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INTERNATIONAL REGULATORY UPDATE 13 – 17 MAY 2019

- **Banking Union: EU Council adopts banking package measures**
- **EU Council adopts EMIR REFIT**
- **AMLD 4: Delegated Regulation on managing ML/TF risks in third countries published in Official Journal**
- **Working group on euro risk-free rates consults on EONIA to €STR legal action plan**
- **UK Jurisdiction Taskforce consults on legal status of crypto-assets, DLT and smart contracts**
- **AMF and Israel Securities Authority sign fintech cooperation agreement**
- **Law no. 37 of 3 May 2019 published in Italian Official Journal**
- **Amendments to Act on Financial Market Supervision and certain other acts published in Journal of Laws**
- **SFC and AFM sign MoU on Netherlands-Hong Kong mutual recognition of funds**
- **SFC issues circular to licensed corporations on recent inspection findings related to client facilitation**
- **FSC revises Financial Investment Business Regulation to promote robo-advisory services**
- **MAS and People's Bank of China renew bilateral currency swap arrangement**
- **MAS launches second consultation on proposed framework for variable capital companies**
- **MAS consults on proposed notice on prevention of money laundering and countering financing of terrorism for variable capital companies**
- **Recent Clifford Chance briefings: Brexit, Italian securitisation framework amendments, and more. Follow this link to the briefings section**

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Banking Union: EU Council adopts banking package measures

The EU Council has adopted the following legislative measures comprising the EU Commission's banking package:

- a Regulation to amend the Capital Requirements Regulation (CRR 2);
- a Directive to amend the Capital Requirements Directive (CRD 5);
- a Directive to amend the Bank Recovery and Resolution Directive (BRRD 2); and
- a Regulation to amend the Single Resolution Mechanism Regulation (SRMR 2).

Key changes aimed at reducing risk and making the framework for regulating and supervising banks more robust include:

- requiring third-country institutions with significant activities in the EU to have an EU intermediate parent undertaking;
- strengthening bank capital requirements;
- requiring global-systemically important institutions ('G-SIIs') to have more loss-absorbing and recapitalisation capacity; and
- easing reporting and disclosure requirements for smaller, less complex banks.

Following the signature of the adopted legislation in the week of 20 May, the banking package will be published in the Official Journal during June and enter into force 20 days later, with most of the new rules applying from mid-2021.

EU Council adopts EMIR REFIT

The EU Council has adopted a regulation amending the European Market Infrastructure 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).

The regulation will be signed in the week beginning 20 May 2019 and will enter into force on the twentieth day following that of its publication in the Official Journal.

AMLD 4: Delegated Regulation on managing ML/TF risks in third countries published in Official Journal

Commission Delegated Regulation (EU) 2019/758, which supplements the fourth Anti-money Laundering Directive (AMLD 4), has been published in the Official Journal. AMLD 4 requires, amongst other things, that obliged entities ensure their anti-money laundering and counter terrorist financing (AML/CFT) policies and procedures are implemented effectively across all branches and majority-owned subsidiaries to the extent that local law permits. Where a third country's law does not permit the effective implementation of AML/CFT policies and procedures, obliged entities are required to take steps to handle the resultant risks effectively.

The Delegated Regulation sets out regulatory technical standards (RTS) providing further detail on the measures obliged entities should take in order to effectively manage the money laundering or terrorist financing (ML/TF) risks posed by their operations in a third country. It sets out obligations on:

- individual risk assessments;
- customer data sharing and processing, including transfer of customer data to Member States;
- disclosure of information on suspicious transactions; and
- record-keeping.

The Delegated Regulation will enter into force on 3 June 2019 and will apply from 3 September 2019.

Working group on euro risk-free rates consults on EONIA to €STR legal action plan

The working group on euro risk-free rates has launched a consultation on its draft recommendations to address the legal implications for new and legacy contracts referencing the euro overnight index average (EONIA) as a result of the proposed transition from EONIA to the euro short-term rate (€STR).

The working group recommends that market participants consider replacing EONIA with €STR as a reference rate for all products and contracts and that they make all operational adjustments necessary for using €STR as their standard benchmark as soon as possible. In particular, the working group recommends that new contracts referencing EONIA include robust fallback provisions and an acknowledgement that references to EONIA will be understood to be references to EONIA as modified after the change to its methodology on 2 October 2019.

For legacy contracts referencing EONIA and maturing after December 2021, the working group advises market participants to consider replacing EONIA as a primary rate as soon as possible or embedding robust fallback clauses referencing the recommended fallback rate for EONIA. Additionally, the working group intends to recommend €STR plus a spread (the one-off computation of the difference between €STR and EONIA in the context of the proposed recalibrated EONIA methodology) as the EONIA fallback rate.

Comments are due by 12 June 2019.

UK Jurisdiction Taskforce consults on legal status of crypto-assets, DLT and smart contracts

The UK Jurisdiction Taskforce (UKJT) of the LawTech Delivery Panel (a group established by the government, judiciary and the Law Society to promote the use of technology in the UK's legal sector) has launched a consultation on the key issues of legal uncertainty regarding crypto-assets, distributed ledger technology (DLT) and smart contracts. In particular, the UKJT is seeking feedback on any uncertainty surrounding the legal status of crypto-assets or the enforceability of smart contracts under English private law.

From the results of the consultation, the UKJT intends to prepare a legal statement that will either demonstrate that English private law already provides a sufficiently certain legal basis for crypto-assets and smart contracts or will highlight particular areas of uncertainty that need to be addressed.

Comments are due by 21 June 2019.

AMF and Israel Securities Authority sign fintech cooperation agreement

At the annual conference of the International Organisation of Securities Commissions (IOSCO) in Sydney, the chairpersons of the French and Israeli authorities, Robert Ophèle and Anat Guetta, signed a fintech cooperation agreement with the aim of strengthening innovation, investor protection and competitiveness in their respective markets.

The agreement will enable the Autorité des marchés financiers (AMF) and the Israel Securities Authority (ISA) to exchange information on innovation and fintech trends in their respective markets. The two authorities will also be able to discuss regulatory issues related to blockchain, crypto-assets, artificial intelligence or the use of data and the development of automated advice.

Law no. 37 of 3 May 2019 published in Italian Official Journal

Italian Law no. 37 of 3 May 2019 (known as European Law 2018) has been published in the Italian Official Journal (no. 109 of 11 May 2019). This piece of legislation lays down provisions to ensure the fulfilment of obligations arising from EU membership. The European Law, along with the European Delegation Law, is one of the two instruments provided for by the Italian Law no. 234/2012 in order to periodically align the Italian legal system to that of the European Union.

The law will come into force on 26 May 2019.

Amendments to Act on Financial Market Supervision and certain other acts published in Journal of Laws

The Act Amending the Act on Financial Market Supervision and Certain Other Acts has been published in the Journal of Laws. The Act implements the EU Securitisation Regulation.

One of the amendments in the Act is to specify that the Polish Financial Supervision Authority is the authority competent with regard to supervision, compliance with and enforcement of the provisions of the Regulation, with the authority to impose administrative sanctions, including publishing information on sanctions imposed in the circumstances set out in the Act. The role of the Polish Financial Supervision Authority will be to supervise performance of the obligations set out in the Regulation by entities that are participants of the securitisation market.

The provisions will come into force on 26 May 2019.

SFC and AFM sign MoU on Netherlands-Hong Kong mutual recognition of funds

The Securities and Futures Commission (SFC) and the Dutch Authority for the Financial Markets (AFM) have signed a memorandum of understanding (MoU) on mutual recognition of funds. The MoU is intended to allow eligible Hong Kong collective investment schemes (CIS) and Dutch undertakings for collective investment in transferable securities (UCITS) to be distributed in each other’s market through a streamlined process.

The MoU establishes a framework for exchange of information, regular dialogue as well as regulatory cooperation in relation to the cross-border offering of eligible Hong Kong CIS and Dutch UCITS. In addition, a streamlined approach to the authorisation of funds also applies where Dutch fund managers have been appointed as managers of other European Union UCITS that qualify under the SFC recognised jurisdiction schemes regime.

The SFC has published the following guidance materials to provide guidance to market practitioners regarding the Netherlands-Hong Kong Mutual Recognition of Funds scheme:

- a new set of frequently asked questions (FAQs) on the Netherlands-Hong Kong Mutual Recognition of Funds;
- updated FAQs on the SFC authorisation of UCITS Funds;
- an updated 'Guide on Practices and Procedures for Application for Authorisation of Unit Trusts and Mutual Funds'; and
- an updated application of the Code on Unit Trusts and Mutual Funds on UCITS funds.

SFC issues circular to licensed corporations on recent inspection findings related to client facilitation

The SFC has issued a circular to licensed corporations to share with them its recent inspection findings related to client facilitation.

From mid-2018, the SFC reviewed compliance with its 'expected standards' in its circular dated 14 February 2018. The SFC has shared the following findings from its inspections:

- some traders misrepresented a house or client facilitation trade as an agency trade;
- some traders were silent or not transparent about whether facilitation would be involved in a trade;
- some traders failed to obtain explicit pre-trade consent from clients when effecting client facilitation trades;
- some indications of interest were described as natural although they were not based on a genuine client intent to trade; and
- some firms' policies and procedures were not clear and could not ensure compliance with the expected standards, although they reported that their client facilitation policies were reviewed and enhanced in light of the February 2018 circular.

The SFC has emphasised that it takes these findings seriously and reiterated that brokerage firms and their traders should obtain explicit client consent prior to each client facilitation trade. It has also warned licensed corporations that it will not hesitate to investigate any apparent improper conduct and non-compliance, as well as to take regulatory action against the individuals (including relevant managers-in-charge) and the brokerage firms as appropriate.

Further, the SFC has advised licensed corporations to critically review existing policies and procedures and revise them as appropriate to ensure that they are clear, in full compliance with the expected standards and have been properly implemented and communicated to all relevant staff.

FSC revises Financial Investment Business Regulation to promote robo-advisory services

The Financial Services Commission (FSC) has revised the Financial Investment Business Regulation to promote robo-advisory services.

In particular, the Financial Investment Business Regulation has been revised to:

- allow asset management firms to commission their business of managing funds and entrusted assets to robo-advisory firms on the condition that the asset managers will remain responsible for investor protection – under the current regulation, asset management firms are not allowed to commission their business of managing funds and entrusted assets to robo-advisory firms. This reform is scheduled to be implemented from 24 July 2019;
- allow individuals to participate in 'Koscom's robo-advisor testbed', which will accept applications from 3 June 2019 – currently, the testbed is open only to firms including fintech firms, not to individuals, given that only companies are allowed to provide robo-advisory services. Robo-advisors verified through the testbed are allowed to provide investment advisory and entrusted services. To commercialise robo-advisory services after they pass the test, individuals will be required to register as an asset management firm or to form a partnership with asset management firms;
- abolish additional capital requirements for discretionary investment businesses to make it easier for small fintech firms to provide non-face-to-face services via robo-advisors – previously, these businesses were required to have additional capital of KRW 4 billion besides the minimum capital of KRW 1.5 billion to provide non-face-to-face services through robo-advisors. This reform will be implemented from 20 March 2019; and
- allow robo-advisors to directly manage fund assets if they are equipped with appropriate systems and safety measures – currently, robo-advisors are not allowed to directly manage fund assets, while they are allowed to manage entrusted assets. This reform is scheduled to be implemented from 24 July 2019.

MAS and People's Bank of China renew bilateral currency swap arrangement

The Monetary Authority of Singapore (MAS) and the People's Bank of China (PBC) have announced the renewal of the bilateral currency swap arrangement (BCSA) to strengthen regional economic resilience and financial stability. The BCSA was originally established in 2010 and renewed in 2013 and 2016.

Under the arrangement, the MAS and the PBC can access foreign currency liquidity to support trade and investment financing needs, including projects under the Belt and Road Initiative, and stabilise financial markets. Up to CNY 300 billion in Chinese Yuan liquidity will be available to eligible financial institutions operating in Singapore.

The BCSA renewal will be for a period of three years, and is effective from 10 May 2019.

MAS launches second consultation on proposed framework for variable capital companies

The MAS has launched a public consultation on proposed new regulations for the variable capital company (VCC) framework, and other amendments to existing rules and regulations, such as the Securities and Futures (Offers of Investments) (Collective Investment Schemes) Regulations 2005 (SFR(CIS)) and Code on Collective Investment Schemes (CIS Code), to provide the operational framework to facilitate the implementation of the new VCC regime. These proposed regulations set out details in relation to the operation of the VCC framework, including the incorporation of a VCC, the registration of sub-funds and the re-domiciliation to Singapore of foreign corporate entities as VCCs.

Comments on the consultation are due by 30 May 2019. The MAS will issue consultation papers on regulations relating to the insolvency of a VCC and its sub-funds in due course.

MAS consults on proposed notice on prevention of money laundering and countering financing of terrorism for variable capital companies

The MAS has launched a public consultation on a proposed Notice on anti-money laundering and countering the financing of terrorism (AML) for VCCs.

The draft VCC AML Notice require VCCs to appoint financial institutions regulated by the MAS for AML purposes (eligible FIs) to conduct the necessary checks and perform measures in order for the VCC to comply with the relevant parts of the VCC AML Notice. However, the MAS has emphasised that the VCC will remain ultimately responsible for fulfilling all its AML obligations.

The draft VCC AML Notice requires VCCs to put in place internal policies and procedures, and appropriate compliance, audit and training procedures, similar to eligible FIs themselves. The MAS anticipates that a VCC would largely adapt the policies and procedures of the eligible FI that it has appointed.

The MAS is also consulting on the definitions of ‘business relations’ and ‘customer’ in the draft VCC AML Notice, which determine the persons on whom the VCC would be required to perform customer due diligence. ‘Business relations’ refers to any direct or indirect contact between a VCC and a person that results in the entering or maintaining of such person’s particulars in the VCC’s register of members, while ‘customer’ refers to a person with whom the VCC establishes or intends to establish business relations.

Comments on the consultation are due by 30 May 2019.

RECENT CLIFFORD CHANCE BRIEFINGS

Brexit – where are we now?

The UK’s withdrawal from the EU has been delayed, potentially until the end of October. How does this affect the risk of a ‘No Deal’ Brexit, the future relationship and our political landscape?

This briefing paper reviews recent developments, explains key concepts and looks at what lies ahead for the UK and the EU.

https://www.cliffordchance.com/briefings/2019/05/brexit_-_where_arewenow.html

Italy supports credit opportunities for investors through recent amendments to the Italian Securitisation framework

Two sets of amendments innovating the Italian Securitisation Law have been recently implemented by, respectively, the Italian Budget Law and the Growth Decree (Decreto Crescita) issued by the Italian Government, having the effect of, among other things, introducing a new type of securitisation relating to real estate and registered movable assets and crystallising the structure and effects of securitisations of non-performing exposures, also to facilitate the disposal of credit claims qualified as unlikely-to-pay receivables. Finally, the Growth Decree introduced innovative tax provisions to streamline and clarify the existing securitisation regime to transactions on non-performing exposures.

This briefing paper discusses the recent amendments to the Italian Securitisation framework.

https://www.cliffordchance.com/briefings/2019/05/italy_supports_creditopportunitiesforinvestor.html

District court decision highlights risks of cooperating too closely with government investigations

On 2 May 2019, a federal district court judge found that a bank and its external counsel had become a de facto arm of the government through efforts to cooperate with the government and minimize the bank's exposure to criminal and regulatory penalties. The ruling serves as a reminder that by aligning too closely with the government's investigative priorities, companies risk opening themselves up to massive discovery obligations in subsequent litigation. In order to minimize these risks, companies seeking cooperation credit should seek to maintain their independence, to the greatest extent possible, in conducting internal investigations.

This briefing paper discusses the ruling.

https://www.cliffordchance.com/briefings/2019/05/district_court_decisionhighlightsriskso.html

OFAC puts Asian companies on notice with 'compliance framework'

Officials from the US Office of Foreign Assets Control (OFAC) have been teasing for months that they would issue guidelines to help companies comply with US sanctions regulations. On 2 May 2019, OFAC made good and published the much-anticipated 'Framework for OFAC Compliance Commitments' outlining the five essential components of an effective sanctions compliance program.

The framework comes at a time when OFAC is more focused than ever on bringing enforcement actions against companies in Asia, as illustrated by the cases we discuss below. The framework puts companies on notice that

OFAC expects non-US companies, especially those in higher risk industries, to adopt risk-based compliance programs to minimize the possibility of violations. For companies with non-existent or weak sanctions compliance programs, it's never too late to start building one, using the framework as a handy blueprint.

This briefing paper discusses the framework.

https://www.cliffordchance.com/briefings/2019/05/ofac_puts_asian_companiesonnoticewit.html

First lawsuits filed under the Helms-Burton act for trafficking in seized Cuban assets

On 17 April 2019, the Trump Administration announced, in a break from the practice of three previous administrations, that it would no longer waive a provision of the 'Helms-Burton Act' that allows US parties to sue non-US persons and entities for 'trafficking' in property confiscated by the Cuban government under the Castro regime—and potentially receive treble damages. The definition of 'trafficking' is extremely broad, and immediately after the suspension was lifted, on 2 May 2019, two suits were filed in federal court in Miami against Carnival Cruise Lines for using the services of two port facilities allegedly confiscated in 1960.

This briefing paper discusses these lawsuits and the implications.

https://www.cliffordchance.com/briefings/2019/05/first_lawsuits_filedundertthehelmsburtonac.html

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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