

International Regulatory Update

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Banking union: European Commission publishes proposals for single supervisory mechanism; Parliament issues resolution

The European Commission has published a [package of proposals](#) to set up a single supervisory mechanism (SSM) for banks in the euro area. The Commission's proposals comprise:

- a proposal for a Council Regulation to give specific tasks related to financial stability and banking supervision to the European Central Bank (ECB);
- a proposal for a Regulation of the European Parliament and of the Council designed to align the existing Regulation 1093/2010 on the establishment of the European Banking Authority (EBA) to the modified framework for banking supervision; and
- a communication outlining the Commission's overall vision for the banking union, covering the single rulebook and the single supervisory mechanism, as well as the next steps involving a single bank resolution mechanism.

In the new single mechanism, ultimate responsibility for specific supervisory tasks related to the financial stability of all euro area banks will lie with the ECB. In particular, the ECB will become responsible for tasks such as authorising credit institutions, compliance with capital, leverage and liquidity requirements, and conducting supervision of financial conglomerates. It will also be able to carry out early intervention measures when a bank breaches or risks breaching regulatory capital requirements by requiring banks to take remedial action. National supervisors will continue to play a role in day-to-day supervision and in preparing and implementing ECB decisions. The Commission is also proposing that the EBA develop a Single Supervisory Handbook to preserve the integrity of the single market and ensure coherence in banking supervision for all 27 EU countries.

The Commission has called on the EU Council and Parliament to adopt the proposed regulations by the end of 2012, together with the other three components of an integrated banking union – the single rulebook in the form of capital requirements, harmonised deposit protection schemes, and a single European recovery and resolution framework.

The Commission is proposing to have the SSM in place by 1 January 2013. To allow for a smooth transition to the new mechanism, a phasing-in period is envisaged. As a first step, as of 1 January 2013, the ECB will be able to

decide to assume full supervisory responsibility over any credit institution, particularly those which have received or requested public funding. As of 1 July 2013, all banks of major systemic importance will be put under the supervision of the ECB. The Commission has indicated that the phasing-in period should be completed by 1 January 2014 when the SSM will cover all banks.

In addition, the European Parliament's plenary session in Strasbourg has issued a [resolution](#) outlining its position on proposals for a European banking union.

[FAQs](#)

IOSCO creates board level task force on financial market benchmarks; BIS issues statement on LIBOR

IOSCO has constituted a board level task force on financial market benchmarks to identify relevant benchmark-related policy issues and to develop global policy guidance and principles for benchmark-related activities of particular relevance to market regulators. The task force is composed of members of the IOSCO Board and will be chaired by Martin Wheatley, Managing Director of the FSA, and Gary Gensler, Chairman of the CFTC.

The mandate for the task force is to:

- identify benchmark-related issues across securities and derivatives, and other financial sectors;
- define the types of benchmarks that are relevant to financial markets;
- identify the relevant policy issues including:
 - exercising appropriate regulatory oversight of the process of benchmarking;
 - having in place robust processes and procedures for benchmark calculation, and constructing credible governance structures, to address conflict of interests in the benchmark setting process; and
 - ensuring transparency and openness in the benchmarking process; and
- develop global policy guidance and principles, including those related to effective self regulation.

The task force will aim to produce a consultation report towards the end of 2012 or early in 2013, while its work is expected to require at least until the first quarter of 2013 to complete.

In addition, the Bank for International Settlements (BIS) governors have agreed to set up a group of senior officials to take forward examination of reference rates used in financial markets, and to consult with the market in order to

provide input into the wider official debate coordinated by the Financial Stability Board. The agreement was announced after the meeting of the Economic Consultative Committee in Basel on 9 September. The BIS governors also noted that they are looking forward to the recommendations of the Wheatley LIBOR Review and to the reports of other official groups examining reference rates used in financial markets.

[IOSCO press release](#)
[BIS press release](#)

Basel Committee publishes revised core principles for effective banking supervision

The Basel Committee on Banking Supervision has completed its review of the October 2006 'Core principles for effective banking supervision' and the associated core principles methodology, and has published [revised core principles](#). The revised document combines the core principles and the assessment methodology into a single comprehensive document.

A number of enhancements have been introduced, particularly in those areas where the Committee believes it is necessary to strengthen supervisory practices and risk management. As a result, certain 'additional criteria' have been upgraded to 'essential criteria', while new assessment criteria are introduced in other instances. The changes also seek to address some of the risk management weaknesses and other vulnerabilities highlighted in the financial crisis. In addition, the review has taken account of several trends and developments that emerged during the last few years of market turmoil.

In addition, a new core principle on corporate governance has been added by bringing together existing corporate governance criteria in the assessment methodology and giving greater emphasis to sound corporate governance practices. Similarly, the Committee has reiterated the role of robust market discipline in fostering a safe and sound banking system by expanding an existing core principle into two new ones dedicated to greater public disclosure and transparency, and enhanced financial reporting and external audit respectively.

Retail Distribution Review: FSA publishes guide for firms

The FSA has published a [guide](#) for firms, 'Make sure you're on track for the RDR', which offers guidance on a number of aspects of the Retail Distribution Review (RDR) intended to help firms prepare for the RDR deadline. In particular,

the guide covers adviser charging, the meaning of 'independent' and 'restricted' advice, and professionalism.

FSA consults on regulatory reform: PRA and FCA regimes relating to aspects of authorisation and supervision

The FSA has published a [consultation paper \(CP12/24\)](#) on proposed changes to existing regulatory rules and guidance following the introduction of the Financial Services Bill in January 2012, which will create a new framework for financial regulation in the UK. CP12/24 is the first of a number of FSA consultation papers on changes to the existing FSA Handbook as a result of UK regulatory reform. These changes are required by the revision of the Financial Services and Markets Act 2000 (and related secondary legislation) and the creation of the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA).

In addition, CP12/24 is part of the work to split the FSA Handbook between the FCA and the PRA to form two new Handbooks. It mainly updates guidance and some rules on aspects of the future authorisations and supervision approaches and processes.

Comments are due by 12 December 2012.

[Summary](#)

FSA consults on addressing implications of non-EEA national depositor preference regimes

The FSA has published a [consultation paper \(CP12/23\)](#) proposing that firms from non-EEA countries that operate national depositor preference regimes be required to accept deposits in the UK using a UK-incorporated subsidiary or implement an alternative arrangement that ensures UK depositors are no worse off than the depositors in the home country if the firm fails.

The FSA notes that in certain non-EEA countries, if a firm becomes insolvent, the claims of depositors in the home country will be preferred above the claims of depositors outside the home country, including the depositors of the UK branch. The FSA wants firms from non-EEA countries that operate these national depositor preference regimes to take steps to address the subordination of the claims of UK branch depositors compared to those of home country depositors.

Comments are due by 11 December 2012.

German Ministry of Finance consults on draft EMIR Implementation Act

The German Ministry of Finance has published a [draft Implementation Act](#) to complement the EU regulation on OTC derivatives, central counterparties and trade repositories (EMIR). The draft Act contains rules on the administrative implementation of EMIR regarding notifications to and supervision by the Federal Financial Services Supervisory Authority (BaFin) and, in particular, licensing requirements for central counterparties.

Amongst other things, the draft Act amends the Banking Act (KWG) and the Securities Trading Act (WpHG)). The draft Act also proposes a change in the Introductory Act to the Insolvency Code (EGInsO), by addressing the enforceability of measures taken under Art. 48, of EMIR including close-out netting, porting and the enforcement of collateral in case of an insolvency proceeding. The proposal further excludes such measures from insolvency clawback, but stipulates a compensation payment by the central counterparty if the administrator proves that the estate would have been in a better position in the event of a close-out netting under the German statutory netting provision (section 104 of the Insolvency Code).

BaFin consults on draft regulation on net short positions

The German Federal Financial Supervisory Authority (BaFin) has published a [draft regulation](#) on net short positions, which includes several amendments to the existing regulation on net short positions. Due to the adoption of the EU regulation on short selling and certain aspects of credit default swaps by the European Parliament on 14 March 2012, several provisions have become obsolete.

Comments are due by 24 September 2012.

Polish Financial Supervision Authority issues recommendation on risk management process concerning credit exposures secured by mortgages

The Polish Financial Supervision Authority (PFSA) has issued a new [Recommendation J](#) concerning rules for the gathering and processing by banks of data on real estate contained in internal and external databases, which are aimed at supporting the risk management process concerning credit exposures secured by mortgages. The recommendation applies to all banks whose share of credit exposures secured by mortgages in their loan portfolios exceeds 10%. Accordingly, it applies to branches of credit institutions.

Most of the recommendations set out in Recommendation J will enter into force on 1 October 2013, except for recommendations 11 and 12, which will enter into force on 1 April 2014.

SFC issues circular to licensed corporations in relation to reporting of OTC derivatives transactions to HKMA

The Securities and Futures Commission (SFC) has issued a [circular](#) to licensed corporations in relation to the reporting of OTC derivatives transactions to the Hong Kong Monetary Authority (HKMA) trade repository. As previously announced, the HKMA is developing a trade repository (HKTR) for market participants to report their OTC derivatives transactions. At the same time, Hong Kong Exchanges and Clearing Limited (HKEx) is establishing a central counterparty (CCP) clearing facility for clearing OTC derivatives transactions. According to the HKMA, a link will be established between the HKTR and the HKEx CCP for passing eligible OTC derivatives transactions to the CCP for clearing.

In December 2012, the HKMA intends to start offering the 'Matching and Confirmation Service' for market participants in respect of their OTC derivatives transactions, and the transmission of these transactions to the HKEx CCP for voluntary clearing. The [circular](#) issued by the HKMA regarding this service, as well as the implementation timeline, reference manual and technical specifications, are attached to the SFC circular.

Diet passes reforms on OTC derivatives, 'comprehensive exchange' and market manipulation

The Diet has passed the Bill to amend the [Financial Instruments and Exchange Act \(FIEA\)](#), which was submitted to it by the Financial Services Agency of Japan (FSA) on 9 March 2012, without any modifications. Amongst other things, the new FIEA includes provisions on: (1) the mandatory use of electronic trading platforms for OTC derivatives; (2) 'comprehensive exchange'; and (3) market manipulation.

In particular, the FSA will require financial instruments business operators (such as securities firms) and registered financial institutions (such as banks) to use electronic trading platforms when they enter into certain OTC derivatives, to be specified in a Cabinet Office Ordinance. Initially, Yen-denominated plain vanilla interest rate swaps are likely to be specified in the Cabinet Office Ordinance. These reforms are expected to come into force by September 2015. In addition, under the new FIEA, financial instrument exchanges may list certain commodity

derivatives. Currently, a financial instruments exchange (such as a stock exchange) cannot list commodities. This reform is expected to come into force by March 2014.

As regards market manipulation, the new FIEA expands the scope of the administrative surcharge regime, which is a monetary penalty imposed by the FSA for certain breaches of regulations made under the FIEA. For instance, a foreign hedge fund that engages in unfair trades in Japan in connection with managing its clients' assets will be caught by the new FIEA. By contrast, the new FIEA relaxes the insider trading regulations in connection with mergers and certain business transfers. These reforms are expected to come into force by September 2013.

ASIC consults on amendments to clearing and settlement facilities guidance

The Australian Securities and Investments Commission (ASIC) has published a [consultation paper \(CP 186\)](#) proposing amendments to its regulatory guidance for clearing and settlement facilities. The amendments have been proposed by ASIC to take into account updated international standards and recent Council of Financial Regulators policy.

The proposals in CP 186 seek to align ASIC's oversight of clearing and settlement facilities with the recently issued [Principles for Financial Market Infrastructures](#) developed by the Committee on Payment and Settlement Systems (CPSS) and Technical Committee of the International Organization of Securities Commissions (IOSCO).

The proposed amendments to ASIC's regulatory guidance for clearing and settlement facilities are also intended to provide certainty and transparency on how ASIC plans to put in place measures and update its existing guidance to ensure there is appropriate regulatory influence over cross-border clearing and settlement facilities. These measures have been set out in the Council's paper ['Ensuring Appropriate Influence for Australian Regulators over Cross-Border Clearing and Settlement Facilities'](#).

Public submissions on the proposals close on 19 October 2012.

ASIC reviews risk management in Australian funds management sector

The Australian Securities and Investments Commission (ASIC) has published [Report 298 'Adequacy of risk management systems of responsible entities'](#) (REP 298). REP 298 contains the findings of ASIC's review which assessed the adequacy and strategic and operational

effectiveness of the risk management systems of selected responsible entities (i.e. the combined trustees/managers of registered managed investment schemes).

In REP 298 ASIC states that it found that the sophistication of risk management systems varied greatly between the responsible entities it reviewed. While they generally had adequate risk management systems adapted to the nature, scale and complexity of their financial services businesses, ASIC observed that improvements could be made, especially for those responsible entities that are not part of an Australian Prudential Regulation Authority (APRA)-regulated group.

ASIC also identified some specific risks that smaller responsible entities tend to face.

ASIC expects to consult on developing good practice guidance on risk management systems for responsible entities.

RECENT CLIFFORD CHANCE BRIEFINGS

Regulation of OTC derivatives markets – A comparison of EU and US initiatives

Both the EU and the US have now adopted the primary legislation which aims to fulfil the G20 commitments that all standardised OTC derivatives should be cleared through central counterparties (CCPs) by end 2012 and that OTC derivatives contracts should be reported to trade repositories (and the related commitments to a common approach to margin rules for uncleared derivatives transactions). The US Dodd-Frank Wall Street Reform and Consumer Protection Act was passed in July 2010 and the text of the EU Regulation on OTC Derivatives, CCPs and Trade Repositories (EMIR) was finally published in the Official Journal on 27 July 2012.

There is a significant commonality of approaches between EMIR and the Dodd-Frank Act in relation to the regulation of OTC derivatives markets, but there are also some significant differences. Clifford Chance, in conjunction with ISDA, has prepared a paper summarising the way in which the two regimes treat different categories of counterparty and highlighting certain other major differences between the proposed EU Regulation and the Dodd-Frank Act in relation to the trading and clearing of OTC derivatives. This paper updates an earlier paper produced in September 2010.

http://www.cliffordchance.com/publicationviews/publications/2012/09/regulation_of_otcderivativesmarkets-.html

Further client assets developments – Porting and beyond

After the FSA's promises of a 'comprehensive review' and 'fundamental review' of its client assets rules (see PS 10/16 'Client Assets Sourcebook (Enhancements) Instrument 2010', October 2010, and FSA Business Plan 2012/2013, March 2012, respectively), the FSA Consultation Paper CP 12/22 'Client assets regime: EMIR, multiple pools and the wider review' published in September 2012 sets out certain imminent changes and gives an idea of possible future developments.

This briefing discusses the proposals in CP 12/22.

http://www.cliffordchance.com/publicationviews/publications/2012/09/further_client_assetsdevelopmentsportingan.html

Contentious Commentary – a review for litigators

This newsletter provides a summary of recent developments in litigation, and is produced by lawyers in the litigation and dispute resolution practice at Clifford Chance. Headlines in this edition include:

- Piercing the corporate veil does not create a contract;
- Hedging and speculation overlap;
- Borrowing does not infringe a freezing injunction; and
- Inhouse lawyers who move escape conflict rules.

http://www.cliffordchance.com/publicationviews/publications/2012/09/contentious_commentary-september2012.html

German Federal Constitutional Court enables Germany to ratify ESM Treaty

On 12 September 2012, the German Federal Constitutional Court rejected temporary injunctions to prevent the ratification of the Treaty on the European Stability Mechanism, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union and amendments to the Treaty on the Functioning of the European Union. However, the Federal Constitutional Court has reinforced again the position of the German Federal Parliament vis-à-vis the German Federal Government in matters of European monetary and economic integration and set out limitations on the transfer of powers to the EU by the Federal Republic of Germany.

This briefing discusses the decision of the Federal Constitutional Court.

Federal Constitutional Court press release (German)
<http://www.bverfg.de/pressemitteilungen/bvg12-067>

Federal Constitutional Court press release (English)
<http://www.bverfg.de/pressemitteilungen/bvg12-067en.html>

Please contact Mhairi Appleton by email at mhairi.appleton@cliffordchance.com for a copy of this briefing.

Royal Decree-Law 24/2012, dated 24 August, on the restructuring and resolution of financial institutions

On 31 August 2012, Royal Decree-Law 24/2012 on the restructuring and resolution of financial institutions was published in Spain's Official State Gazette.

This briefing discusses the purpose and main provisions of the Royal Decree-Law.

http://www.cliffordchance.com/publicationviews/publications/2012/09/royal_decree-law242012dated24augustonth.html

Indian Supreme Court scales back intervention in foreign-seated arbitrations

The Supreme Court of India has significantly limited the extent to which Indian courts can intervene in foreign-seated arbitrations. The ruling, given by a five-judge constitutional bench in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc*, reverses the controversial *Bhatia International* decision from 2002 which had opened the door for heavy-handed intervention by the Indian courts.

This briefing discusses the ruling.

http://www.cliffordchance.com/publicationviews/publications/2012/09/indian_supreme_courtscalesbackintervention.htm

Myanmar Updater

The Myanmar Updater provides an overview of recent news and developments in relation to Myanmar. The September 2012 edition looks at the new foreign investment law and other recent steps taken to develop the economy.

http://www.cliffordchance.com/publicationviews/publications/2012/09/myanmar_updater.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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