

# International Regulatory Update

30 January – 3 February 2012

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### International Regulatory Group Contacts

[Chris Bates](#) +44 (0)20 7006 1041

[Nick O'Neill](#) +44 (0)20 7006 1139

[Marc Benzler](#) +49 69 7199 3304

[Thomas Pax](#) +1 202 912 5168

[Steven Gatti](#) +1 202 912 5095

[Martin Rogers](#) +852 2826 2437

[Mark Shipman](#) + 852 2826 8992

### International Regulatory Update Editor

[Julia Milosh](#) +44 (0)20 7006 4171

To email one of the above, please use [firstname.lastname@cliffordchance.com](mailto:firstname.lastname@cliffordchance.com)

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ, UK

[www.cliffordchance.com](http://www.cliffordchance.com)

### **ESM Treaty signed – Collective Action Clauses brought forward to January 2013**

The [Treaty establishing the European Stability Mechanism \(ESM\)](#) has been signed by the 17 euro area member states. In particular, the Collective Action Clauses (CACs) requirement has been accelerated six months earlier than expected. Article 12(3) of the Treaty requires that, as of 1 January 2013, all new euro area government securities, with a maturity above one year, must include CACs. In its statement on 28 November 2010, the Euro Group had originally indicated that collective action clauses (CACs) would be included from July 2013 onwards.

By way of background, the ESM will be a Luxembourg-based international financial institution, which will provide financial assistance to euro area member states experiencing or being threatened by severe financing problems, if indispensable for safeguarding financial stability in the euro area as a whole. The treaty was originally signed in July 2011, but it has been modified to incorporate decisions taken by the Heads of State and Government of the euro area on 21 July and 9 December 2011.

The eurozone member states will have to ratify the ESM treaty. The treaty is expected to enter into force and become operational in July 2012, one year earlier than originally planned. As the ESM is a permanent mechanism, it will take over the tasks currently fulfilled by the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM). With the accelerated entry into force, the ESM will now operate alongside the EFSF for 12 months.

#### [ESM Treaty factsheet](#)

### **ECB working paper on euro area sovereign debt crisis published**

The ECB has published a [working paper](#) on the euro area sovereign debt crisis. The paper states that, since the intensification of the crisis in September 2008, all euro area long-term government bond yields relative to the German Bund have been characterised by highly persistent processes with upward trends for countries with weaker fiscal fundamentals. Looking at the daily period 1 September 2008 – 4 August 2011, the paper notes that three factors can explain the recorded developments in sovereign spreads: (1) an aggregate regional risk factor; (2) the country-specific credit risk; and (3) the spill-over effect from Greece.

Specifically, the paper argues that higher risk aversion has increased the demand for the Bund and this is behind the pricing of all euro area spreads, including those for Austria, Finland and the Netherlands. Country-specific credit ratings have played a key role in the developments of the spreads for Greece, Ireland, Portugal and Spain. Finally, the paper concludes that the rating downgrade in Greece has contributed to developments in spreads of countries with weaker fiscal fundamentals: Ireland, Portugal, Italy, Spain, Belgium and France.

The ECB has indicated that the views expressed in the paper are those of the authors and do not necessarily reflect those of the ECB.

### **Credit rating agencies: ESMA launches central repository**

ESMA has [launched](#) a central rating repository (CEREP) providing information on credit ratings issued by credit rating agencies (CRAs) which are either registered or certified in the EU. The CEREP database has been established in accordance with Article 11.2 of the Credit Rating Agencies Regulation and is intended to help investors assess the performance and reliability of credit ratings on different types of ratings, asset classes and geographical regions over the time period of choice.

The repository includes standardised statistics on rating activity and the performance of credit ratings, including transition matrices and default rates. It will be updated on a semi-annual basis with statistics covering up to the preceding reporting period, which covers six months lasting from 1 January to 30 June or from 1 July to 31 December.

### **European Commission blocks proposed exchange merger**

The European Commission has prohibited, on the basis of the EU Merger Regulation, the proposed merger between Deutsche Börse and NYSE Euronext. The Commission concluded that the merger would have resulted in a quasi-monopoly in the area of European financial derivatives traded globally on exchanges, and that new competitors would have been unlikely to enter the market successfully enough to pose a credible competitive threat to the merged company.

Although the companies offered to sell certain assets and to provide access to their clearinghouse for some categories of new contracts, the Commission decided that these commitments would not have solved the competition concerns it had identified. As a result, the Commission

concluded that the merger would significantly impede effective competition in the internal market or a substantial part of it and decided to prohibit the transaction.

[Press release](#)

[FAQs](#)

### **ESMA outlines future regulatory framework for exchange-traded funds and other UCITS issues**

ESMA has published a [consultation paper](#) setting out its draft guidelines on UCITS exchange-traded funds (ETFs) and other UCITS-related issues. The proposals cover both synthetic and physical UCITS ETFs and detail the future obligations for UCITS ETFs, index-tracking UCITS, efficient portfolio management techniques, total return swaps and strategy indices for UCITS. Amongst other things, the proposals include placing an obligation on UCITS ETFs to use an identifier and facilitating the ability of investors to redeem their shares, whether in the secondary market or directly with the ETF provider.

Comments are due by 30 March 2012. ESMA expects the final guidelines to be ready for adoption by mid-2012.

### **CRD 4: ECB opinion published**

The ECB has published its [opinion](#), dated 25 January 2012, on the European Commission's proposals for a fourth package of amendments to the Capital Requirements Directive (CRD 4) to implement the Basel III reforms into EU law, which comprise a directive governing access to deposit-taking activities and the prudential supervision of credit institutions and investment firms and a regulation on prudential requirements for credit institutions and investment firms.

### **George Osborne raises concerns over Volcker Rule**

The Chancellor of the Exchequer, George Osborne, has written a [letter](#) to Federal Reserve Chairman Ben Bernanke proposing a more active dialogue on the Volcker Rule and the implications for global financial markets. In particular, Mr. Osborne's letter raises concern about the impact of proprietary trading restrictions on the liquidity of global funding markets and particularly non-US sovereign debt markets. Mr. Osborne warns that the regulations could have a significant adverse impact on sovereign debt markets, including in the UK. Although he acknowledges that the primary legislation makes an exemption for market-making activities, he argues that in practice the regulations would make it more difficult and costlier to provide market-making services in non-US sovereign markets. According to Mr. Osborne, any consequent withdrawal of market-

making services by banks would reduce liquidity in sovereign markets, which in turn would engender greater volatility and make it more difficult, riskier and costlier for countries such as the UK to issue and distribute their debt.

He also raises concern about the planned breadth of exemptions to proprietary trading restrictions for firms carrying out activities which have little economic consequence for US markets. Mr. Osborne states that there may be a risk that the proprietary trading restrictions continue to have implications for firms foreign to the US which use US exchanges or other market infrastructure to carry out their business. He further argues that, unless exemptions are sufficiently broad, there is a risk that the legislation could dis-incentivise transactions with US counterparties. According to Mr. Osborne, this could result in a reduction in market liquidity, leading to investors experiencing higher costs, delays, and potentially greater price volatility. The Chancellor believes that, over the medium term, this may encourage a migration of market making to outside the regulated banking sector.

### **FSA issues finalised guidance on its reviews of counterparty credit risk management by central counterparties**

The FSA has published [finalised guidance](#) on the process and scope of the review it undertakes when assessing the adequacy of the counterparty credit risk management framework within a central counterparty. The FSA assesses both applications and existing services against the UK standards for central counterparties in Part 18 of the Financial Services and Markets Act and the recognition requirements. The guidance provides further information on the way in which the FSA assesses compliance with the Act and the recognition requirements.

### **FSA issues finalised guidance on unfair contract terms and improving standards in consumer contracts**

The FSA has published [finalised guidance](#) on the types of term in consumer contracts which it commonly finds to be of concern under the Unfair Terms in Consumer Contracts Regulations 1999. In particular, these are terms giving the firm: (1) the right to unilaterally vary the contract; (2) the right to terminate the contract; (3) discretion to exercise contractual powers; (4) the right to transfer its obligations under the contract; and (5) terms that are not in plain and intelligible language.

### **LSE consults on proposed rule amendments regarding Exchange enforced cancellations**

The London Stock Exchange (LSE) has issued a [Notice \(N03/12\)](#) outlining proposed amendments to its rules relating to Exchange enforced cancellations. In particular, the LSE is proposing to make procedural changes in relation to its handling of Exchange enforced cancellations as well as amending the threshold limits for Exchange enforced cancellations in Exchange Traded Funds (ETFs) and Exchange Traded Products (ETPs).

At present the potential loss threshold for ETFs and ETPs is set at GBP 100,000 in relation to automated trades conducted in a single security and GBP 200,000 for trades in more than one security. The LSE is proposing to lower the thresholds, for ETFs and ETPs only, to GBP 50,000 for trades conducted in a single security and GBP 100,000 for trades conducted in more than one security.

Comments are due by 24 February 2012.

#### [Attachment](#)

### **French decree setting threshold for requirement of remuneration committee in credit institutions, investment firms and venture capital companies published**

A [decree](#), dated 20 January 2012, which sets the total balance sheet (on an annual or consolidated basis) threshold above which credit institutions, investment firms and venture capital companies are required to create a remuneration committee at EUR 10 billion, has been published in the Official Journal (Journal officiel). The decree was made under Article 65 of Law 2010-1249 of 22 October 2010, known as the Law on Banking and Financial Regulation (codified as Article L.511-41-1 A of the Monetary and Financial Code). The role of the remuneration committee, which is composed of a majority of independent members, is to examine the principles of a company's remuneration policy on an annual basis.

The decree entered into force on 23 January 2012.

### **Bank of Italy introduces new regime on redemption and buy-back of hybrid capital instruments and subordinated securities**

The Bank of Italy (BoI) has issued its [Supervisory Bulletin No. 1](#) (available only in Italian), modifying its supervisory guidance no. 263 and, in particular, the regime applicable to the redemption and buy-back of hybrid capital

instruments and subordinated securities issued by credit institutions.

In order to align with and achieve the capital targets indicated in the recommendations issued by the European Banking Authority (EBA), the BoI has introduced a new regime, under which different conditions must be met for the authorisation of the redemption and buy-back. In particular, the BoI must verify that, after the redemption/buy-back of the hybrid capital instruments and subordinated securities, the credit institution still has adequate capital buffers above the regulatory capital requirements and that such redemption/buy-back does not have a negative impact on the credit institution's liquidity position and its profitability in the foreseeable future.

Such redemption and buy-back can occur even prior to the call date, but the BoI may request the credit institution either to replace the instruments subject to the redemption/buy-back with capital of at least the same or better quality, or to allocate the capital gain arising from the repurchase/buy-back of these instruments to the capital/reserve components of the regulatory capital of the credit institution. In general terms, the credit institution is requested to carry out a thorough analysis of the legal and reputational risks arising from the redemption and buy-back, paying particular attention where the securities are held by non-qualified investors.

### **BSP revises compliance systems and corporate governance standards**

The Bangko Sentral ng Pilipinas (BSP) has announced a revised set of rules relating to: (1) the compliance programme for banks; and (2) corporate governance standards for financial institutions.

The revised compliance programme widens the definitional scope of business risks for banks, provides for new functional powers/responsibilities of the chief compliance officer (CCO), dispenses with the requirement of submitting a compliance manual, and mandates the formation of a board-level compliance committee. The BSP requires banks to meet the provisions of the new compliance programme by 1 July 2012.

The revised corporate governance guidelines are modelled on the Basel Committee on Banking Supervision's paper on principles for enhancing corporate governance. The BSP has indicated that the revised guidelines are the first of a three-part issuance on corporate governance, which will be followed by issuances governing internal controls and risk

management. The three-part governance package is expected to be completed by the end of 2012.

[Revised compliance programme](#)

[Revised corporate governance standards](#)

#### **ASIC releases disclosure guidelines for infrastructure entities**

The Australian Securities and Investments Commission (ASIC) has released its [Regulatory Guide 231](#): 'Infrastructure entities: Improving disclosure for retail investors' containing new disclosure benchmarks and principles to assist infrastructure entities in preparing disclosure documents for retail investors. The nine benchmarks and 11 disclosure principles are designed to provide investors with consistent information to allow them to understand the characteristics and risks of infrastructure entities and allow investors to compare infrastructure investments against a common standard.

The regulatory requirements apply to infrastructure entities from 1 July 2012 and require them to: (1) apply the disclosure principles when disclosing to investors; and (2) disclose against the benchmarks standards on an 'if not, why not' basis – this means that if a particular benchmark requirement is not met, the infrastructure entity must explain to the investor why it does not meet the benchmark and how it deals with the issues underlying the benchmark.

#### **CFTC and SEC release joint report to Congress on international swap regulation**

The Commodity Futures Trading Commission (CFTC) and the Securities and Exchange Commission (SEC) have delivered to Congress a [joint report](#) on international swap regulation, as required by Section 719(c) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The provision requires the Commissions to report on how swaps are regulated in the United States, Asia, and Europe and to identify areas of regulation that are similar and other areas of regulation that could be harmonized.

The report concludes with the observation that the 2009 G-20 Leaders' commitments were the first global commitments regarding OTC derivatives regulatory reform. It notes, however, that progress toward implementing these reforms varies across jurisdictions and that it is still too early to determine precisely where there is alignment internationally and where there may be gaps or inconsistencies.

#### **FINRA issues regulatory notice on verification of emailed instructions to transmit or withdraw assets from customer accounts**

The Financial Industry Regulatory Authority (FINRA) has issued [Regulatory Notice 12-05](#), which includes guidance on the need to verify emailed instructions to transmit or withdraw assets from customer accounts. The notice indicates that FINRA has received an increasing number of reports of incidents of customer funds being stolen as a result of instructions emailed to firms from customer email accounts that have been compromised. The notice advises firms to reassess their policies and procedures to ensure they are adequate to protect customer assets from such risks.

Amongst other things, FINRA recommends that such policies and procedures: (1) include a method for verifying that the email was in fact sent by the customer; and (2) be designed to identify and respond to 'red flags', including transfer requests that are out of the ordinary, requests that funds be transferred to an unfamiliar third party account, or requests that indicate urgency or otherwise appear designed to deter verification of the transfer instructions.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **Iran and Syria – New EU Sanctions**

In January, the EU passed a raft of new restrictive measures against both Syria and Iran, which will have a significant impact on already strained business and trading relations with both countries. As has been reported widely, the new sanctions against Iran are intended to exert further pressure in relation to its nuclear programme, whereas the sanctions against Syria are principally targeted at those responsible for the violent repression of the civilian population. While the new sanctions are designed to achieve different political objectives, the broad range of sanctions now in place against both countries imposes similar compliance challenges.

This briefing summarises the principal features of the new measures. As the political climate continues to develop and sanctions imposed are ever more complex, businesses in Europe that have connections with either country need to consider the new measures carefully and seek advice as appropriate.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/iran\\_and\\_syria\\_neweusanctions.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/iran_and_syria_neweusanctions.html)

### **SFO prosecutes private sector corruption on offshore projects**

In the latest large private sector corruption prosecution to be concluded, the Serious Fraud Office (SFO) has secured four convictions against individuals in respect of corrupt payments made to them in return for passing on confidential procurement information in relation to high value offshore oil and gas engineering projects in Iran, Russia, Singapore and Abu Dhabi between 2001 and 2009.

This briefing discusses the convictions.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/sfo\\_business\\_as\\_usual.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/sfo_business_as_usual.html)

### **FSA paper on AIFMD implementation – a glimpse of the regulator’s ankle**

The UK’s FSA published a discussion paper on implementation of the AIFM Directive on 23 January 2012. The FSA invites comments on the paper and responses to the 69 questions posed, to be received by 23 March 2012.

This briefing discusses the FSA’s paper.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/fsa\\_paper\\_on\\_aifmdimplementationaglimpseo.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/fsa_paper_on_aifmdimplementationaglimpseo.html)

### **New squeeze-out possibility and simplification of the merger and demerger procedure**

On 18 January 2012, a law was published that modifies the Belgian Companies Code and implements Directive 2009/109/EG in connection with the documentation and report obligations of mergers and demergers. The law provides for a simplification of the mandatory formalities for (national) mergers and demergers, and creates a new squeeze-out possibility.

This briefing discusses the changes.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/new\\_squeeze-out\\_possibilityandsimplificationo.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/new_squeeze-out_possibilityandsimplificationo.html)

### **Reform Act on German Insolvency Law**

The global financial and economic crisis over the last two years has strongly influenced the development of the insolvency regime in Germany. Even though the number of company insolvencies has been in decline, it was broadly accepted that the existing insolvency regime was in need of extensive amendment. The Reform Act on German Insolvency Law comes into force on 1 March 2012 and brings substantial changes with the aim of strengthening

creditors’ rights and removing the existing hurdles in a restructuring. Following the reforms, creditors will have more influence on the court’s appointment of the preliminary insolvency administrator and be able to participate in a preliminary creditors’ committee.

This briefing discusses the reforms.

[http://www.cliffordchance.com/publicationviews/publications/2012/02/reform\\_act\\_on\\_germaninsolvencylaw.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/reform_act_on_germaninsolvencylaw.html)

### **Italy – tax measures included in the economic growth and competitiveness package**

On 24 January 2012, the Italian government issued Decree Law 1/2012 containing a set of urgent measures to address the economic growth and the competitiveness of Italian enterprises. The new measures include a number of significant tax measures, such as amendments to the VAT regime of leases and sales of certain residential properties, new limitation to deduction of interest expenses for certain public entities and further amendments to the taxation of financial investments. Decree Law 1/2012 must be converted by the Parliament into law, with eventual amendments, within 60 days; if not converted, it would cease to produce any further effect.

This briefing summarises the most significant tax measures introduced under Decree Law 1/2012.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/italy\\_tax\\_measuresincludedintheeconomy.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/italy_tax_measuresincludedintheeconomy.html)

### **Beneficial Ownership Test in the Context of Eurobond Transactions – New Reality?**

This briefing discusses the apparent change in the approach of the Russian tax authorities to taxation of Eurobonds and its potential impact on future and existing Eurobond issuances of Russian borrowers.

English version

[http://www.cliffordchance.com/publicationviews/publications/2012/02/beneficial\\_ownershiptestinthecontextof0.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/beneficial_ownershiptestinthecontextof0.html)

Russian version

[http://www.cliffordchance.com/publicationviews/publications/2012/02/beneficial\\_ownershiptestinthecontextof0.html](http://www.cliffordchance.com/publicationviews/publications/2012/02/beneficial_ownershiptestinthecontextof0.html)

### **SFC consultation conclusions on proposed anti-money laundering and counter-terrorist financing guidelines**

On 27 January 2012, the Securities and Futures Commission (SFC) issued its consultation conclusions on the proposed guidelines, the final form of the Guideline on Anti-Money Laundering and Counter-Terrorist Financing, as

well as the related Prevention of Money Laundering and Terrorist Financing Guideline for Associated Entities, both of which will come into effect at the same time as the new Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance.

This briefing provides an overview of the key elements of the conclusions.

Please contact Mhairi Appleton by email at [mhairi.appleton@cliffordchance.com](mailto:mhairi.appleton@cliffordchance.com) for a copy of this briefing.

#### **New ASIC disclosure guidelines for infrastructure entities from 1 July 2012**

The Australian Securities and Investments Commission (ASIC) has released new disclosure benchmarks and principles for disclosure documents prepared by infrastructure entities. The nine benchmarks and 11 disclosure principles are designed to provide retail investors with consistent information to allow them to understand the characteristics and risks of infrastructure entities and allow investors to compare infrastructure investments against a common standard. Infrastructure entities will need to review existing disclosure documents before the 1 July 2012 implementation of these changes, and those planning new investment documents should adopt these principles now.

This briefing discusses these new disclosure benchmarks and principles for infrastructure entities.

Please contact Mhairi Appleton by email at [mhairi.appleton@cliffordchance.com](mailto:mhairi.appleton@cliffordchance.com) for a copy of this briefing.

#### **Australian Personal Property Securities Act in effect from 30 January 2012**

Extensive changes to personal property securities laws and the implementation of the new Personal Property Securities Register (PPSR) in Australia began on 30 January 2012. The changes will have a major impact on an extensive range of services and businesses across a number of sectors and will redefine the scope of what constitutes a registrable security interest in Australia.

This briefing discusses the new regime.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/australian\\_personalpropertysecuritiesacti.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/australian_personalpropertysecuritiesacti.html)

#### **The new Australian Personal Property Securities Act – aviation finance issues**

A major reform of personal property securities in Australia began on 30 January 2012, and the current law and practice in Australia relating to security interests over personal property (i.e. most property other than land) will change. The reforms affect a wide range of services and businesses in a broad range of sectors, including, in particular, the banking and finance sectors, together with sectors not previously subject to security registration regimes. In addition, the reforms have specific implications for particular industry groups, including the aircraft finance and leasing industries.

This briefing discusses how the Personal Property Securities Act affects aircraft finance and the aviation industry.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/the\\_new\\_australianpersonalpropertysecuritie.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/the_new_australianpersonalpropertysecuritie.html)

#### **CFTC Issues Final Rules for Swap Dealers and Major Swap Participants**

On 11 January 2012, the Commodity Futures Trading Commission (CFTC) took the following actions:

- the CFTC approved final rules establishing a registration process for swap dealers and major swap participants, as required under Sections 4s(a) and 4s(b) of the Commodity Exchange Act, which were inserted by the Dodd-Frank Act; and
- the CFTC also adopted business conduct rules governing duties of swap dealers and major swap participants to their counterparties – the rules, which address the so called ‘external business conduct’ of such dealers and major participants (as distinguished from their supervisory, record-keeping and similar ‘internal business conduct’ regulations), were proposed by the CFTC in December 2010 and will be codified as Subpart H of Title 17, Part 23, of the U.S. Code of Federal Regulations.

These two briefings provide a summary of the final rules and the business conduct rules respectively.

CFTC Issues Final Rules Regarding Registration of Swap Dealers and Major Swap Participants

[http://www.cliffordchance.com/publicationviews/publications/2012/01/cftc\\_issues\\_finalrulesregardingregistrationo.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/cftc_issues_finalrulesregardingregistrationo.html)

CFTC Issues Final Rules on Business Conduct Standards for Swap Dealers and Major Swap Participants

[http://www.cliffordchance.com/publicationviews/publications/2012/01/cftc\\_issues\\_finalrulesonbusinessconduc.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/cftc_issues_finalrulesonbusinessconduc.html)

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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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Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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