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Briefing note

International Regulatory Update

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- Recent Clifford Chance Briefings: EMIR; the UK Supreme Court in 2014; and more. Follow this link to the briefings section.

CRR: EU Commission adopts Implementing Regulations clarifying supervisory reporting standards

The EU Commission has adopted two Implementing Regulations that amend Implementing Regulation (EU) No 680/2014 on implementing technical standards (ITS) with regard to supervisory reporting of institutions under the Capital Requirements Regulation (CRR).

The first draft Implementing Regulation replaces templates at Annexes I, III and IV and amends some instructions laid down in Annexes V, VII and IX of Implementing Regulation No 680/2014. The amendments are intended to ensure consistency in the definitions of forbearance and non-performing exposures and reporting templates to ensure that the European Banking Authority (EBA), European Systemic Risk Board (ESRB) and competent authorities may obtain a comprehensive view of the risk profile of the activities of institutions.

The second draft Implementing Regulation, on supervisory reporting of institutions as regards asset encumbrance, single data point model and validation rules, amends Implementing Regulation No 680/2014 by specifying that the data items set out in the mandatory reporting tables provided in Annexes I, III, IV, VI, VIII, X, XII and XVI should be transformed into a single data point model. This change is intended to ensure that supervisory reporting of own funds and own funds requirements, financial information, losses stemming from lending collateralised by immovable property, large exposures, the leverage ratio, liquidity and asset encumbrance is carried out in a uniform manner. The draft Implementing Regulation also specifies that the detail data point model laid down in Annex XIV and the detailed validation rules laid down in Annex XV to Implementing Regulation No 680/2014 should be replaced by stringent qualitative criteria for the single data point model and validation rules which will be published electronically on the EBA website. This amendment is intended to ensure that these rules can be modified with necessary rapidity, which under the current arrangements is not possible.

CRR: EBA publishes impact assessment for liquidity coverage requirements

The European Banking Authority (EBA) has published an impact assessment report for liquidity coverage requirements. The report has been developed on the basis of the CRR. It states that the implementation of the Liquidity Coverage Ratio (LCR) is unlikely to have a negative impact on the stability of financial markets and the supply of bank lending. According to the report, this is due to:

- the improvement of EU banks' compliance with LCR requirements:
- the potential for balance sheet adjustments to meet LCR requirements; and
- the absence of supply constraints overall at country level due to redistribution of credit supply from non-compliant to compliant banks.

The report concludes that the implementation of the envisaged Delegated Act by the EU Commission will have a positive impact on the LCR of specialised credit institutions, such as factoring and leasing, auto and consumer credit banks and other specialised credit institutions which were identified in the EBA's first LCR impact assessment report as being potentially detrimentally affected by the LCR.

BRRD: EBA consults on draft ITS on procedures, forms and templates for resolution plans

The EBA has launched a consultation on draft ITS specifying procedures, forms and templates for resolution planning under the Bank Recovery and Resolution Directive (BRRD).

The BRRD requires resolution authorities to draw up resolution plans that outline the actions to be taken in case an institution meets the conditions for resolution. The draft ITS specify minimum standards for the provision of harmonised information for the purpose of resolution plans and include draft forms and templates in the Annexes to the consultation paper. The draft ITS also set out the procedure to be followed by resolution authorities, which will initially contact competent authorities for required information and contact institutions where information provided by competent authorities is unavailable or unsatisfactory. The forms and templates will then be used to provide information to the resolution authority.

The minimum set of forms and templates concern institutions':

- organisational structure;
- governance and management;
- critical functions and core business lines;
- critical counterparties;
- structure of liabilities;
- funding sources;
- off-balance sheet;
- payment systems;
- information systems;
- interconnectedness; and
- legal framework.

Comments on the consultation are due by 14 April 2015.

EMIR: ESMA updates list of authorised CCPs

The European Securities and Markets Authority (ESMA) has updated its list of authorised central counterparties (CCPs) under the European Market Infrastructure Regulation (EMIR) to show that CME has been re-authorised for extended activities and services.

EMIR: ESMA and Hong Kong regulator sign memorandum of understanding on CCPs

ESMA has signed a memorandum of understanding with the Hong Kong Securities and Futures Commission (SFC). The MoU establishes cooperation arrangements between the signatory authorities regarding CCPs that are established in Hong Kong and have applied for recognition under EMIR. The MoU is effective as of 19 December 2014.

ESMA is working with other third-country authorities on similar cooperation arrangements.

CSDR: ESMA publishes list of Member States' laws under which securities are constituted

ESMA has published a list of the key relevant provisions of the corporate or similar law of Member States under which securities are constituted.

In accordance with Article 49(1) of the Central Securities Depositories Regulation (CSDR), Member States must ensure that a list of key relevant provisions of their corporate or similar law under which securities are constituted is compiled and communicated to ESMA.

ESMA will update the information regularly based on further notifications received from the national competent authorities.

CRD 4: Regulations implementing systemic risk buffer laid before Parliament

The Capital Requirements (Capital Buffers and Macro-prudential Measures) (Amendment) Regulations 2015 (SI 2015/19) have been made and laid before Parliament.

The Regulations implement in part the provisions relating to the systemic risk buffer under Arts.133 and 134 of the Capital Requirements Directive (CRD 4) and introduce the systemic risk buffer as a new capital buffer for banks, building societies and investment firms. The Regulations, together with rules and individual requirements imposed by the Prudential Regulation Authority (PRA) and Financial Conduct Authority (FCA), also implement recommendations for an additional capital buffer element set out in the ring-fencing policy recommendations produced by the Independent Commission on Banking (ICB) in 2011 and agreed by the Government.

The Regulations will come into force on 31 May 2016 except for certain provisions set out in Paragraph 1(3) of the Regulations, which will come into force on 1 January 2019 and the systemic risk buffer will be applicable from 1 January 2019.

BRRD: PRA publishes final rules

The PRA has published its final rules on implementing the BRRD, which set out the PRA's recovery and resolution planning framework.

The rules, which are relevant to holding companies, mixed financial holding companies, mixed activity financial holding companies, banks, building societies and PRA-designated investment firms, require institutions to produce recovery plans, which identify the options available to recover from financial stress, and resolution packs, which will support resolution planning by the authorities. The rules are set out across three documents:

- a PRA Policy Statement (PS1/15), which replaces PS8/13 published on 19 December 2014 and sets out feedback concerning resolution planning, resolution packs, intragroup financial support and contractual recognition of bail-in;
- Supervisory Statement (SS18/13), published 19 December 2013 and updated on 16 January 2015, on recovery planning; and

- Supervisory Statement (SS19/13), published 19 December 2013 and updated on 16 January 2015, on resolution planning.

The rules will take effect from 19 January 2015 with the exception of rules on contractual clauses recognising bail-in powers in liabilities governed by the law of a third country. The rules for these contractual clauses will take effect from 19 February 2015 for debt instruments and 1 January 2016 for all other relevant liabilities.

FCA consults on draft guidance on its new competition powers

The FCA has launched a consultation on draft guidance and amendments to the FCA Handbook relating to additional competition powers that the FCA will obtain on 1 April 2015.

The FCA is consulting on:

- draft guidance on its new powers under the Competition Act 1998 enabling it to enforce prohibitions on anti-competitive behaviour in relation to financial services; and
- draft guidance on its new powers under the Enterprise Act 2002 and Financial Services and Markets Act (FSMA) 2000 enabling it to carry out market studies and refer cases for market investigation to the Competition and Markets Authority (CMA).

The CMA already has the ability to exercise its powers in relation to financial services, so the FCA's additional powers will be concurrent powers and the FCA will be a concurrent regulator. The Payment Services Regulator (PSR) will also obtain concurrent powers to prohibit anti-competitive behaviour in relevant areas of financial services from 1 April 2015; it already holds powers enabling it to carry out market studies and market referrals to the CMA for market investigations.

The FCA is also consulting on a draft legislative instrument that would make minor amendments to the FCA Handbook.

Comments on the consultation are due by 13 March 2015.

AMLD 4: HoL Committee Chair criticises HMT over possible legal challenge

The Chair of the House of Lords (HoL) EU Committee, Lord Boswell, has written to the Commercial Secretary to the Treasury, Lord Deighton, concerning a suggestion in his letter dated 4 December 2014 that HM Treasury may consider a challenge to the legal basis of the fourth anti-money laundering Directive (AMLD 4) once it is adopted.

In a letter dated 18 June 2014, Lord Boswell informed Lord Deighton that the HoL EU Committee is of the view that AMLD 4 would be binding on the UK on adoption, regardless of the fact that it includes Justice and Home Affairs (JHA) content, because it does not consider the JHA opt-in protocol as applying unless or until a specific Title V legal basis is included in the proposal.

In his letter on 14 January 2015, Lord Boswell criticises HM Treasury for considering a possible challenge to the legal basis of the Directive at the Court of Justice of the EU (CJEU) and requests a response within ten working days for an explanation of the Government's position in light of similar challenges previously brought by the UK Government before the CJEU which have failed.

CSSF issues press release on enforcement priorities regarding 2014 financial information published by issuers of securities subject to Luxembourg Transparency Law

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a press release on its enforcement plans regarding the 2014 financial information published by issuers of securities subject to the Luxembourg law of 11 January 2008 implementing the EU Transparency Directive 2004/109/EC (as amended).

The purpose of the press release is to draw the attention of issuers preparing their 2014 financial statements in accordance with International Financial Reporting Standards (IFRS) to a number of topics and issues that will be the subject of specific monitoring during the CSSF's enforcement campaign planned for 2015.

These issues mainly relate to:

- the new consolidation standards (especially IFRS 10 'Consolidated Financial Statements', IFRS 11 'Joint Arrangements' and IFRS 12 'Disclosure of Interests in Other Entities') whose mandatory application has been effective since 1 January 2014; and
- the recognition and measurement of deferred tax assets under IAS 12 'Income Taxes'.

These topics are also included among the priorities defined by the supervisory authorities of the European Member States and ESMA and published by ESMA on 28 October 2014.

Additionally, the CSSF has decided to focus on:

- the impairment of intangible assets according to IAS 36 'Impairment of Assets';
- the quality of information disclosed on methods and assumptions used for measuring fair value in accordance with the requirements of IFRS 13 'Fair Value Measurement;' and
- the relevance and completeness of the sensitivity analyses disclosed in the financial statements of issuers.

CSSF publishes circular on notification procedure for an increased ratio applicable to remuneration policy pursuant to CRD 4

The CSSF has published circular no. 15/601 on the notification procedure for an increased ratio applicable to the remuneration policy according to Article 94(1)(g)(ii) of the Capital Requirements Directive (CRD 4).

The decision to increase the ratio of fixed to variable remuneration needs to be approved by the shareholders of the relevant institution, provided that the global level of the variable component does not exceed 200% of the fixed component of the total remuneration.

In Luxembourg, any such approval of an increased ratio needs to be notified to the CSSF and exercised in accordance with the procedure foreseen in Article 94(1)(g)(ii) of the CRD 4. For that purpose, the CSSF has attached to the circular a draft double notification form to be completed with the information regarding the higher ratio, before being sent electronically and in a signed paper version to the CSSF. A first notification has to be made to inform the CSSF of the increased ratio proposed to shareholders and a second notification has to be made to inform the CSSF of the decision taken by the shareholders.

The circular and notification obligation contained therein applies to credit institutions and investment firms as defined in Article 4(1), point 2) of the Capital Requirements Regulation (CRR).

The circular entered into force with immediate effect.

CSSF issues regulation on determination of results and distributable reserves of credit institutions when using fair value method for statutory accounts

The CSSF has issued regulation no. 14-02 with respect to the determination of results and distributable reserves of credit institutions when using the fair value method for their statutory accounts.

The Luxembourg law of 30 July 2013 reforming the commission of accounting norms and modifying inter alia the law of 19 December 2012 on the register of commerce and companies as well as the accounting and annual accounts of companies introduced a set of new rules on determining distributable reserves in case companies use fair value valuation in their statutory accounts established in accordance with Lux GAAP (mixed regime) or IFRS.

The objective of the new CSSF regulation is to apply these rules to Luxembourg credit institutions as well. The new CSSF regulation has to be read in conjunction with CSSF circular 08/340 and CSSF regulation 14-01 implementing certain discretions contained in the Capital Requirements Regulation (CRR) in Luxembourg. According to CSSF circular 08/340, latent gains on certain balance sheet items valuated at fair value and included in the relevant reserve may not be distributed. According to CSSF Regulation 14-01, unrealised gains measured at fair value cannot be included in the calculation of the Common Equity Tier 1 items in the years 2014 to 2017.

The CSSF regulation applies to accounting periods ending on 31 December 2014 and later of Luxembourg law credit institutions.

AIFMD: Polish Ministry of Finance publishes implementing bill

The Polish Ministry of Finance has prepared a bill amending the Act on Investment Funds and Certain Other Acts. The main purpose of the bill is to implement the Alternative Investment Fund Managers Directive into the Polish legal system.

National People's Congress Standing Committee announces new free trade zones in China

The Standing Committee of the National People's Congress has issued the 'Decision on Authorising the State Council to Temporarily Adjust the Administrative Approvals under Relevant Laws in the China (Guangdong), China (Tianjing), China (Fujian) Free Trade Zones and the Expanded Areas of the Shanghai FTZ'.

Under the Decision, three new free trade zones have been established in Guangdong, Tianjing and Fujian and the current geographic scope of the Shanghai FTZ has been enlarged to include the Lujiazui financial district, the Jinqiao Development Zone and the Zhangjiang High-tech Zone. The decision will be implemented as of 1 March 2015, with an initial term of three years.

The more flexible administration of foreign-invested companies which is currently available in the Shanghai FTZ will be applicable in the new free trade zones and other favourable policies will also gradually be implemented in the new free trade zones.

CSRC issues trial measures on administration of stock option trading and guidelines on participation of securities and futures business institutions

The China Securities Regulatory Commission (CSRC) has issued the 'Trial Measures for the Administration of Stock Option Trading' and the 'Trial Guidelines for Participation of Securities and Futures Business Institutions in Stock Option Trading', which are intended to enhance the financial derivatives available on the PRC securities market. Amongst other things, the following aspects are worth noting:

- the measures apply to the trading of standard stock option contracts on stock exchanges in a public and centralised manner or by other means as approved by the CSRC, and such standard contracts shall be made by the stock exchanges and relate to sale or purchase of a specific stock or ETF at a fixed time in the future;
- an investor suitability system will be adopted and only eligible investors are allowed to invest in stock options;
- securities companies, fund management companies and their subsidiaries, futures companies and their subsidiaries are permitted to participate in stock option trading business, with different permissible business scopes;
- various risk control measures (e.g. risk reserve funds) and risk disclosure requirements are provided for stock option trading; and
- market manipulation and insider trading will be severely punished by the CSRC.

The first pilot product will be the SSE 50 Index ETF option, to be listed on the Shanghai Stock Exchange for trading on 9 February 2015.

CFTC issues time-limited extension of no-action relief regarding masking of certain identifying information required to be reported

The Commodity Futures Trading Commission's (CFTC) Division of Market Oversight has issued a letter providing an extension of previously provided relief regarding masking of certain identifying information required to be reported.

CFTC Letter 13-41, issued on 28 June 2013, permits part 45 and part 46 reporting counterparties to mask legal entity identifiers, other enumerated identifiers and other identifying terms, and permits Part 20 reporting entities to mask identifying information in certain enumerated jurisdictions. On 27 June 2014 the Division issued CFTC Letter 14-89, extending the relief provided in CFTC Letter 13-41 until no later than 12:01 a.m. (EST) on 16 January 2015.

The Division has now extended the deadline for the expiration of the relief until the earlier of: the reporting party no longer holding the requisite reasonable belief regarding the privacy law consequences of reporting; or 12:01 a.m. (EST) on 16 January 2016.

The extension of the relief in CFTC Letter 13-41 permits reporting parties who previously met the conditions in CFTC Letter 13-41 to continue fulfilling their reporting obligations while acknowledging privacy, secrecy and blocking laws in certain non-US jurisdictions.

SEC adopts rules to increase transparency in security-based swap market

The US Securities and Exchange Commission (SEC) has adopted rules that establish a comprehensive registration regime for security-based swap data repositories (SDRs) which will act as centralized recordkeeping facilities for security-based swap data. These new rules include requirements designed to promote strong compliance programs at SDRs and the independence, integrity, and effectiveness of their chief compliance officers. Certain non-US SDRs that meet specified conditions will be exempt from registration.

The SEC has also adopted a set of new rules, known as Regulation SBSR, specifying the information that must be reported and publicly disseminated for each security-based swap transaction. Specifically, security-based swaps will need to be reported to an SDR within 24 hours of execution, and SDRs will be required to publicly disseminate a report of any transaction that they receive immediately upon receipt. In addition, these rules assign reporting duties for many security-based swap transactions. Security-based swap counterparties will need to obtain codes from the global legal entity identifier system to identify themselves when reporting security-based swap data.

The SEC has also proposed certain additional rules, rule amendments and guidance related to the reporting and public dissemination of security-based swap transaction data. The SEC staff is continuing to study whether and, if

so, how these requirements should be applied to transactions involving non-US persons when they engage in conduct within the United States.

The new rules will become effective 60 days after they are published in the Federal Register, which is expected shortly. SDRs will be required to comply with the new registration requirements within one year of the Federal Register publication date. The compliance date for certain provisions of Regulation SBSR is the effective date, and the SEC is proposing compliance dates for the remaining provisions of Regulation SBSR in the proposed amendments release.

RECENT CLIFFORD CHANCE BRIEFINGS

EMIR – CCPs and Trade Repositories

The market infrastructure to support EU derivatives reforms is quickly taking shape. 2014 saw the first authorisations of EU central counterparties (CCPs). The first authorisation took place on 18 March 2014, triggering the commencement of the first clearing obligation procedure under Article 5(2) of the EU regulation on OTC derivatives, central counterparties and trade repositories (EMIR). The first regulatory technical standards (RTS) imposing a clearing obligation are likely to be published in the Official Journal in Q2 2015.

The EMIR reporting regime, in force since 12 February 2014, is supported by a number of EU trade repositories (TRs) which are registered with, and directly supervised by, the European Securities and Markets Authority (ESMA). Progress has, however, been slower for non-EU CCPs and TRs.

This briefing sets out the current status of CCPs and TRs in the EU, with a look forward to what can be expected next.

http://www.cliffordchance.com/briefings/2015/01/emir_ccps_and_traderepositories.html

Your 2015 AGM and beyond

The 2014 AGM season was challenging for many listed companies as they grappled with significant regulatory change: the requirement to prepare a new style remuneration report, the replacement of the business review with a standalone strategic report, the requirement to report on the company's greenhouse gas emissions, and enhanced auditor and audit committee reporting requirements.

Companies will be relieved that the amount of regulatory change that will impact on their 2015 AGMs is fairly limited, with the greatest impact on those companies with a controlling shareholder.

This briefing discusses the key changes from the 2014 AGM requirements.

http://www.cliffordchance.com/briefings/2015/01/your_2015_agm_andbeyond.html

The final frontier – the UK Supreme Court in 2014

The UK Supreme Court overturned the decision of the lower court in more than half the cases it decided in 2014. However, only 66 cases reached the Supreme Court, giving rise to 68 decisions, a miniscule fraction of the cases in the UK's courts.

This briefing discusses the appeals that made it to the Supreme Court in 2014.

http://www.cliffordchance.com/briefings/2015/01/the_final_frontiertheuksupremecourtin201.html

Two recent transactions highlight that pulling-and-re-filing is anything but a sure-fire way to avoid a Second Request

The parties to two separate transactions reportedly received pre-Christmas gifts from the US antitrust officials by way of the issuance of requests for additional information, often referred to as Second Requests, despite the fact that the parties in both transactions had pulled-and-re-filed their pre-merger notification filings (HSR filing) required under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the 'HSR Act'). Whether the parties expected to receive the Second Requests is hard to say but the very fact of their issuance is a reminder that, while pulling-and-re-filing is a helpful tactic for many transactions, it is certainly not a sure-fire way to avoid a Second Request.

This briefing discusses the tactic of pulling-and-re-filing.

http://www.cliffordchance.com/briefings/2015/01/two_recent_transactionshighlighttha.html