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Briefing note

International Regulatory Update

11 – 15 September 2017

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EU Commission President delivers State of the Union address

The President of the EU Commission, Jean-Claude Juncker, has delivered his 2017 State of the Union address to the EU Parliament at Strasbourg. The speech set out a roadmap for the EU and a vision for how the EU could evolve by 2025.

In relation to the euro, Juncker proposed a euro-accession instrument to offer technical and potential financial assistance to Member States that want to join the euro. Moreover, he set out his view that all Member States should be encouraged to join the Banking Union. President Juncker also called for the European Stability Mechanism (ESM) to graduate progressively to a European Monetary Fund, proposals on which will be published in December. Moreover, the address called for a European Minister of Economy and Finance who would build on the work of the Commission under its Structural Reform Support Service and who would coordinate all EU financial instruments that can be deployed to a Member State in recession or another fundamental crisis. The speech set out a model whereby the Commissioner for economic and financial affairs would assume the role of the Economy and Finance Minister, who would also preside the Eurogroup. President Juncker argued that a separate budget or parliament for the euro area would not be necessary.

The speech also addressed strengthening EU democracy and, among other things, set out President Juncker's view that merging the roles of Commission President and European Council President would be more efficient and enable the institutions to function better.

The speech also discussed issues relating to taking decisions in the Council by qualified majority in relation to certain tax measures, establishing a European Labour Authority, and priorities for the coming year, including the proposal to open trade negotiations with Australia and New Zealand and the establishment of a European Cybersecurity Authority.

MiFIR: EU Commission reports on exchange-traded derivatives exemption

The EU Commission has published a report on the need to temporarily exclude exchange-traded derivatives from the scope of Articles 35 and 36 of the Markets in Financial Instruments Regulation (MiFIR). The report provides a risk assessment for open and non-discriminatory access provisions in MiFIR and discusses the exchange-traded derivatives market structure.

The report concludes that the current regulatory framework in MiFIR and the European Market Infrastructure Regulation (EMIR) appropriately addresses the potential risks identified and, on this basis, it is not necessary to temporarily exclude exchange-traded derivatives from the scope of Articles 35 and 36.

EU Commission publishes recommendation for Council Decision on establishing multilateral court for investment dispute settlement

The EU Commission has published a Recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.

The multilateral investment court initiative aims to establish a permanent, independent and legitimate framework for the resolution of international investment disputes, which delivers consistent case-law and allows for appeals of decisions and third party interventions (such as interested environmental or labour organisations). It is intended to address the current problems stemming from the usage of Investor-State Dispute Settlement (ISDS) and the Investment Court System (ICS) in EU trade and investment agreements, such as the lack of consistency and transparency of ISDS and administrative complexity and budgetary impact of the ICS.

The proposed initiative will only deal with procedural issues. Matters such as the applicable law or standards of interpretation, including ensuring consistency with other

international obligations, will be addressed in the underlying investment agreements to be applied by the multilateral investment court.

The Annex to the Commission's proposed Council Decision sets out the negotiating directives on issues such as:

- when disputes can be submitted;
- guaranteeing the independence and transparency of the court;
- the mechanism for appealing decisions; and
- ensuring the court's decisions benefit from an effective international enforcement regime.

The recommendation will be sent to the Council for endorsement.

EuSEF and EuVECA funds: EU Parliament approves final text of amending regulation

The EU Parliament's plenary session has voted to approve the text of the proposed regulation amending the European Venture Capital Funds (EuVECA) Regulation and the European Social Entrepreneurship Funds (EuSEF) Regulation.

The proposed Regulation will enter into force twenty days after its publication in the Official Journal.

EBA reports on CRD 4/Basel III monitoring exercise as at 31 December 2016

The European Banking Authority (EBA) has published its twelfth report setting out the results of its monitoring exercise relating to the Capital Requirements Directive (CRD 4) and Regulation (CRR), as well as Basel III. The EBA has published the results of its monitoring for banks across the EU as at 31 December 2016, which has been run in parallel with the exercise carried out at a global level by the Basel Committee on Banking Supervision (BCBS).

Overall, the EBA results of this exercise showed:

- there is a total average Common Equity Tier 1 (CET1) ratio of 13.4%;
- only 2.3% of sampled banks would be constrained by the minimum leverage ratio requirement of 3% additionally to risk-based minimum requirements;
- the average liquidity coverage ratio (LCR) is 139.5%;
- 99.2% of sampled banks show an LCR above the full implementation minimum requirement applicable from January 2018 (100%); and
- based on Basel III standards, in the absence of a finalised EU definition, the average net stable funding ratio (NSFR) is 112.0%.

MiFID2/R: ESMA updates Q&A on market structures topics

The European Securities and Markets Authority (ESMA) has updated its question and answers (Q&A) document on market structures topics under MiFID2 and MiFIR.

The updated Q&A document answers questions on:

- the timing and procedure of notifications for temporary opt-out under Article 36(5) MiFIR;
- exemptions under Article 36(5) and Article 54(2) of MiFIR;
- the timing of applications for transitional arrangements under Article 54(2) of MiFIR; and
- limitations of access rights following exemption under Article 36(5) of MiFIR.

MiFID2: ESMA announces recalculation of transitional transparency calculations and publishes FAQ

ESMA has updated its transitional transparency calculations (TTC) for non-equity instruments in accordance with RTS 2 on transparency requirements in respect of bonds, structured finance products, emission allowances and derivatives under MiFIR.

ESMA published the TTC for all non-equity instruments except for bonds on 3 July 2017. Since publication, some trading venues have notified ESMA of problems in their submitted data. As such, ESMA has corrected and recalculated the TTC for both asset classes accordingly.

Alongside a press release on the recalculation, ESMA has published FAQs on the TTC.

ESMA publishes opinion extending CNMV's temporary short selling prohibition

ESMA has published an opinion agreeing to the prolongation of an emergency short selling prohibition imposed by the Comisión Nacional del Mercado de Valores (CNMV) on net short positions in shares issued by Liberbank, S.A. (ISIN ES0168675090) under the Short Selling Regulation (SSR).

The prohibition entered into force on 12 June 2017 at 08:15 CET and was extended on 12 July 2017. The measure temporarily prohibits transactions in any shares, either directly or through related instruments and irrespective of the venue or market in which the transactions leading to those positions are conducted. The measure does not

apply to market-making activities, trading in index-related instruments or short positions entered into to hedge positions on convertible bond or subscription rights. The measure applies to any natural or legal person, irrespective of their country of residence.

The CNMV notified ESMA of its intention to make use of its powers under the SSR to renew the current emergency measure and ESMA's opinion sets out that it considers that the circumstances are adverse events or developments which constitute a serious threat to market confidence and potential risk to financial stability in Spain, and as such the measures are appropriate, necessary and proportionate.

The short selling restriction will be applicable until the end of 30 November 2017.

Basel Committee reports on Basel III monitoring exercise

The Basel Committee on Banking Supervision has published the results of its latest review of the implications of the Basel III standards for banks. For the first time, the BCBS report provides regional breakdowns for many key metrics in addition to the global averages. Data was provided for a total 200 banks, comprising 105 large internationally active banks.

On a fully phased-in basis, data as of 31 December 2016 show that all participating banks meet both the Basel III risk-based capital minimum Common Equity Tier 1 (CET1) requirement of 4.5% and the target level CET1 of 7.0% (plus any surcharges on global systemically important banks, as applicable).

The monitoring reports also collect data on Basel III's liquidity requirements. The Liquidity Coverage Ratio (LCR) was raised from 60% in 2015 to 70% in 2016, and will continue to rise in equal annual steps to reach 100% in 2019. 91% of all Group 1 banks, with Tier 1 capital of more than EUR 3 billion including all 30 banks designated as G-SIBs, and 96% of Group 2 banks, with Tier 1 capital less than EUR 3 billion or which are not internationally active, in the LCR sample reported an LCR that met or exceeded 100%, and all banks reported an LCR at or above the 70% minimum requirement.

The report also covers the Net Stable Funding Ratio (NSFR), and found that 94% of the Group 1 banks and 88% of the Group 2 banks in the NSFR sample reported a ratio that met or exceeded 100%.

PRA consults on adjustment of regulated fees and levies

The Prudential Regulation Authority (PRA) has published a consultation paper (CP17/17) setting out its proposal to correct the rates for the 2017/18 fee year (1 March 2017 to 28 February 2018) published in Policy Statement (PS) 17/17 'Regulated fees and levies: rates for 2017/18'.

CP17/17 seeks to amend Table III of the Fees Part of the PRA Rulebook in order to reflect the most up-to-date data received from firms, which was not taken into account in the fee rates published in the PS.

The correct fee rates, which will be lower than those in the PS, are being used in the fees calculator on the Financial Conduct Authority (FCA) website, and have been invoiced to firms for the 2017/18 year.

The consultation closes on 12 October 2017.

CSDR: HM Treasury publishes response to consultation on UK implementation

HM Treasury has published the first part of its response to the December 2015 consultation on the implementation of the Central Securities Depositories Regulation (CSDR). The consultation covered competent authorities, settlement internalisers, recognised CSDs and authorisation, enforcement powers, freedom to issue in an authorised CSD, transitional provisions including for issuers of securities already evidenced in a UK CSD and amendments to the Uncertificated Securities Regulations 2001 (USRs) Schedule 1.

The government has decided to publish its response in two parts. It has published a summary of responses submitted and government decisions in relation to the Central Securities Depositories Regulations 2017. A response focusing on the Uncertificated Securities (Amendment) Regulations 2017 is expected sometime in 2018.

HM Treasury publishes policy paper on extending Quoted Eurobond Exemption to UK MTFs

HM Treasury and HMRC have published a policy paper extending the Quoted Eurobond Exemption (QEE) to interest on debt traded on a Multilateral Trading Facility (MTF) operated by an EEA-regulated recognised stock exchange (RSE).

The policy paper proposes to introduce the measure, intended to improve the competitiveness of UK MTFs as alternatives to traditional debt markets, in the Winter Finance Bill 2017. The proposed clause:

- extends the definition of 'quoted Eurobond' in section 987 of the Income Tax Act 2007; and
- widens the definition of 'investment bond arrangements' in various pieces of tax legislation

to include securities admitted to trading on a MTF operated by an EEA-regulated RSE. Amendments to the meaning of 'quoted Eurobond' will have effect for payments of interest made on or after 1 April 2018.

Amendments to 'investment bond arrangements' will have effect for corporation tax purposes for accounting periods beginning on or after 1 April 2018, and for Income Tax purposes for the tax year 2018 to 2019 and subsequent tax years.

Insolvency bill published in Belgian State Gazette

A new Belgian insolvency bill has been published in the Belgian State Gazette. The bill, which was adopted on 13 July 2017, abolishes and replaces the former bankruptcy law and the law on the continuity of enterprises, and assembles all relevant provisions in a new Book XX of the Code of Economic Law.

Aside from implementing the provisions of the recast EU Insolvency Regulation (2015/848), the bill introduces some long-awaited reforms. The scope of the insolvency provisions is henceforth extended to make insolvency proceedings available to all legal entities as well all natural persons who independently exercise a professional activity, regardless of its nature. Although the Belgian legislator has shied away from introducing 'silent' bankruptcy proceedings or pre-packs into Belgian law, the bill incentivises out-of-court settlements between debtors and creditors by providing for the possibility for courts to endorse such out-of-court settlements and protecting them against hardening period risk. It also introduces the concept of a 'business mediator' to assist a company prior to the opening of actual insolvency proceedings.

In addition, the bill allows for the appointment of one single receiver for various group companies. Genuine group insolvency proceedings remain, however, inexistent. A further and important amendment in practice is the (further) digitisation of bankruptcy files.

Records relating to insolvency proceedings will henceforth exclusively be held electronically, and will be available for consultation online (at www.regsol.be). Whilst foreign creditors will still be allowed to submit claim forms on paper, all entities with a registered office in Belgium will need to so electronically. The new rules also clarify that the special treatment of secured claims in judicial reorganisation proceedings is limited to the value of the underlying collateral, and that if the amount of a secured claim is larger than the value of the underlying collateral, the excess is treated as an ordinary claim. Finally, the law contains specific provisions on the liability of directors in case of bankruptcy (including on wrongful trading), and on the waiver of residual debts of non-corporate distressed debtors to offer them a second chance.

The bill will enter into force on 1 May 2018.

Bank of Italy consults on changes to supervisory reporting requirements

In the context of the introduction of International Financial Reporting Standard (IFRS) 9, the Bank of Italy has launched a consultation on a set of proposed amendments to the existing reporting requirements applicable to financial institutions.

In particular, the following regulations will be amended and/or integrated:

- Circular no. 272 of 30 July 2008 'Matrice dei conti';
- Circular no. 115 of 7 August 1990 'Istruzioni per la compilazione delle segnalazioni di vigilanza su base consolidata';
- Circular no. 148 of 2 July 1991 'Manuale delle Segnalazioni Statistiche e di Vigilanza per gli Intermediari del Mercato Mobiliare';
- Circular no. 189 of 21 October 1993 'Manuale delle Segnalazioni Statistiche e di Vigilanza per gli Organismi di Investimento Collettivo del Risparmio'; and
- Circular no. 217 of 5 August 1996 'Manuale per la compilazione delle Segnalazioni di Vigilanza per gli Intermediari Finanziari, per gli Istituti di pagamento e per gli IMEL'.

Comments need to be submitted within 60 days of the publication of the consultation documents.

ELTIFs: Italian Government gives preliminary approval to draft legislative decree

Further to a consultation process launched by the Ministry of Economy and Finance, the Italian Government has given its preliminary approval to a draft legislative decree intended to adapt the Italian legal framework to the provisions of the Regulation on European long-term investment funds (ELTIFs).

The draft legislative decree remains subject to some last comments to be received from other parliamentary committees.

Polish Financial Supervision Authority issues statement on audit firm rotation

The Polish Financial Supervision Authority (PFSA) has made an announcement which states, among other things, that the requirement for a periodic change of statutory auditor or audit firm results from Art. 17 of Regulation no. 537/2014, and the maximum duration of the audit mandate stipulated therein (10 years) may be shortened under national law. In the provisions of the Act on Statutory Auditors, the possibility of shortening the maximum duration of the audit mandate was taken advantage of, with this period being set as five years.

Therefore, if an audit of financial statements of public interest entities (PIE – meaning the public interest entities referred to in the Regulation (EU) no. 537/2014 of the European Parliament and of the Council of 16 April 2014) as at the entry into force of Regulation 537/2014 (17 June 2016) lasts for at least 10 years, the audit firm conducting the audit of financial statements prepared by a PIE should be changed after 16 June 2016. Therefore, if the financial year is the calendar year, then starting from the financial statements prepared for 2017, there should be a change of audit firm.

Polish Financial Supervision Authority issues statement on provision by audit firms of services within scope of auditing solvency and financial condition reports prepared by insurance and re-insurance companies

The PFSA has issued a statement on the standpoint of the Ministry of Finance addressed to an insurance company in reply to an individual enquiry on the classification of the service of auditing a solvency and financial condition report (SFCR).

According to the Ministry of Finance, the service of auditing an SFCR is not a statutory or a voluntary audit service within the meaning of Art. 2 points 1 and 2 of the Act on Statutory Auditors, Audit Firms and Public Supervision of 11 May 2017, since the subject of the service differs from the statutory audit service.

However, the SFCR audit service is an attestation service referred to in Art. 2 point 5 of the Act on Statutory Auditors, since the purpose thereof is to give higher credibility to a solvency and financial condition report (i.e. similar to the level of credibility given in the case of a statutory audit of financial statements) and comes under the list of financial audit activities referred to in Art. 2 point 7 of the Act on Statutory Auditors.

Polish Financial Supervision Authority issues reminder on new regulations on audit committees

The PFSA has issued a reminder that the Act on Statutory Auditors, Audit Firms and Public Supervision of 11 May 2017 introduced a number of significant changes, including regulations on audit committees.

The PFSA notes, among other things, that there will be a requirement for certain entities supervised by the PFSA to appoint an audit committee. Entities which, as a rule, have not been required to have an audit committee in place, but have been authorised to do so pursuant to the new Act on Statutory Auditors, include investment funds, pension funds, open pension fund managers, cooperative banks, and cooperative loans and saving societies which come under the definition of public interest entities, national payment institutions and also, in those cases provided for in the Act, investment fund managers.

The deadline for appointing or adjusting the composition of an audit committee in a PIE is 21 October 2017.

Polish Financial Supervision Authority issues statement on information requirements under Art. 133 of Act on Statutory Auditors

The PFSA has issued a statement on the requirements to inform the PFSA under Art. 133 of the Act on Statutory Auditors.

Pursuant to Art. 133 of the Act on Statutory Auditors, Audit Firms and Public Supervision of 11 May 2017, if a decision-making body (i.e. a body other than the body approving the financial statements) in a public interest entity decides on the choice of audit firm that is to audit its financial statements, the entity must inform the PFSA of this. Furthermore, the PFSA notes that the obligation arising under Art. 133 of the Act on Statutory Auditors should be fulfilled irrespective of compliance with the information requirements imposed by the Act on Public Offerings.

Polish Financial Supervision Authority issues statement on information requirements under Art. 66 sec. 9 of Accounting Act

The PFSA has issued a statement on the requirements to inform the PFSA under Art. 66 sec. 9 of Accounting Act.

The PFSA notes the requirement arising under the Accounting Act to inform the National Council of Statutory Auditors (and, in the case of public interest entities, also the PFSA) of the termination of an agreement on the audit of financial statements.

The PFSA expects the requirement to inform the PFSA under the Accounting Act to be implemented as follows:

- the PIE and the audit firm will, promptly following the occurrence of the event, notify the PFSA of the termination of the agreement on the audit of financial statements, giving an appropriate explanation of the reasons for the termination; and
- the notifications sent by the PIE and the audit firm should also state the period of time for which the audit agreement was concluded, the dates of conclusion and termination of the agreement, and whether the decision to terminate the audit agreement was made by the PIE or the audit firm.

The PFSA also advises that where the agreement on the audit of financial statements has been terminated without a valid reason, or if the PFSA is not informed that such agreement has been terminated, the Accounting Act provides for criminal sanctions, i.e. fines or imprisonment.

SFC updates FAQs on publicly offered investment products

The Securities and Futures Commission (SFC) has updated its series of frequently asked questions (FAQs) on publicly offered investment products by:

- adding a new Question 22 under Section 2 of the FAQs on post authorisation compliance issues of SFC-authorised unit trusts and mutual funds – the new question provides information on the requirement for the management company to notify holders if a fund no longer intends to maintain its status as an eligible collective investment scheme (CIS) under the Capital Investment Entrant Scheme;
- updating the answer to Question 4 of the FAQs on the Capital Investment Entrant Scheme – the question clarifies whether there are restrictions in the allocation of the minimum investments threshold under the Capital Investment Entrant Scheme; and
- adding a new Question 6 to the FAQs on the Capital Investment Entrant Scheme – the new question provides information on the requirement for the management company to notify holders if a fund no longer intends to maintain its status as an eligible CIS under the Capital Investment Entrant Scheme.

SFC and Securities Commission Malaysia sign fintech cooperation agreement

The SFC and the Securities Commission Malaysia have entered into an agreement to establish a framework for cooperation on financial technology (fintech). The agreement follows the creation of the SFC's Fintech Contact Point in 2016 and Securities Commission Malaysia's Fintech initiative in 2015.

Under the agreement, the SFC and the Securities Commission Malaysia have agreed to cooperate on information sharing and referrals of innovative firms seeking to enter one another's markets.

AML/CTF Amendment Bill 2017 introduced to Australian Parliament

The Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017 was introduced to the Australian Parliament on 17 August 2017. The Bill seeks to introduce a range of amendments to the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (AML Act). Key amendments include:

- AUSTRAC will gain new enforcement powers, including the power to issue infringement notices in respect of a wider range of civil penalty provisions, in order to impose financial penalties without the need to obtain a court order;
- regulatory relief in relation to customer due-diligence in correspondent banking relationships;
- reporting entities in a 'corporate group' will be permitted in certain circumstances to share information regarding common customers, to manage money laundering and terrorism financing risks without contravening the AML Act's tipping-off provisions; and
- digital currency exchange providers will be brought within the regulated population from an AML/CTF perspective.

The Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee to gather submissions and produce a report. Submissions closed on 8 September 2017. The Committee received three submissions, including from the Australian Bankers' Association Inc., Nyman Gibson Miralis and the Uniting Church of Australia.

The report of the Committee is due in Parliament on 16 October 2017.

SEC implements shorter settlement cycle for securities transactions

The US Securities and Exchange Commission (SEC) has announced that, pursuant to amendments to Rule 15c6-1 adopted earlier this year, it has implemented a shortened settlement cycle for most securities transactions. The move to a two business day standard settlement cycle (T+2) followed a period of preparation and coordination among regulators and industry. The first transactions covered by the amended rule settled on 7 September 2017.

The SEC has indicated that the shortened settlement cycle, which was largely enabled by advances in technology, is intended to improve efficiency by promoting innovation and changes in market infrastructures and operations. The SEC believes that T+2 should reduce certain risks in the clearance and settlement process, including credit, market, and liquidity risks for central counterparties, their members, and other market participants.

RECENT CLIFFORD CHANCE BRIEFINGS

EU proposal for screening of foreign direct investments

This briefing paper discusses the proposed creation of an EU framework for the screening of foreign takeovers and investments on grounds of security and public policy.

https://www.cliffordchance.com/briefings/2017/09/eu_proposal_for_screeningofforeigndirec1.html

PSD2 implementation – what you need to know

This briefing paper provides guidance for firms implementing the revised Payment Services Directive (PSD2).

https://www.cliffordchance.com/briefings/2017/09/psd2_implementationwhatyouneedtoknow.html

Brexit – Citizens' Rights, Dispute Resolution and the CJEU

Finding a means to resolve direct disputes between the UK and the EU after withdrawal should be easy. The difficult part is what ability companies and individuals should have to pursue their rights under the withdrawal agreement and the agreements forming the 'deep and special partnership' between the UK and the EU. The UK Government appears to reject any recourse by companies and individuals to an international tribunal (including the Court of Justice of the European Union), while the EU appears to require it. If the UK Government's view prevails, then individuals in the UK will find that the entitlement they have today to take direct action to protect their rights under EU treaties will not apply to their rights under any withdrawal agreement, unlike individuals in the EU.

This briefing paper discusses the key issues.

https://www.cliffordchance.com/briefings/2017/09/brexit_-_citizensrightsdisputeresolutionan.html

New SEC Staff Guidance Extends FAST Act Financial Disclosure Relief and the JOBS Act Confidential Review Process to all Issuers, Including REITs

This briefing paper discusses new SEC staff guidance that extends the FAST Act financial disclosure relief and JOBS Act's confidential review process to all issuers.

https://www.cliffordchance.com/briefings/2017/09/new_sec_staff_guidanceextendsfastactfinancia.html