

# International Regulatory Update

23-27 January 2012

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### Data protection: European Commission proposes reform of rules

The European Commission has published its proposals to update the 1995 Data Protection Directive. They include a [Communication](#) setting out the Commission's objectives and two legislative proposals: a [regulation](#) setting out a general EU framework for data protection and a [directive](#) on protecting personal data processed for the purposes of prevention, detection, investigation or prosecution of criminal offences and related judicial activities.

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### International Regulatory Group Contacts

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

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

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

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

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

[Martin Rogers](#) +852 2826 2437

[Mark Shipman](#) + 852 2826 8992

### International Regulatory Update Editor

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

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

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

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

The Commission is proposing a single set of rules on data protection valid across the EU. Instead of the current obligation on all companies to notify all data protection activities to data protection supervisors, the proposed regulation is intended to increase the responsibility and accountability of those processing personal data. For example, companies and organisations must notify the national supervisory authority of serious data breaches as soon as possible (if feasible within 24 hours).

The Commission has further indicated that organisations will only have to deal with a single national data protection authority in the Member State where they have their main establishment, and individuals can refer to the data protection authority in their Member State, even when their data is processed by a company based outside the EU. In addition, EU rules must apply if personal data is handled abroad by companies that are active in the EU market and offer their services to EU citizens. Also independent national data protection authorities will be strengthened and given powers to fine companies that violate EU data protection rules. The Commission is proposing penalties of up to EUR 1 million or up to 2% of the global annual turnover of a company.

### [FAQs](#)

#### **AIFMD: FSA consults on implementation**

The FSA has published a [discussion paper \(DP12/01\)](#) which sets out its provisional thinking on implementing the AIFMD in the UK. Amongst other things, DP12/01 considers questions of scope, covering the definition of an AIF and the treatment of small AIFMs. In addition, it outlines:

- the operating requirements on AIFMs, including general principles, organisational requirements, risk management, delegation and prudential requirements;
- the management requirements on AIFMs, including valuation, liquidity management, use of leverage and securitisation;
- the main transparency requirements such as annual reporting, disclosure to investors and reporting to the FSA;
- the requirements on depositaries, including duties such as the safekeeping of assets, oversight of administrative functions and the standard of liability;
- requirements for marketing, including passporting notifications, private placement, marketing to retail investors and public offers of listed AIFs; and

- categories of AIF and specialist regimes that apply to certain AIFs such as listed AIFs.

Responses are due by 23 March 2012. The AIFMD needs to be transposed by 22 July 2013. The FSA also intends to undertake a preliminary firm categorisation exercise to get more information about the likely population of UK AIFMs coming within the scope of the Directive. The FSA expects to publish its proposed policy positions and rules in a consultation paper later in 2012.

#### **Credit rating agencies: Verena Ross discusses Commission proposals**

Verena Ross, Executive Director of ESMA, has given a [speech](#) outlining ESMA's views on the European Commission's legislative proposals for further amendments to the EU rules on credit rating agencies (CRAs), which were published in November 2011.

Amongst other things, Ms. Ross highlighted a number of provisions in the Commission's proposals where ESMA believes that the implications need to be considered more carefully. In particular, she noted that the proposed requirement for ESMA to assess new draft methodologies as a condition for their entry into force could create serious tensions with the requirement of non-interference and independence. Ms. Ross also raised concerns regarding the proposals on mandatory rotation for rating analysts and CRAs, noting that, at least in the short term, there is a risk that new entrants might compete by offering higher ratings or by lowering prices, which could have a detrimental effect on the quality of the rating process and the reliability of the ratings themselves. In addition, she indicated that the proposed requirement that ESMA's annual report shall assess market concentration levels and related risks would require ESMA to adopt entirely new skills and methodologies, and could place ESMA in the uncomfortable position of pursuing possibly conflicting objectives, such as ensuring the stability and the competition of the securities markets at the same time.

Ms. Ross concluded by emphasising that ESMA needs to be given sufficient time to adopt the new regulatory technical standards in the proposal.

### Short selling and CDS: ESMA consults on draft technical standards

ESMA has published a [consultation paper](#) setting out its draft technical standards on the regulation on short selling and certain aspects of credit default swaps (CDS). In particular, the consultation paper sets out ESMA's proposals on:

- the agreements, arrangements and/or measures that adequately ensure that the shares or the sovereign debt instruments will be available for settlement;
- the details of information to be notified to competent authorities and disclosed to the public;
- the means by which information may be disclosed to the public;
- the information to be provided to ESMA by competent authorities; and
- the application of exemptions where the principal trading venue is located outside the EU.

Comments on the draft technical standards are due by 13 February 2012. ESMA expects to publish a final report and submission of the draft technical standards to the European Commission by 31 March 2012.

### OTC derivatives and market infrastructures: ECOFIN Council updates position ahead of talks with EU Parliament

The ECOFIN Council has adjusted its 'general approach' position in negotiations with the European Parliament on the proposed regulation on OTC derivatives and market infrastructures. The Council's updated position is intended to facilitate rapid agreement with the Parliament, in order to enable the regulation to be adopted at first reading.

The main change to the October 2011 general approach relates to the procedure for authorising central counterparties (CCPs), in particular to the powers of the CCP's home Member State versus those of the college of supervisors and ESMA.

[New compromise text](#)

### Commissioner Barnier sets out financial regulation priorities for 2012

Michel Barnier, EU Commissioner for the Internal Market and Services, has given a [speech](#) at the City of London Event at the Guildhall in London, during which he discussed the Commission's work on financial regulatory reform in 2011 and set out its priorities for 2012.

In particular, M. Barnier indicated that the European Commission intends to look at possible structural measures for the banking sector. The Commission is setting up a working group, to be headed by Erkki Liikanen, Governor of Finland's national bank, to consider this issue. The Commission is also planning to publish a consultation document on shadow banking in spring 2012. M. Barnier noted that this consultation could eventually lead to legislative proposals.

He also stated that the Commission will propose a consumer/retail investor package during the first half of 2012, which will focus on disclosure rules for retail investment products (PRIIPS) to ensure that consumers have access to clear and comparable information about investment opportunities, a review of the UCITS Directive to strengthen depositaries' liability, and a review the Insurance Mediation Directive to improve consumer protection standards for insurance products.

The Commission also intends to publish a cumulative impact assessment assessing the costs and benefits of all proposals linked to the G20 regulation agenda.

### IOSCO publishes follow up report on trading of OTC derivatives

IOSCO has published a [follow-up analysis](#) to its [February 2011 report](#) on trading of OTC derivatives, which set out a framework for international regulators to consider when implementing the G20 commitment to trade all standardised OTC derivatives on exchanges or electronic trading platforms, where appropriate, by end-2012 at the latest.

The follow-on report describes the different types of trading platforms currently available for the execution of OTC derivatives transactions in IOSCO member jurisdictions. The report states that the different types of trading platforms fall into two broad categories: (1) those with multiple liquidity providers (multi-dealer platforms); and (2) those with a single liquidity provider (single-dealer platforms). The report concludes that, while these platforms are broadly similar in terms of the function they fulfil, there may be differences in the trade execution models used to effect transactions, the participant coverage, the degree of automation, the scope of asset class or product coverage, and the geographic coverage.

### IMF publishes working paper on impact and accuracy of sovereign ratings

The IMF has published a [working paper](#) which investigates the impact and accuracy of sovereign ratings.

The paper concludes that credit rating agencies' (CRAs') opinions have an impact on the cost of funding of sovereign issuers and that, as a consequence, ratings are a concern for financial stability. The paper further states that, while ratings produced by the major CRAs perform reasonably well when it comes to rank ordering default risk among sovereigns, there is evidence of rating stability failure during the recent global financial crisis.

According to the authors, these failures suggest that ratings should incorporate the obligor's resilience to stress scenarios. In addition, the paper supports: (1) reform initiatives to reduce the impact of CRAs' certification services; (2) more stringent validation requirements for ratings if they are to be used in capital regulations; and (3) more transparency with regard to the quantitative parameters used in the rating process.

The IMF has emphasised that the views expressed in this working paper are those of the authors and do not necessarily represent those of the IMF or IMF policy.

#### **UK financial regulation reform: Financial Services Bill published**

The Financial Services Bill has been introduced to Parliament. The Bill will implement the government's proposed reforms to the financial regulatory regime within the UK by establishing a macro-prudential regulator, the Financial Policy Committee (FPC), within the Bank of England to monitor and respond to systemic risks. The Bill also sets out the responsibilities between the Treasury and the Bank of England in the event of a financial crisis by giving the Chancellor of the Exchequer powers to direct the Bank of England where public funds are at risk and there is a serious threat to financial stability. In addition, the Bill transfers responsibility for prudential regulation to a new regulator, the Prudential Regulation Authority (PRA), established as a subsidiary of the Bank of England, and creates a new conduct of business regulator, the Financial Conduct Authority (FCA), to ensure that business across financial services and markets is conducted in a way that advances the interests of all users and participants.

Subject to the parliamentary timetable, the government's aim is for the Bill to gain Royal Assent by the end of 2012, and for the new system to be operational in early 2013.

Alongside the introduction of the Bill, the government has published a policy document, 'A new approach to financial regulation: securing stability, protecting consumers', detailing the main changes the government is making to the Bill as a result of this scrutiny, and further consultation. The

changes include amendments to crisis management arrangements between Treasury and the Bank of England, and the decision to transfer consumer credit regulation to the FCA. The government has also published a number of draft statutory instruments to support scrutiny of the Financial Services Bill.

In addition, the Bank of England and the FSA have published a draft memorandum of understanding between the FCA and the PRA setting out a high level framework for how the two regulators will work together within the new regulatory system provided for by the Bill.

[Financial Services Bill – introductory page](#)  
[Bill](#)

[Explanatory Notes](#)

[A new approach to financial regulation – securing stability, protecting consumers](#)

[Link to supplementary documents](#)

[Draft MoU between the FCA and the PRA](#)

#### **Pre-packaged sales in insolvency: government decides not to introduce new legislative controls**

The Minister for Employment Relations, Consumer and Postal Affairs, Edward Davey, has [announced](#) that the government will not be seeking to introduce new legislative controls on pre-pack sales in insolvency at this time.

In March 2011, the government announced that it would be taking steps to improve the transparency and confidence of pre-pack sales in insolvency. It subsequently consulted on measures targeted at the sales of assets in insolvent companies where these are sold to connected parties, such as the directors or their close associates.

Mr. Davey indicated that, having taken account of all the issues, the government is not convinced that the benefit of new legislative controls presently outweighs the overall benefit of adhering to the moratorium on regulations affecting micro-business and, as much of the concern was related to small businesses, the government does not consider that measures should be introduced just for businesses other than micro-businesses.

However, Mr. Davey also noted that concerns remain about the use of pre-pack sales, particularly where the assets are sold to a connected party. Amongst other things, these concerns relate to the potential for sales to be effected at an undervalue, particularly in smaller-value asset sales, where unsecured creditors may receive less than they should. Mr. Davey also believes that it is important to

consider the effect of pre-pack sales on competitors in the market.

### **FSA consults on large exposures regime and groups of connected clients and connected counterparties**

The FSA has published a [consultation paper \(CP12/01\)](#) which sets out its proposals for: (1) changes to the FSA Handbook definition of connected counterparties, and the basis for aggregating exposures to connected counterparties when applying large exposure limits; (2) new guidance on the treatment of large exposures to structured finance vehicles; and (3) a change to the Handbook guidance in BIPRU 10.6.33G on the institutional exemption.

The proposed guidance builds on the [CEBS December 2009 guidelines](#) on the implementation of the revised large exposures regime under the amended Capital Requirements Directive (CRD 2 – as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management). In particular, it is intended to provide additional clarity on how exposures to structured finance vehicles, such as asset backed commercial paper conduits, master trusts, covered bonds, standalone securitisation vehicles and collateralised loan obligations, should be aggregated under the large exposures regime.

Comments are due by 26 April 2012.

### **FSA consults on amendments to Listing Rules**

The FSA has published a [consultation paper \(CP12/02\)](#) setting out its proposals for changes to the Listing Rules. In particular, CP12/02 proposes changes in the following areas: (1) reverse takeovers; (2) sponsors; (3) externally managed companies; (4) financial information; and (5) transactions. In addition, CP12/02 raises a number of wider issues about the nature of the premium listing standard.

Comments are due by 26 April 2012.

### **FSA consults on proposed guidance on transaction reporting strategy trades**

The FSA has published [proposed 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.

Comments are due by 22 February 2012.

### **Vince Cable sets out government proposals on executive pay**

The Secretary of State for Business, Innovation and Skills, Vince Cable, has made a statement to the House of Commons setting out the government's proposals on executive pay. The Department for Business, Innovation and Skills (BIS) has also published a [summary of responses](#) to its September 2011 [discussion paper](#) on executive remuneration.

The government's package of measures focuses on: (1) greater transparency; (2) more shareholder powers to hold companies to account; (3) more diverse boards and remuneration committees; (4) and best practice led by the business and investor community.

As regards transparency, Mr. Cable indicated that the government will, through secondary legislation later in 2012, require companies to publish more detailed remuneration reports on how executives are rewarded. This will start with reports being split into two sections: one detailing proposed future policy for executive pay, and the other setting out how pay policy has been implemented in the previous year.

In relation to increased powers for shareholders, Mr. Cable stated that the government intends to consult in the near future on specific proposals to reform the current voting arrangements and give shareholders a binding vote. This will include a binding vote on future pay policy, including details of how performance will be judged and the potential payouts directors could receive. In addition, companies will have to include a statement on how they have taken into account shareholder views and the results of previous votes. Mr. Cable indicated that there will also be a binding vote on any director's notice period longer than one year and on exit payments of more than one year's salary.

[Daily Hansard for 23 January 2012](#)

### **Treasury Committee responds to Bank of England's memorandum on accountability**

The Treasury Committee has published a [report](#) which responds to the Court of the Bank of England's [response](#) to the Committee's November 2011 report on the accountability of the Bank of England.

The Treasury Committee notes that there are a number of areas where, despite accepting its analysis, the Bank's memorandum comes to different conclusions. In particular, these differences relate to: (1) the Bank's proposed Oversight Committee; (2) crisis management; and (3) the role of external members of the Monetary Policy Committee



(MPC) and the Financial Policy Committee (FPC), and the appointment of the Governor.

[Treasury Committee report \(8 November 2011\)](#)

#### **UK government consults on introduction of statutory register of lobbyists**

The UK government has published a [consultation paper](#) on its proposal to introduce a statutory register of lobbyists.

Under the proposals, a lobbying firm would be required to update the register quarterly with: (1) the registered address of the company and Company Number; (2) the names of employees engaged in lobbying; (3) whether those employees are former ministers or senior civil servants; and (4) client lists.

A self-employed lobbyist would be required to update the register quarterly with his details and his client list. Members of the public accessing the register would be able to see details of lobbying firms and their employees, as well as who has employed those lobbying firms.

Comments are due by 13 April 2012.

[Impact assessment](#)

#### **OCC requests comment on annual stress tests rule**

The Office of the Comptroller of the Currency (OCC) has published a [notice of proposed rulemaking](#) implementing section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 165(i)(2) requires certain companies to conduct annual stress tests pursuant to regulations prescribed by their respective primary financial regulatory agencies. The OCC's proposed rule would require national banks and federal savings associations with total consolidated assets of more than USD 10 billion to conduct an annual stress test as prescribed by the rule. In addition to the annual stress test requirement, such institutions would be subject to certain reporting and disclosure requirements.

Comments are due by 26 March 2012.

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **The Prospectus Directive and the Transparency Directive – More on Non-EEA Financial Statements**

The new year has brought some greater clarity in relation to non-EEA companies and whether they will be able to rely on their national accounting standards for the purposes of the Prospectus Directive and Transparency Directive. Two new regulations from the European Commission have the

effect that, for the purposes of the Prospectus Directive and Transparency Directive: (1) from 1 January 2012, Chinese, Canadian and Korean GAAP will be considered equivalent to International Financial Reporting Standards, as adopted by the European Union (EU IFRS); and (2) the transitional relief previously granted to Indian GAAP for financial years starting before 1 January 2012 is extended to cover financial years starting before 1 January 2015.

This briefing discusses the new regulations.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/the\\_prospectus\\_directiveandthetransparenc.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/the_prospectus_directiveandthetransparenc.html)

### **Corporate Update January 2012**

The January 2012 edition of our bi-annual Corporate Update provides a round-up of developments in company law and corporate finance regulation over the last six months.

As difficult economic conditions persist, questions continue to be asked about the perceived imbalance between executive pay and company performance. This issue has been put firmly in the spotlight by the recent announcement by Vince Cable, Secretary of State for Business, of the government's new plans for the regulation of executive pay. Two key areas are to be targeted: how executive remuneration is to be determined and how companies must report on remuneration.

There are also developments afoot on the European front which will be of interest and, potentially, concern to issuers. In particular, the European Commission's proposals for a new Market Abuse Regulation contain an expanded definition of what constitutes 'inside information' which would not require the information to be either precise or price sensitive. The breadth of the new definition is likely to raise difficult questions for directors and others privy to company confidential information when trying to identify whether such information is 'inside information'.

This edition examines the above issues and a host of other recent corporate developments relevant to companies and their advisers.

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

### **AGM Update 2012**

Good news! After numerous developments in recent years, there are no major changes in AGM and reporting practice for 2012. However, the impact of the financial crisis

continues to be felt and focus remains on areas that are perceived to have contributed to it. Executive pay, board effectiveness, corporate reporting and investor engagement all remain under the spotlight.

Clifford Chance's annual AGM Update highlights hot topics for the 2012 AGM, recent and upcoming changes in financial reporting, and the most recent corporate governance developments.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/agm\\_update\\_2012.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/agm_update_2012.html)

#### **Executive Remuneration – the Government's proposals**

Following months of speculation, the government has announced its response to last year's consultation and discussion paper on the regulation of executive pay. As expected, two principal areas of reform are targeted: how executive remuneration is determined and how it is reported.

This briefing discusses the government's proposals.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/executive\\_remunerationthegovernmentsproposals.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/executive_remunerationthegovernmentsproposals.html)

#### **Belgian Federal Budget 2012 – Corporate tax measures**

This week, an agreement was reached between the Belgian government parties on the final set of new

corporate tax measures in the context of the Belgian Federal Budget 2012. The measures will be put to vote in parliament shortly and are proposed to enter into force as of 1 January 2012.

The final list of measures does not substantially differ from the measures previously announced. However, some very last minute changes to the texts may have an important impact for Belgian corporate tax payers. This briefing provides an update based on the new texts circulated on 27 January 2012.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/belgian\\_federal\\_budget2012corporateta.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/belgian_federal_budget2012corporateta.html)

#### **Unified Center for Lien Registration – do Saudi pledges now have to be registered?**

The long-awaited Unified Center for Lien Registration is now operational for the registration of Saudi pledges.

This briefing, jointly prepared by Clifford Chance and Al-Jadaan & Partners discusses its impact for banks taking security in the Kingdom.

[http://www.cliffordchance.com/publicationviews/publications/2012/01/unified\\_center\\_forlienregistration-dosaud.html](http://www.cliffordchance.com/publicationviews/publications/2012/01/unified_center_forlienregistration-dosaud.html)

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

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