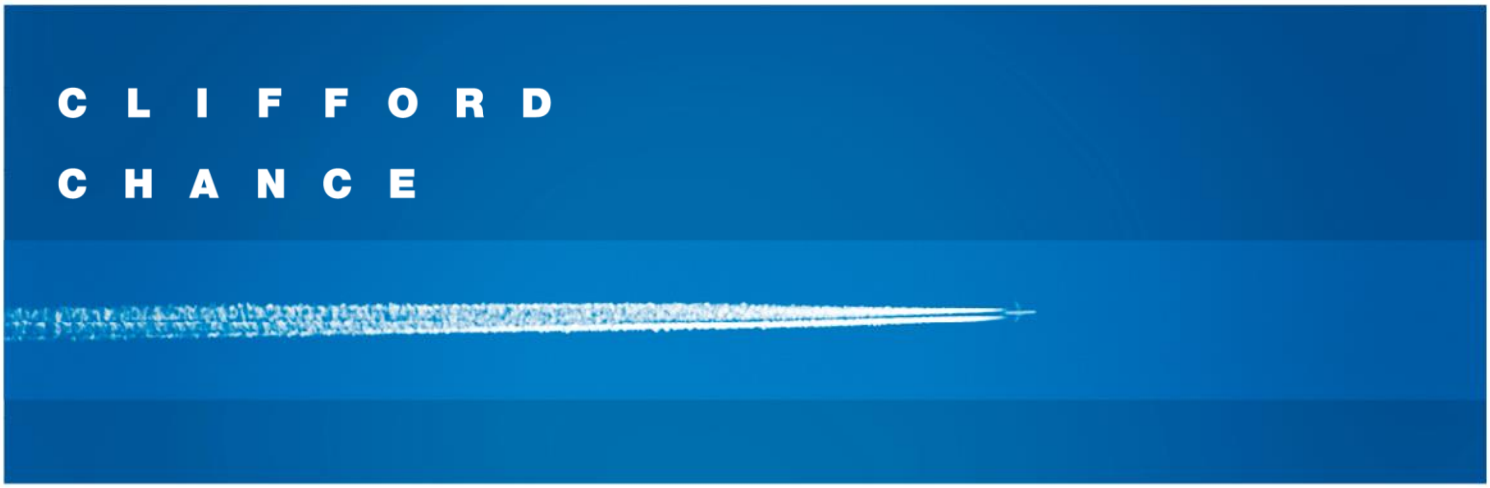

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EU Council adopts fifth Anti-Money Laundering Directive

The EU Council has adopted the fifth Anti-Money Laundering Directive (MLD5). MLD5 amends Directive 2015/849 and forms part of the EU Commission's action plan on strengthening the fight against terrorist financing.

MLD5 was adopted at a meeting of the General Affairs Council, without discussion. This follows an agreement with the EU Parliament reached in December 2017. The EU Parliament approved the agreed text on 19 April 2018.

The main changes to Directive 2015/849 involve:

- broadening access to information on beneficial ownership, improving transparency in the ownership of companies and trusts;
- addressing risks linked to prepaid cards and virtual currencies;
- cooperation between financial intelligence units; and
- improved checks on transactions involving high-risk third countries.

The Directive will enter into force twenty days after publication in the Official Journal.

EMIR: ECON Committee adopts reports on REFIT and CCP supervision proposals

The EU Parliament's Committee on Economic and Monetary Affairs (ECON) has voted to adopt its draft reports on two proposals for regulations to amend the European Market Infrastructure Regulation (EMIR).

The proposals, for a regulation as regards the clearing obligation, reporting requirements, risk-mitigation techniques for OTC derivatives contracts not cleared by a central counterparty, and the supervision of trade repositories (EMIR REFIT) and for a regulation as regards the procedures and authorities involved for the authorisation of central counterparties (CCPs) and requirements for the recognition of third-country CCPs (EMIR 2.2), will now be negotiated by the EU Parliament, Council and Commission once the Member States have agreed their common stance.

ECON Committee publishes report on sustainable finance

The EU Parliament Committee on Economic and Monetary Affairs (ECON) has published an own-initiative report on sustainable finance.

The report contains a motion for an EU Parliament resolution including the following recommendations:

- the EU Commission should create a legislative framework based on its March 2018 action plan on sustainable finance;
- the EU Commission should legislate to establish a 'green finance mark' by the end of 2019;
- the EU Commission should use its powers under the Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPs) to adopt a delegated act specifying the details of procedures for establishing whether a PRIIP targets specific environmental or social objectives;

- the European Supervisory Authorities (ESAs) should develop guidelines for model contracts between asset owners and asset managers;
- ESMA should be mandated to require credit rating agencies (CRAs) to incorporate sustainability risks into their methodologies; and
- the EU Commission should establish a binding labelling system indicating the extent to which underlying assets are in conformity with the Paris Agreement and ESG goals.

The ECON Committee adopted the report in April 2018 and the Parliament is due to consider the report in its plenary session from 28 May to 31 May 2018.

CRD 4: Commission Implementing Regulation on benchmarking portfolios, reporting templates and reporting instructions published in Official Journal

Commission Implementing Regulation (EU) 2018/688 amending Implementing Regulation (EU) 2016/2070 as regards benchmarking portfolios, reporting templates and reporting instructions has been published in the Official Journal.

The Regulation will enter into force on 7 June 2018.

CRR: RTS on excluding transactions with third country non-financial counterparties from own funds requirement for CVA risk published in Official Journal

Commission Delegated Regulation (EU) 2018/728 supplementing the Capital Requirements Regulation (CRR) with regard to regulatory technical standards (RTS) for procedures for excluding transactions with non-financial counterparties established in a third country from the own funds requirement for credit valuation adjustment risk has been published in the Official Journal.

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

Money market funds: ITS on reporting to competent authorities published in Official Journal

Commission Implementing Regulation (EU) 2018/708 laying down implementing technical standards (ITS) with regard to the template to be used by managers of money market funds when reporting to competent authorities as stipulated by Article 37 of the Money Market Funds (MMF) Regulation has been published in the Official Journal.

The Regulation will apply from 21 July 2018.

Brexit: ECB sets out impact of potential transition on incoming banks

The European Central Bank (ECB) has published its newsletter, which includes an article on the impact of a potential transition period on its expectations for banks relocating to the euro area.

The ECB highlights that uncertainty remains as to the precise content of the Withdrawal Agreement, which will not be known until late 2018. As such, the ECB expects banks to continue preparing for all possible contingencies and to determine a credible Brexit plan as soon as possible. The ECB expects

'incoming banks' planning on relocating activities to the euro area to submit authorisation applications by the end of 2Q18 at the very latest.

The article also discusses flexibility which the ECB has previously communicated in relation to a build-up period, in order to enable banks to meet certain supervisory expectations and build up capabilities in the euro area. Based on detailed and reasonable business models, the ECB and national supervisors will determine when banks should meet certain supervisory expectations and how much flexibility can be provided.

BCBS and IOSCO publish criteria for STC short-term securitisations

The Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) have published criteria for identifying simple, transparent and comparable short-term securitisations (short-term STC criteria). The short-term STC criteria are intended to assist the financial industry in its development of STC short-term securitisations, building on the criteria for identifying simple, transparent and comparable securitisations issued by BCBS-IOSCO in July 2015.

The criteria take account of the characteristics of asset-backed commercial paper (ABCP) conduits, such as the short maturity of the commercial paper issued, the different forms of programme structures and the existence of multiple forms of liquidity and credit support facilities. The criteria do not automatically exclude equipment leases and auto loan and lease securitisations from the short-term STC framework.

The BCBS has also published a standard alongside the criteria that sets out additional guidance and requirements which apply preferential regulatory capital treatment for banks acting as investors in or as sponsors of STC short-term securitisations, typically in ABCP structures. Provided that the expanded set of STC short-term criteria are met, STC short-term securitisations will receive the same reduction in capital requirements as other STC term securitisations.

The standard includes setting the minimum performance history for non-retail and retail exposures at five years and three years, respectively, and clarifies that the provision of credit and liquidity support to the ABCP structure can be performed by more than one entity, subject to certain conditions.

German banking supervision: BaFin sets out priorities for 2018

The German Federal Financial Supervisory Authority (BaFin) has issued a press release setting out the priorities of banking supervision in 2018.

BaFin defines the priorities of its banking supervision together with the German Central Bank (Deutsche Bundesbank) each year to ensure an effective and efficient use of resources. The priorities in 2018 are:

- earning risks;
- interest rate risks;
- lack of adequacy and security of the IT systems of banks;
- credit risks (including developments in the real estate sector);
- legal and reputational risks; and

- country risks.

To select its priorities, banking supervision identifies and assesses all relevant supervisory topics, focusing on topics that arise from daily operative supervision. In addition, aspects of particular regulatory or strategic importance for the whole sector are included. Should the basic parameters change, banking supervision will take this into account, as well as the implications of Brexit, which BaFin notes constitute a particular challenge in 2018.

Revised WpDVeroV published in German Federal Gazette

An ordinance amending the German Conduct of Business and Organisation Ordinance (WpDVerOV) has been published in the German Federal Gazette (Bundesgesetzblatt).

From 1 July 2018, the German Securities Trading Act (WpHG) will allow investment services enterprises – under a newly added sentence 3 of section 64 para 2 WpHG – to provide clients, to whom a buy recommendation in relation to shares traded on an organised market is made, with a standardised information sheet instead of the individual information sheet generally required by section 64 para 2 sentence 1 WpHG.

In this context, the revised WpDVerOV is intended to reflect and complement this upcoming WpHG amendment. It provides in particular for a standard form information sheet which institutions may use instead of the individual information sheet previously required pursuant to section 64 para 2 sentence 1 WpHG.

MAR: Italian Council of Ministers approves implementing decree

The Italian Council of Ministers has approved the final decree intended to give full implementation to the Market Abuse Regulation (EU) No 596/2014 (MAR), which establishes a harmonised legal framework regarding market abuse and introduces measures for prevention.

Amongst other things, MAR provides for:

- an extension of the scope of application to financial instruments traded on multilateral trading facilities and organised trading facilities;
- a series of exemptions and accepted market practices; and
- the possibility of market surveys under the conditions laid down by MAR.

The Italian decree, bringing the Italian legislation in line with the European framework, provides for the designation of Consob (the Italian securities regulator) as the competent administrative authority for the purposes of the correct application of MAR.

The final decree will be published in the Italian official gazette shortly.

CNMV consults on draft circular on periodic public information regarding entities that issue securities admitted to trading on a regulated market

The Spanish Securities Market Commission (Comisión Nacional del Mercado de Valores) (CNMV) has launched a public consultation on a draft circular on

periodic public information relating to issuers whose securities are admitted to trading on a regulated market.

The proposed circular is intended to develop the content and forms of periodic public information related to half-yearly financial reports, interim management statements and, when applicable, quarterly financial reports, that shall be forwarded to the CNMV in accordance with Royal Decree 1362/2007, of 19 October, which transposed into Spanish law several aspects of Directive 2004/109/EC on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market (Transparency Directive).

Among other things, the proposed circular is intended to:

- adapt the content of the forms of half-yearly financial reports, either consolidated or individual, interim management statements and, when applicable, quarterly financial reports, to the applicable recent regulatory developments:
  - regarding changes in international accounting regulation – IFRS 9 and IFRS 15; and
  - in connection with Spanish national regulation – mainly Circular 4/2017, of 27 November, of the Bank of Spain and Royal Decree 583/2017, of 12 June, modifying the General Accounting Plan for Insurance and Reinsurance Companies; and
- undertake technical adjustments in order to foster a greater understanding of the aforementioned required content and forms of periodic public information.

The provisions set out in the proposed circular will be applicable to the half-yearly and quarterly information submitted to CNMV during 2019 and 2020 and will be further modified in order to adapt them to the new European Single Electronic Format which requires the use of XBRL.

The consultation closes on 31 May 2018.

FINMA publishes revised Financial Market Infrastructure Ordinance

The Swiss Financial Market Supervisory Authority (FINMA) has published the revised FINMA Financial Market Infrastructure Ordinance (FMIO-FINMA).

The revised ordinance introduces a clearing obligation for standardised interest-rate and credit derivatives traded over the counter. No changes have been made to the categories of derivatives which are subject to this obligation as set out in Appendix 1 of FMIO-FINMA following the industry consultation.

The revised FMIO-FINMA will enter into force on 1 September 2018 with certain transitional periods set out in the Federal Council's Financial Market Infrastructure Ordinance.

Banking (Amendment) Ordinance 2018 (Commencement) Notice 2018 and Banking (Exposure Limits) Rules gazetted

The Hong Kong Government has gazetted the Banking (Amendment) Ordinance 2018 (Commencement) Notice 2018 and the Banking (Exposure

Limits) Rules to modernise section 87 of the Banking Ordinance in relation to a prescribed limit on equity exposures incurred by authorised institutions.

Enacted by the Legislative Council in January 2018, the Banking (Amendment) Ordinance is intended to incorporate into local legislation the latest standards promulgated by the BCBS in relation to concentration of financial exposures of authorised institutions, by empowering the Hong Kong Monetary Authority (HKMA) to prescribe rules on financial exposure limits.

The Banking (Exposure Limits) Rules modernise section 87 of the Banking Ordinance by capturing equity exposures more comprehensively and recognising certain risk mitigation techniques commonly used in the industry in measuring equity exposures. The relevant provisions in the Banking (Amendment) Ordinance 2018 will have to commence operation to allow new rules to be made to replace section 87 of the Banking Ordinance.

The Commencement Notice and the Banking (Exposure Limits) Rules will be tabled before the Legislative Council on 23 May 2018 for negative vetting, and will come into operation on 13 July 2018.

Subsidiary legislation for open-ended fund companies gazetted

The Hong Kong Government and the Securities and Futures Commission (SFC) have published in the gazette the following three pieces of subsidiary legislation to enable the implementation of the open-ended fund company (OFC) regime in Hong Kong:

- the Securities and Futures (Amendment) Ordinance 2016 (Commencement) Notice – the Commencement Notice will bring into effect all provisions in the Securities and Futures (Amendment) Ordinance 2016 on 30 July 2018 to commence the OFC regime;
- the Securities and Futures (Open-ended Fund Companies) Rules – the OFC Rules set out the detailed statutory operational requirements of the OFC regime, including matters related to an OFC's formation, incorporation and maintenance, appointment and cessation of appointment of the key operators, corporate filings, segregated liability of sub-funds (if any), winding-up and offences; and
- the Securities and Futures (Open-ended Fund Companies) (Fees) Regulation – the Fees Regulation sets out the fees to be collected by the SFC and the Registrar of Companies in respect of OFCs.

The Inland Revenue (Amendment) (No. 2) Ordinance 2018, which extends profits tax exemption to onshore privately offered OFCs, will also take effect on 30 July 2018.

The legislation follows the conclusion of the SFC's consultation on the new open-ended fund company (OFC) structure. According to the SFC's conclusions, some modifications and clarifications have been made to the original proposals, including streamlining the approval requirements for private OFCs and setting out a one-stop arrangement for the establishment, ongoing corporate filings and termination of OFCs.

The legislation will enable investment funds to be established in corporate form in Hong Kong, in addition to the current unit trust form. An OFC is a collective investment scheme with variable capital set up in the form of a company, but with the flexibility to create and cancel shares for investors'

subscription and redemption in the fund. Also, an OFC will not be bound by restrictions on distribution out of capital applicable to a conventional company, and instead may distribute out of capital subject to solvency and disclosure requirements. The SFC will be the primary regulator responsible for the registration and regulation of OFCs under the Securities and Futures Ordinance. The Companies Registry will oversee the incorporation and statutory corporate filings of OFCs and the Official Receiver's Office the winding-up procedure.

The three pieces of subsidiary legislation will be tabled before the Legislative Council on 23 May 2018 for negative vetting.

SFC concludes consultation on prescribing professional investors

The SFC has concluded its March 2017 consultation on proposed amendments to the Securities and Futures (Professional Investor) Rules and gazetted the Securities and Futures (Professional Investor) (Amendment) Rules 2018 to standardise the rules for prescribing professional investors.

The amendments allow portfolios held in joint accounts with non-associates and in investment corporations wholly-owned by an individual to count towards meeting the threshold to qualify as a professional investor. The categories of professional investors will be expanded to include corporations which have investment holding as their principal business and are wholly-owned by one or more professional investors, as well as corporations which wholly own another corporation which is a qualified professional investor.

In addition, alternative forms of evidence will be allowed to demonstrate qualification as a professional investor. These refer to public filings made under legal or regulatory requirements and certificates issued by custodians. Certificates issued by auditors or certified public accountants will be allowed for all professional investors.

The proposed amendments will be submitted to the Legislative Council for negative vetting. Subject to the legislative process, the SFC expects the amended rules to come into effect on 13 July 2018.

FSC proposes amendments to Enforcement Decree of Act on Reporting and Use of Certain Financial Transaction Information

The Financial Services Commission (FSC) has proposed amendments to the Enforcement Decree of the Act on Reporting and Use of Certain Financial Transaction Information, which will provide for stricter anti-money laundering and combating the financing of terrorism (AML/CFT) regulations, enhanced currency transaction reporting (CTR), and clearer rules on customer due diligence. The proposed amendments are intended to improve regulatory consistency with international AML/CFT standards issued by the Financial Action Task Force.

The key proposals include the following:

- the definition of 'financial service provider' in the Enforcement Decree will be expanded to include any entity that the Commissioner of the Korea Financial Intelligence Unit designates as posing the risk of being used in an anti-money laundering and terror financing activity;

- public enterprises and other government-affiliated institutions will be covered under the newly enhanced CTR; and
- the definition of 'one-off financial transaction' will be changed to a transaction performed by a customer that has not established a business relationship with a financial service provider – one-off financial transactions will be classified into more specific types with newly established threshold amounts for reporting.

Comments on the proposed amendments are due by 26 June 2018.

RECENT CLIFFORD CHANCE BRIEFINGS

GMRAs and determining 'Fair Market Value' — Broad discretion of the non-defaulting party re-affirmed by Court of Appeal

The English Court of Appeal has ruled on the construction of the close-out default valuation provisions under a repo agreement. The Court's judgment reaffirms that, in reaching a determination of 'fair market value', the non-Defaulting party has considerable discretion when making a determination in its 'reasonable opinion' as long as it acts rationally and not arbitrarily or perversely.

This briefing discusses the judgment.

https://www.cliffordchance.com/briefings/2018/05/gmras_and_determiningfairmarketvaluebroa.html

Changes in the practice of taking real estate security

In March 2018, the Saudi Arabian Monetary Authority (SAMA) issued further guidance on its May 2017 direction for banks and finance companies to perfect their real estate security under the Real Estate Mortgage Law (REML). What does this mean for banks and finance companies?

This briefing, prepared in collaboration with Abuhimed Alsheikh Alhagbani Law Firm, provides an overview of mortgage registration requirements, key questions for financiers to consider and implications under REML.

https://www.cliffordchance.com/briefings/2018/05/changes_in_the_practiceoftakingrealestat.html

New York Court Holds that Market Makers Trading With Each Other in Decentralized Financial Markets can be Prosecuted Criminally for Antitrust Violations

On 4 May 2018, a federal district court in New York permitted criminal charges to go forward against three former currency traders accused of colluding to rig prices of currency pairs in violation of Section 1 of the Sherman Antitrust Act. In United States v Usher, the court held that, among other things, the US Department of Justice, Antitrust Division, had pleaded a 'hard core' horizontal cartel arrangement – a per se violation of the antitrust laws – between market-makers in the decentralized, over-the-counter spot market for foreign currency exchange, a two-sided market in which dealers regularly act as both buyers and sellers, including to each other.

This briefing discusses the court's ruling.

https://www.cliffordchance.com/briefings/2018/05/new_york_court_holdsthatmarketmakerstradin.html