

# International Regulatory Update

12-16 November 2012

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### **EMIR: European Commission publishes FAQs**

The European Commission has published a set of [frequently asked questions](#) on the regulation on OTC derivative transactions, central counterparties and trade repositories (EMIR), which was published in the Official Journal on 27 July 2012. In particular, the FAQs cover: (1) the timing of implementation; (2) the scope of the requirements; and (3) the position of third country CCPs and trade repositories.

The FAQs are designed to provide clarity on these three topics from the perspective of the Commission, but the Commission has emphasised that only the EU Court of Justice can give an authoritative interpretation of EU legislation. The Commission intends to update the FAQs as needed.

### **Capital requirements: EBA publishes discussion paper on draft regulatory standards on prudent valuation, and consults on draft regulatory technical standards on cooperatives, mutuals, savings institutions and similar institutions**

The EBA has published a [discussion paper](#) setting out its preliminary views on the application of prudent valuation requirements to all positions that are measured at fair value, as provided for under Articles 31 and 100 of the draft Capital Requirements Regulation (CRR). The discussion paper also sets out the EBA's preliminary view on how valuation adjustments could in practice be applied by institutions in a consistent manner.

The EBA intends to use the input gathered from stakeholders to assist it in the development of draft regulatory standards (RTS) on how these prudent valuation requirements should be applied. These RTS will also cover the analysis of the costs and benefits that the legal requirements will imply.

Comments are due by 13 January 2013.

In addition, the EBA has published its [second consultation paper](#) on draft regulatory technical standards (RTS) on own funds under the draft Capital Requirements Regulation. The draft RTS are intended to specify the conditions under which competent authorities may determine that a type of undertaking is recognised under applicable national law as a mutual, cooperative society, savings institution or similar institution. They focus on elements which are of relevance to own funds (features linked to capital instruments, reserves, etc.) and may lead competent authorities to

recognise a type of undertaking as a mutual, cooperative society, savings institution or similar institution.

The draft RTS complement the [first consultation paper](#) on draft RTS on own funds published by the EBA in April 2012 and should be read in conjunction with it. The first consultation included details of the rules on own funds to be applied to the European cooperative banking sector (including mutuals, cooperative societies, savings institutions or similar institutions), taking into account its specificities.

Comments are due by 21 December 2012.

### **Market abuse: ECON Committee reports on Commission proposals published**

The European Parliament's ECON Committee has published its reports, dated 19 and 22 October 2012 respectively, on the European Commission's proposals for a regulation on insider dealing and market manipulation (market abuse) and a directive on criminal sanctions for insider dealing and market manipulation.

[Report on proposed regulation](#)

[Report on proposed directive](#)

### **MiFID review: EU Council Presidency publishes compromise texts**

The Cyprus EU Council Presidency has published new compromise texts for the proposals for a directive on markets in financial instruments repealing Directive 2004/39/EC (MiFID 2) and a regulation on markets in financial instruments and amending the regulation on OTC derivatives, central counterparties and trade repositories (MiFIR).

The Presidency has also published a note summarising the state of play of the negotiations on the proposals, which indicates that the Presidency is aiming for an agreement on the Council's general approach at the meeting of the Economic and Financial Affairs Council (ECOFIN) on 4 December 2012. This would allow the Presidency to start negotiations with the EU Parliament with a view to reaching a first reading agreement.

[Proposed directive – Presidency compromise](#)

[Proposed regulation – Presidency compromise](#)

[Note on state of play](#)

### UCITS V: ECON Committee reports on Commission proposal

The European Parliament's ECON Committee has published a [draft report](#) on the European Commission's proposal for a directive amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities as regards depositary functions, remuneration policies and sanctions (UCITS V).

### BIS publishes working paper on liquidity consequences of euro area sovereign debt crisis

The Bank for International Settlements (BIS) has published a [working paper](#) which examines the liquidity consequences of the euro area sovereign debt crisis, including its effects on euro area banks as a group, on intra-euro area financial flows, on the supply of and demand for collateral, and on international liquidity. The paper notes that the lending capacity of the euro area banking system has been weakened despite the growth of the operations of the Eurosystem, including its increased lending, its intermediation between national central banks in surplus and deficit countries and its collateral policy. The authors also note that the euro crisis has created international liquidity stresses, and conclude that central bank swap lines have only had limited effectiveness in alleviating the stresses, probably owing to some stigma being attached to their use.

The BIS has emphasised that the views expressed in the paper are those of its authors and not necessarily the views of the BIS.

### UK Department for Business, Innovation and Skills issues call for evidence on review of balance of competences between UK and EU

The Department for Business, Innovation and Skills (BIS) has published the first [call for evidence](#) inviting views on how the single market works and its impact on the UK. The call for evidence is part of the government's review of the balance of competences between the UK and EU which was announced by the Foreign Secretary in July 2012. The review is an audit of how EU law and its operation and enforcement affect the UK and is intended to develop a comprehensive and detailed analysis of the functioning of the single market.

The BIS's call for evidence covers the first stage of the review, which consists of an overall 'synoptic' review of the internal market. Its objectives will be:

- to consider the broad issues and main debates underlying the single market as a whole, in particular exploring the level of market integration thought to be necessary for an effective single market, and the mechanisms (such as harmonisation or mutual recognition) for achieving it;
- to explore the interrelationships between the single market and other areas of competence, and to assess the strength of the arguments that certain other areas of competence are needed to enable the single market to operate effectively; and
- as a result, to assess the implications for the UK national interest of the current state of integration and EU competence in the single market field.

Submission are due by 28 February 2013.

### AIFMD: FSA consults on implementation

The FSA has published its first [consultation paper \(CP12/32\)](#) on rules and guidance to transpose the requirements of the AIFM Directive into UK law.

In particular, CP12/32 covers:

- the prudential regime for all types of alternative investment fund manager (AIFM), including capital requirements, risk of professional negligence, the liquid assets requirement and reporting matters, as well as changes affecting UCITS management companies;
- the regime for depositaries, including the eligibility of firms to be an AIF depositary, the capital requirements, and the requirement to act independently; and
- the Level 1 Directive requirements on AIFMs, including organisational matters, duties in relation to management of funds, and transparency obligations towards investors and the FCA.

Comments are due by 1 February 2013.

The FSA will publish a second consultation paper in February 2013 on other aspects of AIFMD implementation.

### FSA submits evidence to Parliamentary Commission on Banking Standards

The FSA has submitted a [memorandum](#) to the UK Parliamentary Commission on Banking Standards, which is examining the professional standards and culture of the UK banking industry.

The FSA sets out its view that trust in the UK banking system has declined as the result of factors including macroeconomic conditions and high profile instances of misconduct. It outlines the measures which are in hand to

seek to address the current negative public perception of the banking industry. Specifically, it points to the steps which have been taken to improve prudential regulation and supervision, effect structural changes proposed by the Independent Commission on Banking and put in place more effective conduct regulation and supervision to seek to identify and deal earlier with emerging problems in both the retail and wholesale arenas.

It sets out its view that the restoration of trust in UK banking will depend on changes in culture and values, which will be brought about by the setting of an appropriate 'tone from the top' in conjunction with effective supervision by the bodies which will replace it, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA). It makes clear that it and the FCA will continue to pursue robust enforcement action and makes a case for increasing existing powers by enabling it to take disciplinary action against employees outside the scope of the approved persons regime, extending the limitation period for taking action against approved persons and enabling it to impose interim prohibitions on individuals performing controlled functions.

#### **MiFID review: UK government responds to House of Lords EU Select Committee report on Commission proposals**

The government has published its [response](#) to the House of Lords EU Select Committee's [July 2012 report](#) on the European Commission's proposals for a directive on markets in financial instruments repealing Directive 2004/39/EC (MiFID 2) and a regulation on markets in financial instruments and amending the regulation on OTC derivatives, central counterparties and trade repositories (MiFIR).

In its report, the Committee concluded that while a review of the existing MiFID regulatory package is necessary, the proposals contain fundamental flaws that must be corrected as a matter of urgency if serious damage to the EU financial services industry is to be avoided. Amongst other things, the government's response covers Organised Trading Facilities (OTFs) and the over-the-counter market, pre- and post-trade transparency, systematic internalisers, algorithmic and high-frequency trading, third country access, regulation of commodities markets, investor protection and corporate governance, and the role of ESMA and the power to intervene.

#### **Short selling: FSA publishes factsheet**

The FSA has published a [factsheet](#) on short selling, covering the EU short selling regulation, market makers/authorised primary dealer exemptions, submitting notifications and disclosures, making a notification/disclosure and thresholds.

#### **Spanish law on restructuring and resolution of credit institutions enters into force**

[Law 9/2012](#), of 14 November, on restructuring and resolution of credit institutions has entered into force. The Law gives force of law to Royal Decree law 24/2012, of 31 August, which has now been repealed.

Amongst other things, the Law establishes a restructuring and resolution regime for credit institutions, strengthening the powers of intervention of the Fund for the Orderly Restructuring of the Banking Sector (FROB). The Law also intensifies the powers of inspection that the Spanish Securities Market Commission has in relation to the commercialisation by credit institutions of investment products, and particularly for complex products. In addition, the Law separates functions conferred to the Bank of Spain and to the Spanish Ministry of Economy and Competitiveness on authorisations and sanctions to credit institutions, transferring to the Bank of Spain those functions which were previously held by the Spanish Ministry of Economy and Competitiveness.

#### **Singapore Parliament passes Financial Advisers (Amendment) Bill 2012**

The Singapore Parliament has passed the [Financial Advisers \(Amendment\) Bill 2012](#). The Bill introduces amendments to the enhancement of Monetary Authority of Singapore (MAS) powers to investigate and take regulatory action and extends the MAS' powers to make prohibition orders. The Bill widens the scope of an Financial Advisers (FA) firm's obligations when communicating and dealing with customers. The Bill also extends the provisions on civil liability to breaches of an FA firm's business conduct obligations – specifically, the obligations to furnish product information to investors and to avoid making false or misleading statements. This is intended to enable investors to obtain compensation from FA firms for any loss or damage suffered as a result of breaches of these obligations.

In his [second reading speech](#) before passage of the Bill, Tharman Shanmugaratnam, the Minister for Finance, Deputy Prime Minister and Chairman of the MAS indicated that the MAS will continue to review its regulatory

framework for the provision of financial advisory services to ensure that investors are treated fairly in their dealings with FAs, while allowing for competition and sustainable growth in the financial advisory industry.

#### **Singapore to sign intergovernmental agreement on FATCA**

The Ministry of Finance has [announced](#) that the Singapore government is in talks with the US Department of the Treasury to conclude an intergovernmental agreement on the Foreign Account Tax Compliance Act (FATCA). FATCA is intended to combat tax evasion by targeting non-compliance by US taxpayers using overseas accounts. The Ministry of Finance has indicated that a private sector advisory panel will be formed to provide industry input to the talks.

#### **ASIC consults on updated guidance on takeovers**

The Australian Securities & Investments Commission (ASIC) has published a [consultation paper \(CP 193\)](#) proposing to update and consolidate its takeover regulatory guidance. ASIC proposes to consolidate 17 existing regulatory guides, which represent the bulk of its policies covering Chapters 6–6C of the Corporations Act 2001 – which deal with takeovers – into four new regulatory guides covering topics including takeover bids, substantial holdings, and compulsory acquisition and buy-outs. The guides will also contain updated policy to reflect ASIC’s current views on takeovers and will also address some discrete issues ASIC has identified in the administration of the law.

Proposals for amendments to existing policies are generally limited to matters associated with past legislative changes and other technical matters ASIC considers necessary or desirable to address to ensure the revised guidance on each topic reflects ASIC’s current approach.

ASIC has also asked for feedback on whether there are any particular issues (current or new) that ASIC should consider as part of its administrative and day-to-day enforcement role with respect to the takeovers, substantial holding and compulsory acquisition provisions.

Comments are due by 22 February 2013.

#### **ASIC consults on revised financial requirements for custodial and depository service providers and holding assets of managed investment schemes**

The Australian Securities & Investments Commission (ASIC) has published a [consultation paper \(CP 194\)](#) on proposed changes to the financial requirements for providers of

custodial or depository services. The paper also sets out requirements that apply to responsible entities of registered managed investment schemes and platform operators that hold scheme property or other property and assets.

CP 194 forms part of a broader review of financial requirements that ASIC is undertaking for sectors within the financial services industry. ASIC has already issued revised financial requirements for operators of managed investment schemes and issuers of retail OTC derivatives. ASIC has also consulted on revised requirements for people providing financial services in emissions units, IDPS operators and electricity derivative market participants.

Feedback is due by 14 January 2013. ASIC will consider updating regulatory guidance in RG 166 Licensing: Financial Requirements based on the response to the consultation.

#### **Financial Stability Oversight Council releases proposed recommendations for money market mutual fund reform**

The Financial Stability Oversight Council has approved [proposed recommendations](#), pursuant to Section 120 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, to address the potential risks to the financial system posed by money market mutual funds (MMFs).

The Council has proposed three alternatives for structural reforms of MMFs:

- floating net asset value – MMFs would be required to have a floating net asset value (NAV) that reflects the actual market value of the underlying portfolio holdings;
- stable NAV with NAV buffer and ‘minimum balance at risk’ – MMFs would be required to maintain a NAV buffer that would absorb regular fluctuations in the value of the funds’ portfolio securities, and they would have to make a certain percentage of a shareholder’s account balance available for redemption on a delayed basis; and
- stable NAV with NAV buffer and other measures – MMFs would be required to have a risk-based NAV buffer that could be enhanced by additional measures.

The proposed recommendations will be issued for a 60-day public comment period.

### **Basel III: Federal agencies indicate that US implementation rules will not become effective on 1 January 2013**

The Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency (OCC) have issued [a joint press release](#) concerning three notices of proposed rulemaking issued in June 2012 which would revise and replace the current regulatory capital rules. The proposals suggested an effective date of 1 January 2013.

The agencies have indicated that, due to the volume of comments received and the wide range of views expressed, they do not now expect that any of the proposed rules will become effective on 1 January 2013. The agencies have emphasized that, as members of the Basel Committee on Banking Supervision, they take their internationally agreed timing commitments regarding the implementation of Basel III seriously and are working as expeditiously as possible to complete the rulemaking process.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **Financial collateral remains a Gray area**

Do you have sufficient 'possession' or 'control' for your security interest to qualify for protection under the Financial Collateral Arrangement (No.2) Regulations 2003? Since the decision in *Gray v G-T-P Group* two years ago, the meaning of those terms has been debated at length. Has a recent High Court decision in the Lehman insolvency settled the matter? Certainly more thinking has been provided on these and other questions, such as whether the Regulations have retro-active effect, and issues regarding general liens. One thing is clear – financial collateral is still a complex topic.

This briefing discusses some of the key issues.

[http://www.cliffordchance.com/publicationviews/publications/2012/11/financial\\_collateralremainsagrayarea.html](http://www.cliffordchance.com/publicationviews/publications/2012/11/financial_collateralremainsagrayarea.html)

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

'Contentious Commentary' is a newsletter that provides a summary of recent developments in litigation. The newsletter is produced by lawyers in the litigation and dispute resolution practice at Clifford Chance. Headlines in the latest edition include: (1) US insolvency judgment not enforceable in England; (2) shall and may are not the same; (3) identifying the commercial purpose of a contract may be

difficult; and (4) losses from Lehman's collapse not too remote.

[http://www.cliffordchance.com/publicationviews/publications/2012/11/contentious\\_commentary-november2012.html](http://www.cliffordchance.com/publicationviews/publications/2012/11/contentious_commentary-november2012.html)

### **Mediation in London has evolved**

Like a good wine, mediation process in London has evolved. It has developed into a standard format one day experience, beginning with a joint meeting of all parties where the issues are discussed and followed up by arm's length negotiations from different rooms using the mediator as a shuttle diplomat.

This briefing discusses some of the implications of this evolution of the process.

[http://www.cliffordchance.com/publicationviews/publications/2012/11/mediation\\_in\\_londonhasevolved.html](http://www.cliffordchance.com/publicationviews/publications/2012/11/mediation_in_londonhasevolved.html)

### **Practical Guide to UK Merger Control**

Mergers in the UK are controlled under the Enterprise Act 2002. The Act confers decision-making powers on the Office of Fair Trading and the Competition Commission. The Secretary of State for Business, Innovation & Skills also plays a role in exceptional cases involving certain public interest issues relating to defence, media and the stability of the UK financial system.

This updated guide describes the general merger control rules applicable in the UK, as well as the special rules which apply to mergers involving public interest issues and to those in the water and sewerage sector.

To view a copy of the guide, please contact Mhairi Appleton at [mhairi.appleton@cliffordchance.com](mailto:mhairi.appleton@cliffordchance.com).

### **Corporate assets and divorcing couples – a modern day Wars of the Roses?**

A big money divorce case has exposed a fissure between the Judges of the Family Division of the English High Court and those who sit in the Chancery Division. The battles lines are firmly drawn: on the one side, the Family courts wish to do justice between divorcing spouses; on the other, the Chancery Division Judges wish to uphold the basic tenets of English property law. The Court of Appeal's decision in *Petrodel Resources Ltd v Mrs Yasmin Prest* [2012] EWCA Civ 1395 is the latest instalment. For now, the house of Chancery has gained the upper hand, with the Court of Appeal reaffirming the distinction between a company and its shareholders.

This briefing discusses the decision.

[http://www.cliffordchance.com/publicationviews/publications/2012/11/corporate\\_assetsanddivorcingcouplesamoder.htm](http://www.cliffordchance.com/publicationviews/publications/2012/11/corporate_assetsanddivorcingcouplesamoder.htm)

### **Bulgarian Telecoms Giant Vivacom – given a new lease of life by English scheme**

NEF Telecom Company B.V. (a Dutch company) and Bulgarian Telecommunications Company AD (a Bulgarian company) which form part of the Vivacom group join a growing list of foreign companies which have utilised an English law scheme of arrangement as part of its EUR 1.7bn corporate restructuring. Following on from other cases such as Rodenstock and Primacom, this judgment provides another example of a situation where foreign borrowers with English law governed finance documents have opted to use a scheme of arrangement to restructure their debts.

This briefing discusses the judgment.

[http://www.cliffordchance.com/publicationviews/publications/2012/11/bulgarian\\_telecomsgiantvivacomgivenane.html](http://www.cliffordchance.com/publicationviews/publications/2012/11/bulgarian_telecomsgiantvivacomgivenane.html)

### **BaFin publishes draft circular on recovery plans**

On 2 November 2012, the German Federal Financial Supervisory Authority (BaFin) published a draft circular on minimum requirements for the structure of recovery plans and opened a consultation.

This briefing discusses the draft circular.

To view a copy of the briefing please contact Mhairi Appleton at [mhairi.appleton@cliffordchance.com](mailto:mhairi.appleton@cliffordchance.com).

### **Latest Restructuring Reforms in Italy**

New reforms set forth in the Growth Decree have now been converted into law and apply to procedures for creditors' composition (concordato preventivo) and debt restructuring agreements submitted to the courts on or after 11 September 2012.

This briefing discusses the reforms.

To view a copy of the briefing, please contact Mhairi Appleton at [mhairi.appleton@cliffordchance.com](mailto:mhairi.appleton@cliffordchance.com).

### **Publication of CSSF Circular 12/546**

On 26 October 2012, the Luxembourg supervisory authority of the financial sector (CSSF) released Circular 12/546 relating to the authorisation and organisation of Luxembourg management companies subject to Chapter 15 of the law of 17 December 2010 relating to undertakings for collective investment and self-managed investment

companies which have not designated a management company within the meaning of Article 27 of the 2010 law (SIAGs).

In a separate press release dated 31 October 2012, the CSSF further specified that the concept of promoter is no longer necessary for UCITS taking the form of a SIAG as well as UCITS and other UCIs subject to the 2010 law that are managed by a UCITS management company complying with all the requirements laid down in Circular 12/546.

Circular 12/546 entered into force with immediate effect. However, existing UCITS management companies and SIAGs (where applicable) will have until 30 June 2013 to comply with the new organisational requirements introduced in relation to the shareholders, management bodies and conducting officers, as well as in the area of the use of own funds, the arrangements concerning the central administration and the delegation rules. The application deadline for filing with the CSSF is 15 April 2013.

This briefing provides an overview of the main changes introduced by Circular 12/546 to the substance and organisational requirements applying to UCITS management companies and SIAGs, including the abolishment of the promoter status, and the transitional period running until 30 June 2013.

[http://www.cliffordchance.com/publicationviews/publications/2012/11/publication\\_of\\_cssfcircular12546.html](http://www.cliffordchance.com/publicationviews/publications/2012/11/publication_of_cssfcircular12546.html)

### **China Liberalises Insurance Capital Investment Regulation**

For a long time, China has closely monitored its insurance capital by restricting entities that were allowed to manage it and the eligible asset classes in which it could be invested. Now, eager to liberalise the deployment of insurance capital, the China Insurance Regulatory Commission has issued a series of rules and regulations to expand the scope of market participants, broaden the capital base and increase asset classes for the investment of China's insurance capital. This has also progressed the development of the overseas investment regime for insurance capital.

This briefing summarises and discusses the recent regulatory developments and assess their implications on relevant market participants.

To view a copy of the guide, please contact Mhairi Appleton at [mhairi.appleton@cliffordchance.com](mailto:mhairi.appleton@cliffordchance.com).

### OCI issues Guidance Note on Outsourcing

Hong Kong's financial regulators have regulated 'outsourcing' for many years: the Hong Kong Monetary Authority has a dedicated guidance note on the topic, and both the Securities and Futures Commission and the Mandatory Provident Fund Schemes Authority have covered the topic (on a piecemeal basis) under various codes, guidelines and/or standards.

On 28 September 2012, the Office of the Commissioner of Insurance (OCI) added to this regulatory framework by publishing its Guidance Note on Outsourcing. This is the OCI's first published guidance on outsourcing arrangements and contains requirements which will impact not only authorised insurers, but also their existing and future service providers.

This briefing discusses the OCI's guidance note.

[http://www.cliffordchance.com/publicationviews/publications/2012/11/oci\\_issues\\_guidancenoteonoutsourcing.html](http://www.cliffordchance.com/publicationviews/publications/2012/11/oci_issues_guidancenoteonoutsourcing.html)

### Japanese Antitrust and Compliance – The Fair Trade Commission, no longer a toothless tiger?

The Japan Fair Trade Commission (JFTC) is now more vigorously exposing and sanctioning cartels, bid-rigging, and unfair trade practices which may adversely affect the

economy and is striving to remove obstacles to new market entrants in the IT and public infrastructure sectors and to the dissemination of intellectual property rights.

This briefing covers some of the key developments.

[http://www.cliffordchance.com/publicationviews/publications/2012/11/japanese\\_antitrustandcomplianceandthefairtrad.html](http://www.cliffordchance.com/publicationviews/publications/2012/11/japanese_antitrustandcomplianceandthefairtrad.html)

### Was It Worth the Wait? The Department of Justice / Securities Exchange Commission Guidance on the FCPA

The US Department of Justice (DOJ) and the US Securities and Exchange Commission (SEC) have released 'A Resource Guide to the US Foreign Corrupt Practices Act'. This Guide comes over a year after Assistant Attorney General Lanny Breuer announced that the DOJ would issue guidance clarifying what many consider to be the murky world of US Foreign Corrupt Practices Act (FCPA) compliance and well over three decades since the FCPA was enacted in 1977.

This briefing provides an overview of the guide.

[http://www.cliffordchance.com/publicationviews/publications/2012/11/was\\_it\\_worth\\_thewaitthedepartmentofjustic.html](http://www.cliffordchance.com/publicationviews/publications/2012/11/was_it_worth_thewaitthedepartmentofjustic.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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