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Briefing note

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CJEU upholds UK legal challenge of ECB location policy for CCPs

The EU General Court has upheld a legal challenge by the UK Government regarding the European Central Bank's (ECB's) location policy for central counterparties (CCPs).

The ECB's Eurosystem Oversight Policy Framework published on 5 July 2011 had stated that, as a matter of principle, infrastructures that settle euro-denominated payment transactions should settle these transactions in central bank money and be legally incorporated in the euro area with full managerial and operational control and responsibility over all core functions for processing euro denominated transactions exercised from within the euro area.

The Court has upheld the UK's plea that the ECB did not have the competence necessary to regulate the activity of securities clearing systems, and annulled the Eurosystem Oversight Policy Framework in so far as it sets a requirement for CCPs involved in the clearing of securities to be located within the euro area.

Money Market Funds: ECON Committee votes on proposed regulation

The EU Parliament's Economic and Monetary Affairs Committee (ECON) has voted on the proposal for a regulation on money market funds (MMFs).

The Parliament has indicated that, under the text approved by the ECON Committee, constant net asset value (CNAV) MMFs would be limited to two types:

- retail CNAV that would be available for subscription only for charities, non-profit organisations, public authorities and public foundations; and
- public debt CNAV which would invest 99.5% of its assets in public debt instruments.

There would also be a new type of MMF, the Low Volatility Net Asset Value MMF, that might display a constant net asset value but under strict conditions.

In addition, under the proposed regulation:

- MMFs would be required to diversify their asset portfolios, follow strict liquidity and concentration requirements and have in place sound stress testing processes;
- MMFs would have to have in place a rigorous internal assessment procedure to determine the credit quality of money market instruments;
- the assets of an MMF would have to be valued at least once a day and the result would have to be published daily on the website of the MMF;
- an MMF should not receive external support from a third party including from its sponsor, if any; and
- MMFs would have to report the following information to their investors on a weekly basis – the liquidity profile, the credit profile and portfolio composition, weighted average maturity (WAM) of the portfolio, weighted average life (WAL) of the portfolio, and concentration of the top five investors in the MMF.

The Parliament's plenary session is expected to vote on the proposed regulation on 28 April 2015.

CSDR: EBA consults on draft RTS

The European Banking Authority (EBA) has launched its consultation on draft RTS under the Central Securities Depositories Regulation (CSDR). The three sets of RTS respectively relate to:

- capital requirements for central securities depositories (CSDs) under Article 47 CSDR;
- the application of an additional risk-based capital surcharge reflecting the risks of ancillary banking services, including intraday credit and liquidity risks, under Article 54 CSDR; and
- the details of frameworks and tools for the monitoring, measuring and management, reporting and public disclosure of credit and liquidity risks, including those that occur intraday, under Article 59 CSDR and are divided in two sections, one dealing with credit risk and the other with liquidity risk.

The CSDR introduces a distinction between CSDs offering banking-type ancillary services that are licensed as a credit institution and CSDs that are not permitted to offer banking-type ancillary services but can designate a credit institution to that effect. The draft RTS prepared under Arts. 54 and 59 CSDR only relate to those CSDs offering banking-type ancillary services or credit institutions designated by the CSD to offer such banking-type ancillary services; the draft RTS under Art. 47 CSDR on capital requirements are of relevance to all CSDs. CSDs providing banking-type ancillary services need to comply in parallel with the Capital Requirements Regulation (CRR) and the RTS have considered the possible differences between these two regimes to ensure that the stricter rule on prudential supervision apply.

When developing the draft RTS, the EBA has taken into account technical standards being developed by the

European Securities and Markets Authority (ESMA), the CPSS-IOSCO principles for financial market infrastructures (PFMIs) and Basel Committee on Banking Supervision (BCBS) principles for the monitoring and management of intraday liquidity.

Comments on the consultation paper are due by 27 April 2015.

CRD 4: EBA publishes draft technical standards on benchmarking portfolios

The EBA has published a set of papers for benchmarking the internal approaches that EU institutions use to calculate own funds requirements for credit and market risk exposures. The EBA final draft Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) specify the framework for EU institutions and competent authorities to carry out the annual supervisory benchmarking foreseen by the Capital Requirements Directive (CRD 4).

The draft ITS specify the following that should be applied in the benchmarking exercise for market and credit risk:

- the benchmarking portfolios;
- definitions; and
- IT solutions.

The draft RTS specify:

- the procedures for sharing the assessments between the competent authorities and with the EBA; and
- the standards that will be used by competent authorities to assess the internal approaches banks apply to calculate their capital requirements for market and credit risk.

The regular benchmarking exercises will allow an assessment of differences in RWAs across EU institutions and the identification of potential underestimation of capital requirements.

The EBA has also issued its response to a call for advice by the EU Commission on the benchmarking process. This work is part of the EBA's efforts to address possible inconsistencies in the calculation of risk weighted assets (RWAs) across the EU Single Market and to restore confidence in EU banks' capital and internal models.

The first benchmarking exercise conducted under the ITS and RTS framework will be based on data referred to Q4 2015 observations. Institutions must report the information by 11 April 2016.

CRD 4: EBA consults on draft remuneration guidelines

The EBA has launched a consultation on draft guidelines on governance processes for implementing remuneration policies under the remuneration principles set out in CRD 4 and remuneration disclosures set out in the Capital Requirements Regulation (CRR). The draft guidelines specify the criteria for mapping all remuneration components into either fixed or variable pay and complement an EBA opinion on allowances issued in October 2014 by providing additional details in support of the principles formulated in it, so as to ensure compliance with the bonus cap introduced by CRD 4.

The draft guidelines include measures that relate to:

- remuneration policies and the treatment of identified staff and all other staff;
- governance issues and aligning the remuneration structure to risk profiles and capital structure;
- severance, including shareholder approvals for the maximum amount of severance;
- identification of material risk takers as identified staff and related internal criteria; and
- the bonus cap, retention policies and specific remuneration elements, such as allowances, sign-on bonus and retention bonus.

The EBA intends to send its advice on the application of proportionality to the remuneration principles to the EU Commission, suggesting legislative amendments that would allow for a broader application of the proportionality principle in order that specific exemptions may be introduced for certain institutions that do not rely extensively on variable remuneration.

Comments on the consultation paper are due by 4 June 2015.

EBA publishes discussion paper on IRB models

The EBA has published a discussion paper on regulatory measures to improve the framework for Internal Ratings Based (IRB) models. The paper seeks stakeholders' feedback on how to implement the measures in a consistent way and how to bring forward future changes to the current approach. An overview of the regulatory measures that are under way is also provided.

The EBA work on IRB models is intended to improve the comparability of IRB models across institutions and will focus on three key areas:

- review of the IRB regulatory framework;

- supervisory consistency, which will include annual benchmarking exercises; and
- increased transparency based on standardised comparable templates.

Comments are due by 5 May 2015.

BRRD: EBA consults on records of financial contracts

The EBA has launched a public consultation on draft RTS under the Bank Recovery and Resolution Directive (BRRD) on detailed records of financial contracts of institutions or relevant entities.

Amongst the resolution tools and powers foreseen by the BRRD is the power of resolution authorities to temporarily suspend the termination rights of any party to a contract with an institution under resolution. In order to ensure the successful application of this power, the EBA is given a mandate to specify the minimum set of the information on financial contracts that should be kept in the detailed records, as well as the circumstances in which the requirement to maintain detailed financial records should be imposed on institutions and relevant entities.

The draft RTS are intended to guarantee appropriate convergence in record keeping across the EU, whilst also ensuring that differences in institutions or relevant entities are taken into account.

Comments are due by 6 June 2015.

EMIR: ESMA and Reserve Bank of Australia enter into memorandum of understanding on trade repositories

The European Securities and Markets Authority (ESMA) and the Reserve Bank of Australia (RBA) have published a memorandum of understanding (MoU) that will allow the RBA to have access to data held in European trade repositories.

The MoU is the second cooperation arrangement established under Article 76 of the European Market Infrastructure Regulation (EMIR). The provision aims to ensure that third-country authorities that do not have any trade repository in their jurisdiction may access the information on derivatives contracts held in European trade repositories which is relevant for their mandates.

The MoU ensures that guarantees of professional secrecy exist.

FSB and IOSCO propose updated methodologies for identifying NBNI G-SIFIs

The Financial Stability Board (FSB) and the International Organisation of Securities Commissions (IOSCO) have jointly published updated assessment methodologies for identifying non-bank non-insurer global systemically important financial institutions (NBNI G-SIFIs). The methodologies take into account responses received to the first consultation issued in January 2014 and complement the methodologies for identifying G-SIFIs that currently cover banks and insurers.

The proposed methodologies aim to identify NBNI financial entities whose distress or disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system. The methodologies comprise a high-level framework and an operational framework for identifying G-SIFIs that would apply across NBNI financial entities, as well as detailed NBNI sector-specific methodologies.

In revising the proposed methodologies, the FSB and IOSCO intend to capture different types of systemic impact posed by a range of business models and risk profiles, while also maintaining broad consistency with the existing assessment methodologies for global systemically important banks (G-SIBs) and insurers (G-SIIs). They have also tried to overcome limitations in data availability and the wide variety of business models in the NBNI space, by allowing a greater role for supervisory judgment in the assessment compared to the G-SIB and G-SII methodologies. The NBNI G-SIFI methodologies will rely on detailed analysis conducted primarily by national authorities, which is supplemented by supervisory information-sharing and international coordination through the FSB process.

The methodologies issued for consultation do not propose specific entities for designation as NBNI G-SIFIS, or any policy measures. The FSB confirmed in an earlier report to the G20 leaders that policy measures would be developed once the assessment methodologies are finalised.

Comments are due by 29 May 2015.

Ring-fencing: Banking Reform Pensions Regulations 2015 enter into force

The Financial Services and Markets Act 2000 (Banking Reform) (Pensions) Regulations 2015 (SI 2015/547) have entered into force. These Regulations are the final piece of secondary legislation needed to complete ring-fencing and are intended to ensure that ring-fenced banks cannot be liable for the pension liabilities of other parts of the wider banking group. They allow the trustees of the bank's pension schemes to make the necessary changes to implement ring-fencing and also set out the role of the regulators, the Prudential Regulation Authority (PRA) and the Pensions Regulator, for monitoring and assessing the changes made.

Deposit Guarantee Schemes Directive: Implementing Regulations published

The Deposit Guarantee Scheme Regulations 2015 (SI 2015/486) have been published. The Regulations implement certain requirements of the revised Deposit Guarantee Schemes Directive (DGSD). The other provisions of the DGSD are being implemented in rules made by the Prudential Regulation Authority (PRA) under the Financial Services and Markets Act 2000 (FSMA).

The Regulations set out procedural requirements that apply to the PRA and the Financial Services Compensation Scheme (FSCS) established under FSMA when performing their duties under the DGSD, which relate to the protection of certain deposits in UK credit institutions, and amend FSMA to give effect to notification requirements set out in the DGSD and to ensure that the FSCS can request information from a credit institution at any time in accordance with the DGSD.

They also amend the Insolvency Act 1986, the Insolvency (Northern Ireland) Order 1989 and the Bankruptcy (Scotland) Act 1985 to introduce a new category of preferential debt – debts owed by credit institutions to the FSCS in respect of costs expended by the FSCS.

Finally, they revoke Regulations 46 to 48 of the Credit Institutions (Protection of Depositors) Regulations 1995 as the other amendments being made render these obsolete.

The Regulations come into force on 26 March 2015, except for the provisions on notifications to the scheme manager of problems with a compensation scheme member and the maximum compensation payable in respect of deposits held with a compensation scheme member, which come into force on 3 July 2015.

Order enabling building societies to create floating charges published

The Financial Services (Banking Reform) Act 2013 (Commencement (No. 8) and Consequential Provisions) Order 2015 (SI 2015/428) has been made. The Order enables building societies to create a floating charge by bringing into force paragraph 4 of Schedule 9 to the Financial Services (Banking Reform) Act 2013 and making necessary amendments to the Building Societies (Financial Assistance) Order 2010 (SI 2010/1188). The Order also applies legislation to effect this change in Scotland.

The Order will come into force on 26 March 2015.

Order on regulation of persons related to financial services firms published

The Financial Services (Banking Reform) Act 2013 (Commencement No. 9) Order 2015 (SI 2015/490) has been published. The Order brings into force certain provisions of the Financial Services (Banking Reform) Act 2013 relating to the regulation of persons performing functions in relation to financial services firms.

Royal Decree on entry into force of certain Belgian Banking Law provisions published

A Royal Decree of 22 February 2015, which provides for the entry into force of several provisions of the Law of 25 April 2014 on the status and control of credit institutions, has been published.

As of 3 March 2015, deposits from natural persons and from small and medium-sized enterprises benefit from a lien over the moveable assets of a credit institution. The Deposit Protection Fund benefits from the same lien with respect to its claims against the relevant credit institution.

The provisions of the Belgian Banking Law on resolution tools (Title VIII of Book II) also entered into force on 3 March 2015. These provisions were included in the Banking Law and aimed to anticipate the entry into force of the Bank Recovery and Resolution Directive (BRRD).

The provisions of Title VIII of Book II of the Banking Law set out the conditions under which the resolution authority may initiate resolution proceedings against a credit institution, and the tools available to the resolution authority.

The provisions dealing with the sale of business tool, the bridge institution tool and the asset separation tool have now entered into force. The provisions dealing with the bail-in tool are subject to the adoption of a Royal Decree by the end of 2015 at the latest.

SAFE further relaxes FX administration on foreign and overseas direct investment

The State Administration of Foreign Exchange (SAFE) has issued the 'Circular on further simplifying and improving foreign exchange administration polices in relation to direct investment', which is intended to improve the administrative regime for foreign direct investment (FDI) and overseas direct investment (ODI). The publication of the circular represents another step taken by SAFE to simplify the overall administrative approval regime.

Amongst other things, the following key points are worth noting:

- SAFE approval is no longer required for the foreign exchange registration in relation to FDI and ODI and from 1 June 2015, foreign invested companies can process the foreign exchange registration directly with a qualified bank at the place of their registered office;
- the registration by foreign investors in FDI transactions of (i) their non-currency capital contribution and (ii) payment for consideration of equity acquisition by Chinese parties to foreign investors is also no longer needed;
- no SAFE filling will be needed for re-investments (through equity investment or contractual control) made by offshore entities which are owned or controlled by domestic shareholders; and
- the annual foreign exchange inspection in respect of FDI/ODI projects will be removed – instead, companies shall, by the end of 30 September each year, submit their FDI and/or ODI information for the previous year to SAFE through a designated online system.

The circular will take effect on 1 June 2015 and will supersede any previous conflicting SAFE regulation.

HKMA publishes revised SPM module regarding capital adequacy regime for locally incorporated authorised institutions

The Hong Kong Monetary Authority (HKMA) has issued by notice in the Gazette a revised version of the Supervisory Policy Manual (SPM) module 'Overview of Capital Adequacy Regime for Locally Incorporated Authorised Institutions', as a statutory guideline under the Banking Ordinance.

The revisions update the module to reflect the current regulatory capital requirements (as contained in the Banking Ordinance, the Banking (Capital) Rules (BCR), the Banking (Disclosure) Rules and the relevant supervisory guidelines issued to date) as well as the supervisory process to ensure compliance. In particular, paragraphs 6.1.2 to 6.1.6 of the revised module provide guidance on the procedures to be followed by authorised institutions to ensure a capital instrument proposed to be included as Additional Tier 1 capital or Tier 2 capital meets all of the qualifying criteria specified in Schedule 4B or 4C to the BCR.

The revisions also clarify some issues identified in the Basel Committee on Banking Supervision's recent assessment of Hong Kong's compliance with the Basel 2/2.5/3 standards under its Regulatory Consistency Assessment.

SFC consults on principles of responsible ownership

The Securities and Futures Commission (SFC) has launched a three-month consultation on proposed principles of responsible ownership which provide guidance on how investors should fulfil their ownership responsibilities in relation to their investment in a listed company.

The seven principles of responsible ownership ask investors to:

- establish and report to their stakeholders their policies for discharging their ownership responsibilities;
- monitor and engage with their investee companies;
- establish clear policies on when to escalate their engagement activities;
- have clear policies on voting;
- be willing to act collectively with other investors when appropriate;
- report to their stakeholders on how they have discharged their ownership responsibilities; and
- have policies on managing conflicts of interests when investing on behalf of clients.

The SFC has indicated that the principles, which are non-binding and voluntary, operate on a 'comply-or-explain' basis. Investors are encouraged to sign up to the principles and either disclose how they comply with the principles, or else explain why some or all of the principles do not, or cannot, apply. The principles are relevant to individual and retail investors in that they provide general guidance on share ownership engagement, although some elements of the principles, such as reporting to stakeholders, do not expressly apply to individuals.

Comments on the consultation paper are due by 2 June 2015.

Asia Region Funds Passport: Singapore and other APEC economies consult on proposed rules

Singapore, Australia, Korea, New Zealand, Philippines and Thailand have launched a joint consultation paper to seek views from the public on the proposed rules and operational arrangements that will govern the operation of the Asia Region Funds Passport (ARFP).

The Working Group has also issued its responses to the feedback it received on the April 2014 public consultation on the ARFP and has refined the proposed arrangements, taking into account the feedback received during the consultation period.

The proposed rules cover areas such as the eligibility and operational criteria for passport fund managers and passport funds, as well as the authorisation process for passport funds. The rules also set out common standards and expectations amongst regulators from passport member economies on the supervision of passport funds, including the protection of investor interests. When implemented, the ARFP will allow fund managers operating in a passport member economy to offer their funds in other passport member economies under a streamlined authorisation process.

Comments on the consultation paper are due by 10 April 2015.

Singapore, Malaysia and Thailand sign MOU on facilitating cross-border capital raising in ASEAN

The Monetary Authority of Singapore (MAS) and the Singapore Exchange (SGX) have jointly signed a MoU with the Securities Commission Malaysia and the Securities and Exchange Commission of Thailand to establish a Streamlined Review Framework for the ASEAN Common Prospectus. The Framework, which is an initiative under the ASEAN Capital Market Forum Implementation Plan endorsed by the ASEAN Finance Ministers, is intended to facilitate cross-border offerings of equity securities and plain debt securities in ASEAN.

Under the Framework, the review process for a multi-jurisdiction offering of equity securities or plain debt securities will be streamlined, as long as the prospectus is prepared in accordance with the ASEAN disclosure standards. The Framework requires both home and host authorities to complete the review process at the same time, within three to four months from the date of submission. This is expected to enhance market efficiency as the time taken for the issuer to obtain approval to offer its securities in multiple jurisdictions would be shortened, providing more certainty to the issuer in terms of the time-to-market.

Malaysia, Singapore and Thailand are the first three jurisdictions to sign the MoU. Securities regulators in other ASEAN jurisdictions will participate in the Framework when they are ready. ASEAN exchanges with a substantial role in reviewing listing applications may also sign the MoU along with the securities regulators in their jurisdictions.

The signatories to the MoU plan to implement the Framework by the third quarter of 2015. They will jointly issue a handbook to provide guidance on the various administrative and procedural matters including the criteria for issuers, the application procedures and the review timeline.

RECENT CLIFFORD CHANCE BRIEFINGS

Non-Swiss Fund Managers – new Swiss fund marketing regime applies from 1 March 2015

The two-year transitional period applicable to the amended Swiss fund marketing rules ended on 1 March 2015 and any fund marketing activity taking place after this date must be in compliance with the amended rules governing the distribution of funds under the Swiss Collective Investments Schemes Act (CISA) and Collective Investment Schemes Ordnance (CISO).

This briefing discusses the new regime.

http://www.cliffordchance.com/briefings/2015/02/non-swiss_fund_managersnewswissfun.html

US Regulators reverse themselves on Volcker Rule Implementing Regulations and declare that 'SOTUS' restriction on marketing to US residents does not apply to Third-Party Covered Funds after all

On 27 February 2015, the Board of Governors of the Federal Reserve System and the other US Federal financial regulators published an addition to their list of Frequently Asked Questions about Section 13 of the Bank Holding Company Act of 1956, as amended (the Volcker Rule), and the final regulations adopted by the agencies in December 2013 to implement the Volcker Rule. The Implementing Regulations include an exemption from the Volcker Rule's 'covered funds' prohibition for non-US banking entities that sponsor or acquire ownership interests in covered funds 'solely outside of the United States' (SOTUS Covered Fund Exemption), which requires among other things that '[n]o ownership interest in the covered fund is offered for sale or sold to a resident of the United States' (US Marketing Restriction). The new Frequently Asked Question – the thirteenth to be published, according to the Fed's numbering scheme (FAQ 13) – addresses the scope of the

US Marketing Restriction, and is followed by a never-before given answer.

This briefing discusses the implications of FAQ 13, which reverses what was generally understood to be the agencies' settled position regarding the US Marketing Restriction.

http://www.cliffordchance.com/briefings/2015/02/non-swiss_fund_managersnewswissfun.html