

# International Regulatory Update

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### **OTC derivatives and market infrastructures: EU Parliament and Council reach agreement**

The Danish EU Council Presidency has reached an agreement with representatives of the European Parliament on the proposed regulation on OTC derivatives and market infrastructures. Specifically, agreement has been reached on the authorisation of central counterparties (CCPs). In the event that national authorities have concerns about the authorisation of a CCP, the regulation will include a mechanism that allows those authorities to raise their concerns and, if necessary, to request ESMA to take a final decision using a procedure of binding mediation.

The final text reflecting this triologue agreement has not yet been published. In addition, the compromise will need to be formally confirmed by the Parliament's plenary session and by the EU Council, and will enter into force 20 days after its publication in the Official Journal.

[EU Council press release](#)

[European Parliament press release](#)

[European Commission FAQs](#)

[Commissioner Michel Barnier's statement](#)

### **EBA publishes aggregate assessment of banks' capital plans**

EBA's Board of Supervisors has published a [preliminary assessment](#) of banks' recapitalisation plans submitted in response to its recommendation on the creation and supervisory oversight of temporary capital buffers to restore market confidence. The review highlights that, in aggregate, the shortfalls are expected to be met primarily through direct capital measures. The measures are not viewed as having a negative impact on lending into the real economy. The Board of Supervisors also agreed that, in the context of the ongoing recapitalisation exercise, the EBA will undertake its next EU-wide stress test in 2013.

### **Regulation of financial conglomerates: European Commission launches consultation**

The European Commission has launched a [consultation](#) to review the way financial conglomerates are regulated. The review follows the [December 2011 Joint Forum consultation](#) – which comprises the Basel Committee on Banking Supervision, the International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Supervisors (IAIS) – on principles for the supervision of financial conglomerates. The principles proposed by the Joint Forum cover supervisory powers and authority, supervisory responsibility, corporate governance, capital adequacy and liquidity, and risk management.

The results of the Commission's consultation will serve as a basis for a review report on the fundamentals of the prudential supervision of financial groups, due for autumn 2012. This report will also indicate whether the Commission believes any legislative action is needed. Comments are due by 19 April 2012.

### **Data protection: UK Ministry of Justice issues call for evidence on EU proposals**

The Ministry of Justice has issued a [call for evidence](#) on the European Commission's proposals to update and modernise the 1995 Data Protection Directive. The proposals include a regulation setting out a general EU framework for data protection and a directive on protecting personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offences and related judicial activities. Data controllers, rights groups, information policy experts and other interested parties are invited to provide information about the likely impact of the Commission's proposals in order to assist the UK government in its forthcoming negotiations.

Responses are due by 4 March 2012.

### **UK twin peaks regulatory model to be introduced 2 April 2012**

FSA Chief Executive Hector Sants has given a [speech](#) during which he discussed the progress of the UK regulatory reform programme and announced the introduction of a 'twin peaks' model operating within the FSA from 2 April 2012. Ultimately, prudential supervision of banks, insurers and major investment firms will be transferred to a subsidiary of the Bank of England, the Prudential Regulation Authority (PRA). With respect to conduct regulation, the FSA will be renamed the Financial Conduct Authority (FCA), which will focus on consumer protection and market regulation. The current expectation is that the 'cutover' to the new structure will occur early in 2013.

Mr. Sants discussed in detail the general principles underlying twin peaks, the principal operational changes that will occur to the supervisory model, the behavioural changes that will be necessary, and the further changes that will need to be made by the PRA and the FCA.

### **Bank of Italy consults on customer due diligence obligations**

The Bank of Italy has published a [consultation document](#) (available only in Italian) relating to a new supervisory framework governing: (1) the obligations of customer due

diligence; and (2) the keeping of the single electronic archive, which provides for the centralised retention of all information acquired in fulfilling the identification and regulation obligations created in accordance with the principles laid down in the Anti-money Laundering Decree, which implements the EU Anti-money Laundering Directive in Italy.

In particular, the consultation document is intended to give actual application to the risk-based approach, whereby institutions subject to supervision (i.e. banks, financial intermediaries) should comply with the obligations of adequately verifying customers in proportion to the risk of money laundering transactions or terrorist financing actually being carried out.

Comments are due by 15 March 2012.

#### **SFC publishes consultation conclusions on short position reporting rules**

The Securities and Futures Commission (SFC) has published the [conclusions](#) of its further consultation exercise on the Securities and Futures (Short Position Reporting) Rules, which ended in November 2011. The SFC has indicated that the proposed rules published alongside the conclusions will be submitted to the Legislative Council for consideration and, subject to the legislative process, will come into effect on 18 June 2012.

In view of additional market feedback, the proposed rules provide for the reporting of short positions on a net basis. They have also been modified in certain respects, including the reporting obligations in relation to corporate 'umbrella' funds and jointly owned short positions. The reporting template has also been slightly modified. However, the SFC has emphasised that the proposed rules are fundamentally the same as those consulted on previously in May 2011.

The SFC has urged market participants to start preparing for the new reporting requirements.

#### **Japan's FSA consults on draft amendment to Ordinances requiring disclosure of compensation**

The Financial Services Agency of Japan (FSA) has published a [draft amendment](#) to the Cabinet Office Ordinances regulating banks, securities companies and other financial institutions. The amendment requires financial institutions (including banks, certain large securities companies and other financial institutions) to disclose information on compensation for directors and material employees (including those of certain consolidated

subsidiaries), and is intended to prevent financial institutions from engaging in excessive risk-taking and promote safe and sound management. The amendment follows the Pillar 3 compensation disclosure requirements published by the Basel Committee in July 2011.

Comments are due by 2 March 2012. The disclosure requirement is expected to apply from the fiscal year ending 31 March 2012. Compensation to directors and material employees who are working for a financial institution on or after 1 April 2012 will be subject to the requirement.

#### **Tokyo Stock Exchange consults on development of rules and frameworks to increase confidence in exchange traded products market**

The Tokyo Stock Exchange (TSE) has published a draft of the current development of rules and frameworks to increase confidence in and further invigorate the exchange traded products (ETP) market in light of global trends. In particular, the draft covers: (1) the development of listing rules and systems of ETPs which track leveraged/inverse indicators; (2) measures to increase confidence in exchange traded funds which contain credit risks; and (3) reverse-splits or splits of beneficiary rights.

Comments are due by 22 February 2012.

[Announcement \(English\)](#)

[Announcement \(Japanese\)](#)

## **TAX UPDATE**

#### **Draft law providing for French financial transaction tax published**

The French National Assembly has published the [Amending Finance Bill for 2012](#), which introduces a financial transactions tax in France. The 0.1% tax will apply to acquisitions of securities representative of a portion of the share capital of a company whose registered office is located in France and whose market capitalisation exceeds EUR 1 billion. The draft law provides for several exceptions.

The Bill is expected to be debated on 13 February 2012 and French President Nicolas Sarkozy has announced that this new tax would be implemented in August 2012.

#### **European Parliament Socialists and Democrats publish study on potential impact of European financial transaction tax**

The Group of the Progressive Alliance of Socialists and Democrats in the European Parliament has published a [study](#) on the potential impact of introducing a financial

transaction tax in Europe. The study concludes that the introduction of a financial transaction tax could benefit the European economy and raise the level of growth. In particular, the authors challenge the estimate in the European Commission's impact assessment of a total long run loss of GDP of -0.53% as a result of the FTT, arguing instead that the impact of introducing an FTT on level of GDP is likely to be positive, at around +0.25% as a minimum.

#### [Executive summary](#)

#### **International tax compliance and implementation of FATCA: UK, France, Germany, Italy, Spain and US issue joint statement**

The governments of the United Kingdom, France, Germany, Italy, Spain and the United States have issued a [joint statement](#) setting out an agreed approach to the US Foreign Account Tax Compliant Act (FATCA). This focuses on an intergovernmental approach to information exchange to address legal difficulties and compliance burdens that would otherwise arise for financial institutions affected by FATCA.

FATCA includes certain provisions on withholding taxes and on the reporting of information by foreign financial institutions (FFIs) for US tax compliance purposes. The statement notes that FFIs established in France, Germany, Italy, Spain and the United Kingdom may not be able to comply with the reporting, withholding and account closure requirements in FATCA because of legal restrictions. The agreed approach focuses on the use of intergovernmental agreements for information exchange between tax authorities, rather than direct reporting by financial institutions to the US Internal Revenue Service.

#### **Dutch Central Bank: Financial transaction tax in EU is undesirable**

The Dutch Central Bank (DNB) has published a [bulletin](#) expressing its view that the introduction of a European financial transaction tax (FTT) is undesirable. The DNB states that it is doubtful whether the FTT will counteract disruptive market behaviour and that the current proposal would slow down economic growth. It further doubts whether the FTT proposal will realise the European Commission's aim to discourage risky trading (including speculation) and to make the financial sector pay for part of the damage caused by the crisis.

The DNB warns that the Netherlands will be affected relatively severely by an FTT on account of its large

financial sector, including pension funds. The DNB estimates that the FTT would set Dutch banks, pension funds and insurers back EUR 4 billion per year. In addition, the negative effects in terms of economic growth and arbitrage will be stronger if the tax is not levied on a global scale. While an FTT might counteract forms of arbitrage, such as high-frequency trading, the DNB warns that it might also cause traders to relocate or to increase their risk appetite.

Moreover, the DNB notes that the Commission's draft proposal raises several questions. The lower rate on derivatives compared to shares may provoke arbitrage and opaque financial innovations. Secondly, it is uncertain what the per-transaction rate will turn out to be. Since the tax also applies to intermediaries in a transaction, the result may be a 'cascade effect' that will multiply the taxation rate. Thirdly, the effects of the FTT will include implications for the repo market, currently a major source of short-term funding for banks. The DNB argues that hard evidence that the FTT would yield a net stabilising effect is lacking.

#### **US Treasury Department and IRS issue proposed regulations under FATCA to improve offshore tax compliance and ease burden**

The Department of the Treasury and the Internal Revenue Service (IRS) have proposed regulations implementing the information reporting and withholding tax provisions commonly known as the Foreign Account Tax Compliance Act (FATCA). The regulations lay out a step-by-step process for US account identification, information reporting, and withholding requirements for foreign financial institutions (FFIs), other foreign entities, and US withholding agents. The proposed regulations implement FATCA's obligations in stages to minimise burdens and costs consistent with achieving the statute's compliance objectives.

#### [Press release](#)

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **FATCA – the new regulations, and what they mean for financial institutions worldwide**

FATCA – the Foreign Account Tax Compliance Act – is US legislation, but it imposes US compliance and withholding taxes on banks and financial institutions worldwide, regardless of their connection with the US. Many financial institutions have been concerned that FATCA conflicts with local data protection and other laws – and that FATCA

could also result in US withholding tax applying to non-US transactions between non-US parties.

On 8 February 2012, the IRS published draft regulations, and at the same time released a joint statement between the US, France, Germany, Italy, Spain and the United Kingdom. There are signs that compliance is going to be easier, at least for financial institutions in those five jurisdictions. And there is going to be more breathing space before the withholding regimes start to bite. But how far do these changes go? What risks remain? And what about institutions in other jurisdictions?

This briefing provides our immediate reaction.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/fatca\\_the\\_new\\_regulationsandwhattheymea.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/fatca_the_new_regulationsandwhattheymea.html)

#### **2011 – The Year of the Insurance Business Transfer**

2011 saw a significant increase in the number of insurance business transfers under Part VII of the Financial Services and Markets Act 2000 (FSMA).

Valuable guidance as to the factors the court should take into account when deciding whether or not to waive strict compliance with the advertising and notification requirements on a Part VII transfer was also set out in two judgements. This was a welcome development, particularly as the volume of transfers looks set to remain high as insurers continue to reorganise their businesses in preparation for the implementation of Solvency II.

This briefing provides an analysis of insurance business transfers in 2011.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/2011\\_-\\_the\\_year\\_of\\_theinsurancebusinesstransfer.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/2011_-_the_year_of_theinsurancebusinesstransfer.html)

#### **Contentious Commentary – a review for litigators**

This newsletter provides a summary of recent developments in litigation. The newsletter is produced by lawyers in the litigation and dispute resolution practice at Clifford Chance.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/contentious\\_commentary-areviewforlitigator.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/contentious_commentary-areviewforlitigator.html)

#### **FSA market abuse action underlines market participants' responsibilities on inside information**

In the well publicised action taken against Greenlight Capital Inc and its owner, President and US based sole portfolio manager David Einhorn, the FSA has imposed

finances totalling over GBP 7 million following findings that he and the hedge fund engaged in market abuse contrary to section 118 Financial Services and Markets Act 2000.

This briefing discusses the case.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/fsa\\_market\\_abuseactionunderlinesmarke.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/fsa_market_abuseactionunderlinesmarke.html)

#### **UK Employment Update**

This February 2012 edition of UK Employment Update reviews the increase in the qualifying period of employment required to claim unfair dismissal, what test an Employment Tribunal will apply when considering whether a redundant employee has unreasonably refused alternative employment and when an employer will be vicariously liable for violent employees. In addition, this edition considers a few practical employment issues that the Olympics may throw up.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/uk\\_employment\\_update-february2012.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/uk_employment_update-february2012.html)

#### **Employee Benefits News**

Since our last edition of Employee Benefits News, there has been no let-up in the pressure for reform of executive remuneration. This February 2012 edition outlines some of the practical implications of the Government's proposals for executive remuneration. In particular, it examines the Government's proposals that: (1) a backward looking remuneration statement should include a single figure for total remuneration for each director; and (2) the UK Corporate Governance Code should be amended to require 'claw-back'.

This edition also: (1) explains the implications of HMRC's proposed changes to PAYE on share plans from 6 April 2012; (2) provides an update on the latest developments on the EU prospectus directive for companies offering share plans; and outlines the latest Government proposals to improve access to share plans for all companies.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/employee\\_benefitsnews-february2012.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/employee_benefitsnews-february2012.html)

#### **Italian Employment agenda focused on the banking sector**

On 19 January 2012, the Italian unions and employers' association of the banking sector renewed the National Collective Bargaining Agreement for employees (other than executives or 'dirigenti') of the banking sector (the 'NCBA'). This renewed agreement entered into force on 19 January

2012, for a term ending on 30 June 2014, except where different terms are specifically provided.

The NCBA contains groundbreaking changes useful to employers to strike a balance and to face the adverse market conditions: on the one side, it enhances working organisation flexibility and it limits employment costs, on the other side, it promotes employment growth. More specifically, the parties have taken into account the debt crisis and the current international economic situation (which are significantly affecting the Italian market and, specifically, the employment rate), as well as the peculiar situation of the Italian banking sector, which is materially affected by the Italian Gross Domestic Product (GDP) trend.

This briefing summarises the main changes introduced by the NCBA, as renewed.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/employment\\_agendafocusedonthebankingsector.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/employment_agendafocusedonthebankingsector.html)

### **The Eurozone crisis and loan agreements – the Dutch law perspective**

The Eurozone crisis continues to dominate the global economic landscape. What once was unthinkable – a discussion about the possibility of a Eurozone member departing from the currency union – has now been touched on publicly by leaders of European member states at the heart of the European project. It has raised questions among market participants as to the implications of such an event for market standard documentation.

This briefing looks at a set of questions in the context of how loan documentation might (or might not) deal with such an eventuality, albeit an unlikely one, from a Dutch legal perspective.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/the\\_eurozone\\_crisisandloanagreements-th.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/the_eurozone_crisisandloanagreements-th.html)

### **The Converium decision – promoting the Netherlands as a centre for class settlements**

This briefing reviews the confirmation on 17 January 2012 of the Amsterdam Court of Appeal of its earlier provisional decision in the Converium case, in which it declared the international collective settlement reached between non-US securities holders and two Swiss issuers binding. The interesting aspect of this decision is the Court's finding that it had jurisdiction even though the potentially liable parties were neither domiciled in the Netherlands nor had shares listed on the Amsterdam Stock Exchange, and the vast

majority of the shareholders were also based outside the Netherlands.

This ruling will further promote the position of the Netherlands as a centre for the international collective settlement of mass claims and as a forum for non-US securities holders. As such, the Dutch system of class settlements – in conjunction with the US class settlement system – makes the Amsterdam Court of Appeal an attractive venue for parties wishing to reach a global settlement.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/the\\_converium\\_decisionpromotingthenetherland.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/the_converium_decisionpromotingthenetherland.html)

### **Exempt Reporting Advisers – A Guide for the Perplexed**

Clifford Chance's US Financial Services Regulatory team has prepared 'A Guide for the Perplexed', intended to provide overall guidance to non-US fund managers and other investment advisers and to address the most frequently-asked questions about compliance with Exempt Reporting Adviser requirements under the Dodd-Frank Act.

The guide includes:

- a one-page suggested timeline for Form ADV filings by ERAs;
- a brief how-to on gaining access to IARD electronic filing system, together with a copy of the FNRA Entitlement Packet containing application and related materials;
- a complete copy of SEC Form ADV;
- a summary of Clifford Chance's advice on combined ERA reporting by commonly-controlled investment advisers;
- a note concerning an interpretive issue of particular importance to non-US ERAs; and
- Clifford Chance's suggested template for an internal compliance policy under the SEC's 'pay-to-play' rule.

If you would like to request a copy of the guide, please email Fiona Grafton at [fiona.grafton@cliffordchance.com](mailto:fiona.grafton@cliffordchance.com).

### **US Requires Blocking of Iranian Government and Banking Assets**

The escalation of US sanctions against Iran has continued with the release by President Obama of an Executive Order 'Blocking Property of the Government of Iran and Iranian Financial Institutions'.

This briefing discusses the Executive Order.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/us\\_requires\\_blockingofiraniangovernmentan.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/us_requires_blockingofiraniangovernmentan.html)

### **The Ninth Circuit Rejects 'Whole Enterprise' Exception to Secured Lenders' Rights in Single Asset Real Estate Bankruptcy Cases**

In what appears to be a case of first impression, the United States Court of Appeals for the Ninth Circuit rejected the

notion that a single asset real estate debtor that is part of a larger real estate enterprise can avoid the special protections for secured creditors under the Bankruptcy Code. The decision is an important victory for creditors holding claims secured by real property of single asset debtors.

This briefing discusses the decision.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/the\\_ninth\\_circuitrejectswholeenterprise.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/the_ninth_circuitrejectswholeenterprise.html)

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