

# International Regulatory Update

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## European Commission proposes European account preservation order

The European Commission has published a [proposed regulation](#) creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters. The proposed regulation establishes a new and self-standing European procedure for the preservation of bank accounts to enable a creditor to prevent the transfer or withdrawal of his debtor's assets in any bank account located in the European Union.

The proposed regulation regulates the procedure for issuing the European account preservation order as well as its implementation by the bank holding the account targeted. The Commission has indicated that the European account preservation order would be of a protective nature only, i.e. it would only block the debtor's account, and it would not allow money

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to be paid out to the creditor. The European procedure would be available to citizens and companies as an alternative to procedures existing under national law.

#### [FAQs](#)

### **EBA consults on guidelines for data collection on bank remuneration practices**

The EBA has published two consultation papers (CP46 and CP47) on guidelines for data collection on bank remuneration practices. The revised Capital Requirements Directive (CRD 3, as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies) introduced two tasks for national supervisory authorities and the EBA relating to data collection on remuneration practices: (1) the collection of aggregate quantitative information on remuneration (broken down by business areas); and (2) the collection of information on the number of individuals per credit institution in pay brackets of EUR 1 million and above.

To support these two tasks the EBA, after discussion with its Banking Stakeholder Group, is proposing the two guideline documents for a common approach across the EU for remuneration data collection, via templates to be used by financial institutions for reporting to their national supervisors.

Comments are due by 2 September 2011.

[Draft guidelines on the remuneration benchmarking exercise \(CP46\)](#)

[Draft guidelines on remuneration data collection exercise regarding high earners \(CP47\)](#)

### **European Commission consults on promoting social investment funds**

The European Commission has published a [consultation paper](#) on possible European measures to support social businesses through private investment funds. Social businesses are defined as those targeting social, ethical or environmental goals as their primary corporate objective, which place the achievement of social impacts above the delivery of financial returns. The Commission notes that certain barriers to funding social businesses through private investment might exist, because of the nature of these businesses and the existing rules that apply to those running funds.

The consultation paper outlines different options, including better transparency, and seeks the views of all stakeholders on whether existing European investment fund rules work well for social businesses and those wanting to invest in them. The results will be used to identify European measures, so that proposals can be made by the Commission by the end of 2011.

The consultation closes on 14 September 2011.

### **FSA assesses possible sources of systemic risk from hedge funds**

The FSA has published a [report](#) assessing possible sources of systemic risk from hedge funds and describing some of the survey work the FSA has carried out to address the issue. The report highlights the findings of the FSA's latest hedge fund survey (which focuses on the market channel for the potential systemic risks posed by hedge funds) and the latest hedge fund as counterparty survey (which focuses on the credit channel for systemic risk), which were conducted in March and April 2011 respectively.

The FSA intends to repeat these surveys in September and October 2011.

### **FSA consults on further amendments to client assets sourcebook**

The FSA has published a [Consultation Paper \(CP11/15\)](#) setting out its proposals to amend the Client Assets Sourcebook (CASS) in the area of custody liens and title transfer collateral arrangements (TTCA).

In particular, CP11/15 includes proposals on the following matters relating to the lien rules in CASS: (1) interim relief from the effect of the existing rules from 1 October 2011 to 31 March 2012; (2) changes in the rules to provide for the taking of certain liens or rights over omnibus clients accounts; and (3) changes in the rules in relation to liens or rights over assets held in overseas jurisdictions. In addition, the FSA is proposing to prohibit the use of TTCA in relation to rolling spot forex contracts offered to retail clients.

Comments regarding issues around the interim relief from the application of CASS 6.3.5 and the prohibition on the use of TTCA in relation to rolling spot forex contracts are due by 29 August 2011. Comments regarding certain custody liens over omnibus client accounts and custody liens in overseas jurisdictions are due by 28 October 2011.

## Joint Committee launches inquiry into draft UK Financial Services Bill

A new Joint Committee has been appointed by both Houses of Parliament to conduct pre-legislative scrutiny of the [draft Financial Services Bill](#), which was published in June 2011 and sets out the government's proposed reforms to the financial regulatory regime within the UK. The Joint Committee has invited interested organisations and individuals to submit written evidence as part of the inquiry.

Amongst other things, the Joint Committee's [call for evidence](#) invites views on: (1) whether the separation of prudential and conduct regulation into a 'twin peaks' system is the right approach; (2) whether it is appropriate to make major changes to the regulatory system by way of amending legislation, rather than starting afresh; (3) whether the accountability and governance arrangements for the Bank of England, the Financial Policy Committee, the Prudential Regulation Authority and the Financial Conduct Authority are satisfactory; (4) whether there are any risks in the government's proposed 'judgement-based' regulation; and (5) how the proposals in the draft Bill fit within the new European regulatory regime.

Responses are due by 2 September 2011.

## FSA consults on auctioning of greenhouse gas emission allowances

The FSA has published a [Consultation Paper \(CP11/14\)](#) setting out proposed amendments to its Recognised Investment Exchanges and Recognised Clearing Houses sourcebook (REC) and the Fees Manual (FEES). The FSA is proposing these changes in order to complement the Treasury's implementation of a new regulatory regime applicable to platforms that will conduct auctions in emission allowances. The new regime is being put in place ahead of the start of EU procurement processes to select both a common EU auction platform and one or more national auction platforms. The Handbook amendments the FSA is proposing originate from the introduction of the EU carbon emission allowance auctioning regime that is being implemented under the Commission Auction Regulation (1031/2010).

Comments are due by 18 September 2011.

## CONSOB consults on amendments to resolutions on issuers and markets

CONSOB has launched a [consultation](#) on prospective amendments to its Resolutions No. 11971/1999 on issuers and No. 16191/2007 on markets, which are intended to streamline and simplify the legal and regulatory frameworks.

Amongst other things, under the proposed amendments, the timing for prospectus authorisation is reduced, and the financial operators' associations are no longer required to transmit the code of conduct to CONSOB. Further amendments relate to the market abuse provisions. In particular, the threshold triggering the internal dealing notification requirements is raised, and issuers, under some specified circumstances, can decide not to comment on spreading rumours about inside information that directly concerns such issuers and their subsidiaries.

In addition, the consultation paper calls for a legislative intervention to amend the Royal Decree No. 267/1942 (the 'Civil Code') and the Legislative Decree No. 58/1998 (the 'Consolidated Financial Law').

Comments are due by 21 September 2011.

## FINMA consults on Stock Exchange Ordinance

The Swiss Financial Market Supervisory Authority (FINMA) has [launched](#) a consultation on the revision of its 'Ordinance On Stock Exchanges and Securities Trading'. Amongst other things, the proposed revisions to the Stock Exchange Ordinance include amending the disclosure requirements for foreign collective investment schemes by introducing a separate definition of 'independence'. Foreign collective investment schemes that are not authorised to distribute may not consolidate for the purposes of disclosure by relying on an exemption if such foreign collective investment schemes submit proof of 'independence' from the group.

The proposed revisions also introduce a specific threshold value for the reporting obligation to be triggered, additional and specific procedural regulations, and enhance the presentation of the notifications received on the publishing platforms.

Comments are due by 5 September 2011.

## **SGX consults on proposed change to algorithm used for computing equilibrium in securities market**

The Singapore Exchange Limited (SGX) has published a [consultation paper](#) on its proposal to change the algorithm used by the Singapore Exchange Securities Trading Limited (SGX-ST) to compute the equilibrium price at which orders at the end of the opening routine, closing routine and adjust phases in the securities market are matched. The SGX has indicated that, in a majority of scenarios, the new algorithm will yield the same equilibrium price as the current algorithm. However, the SGA believes that, in cases where the proposed algorithm yields a different equilibrium price, it will provide a better reflection of the market because its parameters take better account of the forces of supply and demand.

The proposed algorithm is used by the Australian Securities Exchange and the NASDAQ OMX. To facilitate market participants' understanding of the proposed algorithm, the SGX also proposes to amend Practice Note 8.2.1 to the SGX-ST Listing Rules to include the proposed algorithm. The SGX intends to implement the proposed algorithm with the Reach trading engine in the second half of 2011.

Comments are due by 5 August 2011.

[Appendix A - Amendments to Practice Note 8.2.1](#)  
[Appendix B - Comparison between current and new algorithm](#)

## **ASIC consults on how to scale advice**

The Australian Securities and Investments Commission (ASIC) has published a [consultation paper \(CP 164\)](#) proposing new guidance for those who give advice to retail clients. It follows ASIC's regulatory guide on access to advice for super fund members ([RG 200](#)) and its report on access to financial advice in Australia ([REP 224](#)), both published in December 2010.

CP 164 provides guidance on how to scale financial product advice to retail clients and includes eight examples of giving information and advice to clients. It also describes the differences between factual information, general advice and personal advice. This is the first phase of consultation on how to scale advice. Based on feedback to this consultation paper, ASIC intends to produce further examples of factual information, general advice and scaled personal advice on other topics in phase two.

## **FRB consults on proposed standards for banking organizations engaging in certain types of foreign exchange transactions**

Pursuant to provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Board of Governors of the Federal Reserve System (FRB) has issued a [proposal](#) establishing standards for FRB regulated banking organizations engaging in certain types of foreign exchange transactions with retail customers. The proposal outlines requirements for disclosure, recordkeeping, business conduct, and documentation for retail foreign exchange transactions. Institutions engaging in such transactions will be required to identify themselves to their regulator and to be well capitalized. They will also be required to collect margin for retail foreign exchange transactions.

Comments are due by 11 October 2011.

## **SEC adopts large trader reporting regime**

The SEC has adopted a [rule](#) creating large trader reporting requirements. The rule is intended to increase the SEC's ability to identify large traders (for example, high frequency traders that buy or sell at least 2 million shares in exchange-listed securities a day or meet other volume standards), collect information on their trading, and analyze their trading activity. The new rule requires large traders to register with the SEC on new Form 13H and imposes recordkeeping, reporting, and limited monitoring requirements on registered broker-dealers through whom large traders execute their transactions.

The rule will be effective 60 days after its publication in the Federal Register. Large traders will have two months after the effective date to comply with the identification requirements. Broker-dealers will have seven months after the effective date to comply with the requirements to maintain records, report transaction data when requested, and monitor large trader activity.

## RECENT CLIFFORD CHANCE BRIEFINGS

### Perpetual litigation comes to an end

The Supreme Court has handed down its long awaited judgment in the case Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc (LBSF). Although there were no surprises – the decision essentially follows the Court of Appeal’s view that ‘flip provisions’ reversing a counterparty’s priority in the payment waterfall are not contrary to the anti-deprivation principle, and did not deprive LBSF’s insolvent estate of an asset – it does, however, provide some much needed clarity for those operating in the financial markets on the limits of the anti-deprivation principle.

This briefing discusses the Supreme Court’s judgment.

[http://www.cliffordchance.com/publicationviews/publications/2011/07/perpetual\\_litigationcomestoanend.html](http://www.cliffordchance.com/publicationviews/publications/2011/07/perpetual_litigationcomestoanend.html)

### Selection of arbitrators not subject to anti-discrimination laws

The UK Supreme Court has overturned the decision of the Court of Appeal in Jivraj v Hashwani. The Court of Appeal had decided that arbitrators were employees of the parties for the purposes of the Employee Equality (Religion and Belief) Regulations 2003 (now replaced by the Equality Act 2010) and that a requirement that an arbitrator be a member of the Ismaili community was discriminatory and unenforceable. Extrapolating that principle, it was feared that the requirements in arbitral rules of various institutions (including the LCIA and ICC rules) that a sole arbitrator or chairperson not be the same nationality as any of the parties was discriminatory and unenforceable. The Supreme Court has decided that UK anti-discrimination law does not apply because arbitrators are not employees.

This briefing discusses the Supreme Court’s decision.

[http://www.cliffordchance.com/publicationviews/publications/2011/07/selection\\_of\\_arbitratorsnotsubjectt.html](http://www.cliffordchance.com/publicationviews/publications/2011/07/selection_of_arbitratorsnotsubjectt.html)

### ESMA consultation paper on the Alternative Investment Fund Managers Directive

On 13 July 2011, ESMA released its first draft technical advice on possible implementing measures in respect of the AIFMD). This draft advice is the first step in the process of putting in place approximately one hundred level 2 implementing measures, technical standards and guidelines under the AIFMD. Although agreement was reached on the AIFMD in October 2010 and the final text published in the Official Journal on 1 July 2011, these implementing measures, technical standards and guidelines are needed to give concrete shape to the general provisions and principles set out in the AIFMD.

This briefing discusses ESMA’s consultation paper.

[http://www.cliffordchance.com/publicationviews/publications/2011/07/esma\\_consultationpaperonthealternativ.htm](http://www.cliffordchance.com/publicationviews/publications/2011/07/esma_consultationpaperonthealternativ.htm)

### Prospectus and Transparency Directives: Countries start to implement changes

EEA Member States have until 1 July 2012 to implement Directive 2010/73/EU (the Directive amending the Prospectus and Transparency Directives), but some Member States are choosing to implement certain provisions in advance of the deadline. Some of the changes take immediate effect. So far, there is no uniformity on either the selected changes or the effective dates. Accordingly, over the next few months, careful assessment will be necessary, country by country, when preparing prospectuses, planning cross-border offers of securities or undertaking passporting.

This briefing is the first in a series of papers to monitor implementation, which covers the Netherlands, the United Kingdom, Italy and the Czech Republic.

[http://www.cliffordchance.com/publicationviews/publications/2011/07/prospectus\\_and\\_transparencydirectivescountry.html](http://www.cliffordchance.com/publicationviews/publications/2011/07/prospectus_and_transparencydirectivescountry.html)

### Electricity Market Reform White Paper – increasing investor confidence

The Department of Energy and Climate Change’s (DECC’s) new Electricity Reform White Paper marks a milestone in the government’s complex plans to guarantee security of electricity supply, increase renewable electricity generation, whilst keeping electricity affordable. There is still a lot of work to be done by the government to create a clear and stable investment environment to encourage funds to flow at the scale and

pace needed to 'keep the lights on'. However, potential investors should nevertheless be encouraged that the government is sending the right signals to the market.

This briefing examines the main proposals in the White Paper.

[http://www.cliffordchance.com/publicationviews/publications/2011/07/clifford\\_chance\\_commentelectricityreformwhit.html](http://www.cliffordchance.com/publicationviews/publications/2011/07/clifford_chance_commentelectricityreformwhit.html)

### **Luxembourg Quarterly Update**

This edition of the Luxembourg Quarterly Update discusses, amongst other things: (1) the entry into force of the AIFM Directive and the preparation of its implementing measures; (2) the coming into force of CESR's guidelines on a common definition of European money-market funds; (3) the latest developments in relation to the UCITS IV regime; (4) some updates on the Prospectus Directive, including ESMA's consultation on possible delegated acts; (5) the European Commission's consultation on a new regime for venture capital funds; and (6) the latest developments on the proposed regulation on over-the-counter derivatives and market infrastructures.

In particular, the last section discusses the main changes in Luxembourg linked to the implementation of the UCITS IV Directive as from 1 July 2011 and the Luxembourg Government Council bill of 1 July 2011 amending the SIF Law.

[http://www.cliffordchance.com/publicationviews/publications/2011/07/luxembourg\\_fundsquarterlyupdate-july2011.html](http://www.cliffordchance.com/publicationviews/publications/2011/07/luxembourg_fundsquarterlyupdate-july2011.html)

### **Impact on debt capital markets transactions of new Italian tax provisions on indirect note issues**

The Italian government has introduced new legislation which applies to notes issued by a foreign affiliate of an Italian company and guaranteed by the Italian company. The new legislation is contained in Law Decree No. 98 of 6 July 2011 as converted by Law No. 111 of 15 July 2011.

This briefing addresses the principal scenarios which would be of concern on mainstream debt capital markets transactions and providing an overview of issues to look out for.

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### **'Gender quotas' at the starting blocks**

On 28 June 2011, the Chamber of Deputies gave its final approval to the bill of law on equal access to management and supervisory boards of listed companies and of publicly-held unlisted companies. The law is pending enactment by the President of the Republic and subsequent publication in the Official Journal. The law will take effect 12 months after its publication in the Official Journal (and therefore no earlier than July 2012 and only following the first renewal of management and supervisory bodies of listed companies following its effectiveness). Consequently, the amendments introduced by the law will not apply to company shareholders' meetings forecast for spring 2012.

This briefing outlines the relevant new provisions.

Please contact Barbara Kahn by email at [barbara.kahn@cliffordchance.com](mailto:barbara.kahn@cliffordchance.com) for a copy of this briefing.

### **Insider Trading Law Virtually Here**

The Insider Trading Law that was adopted a year ago and has been gradually implemented since then is due to come into full effect on 31 July 2011. Despite the one-year suspension the secondary legislation necessary to make the provisions of the Insider Trading Law operational was unofficially published only in mid-July 2011 and is expected to come into effect on 31 July 2011. Recognising the virtual impossibility for the market to comply with these new regulations the Federal Service for Financial Markets has granted insiders another 'grace period' in respect of a number of their duties imposed on them by the new legislation.

This briefing summarises the current state of play and some of the issues the market may be facing.

[http://www.cliffordchance.com/publicationviews/publications/2011/07/insider\\_trading\\_lawvirtuallyhere.html](http://www.cliffordchance.com/publicationviews/publications/2011/07/insider_trading_lawvirtuallyhere.html)

## Taxability of profits – the importance of correctly identifying what a person's trade or business consists of

The recent Court of First Instance decision in *Aviation Fuel Supply Company v Commissioner of Inland Revenue* illustrates how important it is to correctly identify what a person's business consists of when determining the taxability of his or her profits under section 14 of the Inland Revenue Ordinance. The decision also contains a useful discussion on the rarely-invoked sections 15(1)(m) and 15A of the Inland Revenue Ordinance, which provide for the chargeability to profits tax in respect of the amount paid in return for the transfer of a right to receive income from property.

This briefing discusses the court's decision.

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## China issues guidelines to supervise the conduct of insurance agency business by commercial banks

On 7 March 2011, the China Insurance Regulatory Commission (CIRC) and the China Banking Regulatory Commission (CBRC) jointly promulgated the Guidelines on the Supervision of Insurance Agency Business of Commercial Banks, which came into effect as of the same date. The Supervision Guidelines aim to regulate how commercial banks conduct insurance agency business with a view to protecting the rights of consumers.

This briefing highlights the key requirements under the Supervision Guidelines and their impact on the conduct of insurance agency business by commercial banks.

[http://www.cliffordchance.com/publicationviews/publications/2011/07/china\\_issues\\_guidelinestosupervisethecond uc.html](http://www.cliffordchance.com/publicationviews/publications/2011/07/china_issues_guidelinestosupervisethecond uc.html)

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