

International Regulatory Update

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CRD 4: Parliament's ECON Committee sets out position; ECOFIN Council agrees on general approach and EU Council publishes modifications agreed by ECOFIN

On 14 May, the European Parliament's ECON Committee voted on the proposed fourth package of amendments to the Capital Requirements Directive (CRD 4), comprising 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. The Committee issued a press release setting out its position as follows:

- banks should be required to hold enough capital to protect themselves against unexpected losses, and systemically important banks should be required to hold a supplementary capital buffer of 3%, which could be raised to 10% if this were considered necessary by the authorities;
- every financial institution should be required to have 'robust' governance agreements, including consistent lines of responsibility, effective processes for identifying and managing risks and sound and fair remuneration policies;
- bankers pay should be consistent with effective risk management, not encourage unjustified risk-taking and reflect performance; and
- bankers' bonuses must not exceed their fixed salaries.

On 15 May, the ECOFIN Council unanimously agreed on a general approach on CRD 4.

The EU Council Presidency's compromise text for the proposed regulation sets capital requirements and introduces initial liquidity requirements from 2013, according to national provisions, and a fully calibrated EU liquidity requirement from 2015. To address longer term funding issues, the draft regulation calls on the European Commission to submit by 31 December 2016 a report and, if appropriate, a legislative proposal for a stable funding requirement. The draft regulation also provides for the introduction of a leverage ratio from 1 January 2018, if agreed by Council and Parliament on the basis of a report to be presented by the Commission in 2016. The draft regulation further provides the opportunity for Member States to impose, for up to two years (extendable), stricter prudential requirements for domestically authorised financial institutions. The Commission, for its part, would also have the possibility to impose for one year stricter

prudential requirements, via delegated acts addressed to all Member States.

The draft directive introduces additional requirements for a capital conservation buffer of 2.5% CET 1 for all banks in the EU, and an institution-specific countercyclical capital buffer, as well as the possibility for Member States to introduce a systemic risk buffer of additional CET 1 capital for the financial sector or one or more subsets of it. Member States would be able to apply systemic risk buffers of up to 3% for all exposures and up to 5% for domestic and third country exposures, without having to seek prior Commission approval, while they could impose even higher buffers with prior Commission authorisation in the form of a delegated act. If a Member State decides to impose a buffer of up to 3% for all exposures, the buffer has to be set equally on all exposures located within the EU.

On 16 May, the EU Council published certain modifications CRD 4 agreed by the ECOFIN Council on 15 May 2012.

The negotiations with the EU Parliament will aim for adoption of the package at first reading, if possible by June 2012.

[ECON Committee press release](#)

[ECOFIN Council press release](#)

[Proposed directive – Presidency compromise \(11 May 2012\)](#)

[Proposed directive – ECOFIN modifications](#)

[Proposed regulation – Presidency compromise \(11 May 2012\)](#)

[Proposed regulation – ECOFIN modifications](#)

CRD 3: EBA publishes guidelines on incremental default and migration risk charge and stressed value at risk

The EBA has published two sets of guidelines on stressed value at risk (VaR) and on the incremental default and migration risk charge (IRC) modelling approaches employed by credit institutions using the internal model approach (IMA).

The two sets of guidelines have been prepared in response to the revised Capital Requirements Directive (CRD3 – as regards capital requirements for the trading book and for re-securitisations, and the supervisory review of remuneration policies) and the amendments relating to stressed VaR and to the IRC in the trading book. CRD 3 requires the EBA to monitor the range of practices in these areas and to draw up guidelines in order to ensure convergence of supervisory practices.

National competent authorities are expected to implement the provisions set out in the guidelines within six months after their publication. After that date, the competent authorities must ensure that institutions comply with the guidelines effectively.

[Guidelines on stressed VaR](#)
[Guidelines on ICR](#)

EBA publishes discussion paper on template for recovery plans

The EBA has published a [discussion paper](#) on a template for recovery plans, which is intended to encourage discussion and gather stakeholders' opinions at an early stage of the process. The paper presents the EBA staff's preliminary view on what the key elements of a recovery plan should be and proposes a possible 'template for recovery plan' covering the essential issues that should be addressed in a recovery plan.

Comments are due by 15 June. The European Commission's legislative proposal on crisis management is expected on 6 June 2012.

[Consultation page](#)

Financial Conglomerates Directive review: ESA Joint Committee launches consultation

The Joint Committee of the European Supervisory Authorities (ESAs) has launched a three-month [consultation](#) on the proposed response to the call for technical advice from the European Commission on the fundamental review of the Financial Conglomerates Directive (FICOD). The consultation covers three broad areas where advice is sought by the Commission: (1) the scope of application, especially the inclusion of non-regulated entities; (2) the group wide internal governance requirements and sanctions; and (3) supervisory empowerments under the FICOD.

In its proposed response, the Joint Committee issues a series of recommendations for the review of the FICOD, including the widening of the scope of supervision, addressing requirements and responsibilities to a designated entity within the financial conglomerate and the framework of supervisory powers provided by the FICOD.

Comments are due by 13 August 2012. Later in 2012, the Joint Committee also intends to provide a supervisory contribution to the wider fundamental review of the FICOD which is being carried out by the Commission.

FSB announces establishment of Enhanced Disclosure Task Force

The Financial Stability Board (FSB) has [announced](#) the formation of a new private-sector task force – the Enhanced Disclosure Task Force – to develop principles for improved disclosures and to identify recent leading risk disclosure practices. The primary objectives of the task force are: (1) to develop principles for enhanced disclosures, based on current market conditions and risks, including ways to enhance the comparability of disclosures; and (2) to identify leading practice risk disclosures presented in annual reports for end-year 2011 based on broad risk areas such as those identified in the summary of the first FSB roundtable on risk disclosures held in December 2011.

The task force will report its recommendations to the FSB during October 2012. The FSB will consider holding another international roundtable by end-2012 to facilitate further discussion by investors, financial institutions, auditors, standard setters, regulators and supervisors on market conditions and risks at that time and the progress toward improving the transparency of risks and risk management through relevant disclosures.

Economic crime: Ministry of Justice consults on deferred prosecution agreements

The Ministry of Justice has published a [consultation paper \(CP9/2012\)](#) setting out its proposals to introduce deferred prosecution agreements as a new enforcement tool to deal with economic crime committed by commercial organisations. The proposals are intended to enable prosecutors to take more effective action against commercial organisations which commit economic crimes like fraud, bribery, corruption and money laundering.

Under a deferred prosecution agreement, the prosecutor would lay, but would not immediately proceed with, criminal charges against a commercial organisation pending successful compliance with agreed terms and conditions stated in the agreement. These would be discussed and agreed between the parties and then placed before a judge for consideration and approval. Time limits would be attached to the terms and conditions so that compliance can be managed and it will be clear when the agreement should cease.

Comments are due by 9 August 2012.

FSA and Bank of England publish paper on designation of investment firms by the PRA

The FSA and the Bank of England have published a [paper](#) setting out their initial views on how the Prudential Regulation Authority (PRA) will exercise the powers that would be conferred under the Financial Services and Markets Act 2000 (PRA-Regulated Activities) Order 2011*. The proposed draft Order will provide, amongst other things, for the PRA to designate certain investment firms for prudential regulation by the PRA rather than by the Financial Conduct Authority (FCA). The paper is intended to assist Parliamentary scrutiny of the Financial Services Bill.

[Preparing for the PRA page](#)

FSA issues finalised guidance on transaction reporting of strategy trades

The FSA has published [finalised guidance](#) for authorised firms with transaction reporting obligations on how to report strategy trades entered into on Alternative Instrument Identifier (Aii) exchanges, with particular focus on correctly reporting the venue identification field.

The guidance will be effective from 15 August 2012.

[Summary of feedback received](#)

FSA issues finalised guidance on payment for order flow

The FSA has published [finalised guidance](#) on the practice of 'payment for order flow', i.e. an arrangement whereby a broker receives payment from market makers, in exchange for directing order flow to them. The guidance is intended to clarify how this practice interacts with the FSA's rules. Amongst other things, the guidance states that payments from a market maker to a broker can only take place where all three tests of the inducements rule are satisfied, and both the best execution and conflicts of interest rules are complied with.

[Summary of feedback received](#)

German regulation introducing financial intermediaries regulation published in Federal Law Gazette

The regulation introducing a financial intermediaries regulation has been published in the [Federal Law Gazette](#). The regulation applies to financial intermediaries who can rely on the licence exemption under section 2 para 6 no. 8 of the German Banking Act and sets out detailed requirements regarding the evidence of the professional expertise of the intermediaries and the required

professional liability insurance, and includes business conduct rules comparable to those stipulated in sections 31 et seq. of the German Securities Trading Act. The main part of the new Act enters into force on 1 November 2012 and other parts on 1 January 2013.

ISVAP consults on assessment criteria of debt instruments issued or guaranteed by EU Member States

The Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo (ISVAP) has launched a [consultation](#) on a proposed regulation concerning assessment criteria of debt instruments issued or guaranteed by EU Member States. In light of the financial crisis and the volatility of the markets which have a daily impact on interest rates of sovereign bonds, the ISVAP is proposing to extend the validity of special anti-crisis measures issued in 2009 and 2011. Amongst other things, the draft regulation proposes to extend specific accounting provisions which will apply during the ongoing financial crisis.

Comments are due by 11 June 2012.

Prospectus and Transparency Directive: Italian Ministry of Economy and Finance consults on implementing measures of Directive 2010/73/EC

The Ministry of Economy and Finance (MEF) has launched a [consultation](#) on amendments to, amongst other things, Legislative Decree No. 58 of 24 February 1998 (the 'Italian Financial Act') and Royal Decree No. 262 of 16 March 1942 (the 'Italian Civil Code'), which are intended to implement the amended Prospectus Directive. Directive 2010/73/EC amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

Amongst other things, the consultation paper sets out proposals to modify the Italian Financial Act in order to: (1) simplify the content of the summary of a prospectus and the relevant liability regime; and (2) streamline the decision making process of the competent regulator (CONSOB) regarding the approval of a prospectus. In addition, the consultation proposes to amend Article 2412 of the Italian Civil Code in order to broaden the possibility of corporate entities issuing bonds. In particular, the current exception from the limit to issue such instruments for a restricted amount (i.e., not greater than double the share capital, including legal and free reserves) will no longer be limited

to bonds issued by corporate entities with shares listed on regulated markets, with respect only to bonds to be listed on regulated markets. Under the proposal, the exception will be extended to any issuance of bonds to be listed on regulated markets or on a multilateral trading system.

Comments are due by 20 May 2012.

Market entry criteria for Hong Kong banking sector revised

The Hong Kong Monetary Authority (HKMA) [announced](#) on 16 May that the Banking Ordinance (Amendment of Seventh Schedule) Notice 2012, which seeks to update certain market entry criteria for the banking sector in Hong Kong, would be gazetted on 18 May 2012. The Notice seeks to remove the present licensing requirement under which an applicant for a bank licence must have total customer deposits of not less than HKD 3 billion and total assets of not less than HKD 4 billion. The Notice also seeks to remove certain impediments which restrict foreign banks from entering the Hong Kong market through the establishment of a locally incorporated subsidiary.

The proposed amendments arose from a review conducted by the HKMA in 2011, which concluded that some licensing conditions under the Banking Ordinance applying to Hong Kong are not found in other financial markets and that these conditions are also not part of the international standards for banking supervision and regulation. The Notice will be tabled before the Legislative Council on 23 May 2012. Subject to the negative vetting of the Notice by the Legislative Council, the amendments will take effect on 12 July 2012.

US federal agencies finalize large bank stress testing guidance

The Board of Governors of the Federal Reserve System (FRB), the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) have issued [final guidance](#) with respect to stress testing at banking organizations with total consolidated assets of more than USD 10 billion. The guidance outlines broad principles for the implementation of a satisfactory stress testing framework as part of the broader risk management and governance processes, and has been issued to emphasize the importance of stress testing as an ongoing risk management practice. The guidance does not provide specific instructions for stress testing, but outlines general stress testing principles, some general types of stress testing approaches and applications, and governance and control over the stress testing framework.

The guidance will become effective on 23 July 2012.

RECENT CLIFFORD CHANCE BRIEFINGS

EU accession and State aid risks

The recent judgment of the EU General Court in *Budapesti Erőmű* highlights the risks of entering into investments through long term contractual arrangements in EU accession countries and accession candidates. Even if EU State aid laws do not apply at the time of entering into the contract, the European Commission can still challenge the arrangement post-accession, and order repayment of amounts it deems to be in excess of the market rate.

This briefing explores some of the key issues, including: If a contract is entered into in a country in which EU State aid laws are not in force, can it later be challenged if that country joins the EU? What are the consequences of such a challenge? How can investors protect themselves against these risks?

http://www.cliffordchance.com/content/cliffordchance/publicationviews/publications/2012/05/eu_accession_andstateaid_risks.html

Can new forms of finance provide support for the real economy?

While economic growth depends on the ability of companies to access finance, banks face new regulations that threaten to constrain lending. How to square this circle is a conundrum facing the UK government. The challenge of raising capital for the real economy also extends beyond banks to other lenders including government efforts to fund infrastructure projects. Journalist Brian Thompson heard Clifford Chance specialists assess the problem, examine the latest proposals and consider the other approaches that could be used.

http://www.cliffordchance.com/publicationviews/publications/2012/05/can_new_forms_offinanceprovidesupportforth.html

UK Government unveils plans for Deferred Prosecution Agreements

The UK Government has announced details of its proposals to enable companies to avoid prosecution in some cases. Deferred prosecution agreements (DPAs), whereby companies agree to pay penalties and take remedial action as an alternative to contested criminal proceedings, have been used extensively in the United States to conclude

fraud and corruption investigations. The consultation paper released on 17 May 2012 brings their use in the UK a step closer. Although DPAs are proposed to be made available to a number of agencies responsible for prosecuting serious economic crime, they are expected to be used principally by the Serious Fraud Office (SFO).

This briefing discusses the proposals.

http://www.cliffordchance.com/publicationviews/publications/2012/05/uk_government_unveilsplansfordeferre.html

UK Regulatory Reform – Adapting to the new approach to regulating insurers

In the aftermath of the financial crisis of 2008, there emerged a consensus of opinion both on the global stage and in the domestic arena that failures in regulation played a significant role in the crisis. In the UK, in particular, the view of the then Labour government was that that failure was caused by weaknesses in the Tripartite system of regulation. However, whilst the Labour government's proposals for change did not involve a wholesale dismantling of the Tripartite system, George Osborne made clear from the outset that the Coalition government believed that the Tripartite system 'failed spectacularly in its mission to maintain stability' and nothing less than a 'programme for radical reform' would suffice, which 'places the judgement of expert supervisors at the heart of regulation'.

This briefing looks at some of the key proposals in the Financial Services Bill, which was formally introduced into Parliament in January 2012, and highlights some of the regulatory challenges facing the UK insurance market.

http://www.cliffordchance.com/publicationviews/publications/2012/05/uk_regulatory_reformadaptingtothene.html

Employment Newsletter May 2012 – the Netherlands

This briefing, prepared by Clifford Chance's Amsterdam Employment and Pensions group, provides a description of the impact of developments on employers in the Netherlands that can no longer be ignored: the new world

of working (het nieuwe werken) and the use of social media by employees. The newsletter also provides an update on whistleblowing policies and the implementation of the AIFM Directive in the Netherlands, and describes changes to the dismissal protection for expats in the Netherlands.

http://www.cliffordchance.com/publicationviews/publications/2012/05/employment_newslettermay2012-thenetherlands.html

Polish Legislation Newsletter

The Polish Legislation Newsletter for March to April 2012 contains information on, amongst other things: (1) an Ordinance amending the Ordinance on the special accounting standards for banks; (2) an Ordinance amending the Ordinance on the current and periodic information provided by issuers of securities and on the conditions of recognising the information required by the provisions of law of a State that is not a Member State as equivalent information.

http://www.cliffordchance.com/publicationviews/publications/2012/05/polish_legislationnewslettermarch-april2012.html

New aspects of the Spanish SOCIMI regime

On Friday 11 May 2012, the Council of Ministers announced the main content of the Draft Bill on Measures on Flexibility and Promotion in the Housing Rental Market, by virtue of which significant changes could be introduced into the current regime of Listed Real Estate Investment Companies (SOCIMI). As is already known, the SOCIMI regime was created in 2009 (Act 11/2009, of 26 October) with scant success to date. One of the main reasons hindering the progress of SOCIMI entities has been the strict, complex regulation, requiring compliance with numerous requisites in various areas.

This briefing discusses the measures and their implications for the development of these types of entities.

http://www.cliffordchance.com/publicationviews/publications/2012/05/new_aspects_of_thespanishsocimiregime.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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