

International Regulatory Update

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European Council agrees on measures to increase capital position of banks

The European Council (Heads of State or Government) has agreed on a set of measures intended to raise confidence in the banking sector by facilitating access to term funding through a coordinated approach at EU level. Guarantees on bank liabilities would be required to provide more direct support for banks in accessing term funding, where appropriate. The measures also increase the capital position of banks to 9% of Core Tier 1 and, after

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accounting for market valuation of sovereign debt exposures, create a temporary buffer. This quantitative capital target will have to be attained by 30 June 2012, based on plans agreed with national supervisors and coordinated by the EBA.

The European Council has emphasised that national supervisory authorities, under the auspices of the EBA, must ensure that banks' plans to strengthen capital do not lead to excessive deleveraging. It has further indicated that banks should first use private sources of capital, including through restructuring and conversion of debt to equity instruments, and that they should be subject to constraints regarding the distribution of dividends and bonus payments until the target has been attained. If necessary, national governments should provide support and, if this support is not available, recapitalisation should be funded via a loan from the European Financial Stability Facility (EFSF) in the case of euro zone countries.

The EBA has issued a statement providing further details on the bank package agreed on by the European Council. Amongst other things, the EBA has indicated that newly issued private contingent convertibles might be considered eligible capital instruments for meeting the increased buffers under strict and fully harmonised criteria. These instruments should be fully funded and structured consistently with a common European term-sheet that the EBA is finalising. Existing convertible capital instruments will not be eligible unless they will be converted into Core Tier 1 by the end of October 2012.

[European Council statement](#)
[EBA methodological note on capital buffers](#)

European Commission proposes revisions to Transparency Directive and Accounting Directives

The European Commission has announced a package of measures intended to promote responsible business, which comprises the following:

- a proposed directive amending the Transparency Directive (2004/109/EC);
- a proposed directive on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, which repeals and replaces the Accounting Directives (78/660/EEC and 83/349/EEC);
- a communication on a renewed EU strategy 2011-14 for corporate social responsibility; and
- a communication on creating a favourable climate for social enterprises, key stakeholders in the social economy and innovation (the Social Business Initiative).

Amongst other things, the Commission's proposals introduce a system of country-by-country reporting in order to increase transparency regarding the payments made by the extractive and logging industries to governments. This system would apply to EU privately-owned large companies or companies listed in the EU that are active in the oil, gas, mining or logging sectors.

[Proposed directive amending Transparency Directive](#)
[Proposed directive amending Accounting Directives](#)
[Communication on Social Business Initiative](#)
[Communication on corporate social responsibility](#)

ISDA updates Greek sovereign debt Q&A

Following recent events related to the restructuring of Greek sovereign debt, ISDA has updated its Greek sovereign debt Q&A.

In particular, the updated section indicates that the determination of whether the Eurozone deal with regard to Greece is a credit event under CDS documentation will be made by ISDA's EMEA Determinations Committee when the proposal is formally signed, and if a market participant requests a ruling. ISDA has noted that, based on what it knows, it appears from preliminary news reports that the bond restructuring is voluntary and not binding on all bondholders. As such, ISDA has concluded that it does not appear to be likely that the restructuring will trigger payments under existing CDS contracts. In addition, ISDA has noted that the restructuring proposal is not yet at the stage at which the ISDA Determinations Committee would be likely to accept a request to determine whether a credit event has occurred.

[Greek sovereign debt Q&A](#)

FSB consults on principles for sound residential mortgage underwriting practices

The Financial Stability Board (FSB) has published a [consultation paper](#) setting out principles for sound residential mortgage underwriting practices.

The FSB notes that, in response to the financial crisis, a number of its members have encouraged stricter underwriting practices so as to limit the potential risks that mortgage markets pose to financial stability and to better safeguard borrowers and investors. The FSB believes that internationally agreed principles will help to strengthen residential mortgage underwriting practices and help supervisors to more effectively monitor and detect the erosion of underwriting practices, particularly when the housing market is booming.

Comments are due by 9 December 2011. The FSB intends to publish the final set of principles in early 2012.

FSB publishes report on consumer finance protection with particular focus on credit

The Financial Stability Board (FSB) has published a [report](#) on consumer finance protection in the area of consumer credit, including mortgages, credit cards, and secured and unsecured loans. The report, which was produced in collaboration with the OECD provides a global overview of completed or planned policy initiatives to strengthen consumer protection frameworks and sets out existing and evolving institutional arrangements. The report also reviews the work of regulators and prudential supervisors in various areas of consumer protection, including responsible lending practices, disclosure guidelines, product intervention, and complaints and dispute resolution mechanisms.

The report identifies a number of areas where additional international work could help to advance consumer finance protection and financial stability, including: (1) calling upon an international organisation of regulators to take the lead on global financial consumer protection efforts; (2) launching work on institutional arrangements and, if appropriate, developing best practices to guide institutional reform; and (3) strengthening supervisory tools by identifying gaps and weaknesses.

Macroprudential policy tools and frameworks: BIS publishes progress report to G20

The Bank for International Settlements (BIS) has published a [progress report](#) to the G20 on macroprudential policy tools and frameworks, which responds to the call of G20 Leaders on the Financial Stability Board (FSB), International Monetary Fund (IMF) and BIS to do further work on macroprudential policy.

The report traces the progress in implementing macroprudential policy frameworks along three broad lines: (1) advances in the identification and monitoring of systemic financial risk; (2) the designation and calibration of instruments for macroprudential purposes; and (3) building institutional and governance arrangements in the domestic and regional context.

Given the interlinkages with other spheres of public policy, the report's main message is that effective macroprudential frameworks require institutional arrangements and governance structures, tailored to national circumstances, that can ensure an open and frank dialogue among policymakers on policy choices that impact on systemic risk, resolve conflicts among policy objectives and instruments and mobilise the right tools to limit systemic risk.

While recognising that no one size fits all, the report describes steps that have been taken, nationally and internationally, in developing macroprudential policy frameworks. The report also highlights the scope for further progress in the identification of systemic risk, the collection and analysis of data, in assessing the performance of newly introduced tools and in the establishment of institutional arrangements for the conduct of policy.

Basel Committee reports on treatment of trade finance under Basel capital framework

The Basel Committee on Banking Supervision has published a [report](#) on the treatment of trade finance under the Basel capital framework. The report follows the Committee's evaluation of the impact of Basel II and Basel III on trade finance in the context of low income countries, which it conducted in consultation with the World Bank, the World Trade Organisation and the International Chamber of Commerce. As a result of this evaluation, the Committee has adopted two technical changes to the Basel regulatory capital adequacy framework related to the treatment of trade finance.

In particular, the Committee has agreed to: (1) waive the one-year maturity floor for certain trade finance instruments under the advanced internal ratings-based approach for credit risk; and (2) waive the so-called sovereign floor for certain trade-finance related claims on banks using the standardised approach for credit risk.

FSA consults on version 3 of Transaction Reporting User Pack

The FSA has published [version 3 of its Transaction Reporting User Pack](#) for consultation. The Transaction Reporting User Pack provides guidance to firms on understanding the transaction reporting obligations under MiFID, implemented through SUP17 of the FSA Handbook.

Amongst other things, the purpose of version 3 is to: (1) update references and incorporate CESR's guidelines; (2) incorporate guidance published elsewhere and guidance issued since the publication of Version 2; and (3) provide clarification on areas raised by firms and trade bodies and where it is helpful in assisting the FSA to conduct its market abuse monitoring.

Comments are due by 24 November 2011.

LSE consults on proposed rule amendments regarding settlement, clearing and corporate actions

The London Stock Exchange has issued a [Notice \(N17/11\)](#) setting out proposed amendments to the settlement, clearing and corporate actions rules within the Rules of the London Stock Exchange.

Amongst other things, the LSE is proposing to: (1) combine all detailed rules relating to 'good delivery' for non-electronic settlement into a single set of rule guidance; (2) reduce the maximum settlement period for an on Exchange trade from 25 days to 20 days; (3) remove settlement rules considered to be out of date/no longer relevant; (4) introduce a new clearing rule and guidance regarding the outage of central counterparties; and (5) remove corporate action rules relating to specific optional stock situations and introduce new generic rules.

Comments are due by 16 December 2011.

[Attachment 1](#)

[Attachment 2](#)

FINMA to bring revised circular on disclosure requirements for securities transactions into force on 1 November 2011

The Swiss Financial Market Supervisory Authority (FINMA) has [announced](#) that it will bring the revised Circular 08/11 on disclosure requirements for securities transactions into force on 1 November 2011. The revised circular is intended to make the existing disclosure requirements prescribed in the former circular 'Reporting obligation – stock exchange transactions' more precise.

In particular, the revision is intended to eliminate ambiguities and shortcomings which have become apparent in practice and to correct any terminological inconsistencies with the Swiss stock exchange regulations. The revised circular also addresses issues arising from the relocation of trading of the Swiss Market Index (SMI) and Swiss Leader Index (SLI) from London (virt-x and SWX Europe) to Zurich. No additional requirements have been incorporated into the revised circular.

FINMA and FDF consult on new capital adequacy rules for Swiss banks

The Swiss Financial Market Supervisory Authority (FINMA) has announced that Switzerland intends to adopt the international Basel III standards for all banks and complement them with transparent capital buffers which are specific to the situation in Switzerland. To this end, FINMA is launching a consultation on the new circular governing eligible equity and on the amendments to the circulars governing market and credit risks, disclosure and risk diversification. Concurrently, the Federal Department of Finance (FDF) will conduct a consultation on the relevant amendments to the Capital Adequacy Ordinance. Both consultations will end on 16 January 2012.

The Swiss implementation of the new capital requirements comprises the minimum requirements determined under the international regulatory framework, the capital buffer and the anti-cyclical buffer, as well as additional capital requirements which FINMA has prescribed depending on the size of the bank.

FINMA expects the new provisions to enter into force on 1 January 2013, and that they will be fully implemented by the end of 2018, respecting the transitional deadlines of the international regulatory framework.

[Key Points of the New Basel III Rules on Capital Adequacy and Revision of Various FINMA Circulars](#)

SGX consults on proposal to introduce MSCI Indonesian Index futures

The Singapore Exchange (SGX) has issued a [consultation paper](#) on the proposal to add the MSCI Indonesian Index Futures contract to its suite of Asian equity index derivatives from the first quarter of 2012, subject to regulatory approval. The proposed contract will be denominated in USD. The listing of the contract on the SGX is intended to offer investors an alternative trading platform to the over-the-counter market. The proposed contract specifications are subject to the approval of the Monetary Authority of Singapore (MAS).

Comments are due by 31 October 2011.

Japan's FSA further extends temporary restrictions on short selling activities and relaxation of share buyback regulations

The Financial Services Agency (FSA) has announced that it is extending the temporary restriction on short selling activities and the relaxation of the share buyback regulations until 30 April 2012.

Under the temporary restriction on short selling activities: (1) 'naked' short selling activities, where shares are sold without first borrowing or arranging to borrow the relevant shares, are prohibited; and (2) any investor that holds a short sale position of 0.25% or more of the outstanding shares in the relevant listed entity has an obligation to report their short sale position to the stock exchange via a broker.

Under the temporary relaxation of the share buyback regulations: (1) the daily cap for share buybacks by a listed company is increased to 100% of the average daily number of shares traded over the preceding four-week period; and (2) share buybacks by a listed company can be made at any time during trading hours.

[Announcement \(Japanese\)](#)
[Announcement \(English\)](#)

FINRA requests comment on proposed rule requiring carrying/clearing member firms to maintain certain records in central location

The Financial Industry Regulation Authority (FINRA) has requested comment on a proposed new rule which would require each carrying or clearing member firm to maintain and keep current certain records in a central location. Rule 4516 (Readily Identifiable and Accessible Records) is intended to facilitate the transfer of customer accounts and orderly liquidation of a firm if financial and operational problems render it unable to continue operations.

Under the rule, specified records would have to be immediately available to and accessible by representatives or designees of FINRA, the SEC, and the Securities Investor Protection Corporation. All records maintained pursuant to Rule 4516 would have to be updated regularly and reflect the updating date. Rule 4516 would also require member firms to designate a contact person responsible for maintaining and updating these records.

Comments are due by 9 December 2011.

[Regulatory Notice](#)

UPCOMING CLIFFORD CHANCE EVENT

Strategic Drivers for the financial services sector in a sea of regulatory change

Clifford Chance invites you to join a 40 minute live webinar on strategic drivers for the financial services sector in a sea of regulatory change. The webinar will take place on 2 November 2011 at 11am London time.

Regulatory change is going to have a real and material impact on the scope and nature of corporate activity in the financial services sector. Anyone active in the sector should be thinking about the opportunities and challenges this may present but the sheer breadth of the changes can make this difficult to do. Our panellists will highlight the key elements of the regulatory initiatives and explain what the likely practical corporate M&A impact of these might be – and already are.

[Registration page](#)
[Webinar Autumn Series invitation](#)

RECENT CLIFFORD CHANCE BRIEFINGS

European Contract Law – Doubling Up

The European Commission has long hankered after a European contract law. Many years of action plans, of academic investigations, and of reports and resolutions have now led to the first concrete step towards this goal, namely the Commission's proposal for a Common European Sales Law. This is limited in scope to the sale of goods and related matters (financial services are excluded – for now), would be optional only, and would be implemented by the insertion of the Common European Sales Law into national laws alongside, but not as a substitute for, those laws' current sale of goods legislation. If chosen, the Common European Sales Law would trump existing consumer protection laws – lowering the level of protection in some states, raising it in others – which will concern consumer representatives. The quality of the proposed Sales Law will concern everyone. The political and legal path to the implementation of any sales law could be long and bumpy, despite the Commission's wish to complete it within a year.

This briefing discusses the Commission's proposal.

http://www.cliffordchance.com/publicationviews/publications/2011/10/european_contractlawdoublingup.html

Practical Guide to EU Merger Control

This guide sets out the application of the EU merger regulation which enables the European Commission to prohibit major cross-border mergers, acquisitions and certain joint ventures, if they would have anticompetitive effects within the European Union. The regulation requires compulsory and exclusive ('one-stop shop') notification to the Commission of significant transactions. The size of the transaction concerned is measured by cumulative turnover thresholds. The regulation tries to optimise the allocation of jurisdiction in merger cases between the Commission and the competition authorities of the Member States by the use of referral mechanisms and provides the Commission with wide enforcement powers.

Please contact Barbara Kahn at barbara.kahn@cliffordchance.com for a copy of this briefing.

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 (OFT) 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.

Please contact Barbara Kahn at barbara.kahn@cliffordchance.com for a copy of this briefing.

EU Merger Control and Chinese SOEs

The European Commission has reviewed a number of concentrations involving Chinese State-owned enterprises (SOEs) this year. With China having risen to be the world's fifth largest outbound investor, more such cases can be expected.

This briefing discusses the DSM/Sinochem/JV decision and considers what lessons can be learnt for future transactions involving China's SOEs. The briefing also considers other recent decisions by the European Commission involving Chinese SOEs. Two central questions lie at the core of the treatment of SOEs under EU merger control. First, is the SOE operated in a manner independent of the State i.e., does the State have the power to influence that SOE's commercial strategy? Second, are there risks of coordination between that SOE and other State undertakings active in the relevant market in which the SOE operates i.e., does the State actually coordinate the commercial conduct of the particular SOEs concerned or facilitate such conduct?

http://www.cliffordchance.com/publicationviews/publications/2011/10/eu_merger_controlandchineseso.html

Feel the flex

As the high yield market stalls, a flexible and creative approach is increasingly important to access liquidity. Clifford Chance experts told journalist Brian Thompson about the challenges facing high yield and leveraged loan markets, and the key issues ahead.

http://www.cliffordchance.com/publicationviews/publications/2011/10/feel_the_flex.html

The Kaupthing Case – Playing by the Rules: A Supreme Court win for Bondholders in Icelandic Bank administrations

On 19 October 2011 the Supreme Court handed down its judgment in the case of Re Kaupthing Singer and Friedlander Limited (in administration) [2011] UKSC 48. The appeal was concerned with a long standing principle of insolvency law known as the rule against double proof and has been eagerly awaited since it deals with an important issue in the context of guarantees and recourse to those guarantees when a party becomes insolvent. In this case the guarantor, Kaupthing Singer & Friedlander Limited (KSF) and the principal debtor, Kaupthing & Singer Funding plc (Funding) were both in administration.

This briefing discusses the Supreme Court's judgment.

http://www.cliffordchance.com/publicationviews/publications/2011/10/the_kaupthing_caseplayingbytherules.html

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