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Briefing note

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Comitology: EU Commission proposes changes to procedures for implementing legislation

The EU Commission has published a proposal to amend the Comitology Regulation, which lays down rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of its implementing powers.

The proposal is intended to enhance transparency about the positions taken by Member States, allow for greater political guidance and ensure more accountability in the decision-making process. The proposals include:

- changes to voting rules at the last stage of the comitology procedure (the appeal committee), so that only votes in favour or against an act are taken into account. This is intended to reduce the use of abstentions and the number of situations where the committee is unable to take a position and the Commission is obliged to act without a clear mandate from the Member States;
- involving national Ministers by allowing the Commission to make a second referral to the appeal committee at Ministerial level if national experts do not take a position;
- increasing voting transparency at the appeal committee level by making public the votes of Member State representatives; and
- ensuring political input by enabling the Commission to refer the matter to the Council of Ministers for an opinion if the appeal committee is unable to take a position.

The proposals will be transmitted to the EU Parliament and EU Council for consideration.

European Supervisory Authorities consult on establishment of central contact points to prevent financial crime

The Joint Committee of the European Supervisory Authorities has launched a consultation on draft regulatory technical standards (RTS) intended to help Member States determine when payment service providers and electronic money issuers should appoint a central contact point (CCP) to help prevent money laundering and terrorist financing.

CCPs are intended to assist in effectively countering money laundering and terrorist financing (AML/CFT) in instances where a payment service provider or electronic money issuer has a head office in a Member State but operates establishments, such as agents or distributions, in other host Member States. These establishments must comply with the AML/CFT regimes of the Member State in which they are based, even if they are not obliged entities themselves.

The draft RTS set out the criteria Member States should consider when deciding whether a CCP should be appointed and the functions the CCP should perform.

Comments are due by 5 May 2017.

MiFID2: ESMA writes to Commission on systematic internalisers operating broker crossing networks

The European Securities and Markets Authority (ESMA) has written to the EU Commission to raise concerns over the potential establishment of networks of systematic internalisers (SIs) by investment firms to circumvent certain MiFID2 obligations.

Several market participants have made ESMA aware of their observations that certain investment firms, that currently operate broker-crossing networks, might be seeking to circumvent the MiFID2 requirements by setting up networks of interconnected SIs and other liquidity providers. Such arrangements would allow SIs to cross third party buying and selling interests via matched principal trading, or other types of back-to-back transactions. ESMA has encouraged the Commission to look into the matter to determine whether it should use any of its regulatory tools to address this issue, such as the power to adopt delegated acts further specifying the definitions in the Level 1 Directive.

ESMA intends to closely monitor developments and may, in future, clarify the scope of SIs' permitted activities and the characteristics of multilateral systems in its questions and answers (Q&A) document.

PSD2: EBA consults on complaints handling guidelines

The European Banking Authority (EBA) has launched a consultation on draft guidelines on procedures for complaints of alleged infringements of the recast Payment Services Directive (PSD2). The guidelines relate to the process of complaints submitted to competent authorities by payment service users or any other interested party about the alleged infringement of the PSD2 by payment service providers.

The draft guidelines set out:

- requirements on the channels to be made available by competent authorities to complainants for the submission of complaints and on the information to be requested from complainants and recorded by competent authorities;
- relevant information that competent authorities should provide when responding to complainants;
- requirements for competent authorities to perform an aggregate analysis of complaints of alleged infringements of PSD2 to be taken into consideration to ensure and monitor effective compliance; and
- requirements for competent authorities to document their complaints procedure.

Comments are due by 16 May 2017.

Interchange Fee Regulation: EBA dissents over proposed amendments to draft RTS

The EBA has issued an opinion to the EU Commission on proposed amendments to draft RTS on the separation of the payment card schemes and processing entities under the Interchange Fee Regulation (IFR).

The opinion responds to a letter from the Commission to the EBA setting out six proposals to amend the draft RTS, which were submitted by the EBA in July 2016 under Article 7(6) of the IFR.

The EBA dissents over three of the Commission's proposals and has taken the view that several proposals appear to assume that card schemes and processing entities are, or should be, treated as if they were legally and structurally separate. However, the IFR does not require structural or legal separation. As such, the EBA views the proposals may be disproportionate, difficult or ambiguous for certain payment card schemes and processing entities that are not legally separated, or are separate undertakings within the same group.

Benchmarks: Bank of England launches supplementary consultation on SONIA reform

The Bank of England (BoE) has published a supplementary consultation on the proposed reform of the Sterling Overnight Index Average (SONIA) interest rate benchmark.

This follows a consultation on detailed proposals for the reform of SONIA published in October 2016. The supplementary consultation seeks feedback on the BoE's revised proposal for the averaging methodology for SONIA to be calculated as the volume-weighted trimmed mean of eligible transactions, instead of as the volume-weighted median. This proposed change of averaging methodology is due to the trimmed mean methodology being more likely to behave like the existing SONIA, and to its being perceived as less sensitive to erroneous transactions or data reporting problems than the median methodology.

Comments are due by 16 March 2017.

The BoE aims to provide a summary of feedback to this supplementary consultation and the 2016 consultation, together with its response, by the end of March 2017. The BoE anticipates that the transition to reformed SONIA will occur in March or April 2018, rather than the end of 2017 as previously stated.

FCA reviews UK capital markets

The Financial Conduct Authority (FCA) has published a discussion paper (DP 17/2) on how the UK primary capital markets can most effectively meet the needs of issuers and investors.

The FCA has requested feedback on:

- whether the current boundary between the standard and premium listing categories is appropriate, particularly in relation to overseas issuers and exchange traded funds;
- the effectiveness of UK primary equity markets in providing capital for growth, particularly for early stage science and technology companies;
- whether there is a role for a UK primary debt multilateral trading facility, and its potential structure; and
- measures that could be introduced to support greater retail participation in debt markets.

The FCA has also published a consultation paper (CP17/14) on proposed technical enhancements to the Listing Rules.

The proposed changes include:

- clarifying the eligibility requirements for premium listing;
- introducing a concessionary route to premium listing for property companies;
- updating how premium listed issuers may classify transactions and the FCA consultation requirements; and
- the FCA approach to the suspension of listing for reverse takeovers.

The two publications are part of the FCA's wider work on the efficiency and effectiveness of UK primary markets as set out in the 2016/17 business plan.

Comments on both papers are due by 14 May 2017.

MiFID2: AMF updates its guide on implementation for asset management companies

The AMF has updated its guide to help asset management companies to implement the new measures introduced by the revised Markets in Financial Instruments Directive (MiFID2), which will apply from 3 January 2018.

In the context of MiFID2 transposition into national law by 3 July 2017, the guide addresses specific questions and covers key topics for asset management companies, in particular regarding product governance, independent investment advice, inducement, best execution and funding of research. The updated guide takes into account the main provisions of Level 2 MiFID2.

The guide may be further updated and supplemented, notably in light of final implementing MiFID2 laws and regulations, as well as the clarifications made by ESMA as part of its work on Level 3.

The impact of the implementation of MiFID2 requires the AMF to continue adjusting its published policy, positions and recommendations accordingly.

MiFID2: AMF publishes feedback on public consultation on new rules for funding of research by investment firms

The French Autorité des marchés financiers (AMF) has published a feedback statement on the public consultation it carried out from 12 September to 28 October 2016 on the principles for the operational implementation of the new rules governing the funding of research pursuant to MiFID2 and the Delegated Directive published on 7 April 2016. The document contains a summary of the responses received, as well as the AMF's comments.

The AMF is considering the publication of a guide in 2017, following the finalisation of the Level 3 measures by ESMA.

CSSF issues circular on EBA guidelines on provision of information in summary or collective form

The Luxembourg financial sector supervisory authority, the Commission de Surveillance du Secteur Financier (CSSF), has issued a new circular (17/649) to implement the European Banking Authority's guidelines (EBA/GL/2016/03) on the provision of information in summary or collective form for the purposes of Article 84(3) of the Bank Recovery and Resolution Directive 2014/59/EU (BRRD) in Luxembourg.

The circular is addressed to credit institutions, investment firms and financial conglomerates and sets out that within the context of the professional secrecy obligation of, amongst others, resolution authorities and competent authorities provided for in Article 84(1) BRRD, the EBA guidelines aim to establish certain factors to be taken into account in order to ensure that the information in summary or collective form is disclosed such that individual institutions or entities within the scope of the BRRD cannot be identified.

The guidelines entered into force on 19 January 2017.

FINMA modifies reporting requirements for persons with voting power

The Swiss Financial Market Supervisory Authority (FINMA) has revised the reporting requirements for parties with discretionary power to exercise voting rights set out in the FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA).

The revision follows feedback from market participants who experienced practical problems in implementing the current reporting requirements and a FINMA consultation on the proposed changes.

FMIO-FINMA now provides that where voting rights are delegated, the person subject to reporting requirements is the person who decides on how voting rights are exercised. Alternatively, where an entity which has discretionary power to exercise the voting rights is directly or indirectly controlled, the reporting requirement can be met by the controlling person on a consolidated basis.

The revised provisions will enter into force on 1 March 2017 and provide for a transitional period of six months from that date.

MAS consults on proposed regulatory regime for venture capital fund managers

The Monetary Authority of Singapore (MAS) has published a consultation paper proposing a simplified authorisation process and regulatory framework for managers of venture capital funds (VC managers) that meet certain criteria.

Currently, VC managers are subject to the same regulatory framework as other fund managers. However, the MAS notes that VC managers are different from other fund managers as they manage funds that typically:

- invest only in unlisted business ventures that have been established or incorporated for no more than five years at the time of initial investment;
- are non-redeemable at the discretion of the investor, and are not continuously available for subscription; and
- are offered only to accredited and/or institutional investors.

The MAS considers that these differences make some fund management rules that are currently imposed on VC managers less relevant. The MAS therefore intends to simplify the authorisation process and regulatory regime for VC managers. The simplified regime also takes into account the extent of contractual safeguards that are already present in typical fund management contracts negotiated by VC managers' sophisticated investor base.

Under the proposed simplified authorisation process, the MAS will focus primarily on fitness and propriety assessments of VC managers.

Under the proposed VC manager regime:

- the directors and representatives of VC managers will not need to have at least five years of relevant experience in fund management;
- there will be no base capital or risk-based capital requirements;
- it will not be mandatory for the VC manager to have an in-house compliance capability;
- it will not be mandatory for the VC manager to carry out independent valuation of the funds managed or internal audits of its business activities; and
- it will not be mandatory for the VC manager to submit to the MAS its annual audited financial statements or audit reports.

An existing fund manager that manages VC funds can operate under the VC manager regime after notifying the MAS that it meets all the proposed criteria and obtaining the MAS' acknowledgement of the notification. Alternatively, existing fund managers can choose to maintain their current regulatory status and be subject to the full list of ongoing requirements, even if they meet all the proposed criteria to qualify for the VC manager regime.

Comments on the consultation paper are due by 15 March 2017.

MAS announces changes to finance company regulations to enhance their ability to finance SMEs

The MAS has announced regulatory changes intended to strengthen the resilience of finance companies and enhance their ability to provide financing to small and medium sized enterprises (SMEs).

To enhance finance companies' role in SME financing, the MAS will relax the following business restrictions that currently apply to them:

- the limit on a finance company's aggregate uncollateralised business loans will be raised from the current 10% to up to 25% of its capital funds;
- the limit on uncollateralised business loans to a single borrower will be raised from the current SGD 5,000 to up to 0.5% of capital funds;
- finance companies will be allowed to offer current account and chequing services to their business customers; and
- finance companies will be allowed to join electronic payment networks, including Inter-bank GIRO, Fast and Secure Transfers (FAST) and Electronic Funds Transfer at Point of Sale (EFTPOS).

However, the MAS will retain other regulatory restrictions on finance companies, such as restrictions on foreign currency exposures and derivatives trading, and will require finance companies to enhance their corporate governance and risk management by imposing stricter rules on related party transactions and limits on exposures to the property sector.

The above regulatory changes will be phased in from this 2017.

The MAS will also liberalise its existing policy of prohibiting a foreign takeover of a finance company. Specifically, the MAS is prepared to consider an application for a merger or acquisition if the prospective merger partner or acquirer commits to maintaining SME financing as a core business of the finance company. The merger partner or acquirer must be able to demonstrate expertise in SME financing and present proposals to enhance the finance company's SME lending activities with new technologies, methodologies or business models.

MAS issues responses to feedback received on first consultation and launches second consultation on proposed revisions to notices on submission of statistics and returns

The MAS has published its responses to the feedback it received on its December 2014 public consultation on proposed revisions to MAS Notice 610 (for banks) and MAS Notice 1003 (for merchant banks) on the Submission of Statistics and Returns and simultaneously launched a second consultation on its revised proposals.

In particular, following the first consultation, the MAS has decided to remove the distinction between the Domestic Business Unit (DBU) and the Asian Currency Unit (ACU) in its banking regulations and the requirement to separately report on the DBU and ACU.

The MAS is also in the process of reviewing MAS Notice 612 on Credit Files, Grading and Provisioning and MAS Notice 1005 on Credit Files and Classification of Loans, and their implications on MAS Notice 610 and MAS Notice 1003. The MAS will consult the industry at a later date.

Comments on the second consultation are due by 20 March 2017

MAS publishes response to feedback received on consultation paper on removing DBU-ACU divide

The MAS has published its responses to the feedback it received on its August 2015 consultation on the proposed consequential amendments to the regulatory requirements in relation to the removal of the Domestic Business Unit (DBU) and the Asian Currency Unit (ACU) divide.

Amongst other things, the MAS has advised that:

- the concept of the DBU-ACU divide will be removed in the legislative framework for both banks and merchant banks;
- the implementation timeline for the removal of the DBU-ACU divide should be aligned with that of the revised MAS Notice 610 (i.e. 30 months), and that all banks will be required to adhere to the same implementation timeline;
- the MAS will retain the concentration limits for foreign bank branches in MAS Notice 639 on Exposures to Single Counterparty Groups until the DBU-ACU divide is removed;
- with the removal of the DBU-ACU divide, the MAS will cancel the ACU Terms and Conditions of Operation; and
- MAS Notice 639A on Exposures and Credit Facilities to Related Concerns will continue to apply to all banks in Singapore, including foreign bank branches, but banks will no longer need to prepare separate statements for DBU and ACU operations.

KRX to introduce new rules on short selling

The Korea Exchange (KRX) has revised the business regulations of the KOSPI, KOSDAQ and KONEX market to introduce a new rule to designate overheated short selling stocks. The revision follows the Financial Services Commission's (FSC's) announcement on 10 November 2016 on the improvement of short selling and disclosure rules.

Under the plan, stocks showing extraordinary increases in short selling with sharp falls in prices will be detected after market close and be designated as overheated short selling stocks. The KRX will then prohibit short selling for those stocks on the following day. Detailed conditions for the designation will be determined and announced shortly. Penalties against violation of short selling rules will also be strengthened.

The revision will come into effect after the KRX amends the enforcement rules of the business regulations and develops relevant systems in cooperation with member securities firms, scheduled to be effective on 27 March 2017.

Office of Compliance Inspections and Examinations publishes risk alert highlighting frequent compliance deficiencies

The US Securities and Exchange Commission (SEC) Office of Compliance Inspections and Examinations (OCIE) has published a risk alert identifying five of the most frequently cited topics in 1,000 deficiency letters involving SEC-registered advisers.

These topics are:

- general compliance program issues under SEC Rule 206(4)-7 (e.g., incomplete compliance manuals and failure to perform annual audits);
- incomplete/insufficient regulatory filings (e.g., failure to update Form ADV and untimely Form D filings);
- 'custody rule' issues under SEC Rule 206(4)-2 (e.g., failing to realize the adviser has custody of client assets and insufficient surprise examination practices);
- code of ethics issues under SEC Rule 204A-1 (e.g., failure to identify all access persons and untimely submission of transaction and holdings reports); and

- books and records issues under SEC Rule 204-2 (e.g., inconsistent or incomplete recordkeeping).

The risk alert encourages advisers to review their own practices in light of these frequently identified weaknesses.

CFTC staff grants transition period for complying with new variation margin requirements and provides relief from minimum transfer amount provisions for separately managed accounts

The staff of the CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO) has issued limited no-action relief regarding the CFTC's variation margin requirements that have a 1 March 2017 compliance date (1 March VM Requirements). This no-action relief is effective from 1 March 2017 until 1 September 2017.

The transitional relief is conditioned on the following:

- the swap dealer does not comply with the 1 March VM Requirements with respect to a particular counterparty solely because it has not, despite good faith efforts, completed necessary credit support documentation with such counterparty or, acting in good faith, requires additional time to implement the related operational processes;
- the swap dealer uses its best efforts to continue to implement compliance with the 1 March VM Requirements;
- the swap dealer must continue to post and collect variation margin with such counterparty in accordance with any existing variation margin arrangements until such time as the swap dealer is able to comply with the 1 March VM Requirements; and
- no later than 1 September 2017, the swap dealer complies with the 1 March VM Requirements with respect to all swaps to which the 1 March VM Requirements are applicable entered on or after 1 March 2017.

The no-action relief does not apply to the CFTC's variation margin requirements that had a compliance date of 1 September 2016.

DSIO staff have also issued a no-action letter stating that it will not recommend enforcement action against a swap dealer, subject to certain conditions, that does not comply with the minimum transfer amount requirements of CFTC Regulations 23.152(b)(3) or 23.153(c) with respect to one or more swaps with any legal entity that is the owner of more than one separately managed account.

The relief does not apply to any swap dealer that is subject to the margin rules issued by the US prudential regulators.

RECENT CLIFFORD CHANCE BRIEFINGS

Sovereign pari passu clauses – lost rights or last rites?

In late 2012, the New York courts decided that a pari passu clause in a sovereign bond prevented the sovereign from paying other creditors without paying the bondholders at the same time. This caused concern in some quarters, not least because of the power it offered holdout creditors in sovereign debt restructurings. Four years later, the position may have changed. A New York court has now held that the same sovereign's payments to other creditors do not breach the same pari passu clause. Instead, more egregious behaviour – in substance, subordinating the bonds – is, it seems, required.

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2017/02/sovereign_pari_passuclauseslostrightsorlas.html

The regime for third country firms under MiFID2/MiFIR – The outlook from Spain

MiFID 1 did not have a harmonised regime for firms domiciled outside the EU operating and offering services in the EU. MiFID2/MiFIR introduces a radical change, harmonising the regime under which these firms can offer investment services in the EU, albeit establishing different regimes depending on the type of clients that receive the services.

This briefing paper discusses the new regime and the outlook from Spain.

https://www.cliffordchance.com/briefings/2017/02/the_regime_for_thirdcountryfimrsundermifidi.html

Universal Succession in Singapore – Getting the Recognition It Deserves

The doctrine of universal succession has finally received judicial recognition in Singapore, almost 60 years after the leading English case on the subject was decided.

The doctrine of universal succession has, for the first time, been considered – and approved – by the Singapore courts in JX Holdings Inc and another v Singapore Airlines Ltd [2016] SGHC 212. Prior to this judgment, practitioners in Singapore placed reliance on the English position in concluding that the Singapore courts are likely to follow

English common law principles when examining the doctrine of universal succession.

The JX Holdings judgment now puts this beyond doubt and suggests that the Singapore courts may be prepared to recognise succession even (1) where it may not be recognised under English law and (2) where the succession is not 'universal'.

This briefing paper discusses the judgment.

https://www.cliffordchance.com/briefings/2017/02/universal_successioninsingaporegettingth.html

Evolving venture capital landscape in Singapore

On 10 November 2016, the Deputy Prime Minister (DPM) and Chairman of the Monetary Authority of Singapore (MAS), Tharman Shanmugaratnam, announced in his speech (at the launch of LATTICE80) that the MAS is working with the venture capital (VC) industry to grow the funding landscape for start-ups in Singapore and the region. The MAS proposed to achieve this through simplifying the regulatory regime for managers of VC funds (VC managers) and studying whether the existing tax incentives for funds and fund managers are sufficient to anchor VC funds and VC managers in Singapore.

This briefing paper discusses the MAS' February 2017 consultation paper detailing its proposals for a simplified regulatory regime.

https://www.cliffordchance.com/briefings/2017/02/evolving_venturecapitallandscapeinsingapore.html

Decibels down under – major whistleblower reforms being considered

Significant reforms to Australia's whistleblower laws in the corporate, public and not-for-profit sectors are likely to emerge as a result of an inquiry by the Joint Parliamentary Committee on Corporations and Financial Services.

The inquiry process is underway, with the inquiry to consider public submissions and undertake hearings between now and the 30 June 2017 deadline for its report. How far the inquiry embraces some of the more controversial proposals, including the introduction of compensation arrangements and whether to extend such arrangements to culpable whistleblowers, will be closely followed.

This briefing paper identifies some of the key issues that the inquiry will be considering under its terms of reference and areas where reforms are likely.

https://www.cliffordchance.com/briefings/2017/02/decibels_down_undermajorwhistleblowerreform.html

US Person Restrictions in the US Risk Retention Regulation Foreign Transaction Safe Harbor raise practical problems for non-US securitizations

With effect from 24 December 2016, the sponsor of a securitization transaction is required to comply with the US credit risk retention requirements set out in Section 15G of the Securities Exchange Act of 1934, as amended and the related implementing regulations unless an exemption applies. The Regulations contain a safe-harbor for foreign transactions that meet specific conditions. One of those conditions is a limit on the offer and sale of the securitization securities to US Persons. Unfortunately, the definition of US Person in the Regulations is different from the familiar Regulation S definition. Sponsors and issuers should take care to ensure that their offering complies with the Regulations.

This briefing paper discusses the Regulations.

https://www.cliffordchance.com/briefings/2017/02/u_s_person_restrictionsintheusris.html

CFTC no-action letters address variation margin deadline and minimum transfer amounts

On 13 February 2017, the US Commodity Futures Trading Commission's (CFTC's) Division of Swap Dealer and Intermediary Oversight (DSIO) issued a no-action letter granting limited relief relating to the CFTC's variation margin requirements until 1 September 2017. The DSIO also issued a no-action letter that grants exemptive relief related to the application of the minimum transfer amount to separately managed accounts.

This briefing paper discusses the relief, which only applies to dealers subject to the CFTC's margin rules (typically non-bank dealers) and does not apply to any swap dealer that is subject to the margin rules issued by the US prudential regulators (typically bank dealers).

https://www.cliffordchance.com/briefings/2017/02/cftc_no-action_lettersaddressvariationmargi.html