (FSB) has published its final peer review report on national authorities' implementation of the FSB Principles for Reducing Reliance on Credit Rating Agency (CRA) Ratings. The FSB roadmap, agreed in October 2012, set out milestones for work to reduce mechanistic reliance on CRA ratings in standards, laws and regulations, and to promote and, where needed, require that financial institutions strengthen and disclose information on their own credit assessment approaches.

The review found that progress toward the removal of references to CRA ratings from standards, laws and regulations has been uneven across jurisdictions and the financial sectors. The FSB has indicated that the key challenge lies in developing alternative standards of creditworthiness and processes so that CRA ratings are not the sole input to credit risk assessment.

The review sets out several recommendations to address some of the challenges hindering progress toward implementation of the roadmap. In particular, national authorities should:

- implement their action plans and refine them as lessons of experience are gained;
- engage market participants to encourage adoption of alternative approaches such as strengthening of internal credit assessment processes, and reviewing reliance on CRA ratings in private contracts, such as ratings triggers, which represent mechanistic reliance on CRA ratings; and
- not replace mechanistic reliance on CRA ratings with mechanistic reliance on a very limited number of alternative measures, as this might lead to substituted procyclicality and herd behaviour.

This report is the final stage of a thematic review of national authorities' implementation of the FSB Principles on CRA ratings. The first stage, completed in August 2013, comprised a stocktake of references to CRA ratings in national laws and regulations.

HM Treasury issues call for evidence on enforcement decision-making at financial services regulators

HM Treasury has published a call for evidence to begin a review into the institutional arrangements and processes used by the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) when making enforcement decisions. The review will consider the design and governance of the regulators' arrangements in the context of the fairness, transparency, speed and efficiency of making enforcement decisions and include a comparison between the regulators' arrangements with international practice.

The call for evidence ends on 4 July 2014. The review will report to the Chancellor in autumn 2014.

FCA publishes thematic review on clarity of funds charges

The Financial Conduct Authority (FCA) has published the findings of its review into the clarity of fund charges. The FCA's review focused on UK firms operating funds that were sold to UK retail investors, using eleven firms as its sample, representing 29% of the market by assets under management.

The FCA found that when firms use the annual management charge (AMC) in some marketing materials and the ongoing charges figure (OCF) in other documents it could hinder investors' ability to compare charges. The FCA recommends that firms should use the OCF consistently in all marketing material to help investors understand and compare charges.

The FCA has given detailed feedback to the firms visited and, where it appears firms may not have complied with relevant principles or rules, has asked them to justify their approach and, where appropriate, required them to take remedial action.

It will follow up this work with firms through its routine supervision and work with the Investment Management Association (IMA), which has issued voluntary guidance to the industry on the disclosure of charges and costs.

FCA publishes policy statement on rules to enhance Listing Regime

The FCA has published a policy statement (PS 14/8) providing its final rules to enhance the effectiveness of the Listing Regime, including feedback on the responses received during its consultation exercise (CP 13/15). The finalised rules include measures to protect minority shareholders through:

- mandatory agreements between premium listed companies and controlling shareholders that place requirements on their interaction and enhanced oversight where an agreement is not in place or complied with;
- additional voting power for minority shareholders when electing independent directors in premium listed companies with a controlling shareholder; and
- enhanced voting power for minority shareholders of premium listed companies with a controlling shareholder in circumstances whereby the company wishes to cancel or transfer its premium listing.

The rules came into effect on 16 May 2014.

New law on status and supervision of credit institutions published

The law of 25 April 2014 on the status and supervision of credit institutions has been published in the Moniteur Belge. The new law replaces the law of 22 March 1993 on the status and supervision of credit institutions.

The law implements the Capital Requirements Directive (CRD 4) and the Capital Requirements Regulation into Belgian law, and imposes limits on distributions, and more stringent own funds and liquidity requirements, to credit institutions. The law also requires credit institutions to submit any proposed strategic decision to the National Bank of Belgium for prior approval, and promotes the use of internal risk assessments methods.

The law further partially implements – in advance – the Recovery and Resolution Directive and provides for recovery plans to be prepared by credits institutions and resolution plans to be prepared by the resolution authority.

The law also adapts the Belgian legal framework for the supervision of credit institutions to the participation of National of Bank of Belgium in the Single Supervisory Mechanism (SSM).

Finally, the law introduces a prohibition in principle of proprietary trading in financial instruments and commodities as from 1 January 2015. Certain own-account trading activities may, however, continue to be performed by credit institutions, such as activities that relate to the provision to clients of investment and auxiliary services, market-marking activities, activities for the hedging of risk, sound and prudent management of liquid assets, and the purchase and sale of financial instruments acquired as long-term holdings. These permitted proprietary trading activities will be subject to an overall cap and must be carried out in accordance with certain governance, internal control and reporting requirements.

Most provisions of the law have entered into force. Certain provisions will, however, enter into force at a later date.

CSSF publishes 2013 Annual Report

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has published its Activity Report for 2013.

In addition to statistical information concerning the Luxembourg financial sector, the report contains information on the exercise by the CSSF of its regulatory powers. Amongst other things, it covers:

- new specifications by the CSSF of its supervisory practice in relation to IT systems, including on the requirement for consent that needs to be obtained for statutory confidentiality purposes in case of IT task outsourcing; as well as
- decisions or other actions taken in response to customer complaints in the past year, including in the area of information obligations of the bank vis-à-vis its customer, asset management and investment advice, lending and payment services, in particular in relation to fraudulent money transfer orders.

Central Bank of Luxembourg issues circular on modification of statistical data collection of securitisation vehicles

The Central Bank of Luxembourg (BCL) has issued a new circular (2014/236) on the modification of the statistical data collection of securitisation vehicles. The new circular has been issued to adapt the data collection set-up in this area to the developments at EU level by way of Regulation (EU) 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union (European System of National Accounts 2010) (ESA 2010) and implementing regulations and guidelines issued by the governing council of the European Central Bank (ECB).

The main innovations of the new data collection system include:

- harmonisation of codification of items and original maturities with those used for the data collection for other Luxembourg financial entities;
- modification of the list of economic sectors and the list of security types, in accordance with the changes in the ESA 2010;
- introduction of a monthly security by security reporting together with a lightening of the quarterly reports on transactions and write-offs/write-downs on securitised loans;
- in the quarterly balance sheet, breakdowns by country, currency, economic sector and original maturity of items other than those in relation with securities are now required in order to estimate the financial transactions on these captions; and
- introduction of a new nature of securitisation linked to the insurance and re-insurance area.

The new circular applies to all undertakings located in Luxembourg and governed by the Luxembourg Securitisation Law as well as commercial companies located in Luxembourg that fall within the definition of a securitisation vehicle in the sense of article 1 of regulation ECB/2013/40. Small-sized securitisation vehicles may be exempted from reporting requirements.

The reported data may also be exchanged with the Luxembourg financial and insurance sector authorities, CSSF and CAA and the central service for statistics and economic studies (Statec) if required for their respective missions.

The new reporting starts for the period of reference ending December 2014, no later than 30 January 2015.

Central Bank of Luxembourg issues regulation implementing ECB guideline on temporary measures concerning refinancing operations of Eurosystem and eligibility of collateral

The BCL has issued a new regulation (2014/16) which implements the Guideline of the European Central Bank (ECB) of 12 March 2014 amending Guideline EC/2014/4 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline EC/2007/9 (ECB/2014/12).

The new regulation also amends Regulation BCL/2013/15. The BCL regulation thereby reflects the changes to the Eurosystem's collateral framework, relating to:

- the extension of loan-level reporting requirements to asset-backed securities backed by credit card receivables in Annex I to Guideline ECB/2011/14;
- the revision of the mapping of certain credit ratings in the context of the Eurosystem harmonised rating scale; and
- clarification of the rating rules relating to asset-backed securities.

The new regulation is applicable as of 12 May 2014.

Polish government publishes draft Restructuring Law

The Ministry of Justice and the Ministry of the Economy have presented a draft of the Restructuring Law, which is to replace the Bankruptcy and Recovery Proceedings Law of 28 February 2003, and contains a number of material amendments in comparison with the Bankruptcy and Recovery Proceedings Law.

The Restructuring Law aims more at saving an entity from bankruptcy rather than, as is currently the case, focusing on the repayment of debts to creditors.

The draft provides for a new arrangement of composition proceedings, which are to be divided into four types of restructuring proceedings: two simplified, one full and one remedial. There will also be changes in the voting of the creditors on the conclusion of a composition agreement with debtors, whereby votes not cast will be counted (they are currently counted as votes against the conclusion of the agreement).

The government plans to enact the draft as binding legislation within the next year.

CSRC consults on rules for Shanghai-Hong Kong Stock Connect scheme

In order to launch the Shanghai-Hong Kong Stock Connect pilot programme, the China Securities Regulatory Commission (CSRC) has published a consultation draft of the 'Provisions on the Mechanism of the Connection between the Shanghai and Hong Kong Stock Markets'. Amongst other things, the consultation draft:

- sets out the principle that trading and settlement activities must comply with the regulations and rules of the jurisdiction where such activities take place, and the relevant listed companies and brokers should be subject to the regulations/rules where they are listed or incorporated;
- prescribes the duties and authorities of the Shanghai Stock Exchange (SSE), the Hong Kong Stock Exchange (HKSE), the securities trading service agencies and the securities clearing and depository institutions in both Shanghai and Hong Kong;
- authorises SSE and HKSE to suspend the programme under abnormal circumstances; and
- clarifies the settlement procedures between the Shanghai and Hong Kong clearing and depositary institutions.

Comments are due by 23 May 2013.

Hong Kong and US discuss tax agreement to comply with FATCA

Hong Kong and the United States have concluded discussions on an inter-governmental agreement that will facilitate Hong Kong financial institutions' compliance with the US Foreign Account Tax Compliance Act (FATCA). Under the agreement, Hong Kong financial institutions will need to register and conclude separate individual agreements with the US Internal Revenue Service, and seek their US taxpayer account holders' consent to report their account information annually.

According to the Financial Services and the Treasury Bureau, the agreement will reduce Hong Kong financial institutions' reporting burden and facilitate their compliance with FATCA. The agreement will include exemptions for financial institutions or products which present low risks for US taxpayers to evade paying tax.

The two countries are expected to formally sign the agreement by the end of 2014.

FSA publishes draft amendment to clearing requirements for OTC derivatives transactions

The Japan Financial Services Agency (FSA) has published a draft amendment to an ordinance under the Financial Instruments and Exchange Act regarding the clearing requirements for OTC derivative transactions.

With the requirements currently applicable to certain CDSs and interest rate swaps (IRS), the amendment broadens the scope of application of the requirements for IRS in relation to products and counterparties.

As regards products, currently only IRS on 3-month or 6-month JPY-LIBOR are subject to the requirements. The amendment proposes to add, from 1 July 2014, 3-month and 6-month Euro-yen TIBOR (with maximum 5 and 10 years duration, respectively).

As regards counterparties, the requirements generally apply to locally licensed Financial Instruments Business Operators (i.e. securities houses, investment managers and investment advisors) and Registered Financial Institutions (i.e. banks and other financial institutions). Currently, if the parties to a transaction (or their parents or subsidiaries) are not, on reasonable grounds, members of the same Central Counterparty Clearing House, then such parties are exempt from the requirements.

The draft amendment proposes to change, from 1 December 2014, the eligibility criteria to receive an exemption from the requirements as follows:

- one party is not: (i) a Type I Financial Instruments Business Operator (i.e. securities house); (ii) a bank which is a Registered Financial Institution; (iii) DBJ; (iv) Shoko Chukin Bank; (v) Shinkin Central Bank; or (vi) Nochu Bank; or
- the average outstanding notional amount of one party is: (i) from 1 December 2014, less than JPY 1 trillion;

and (ii) from 1 December 2015, less than JPY 300 billion. Applicants crossing this threshold must report the same to the FSA, who will publish a list of those applicants whose notional reaches/exceeds this threshold.

Comments are due by 2 June 2014.

FSA publishes draft amendment to Article 63 Exemption

The FSA has published a draft amendment to the regulations under the Financial Instruments and Exchange Act of Japan (FIEA) regarding the 'Article 63 Exemption', which allows general partners of certain collective investment schemes (funds) to market interests in such funds to Japanese investors and manage the assets of Japanese investors without being licensed as securities broker-dealers and fund managers pursuant to the FIEA.

Currently, if investors in Japan are limited to qualified institutional investors (QIIs) and if there are no more than 49 non-QIIs, a general partner of a fund is exempted from the licence requirement as a securities broker-dealer and fund manager under the FIEA. However, the draft amendment proposes that the 49 non-QIIs should be limited to certain categories of persons including the following:

- financial instruments business operators which are corporations and licensed under the FIEA;
- certain fund managers;
- Japanese listed companies;
- Japanese joint stock companies whose stated capital exceeds JPY 50 million;
- certain pension funds;
- foreign corporations;
- individuals who have assets of JPY 100 million or more and experience in investments of longer than one year; and
- corporations which have assets of JPY 300 million or more.

Comments on the draft amendment are due by 12 June 2014. The amendment is expected to be implemented on 1 August 2014.

RECENT CLIFFORD CHANCE BRIEFINGS

Amendments to Russian Civil Code on pledge – Wind of change

This briefing discusses the changes adopted at the end of 2013 to the chapters of the Russian Civil Code on pledges and the transfer of rights and obligations, which represent another set of amendments in the course of the reform of the Civil Code. The changes will come into force on 1 July 2014. Whereas the list of new concepts and some principal provisions remained as under the initial draft, the particular wording and essence of many of them are significantly different from those of the initial draft adopted at the first reading and available to the general public. At the same time the vast majority of the amendments reinforce the approaches developed by the courts and, in particular, by the Supreme Arbitrazh Court so far.

http://www.cliffordchance.com/briefings/2014/05/amendments_to_russiancivilcodeonpledge-win.html

Japan amends its Commercial Arbitration Rules

This briefing discusses the Japan Commercial Arbitration Association's (JCAA's) implementation of a new set of Commercial Arbitration Rules which came into effect on 1 February 2014 and apply to all arbitrations initiated on or after that date. Although minor amendments had been made in 2006 and 2008, the new JCA Rules mark the first major overhaul since 2004 when the Japanese Arbitration Law (which is based upon the UNCITRAL Model Law) was first enacted. The amendments introduced by the new JCA Rules aim not only to make arbitrations administered by the JCAA more efficient and user-friendly, but also to bring the JCAA more in line with recent arbitration trends and the amendments made to internationally recognised institutional arbitration rules commonly used in Asia Pacific, such as the Hong Kong International Arbitration Centre Administered Arbitration Rules 2013, the Singapore International Arbitration Centre Rules 2013 and the International Chamber of Commerce Rules 012.

http://www.cliffordchance.com/briefings/2014/05/japan_amends_itscommercialarbitrationrules.html

Hong Kong and USA conclude tax agreements

Hong Kong has recently signed its first standalone tax information exchange agreement (TIEA) with the United States of America (HK-United States TIEA). It is the first TIEA signed by Hong Kong with the government of a foreign territory since amendments to Hong Kong's Inland Revenue Ordinance came into force in July 2013 allowing

the exchange of tax-related information with other jurisdictions under comprehensive avoidance of double taxation agreements and TIEAs. The HK-United States TIEA, operative on 20 June 2014, puts into practice international tax exchange information standards to enhance tax transparency and prevent tax evasion that were recommended be adopted by Hong Kong by the Organization for Economic Cooperation and Development.

In addition, within the past week, Hong Kong and the United States have substantially concluded an intergovernmental agreement (IGA) that will reduce the reporting burden under the US Foreign Account Tax Compliance Act (FATCA) and facilitate compliance by financial institutions in Hong Kong. FATCA is a US tax law requiring financial institutions outside the US to report financial account information of US taxpayers to the US tax authorities. The IGA and the Hong Kong TIEA will complement each other with the aim of avoiding tax evasion locally and overseas.

This briefing discusses the two agreements.

http://www.cliffordchance.com/content/cliffordchance/briefings/2014/05/hong_kong_and_usaconcludetaxagreements.html

Second Circuit Holds That Morrison Precludes Securities Fraud Claims for Cross-listed Securities

This week, the US Court of Appeals for the Second Circuit issued an important ruling restricting the courts' authority over securities fraud cases involving securities listed on foreign exchanges – even if those securities are cross-listed on exchanges in the United States.

This briefing discusses the case.

http://www.cliffordchance.com/briefings/2014/05/second_circuit_holdsthatmorrisonpreclude.html