

# International Regulatory Update

30 April – 4 May 2012

## IN THIS WEEK'S NEWS

- Liikanen expert group consults on reforming structure of EU banking sector
- Shadow banking: ECB paper on shadow banking in euro area published; ECB Vice-President proposes creation of central database on euro repos
- Basel Committee consults on fundamental review of trading book capital requirements
- CRD 4: Danish EU Presidency publishes compromise proposals; ECOFIN Council intends to confirm agreement on 15 May 2012
- Market abuse regulation: Danish EU Presidency publishes compromise text
- IMF publishes working paper on dynamic loan loss provisioning
- FSA consults on redress scheme for Arch cru investors
- Corporate governance and remuneration: Treasury Committee announces terms of reference for inquiry
- FSA issues policy statement on regulatory prudent valuation return
- FSA issues policy statement on changes to pension transfer value analysis assumptions
- UCITS IV: Italian delegated act published
- Swiss National Bank publishes working paper on banking sectors' international interconnectedness
- Hong Kong Securities and Futures (Amendment) Ordinance 2012 gazetted
- Basel III: RBI issues final guidelines on implementation of capital regulations in India
- CFTC votes to clarify applicability of indemnification and confidentiality provisions in Dodd-Frank Act to foreign regulators
- Recent Clifford Chance briefings: Cross-border M&A: Perspectives on a changing world; and more. [Follow this link to the briefings section.](#)

*Clifford Chance's International Regulatory Update is a weekly digest of significant regulatory developments, drawing on our daily content from our Alerter: Finance Industry service.*

If you would like to continue to receive International Regulatory Update or would like to request a subscription for a colleague, please [click here](#).

To request a subscription to our Alerter: Finance Industry service, please email [Online Services](#).

If you would like to know more about the subjects covered in this publication or our services, please contact:

### International Regulatory Group Contacts

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

[Nick O'Neill](#) +1 212 878 3119

[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)

### Liikanen expert group consults on reforming structure of EU banking sector

The European Commission's high-level expert group, chaired by Finnish Central Bank Governor Erkki Liikanen, on possible reforms to the structure of the EU banking sector has published a [consultation paper](#) seeking stakeholders' views on bank structural reform. The group was set up in February 2012 and has the mandate to consider in depth whether there is a need for structural reforms of the EU banking sector or not and to make any relevant proposals as appropriate.

Comments by 1 June 2012. The expert group will present its final report to the Commission by the end of summer 2012.

### Shadow banking: ECB paper on shadow banking in euro area published; ECB Vice-President proposes creation of central database on euro repos

The ECB has published a [paper](#) providing an overview of the size and structure of shadow banking within the euro area, using the statistical data sources available to the ECB/Eurosystem. The paper also addresses the interconnection between the regulated and the non-bank-regulated segments of the financial sector.

According to the authors, euro area banks now rely more on funding from the financial sector than in the past, in particular from other financial intermediaries, which cover shadow banking entities, including securitisation vehicles. The paper states that this source of funding is mainly short term and therefore more susceptible to runs and to the drying-up of liquidity, and that macro-prudential authorities and supervisors should carefully monitor the growing interlinkages between the regulated banking sector and the shadow banking system. The ECB has emphasised that the views expressed in the paper are those of the authors and do not necessarily reflect those of the ECB.

In addition, Vítor Constâncio, ECB Vice-President, gave a [speech](#) at the European Commission's conference on the shadow banking system, during which he proposed the creation of an EU central database on euro repos and the preparation of a detailed feasibility study for the repo market database in cooperation with the Commission

### Basel Committee consults on fundamental review of trading book capital requirements

The Basel Committee on Banking Supervision has published a [consultation paper](#) on the fundamental review of trading book capital requirements. The paper sets out a

revised market risk framework and proposes a number of measures to improve trading book capital requirements. Amongst other things, the proposals include:

- a more objective boundary between the trading book and the banking book to reduce the scope for regulatory arbitrage – feedback is sought on two alternative approaches;
- moving from value-at-risk to expected shortfall, a risk measure intended to better capture 'tail risk';
- calibrating the revised framework in both the standardised and internal models-based approaches to a period of significant financial stress, consistent with the stressed value-at-risk approach adopted in Basel 2.5;
- comprehensively incorporating the risk of market illiquidity, again consistent with the direction taken in Basel 2.5;
- measures to reduce model risk in the internal models-based approach, including a more granular models approval process and constraints on diversification; and
- a revised standardised approach that is intended to be more risk-sensitive and act as a credible fallback to internal models.

The Committee is also proposing to strengthen the relationship between the models-based and standardised approaches by establishing a closer link between the calibration of the two approaches, requiring mandatory calculation of the standardised approach by all banks, and considering the merits of introducing the standardised approach as a floor or surcharge to the models-based approach. In addition, the treatment of hedging and diversification will be more closely aligned between the two approaches.

Comments are due by 7 September 2012.

### CRD 4: Danish EU Presidency publishes compromise proposals; ECOFIN Council intends to confirm agreement on 15 May 2012

The Danish EU Council Presidency has published compromise texts for the proposed fourth package of amendments to the Capital Requirements Directive (CRD 4), comprising a directive governing access to deposit-taking activities and the prudential supervision of credit institutions and investment firms and a regulation on prudential requirements for credit institutions and investment firms.

The Presidency has also published a general approach document setting out the key outstanding issues in the compromise text. In particular, these relate to: (1) the mechanism of the systemic risk buffer and country-specific prudential measures; and (2) the leverage ratio – disclosure and mandatory nature.

The document also indicates that the European Parliament's ECON Committee is expected to adopt its report on the proposals on 14 May 2012 and that the Presidency has already pursued informal contacts with the Parliament in order to facilitate reaching an agreement at first reading.

In addition, the ECOFIN Council has published a [press release](#) setting out the main results of its meeting on 2 May 2012. Amongst other things, the Council examined CRD 4, with a view to starting negotiations with the European Parliament and adopting the texts at first reading. Noting the support of a qualified majority in favour of a provisional compromise text, the Council decided to review the dossier on 15 May 2012, subsequent to a technical verification, with a view to confirming its agreement on the overall package.

[Proposed directive – Presidency compromise](#)  
[Proposed regulation – Presidency compromise](#)  
[General approach document](#)

#### **Market abuse regulation: Danish EU Presidency publishes compromise text**

The Danish EU Council Presidency has published a new [compromise text](#) for the proposed regulation on insider dealing and market manipulation, which updates the existing framework provided by the Market Abuse Directive.

#### **IMF publishes working paper on dynamic loan loss provisioning**

The IMF has published a [working paper](#), 'Dynamic Loan Loss Provisioning: Simulations on Effectiveness and Guide to Implementation' which investigates the impact of different methods of dynamic provisioning on bank soundness and argues that this increasingly popular macroprudential tool can smooth provisioning costs over the credit cycle and lower banks' probability of default. In addition, the paper offers a guide to implementation that addresses issues related to data requirements, calibration and safeguards as well as accounting, disclosure and tax treatment. It also discusses the interaction of dynamic provisioning with other macroprudential instruments such as countercyclical capital.

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.

#### **FSA consults on redress scheme for Arch cru investors**

The FSA has published a [consultation paper \(CP12/09\)](#) setting out its proposal to establish a consumer redress scheme for investors who were mis-sold the CF Arch cru Investment and Diversified funds.

Amongst other things, under the proposed scheme:

- all firms which sold Arch cru funds would have to contact their customers within four weeks of rules being made, indicating whether or not their case falls within the scope of the scheme;
- where redress is due, firms would be able to use an FSA online calculator to calculate each payment – taking account of how much money each investor is able to claim from the separate voluntary payment scheme; and
- investors should receive notification of how much redress is due within six months of the scheme starting, and would receive payment within 28 days of accepting.

Comments are due by 31 July 2012.

#### **Corporate governance and remuneration: Treasury Committee announces terms of reference for inquiry**

The Treasury Select Committee has published the [terms of reference](#) for a new inquiry into corporate governance in systemically important financial institutions.

Amongst other things, the inquiry will consider:

- what outcomes corporate governance in the financial services sector should seek to achieve;
- whether the UK approach to regulation and supervision of financial services incentivises Boards to perform their role effectively;
- what type of corporate culture financial services firms should seek to foster;
- what difference the proposals in the Independent Commission on Banking report on the Boards of ring-fenced banks would make to corporate governance in these institutions;
- whether non-executive directors should bear greater liabilities than under current law;

- whether shareholders should be required to exercise a stronger role in systemically important financial institutions;
- what role institutional investors, remuneration consultants, employees and others should play with respect to remuneration in the financial services sector;
- whether the management of risk in firms has improved since the financial crisis; and
- the relationship, if any, between Board diversity and company performance in the financial service sector.

Submissions are due by 24 May 2012.

#### **FSA issues policy statement on regulatory prudent valuation return**

The FSA has published a [policy statement \(PS12/07\)](#) discussing the responses to its December 2011 [consultation paper \(CP11/30\)](#) on the regulatory prudent valuation return. PS12/07 sets out a standard format in which relevant firms should produce their quarterly reports showing the differences between prudent valuation and the fair valuation used in their financial statements. The proposed regulatory prudent valuation return is intended to ensure consistency and aid comparability between firms and over time.

Firms will have to produce the new regulatory return for reporting periods ending on or after 30 June 2012.

#### **FSA issues policy statement on changes to pension transfer value analysis assumptions**

The FSA has published a [policy statement \(PS12/08\)](#) discussing the responses to its February 2012 [consultation paper \(CP12/04\)](#) on changes to the way pension transfer analysis is carried out. PS12/08 also sets out new rules and guidance to strengthen the protection for members of defined benefit pension schemes who are considering moving their money into personal pensions.

The changes are designed to deal with the FSA's concern that in most cases a pension transfer is not in the best interest of pension scheme members. The FSA is raising the standards on the assumptions used when a pension transfer value analysis is made to make it less likely that an adviser will be able to recommend a transfer from a defined benefit pension scheme to a personal pension.

#### **UCITS IV: Italian delegated act published**

The [Legislative Decree No. 47](#), dated 16 April 2012, has been published in the Italian Official Gazette. The decree amends the relevant Italian legal and regulatory framework

as required to comply with the UCITS IV Directive, following its implementation in Italy via the 'Legge Comunitaria' (law no. 217 dated 15 December, which entered into force on 17 January 2012). The Legislative Decree will enter into force on 13 May 2012.

CONSOB and the Bank of Italy intend to publish the relevant second-level provisions detailing the framework introduced by the Legislative Decree shortly. With respect to fund 'passporting' procedures, as provided for by UCITS IV, the Italian regulators have already requested compliance with the European framework and issued relevant guidance.

#### **Swiss National Bank publishes working paper on banking sectors' international interconnectedness**

The Swiss National Bank (SNB) has published a [working paper](#), 'Banking sectors' international interconnectedness: Implications for consumption risk sharing in Europe', which evaluates the impact of banks' cross-border links on the ability of their host countries to share consumption risk internationally. The paper concludes that the impact of banks' links to the non-bank sector in the rest of the world on consumption risk sharing is negligible while strong interbank links are associated with relatively little consumption risk sharing of banks' host countries.

#### **Hong Kong Securities and Futures (Amendment) Ordinance 2012 gazetted**

The Securities and Futures (Amendment) Ordinance 2012 (Amendment Ordinance) has been gazetted, following the passage of the relevant bill in the Legislative Council on 25 April 2012.

Under the Amendment Ordinance, the SFC is empowered to implement the following new regulatory initiatives:

- the establishment of a statutory disclosure regime whereby listed corporations will be required to disclose price sensitive information in a timely manner, backed by civil sanctions for non-disclosure;
- the SFC can directly institute proceedings before the Market Misconduct Tribunal, without having to first refer the case to the Financial Secretary for his decision, to enforce the price sensitive information disclosure requirement, and to deal with the existing six types of market misconduct under the Securities and Futures Ordinance (SFO); and
- the SFC will establish the Investor Education Centre to take up broader investor education responsibilities covering the entire financial services sector.

Provisions relating to the SFC directly instituting proceedings before the Market Misconduct Tribunal and the establishment of the Investor Education Centre will come into operation on 4 May 2012. The price sensitive information disclosure regime will take effect on 1 January 2013 to give listed companies sufficient time to prepare themselves to comply with the new requirements and to set up the necessary internal control systems.

[SFC press release](#)

[Govt press release](#)

[HKEx press release](#)

### **Basel III: RBI issues final guidelines on implementation of capital regulations in India**

Following the announcements made in Monetary Policy Statement 2012-13 relating to guidelines on Basel III capital regulations, the Reserve Bank of India (RBI) has issued a [circular](#) to announce the final guidelines on implementation of Basel III capital regulations in India.

The final guidelines will be effective from 1 January 2013 in a phased manner. The Basel III capital ratios will be fully implemented on 31 March 2018. The RBI notes that the capital requirements for the implementation of Basel III guidelines may be lower during the initial periods and higher during the later years. The RBI is currently working on operational aspects of the implementation of the countercyclical capital buffer and intends to issue the related guidance to banks in due course.

For the financial year ending 31 March 2013, banks will have to disclose the capital ratios computed under the existing guidelines (Basel II) on capital adequacy as well as those computed under the Basel III capital adequacy framework.

[Document on final guidelines](#)

### **CFTC votes to clarify applicability of indemnification and confidentiality provisions in Dodd-Frank Act to foreign regulators**

The CFTC has voted to [propose an interpretative statement](#) providing guidance regarding the applicability of the confidentiality and indemnification provisions set forth in new section 21(d) of the Commodity Exchange Act (CEA), added by section 728 of the Dodd-Frank Act. New Section 21(d) requires a foreign regulatory authority to agree in writing to abide by the confidentiality requirements described in Section 8 of the CEA and to indemnify the swap data repository (SDR) and the CFTC for any expenses arising from litigation relating to the information

provided prior to receipt of any requested data or information from the SDR.

The CFTC is proposing to interpret CEA section 21(d) such that a registered SDR would not be subject to the confidentiality and indemnification provisions of that section if: (1) such registered SDR also is registered, recognized or otherwise authorized in a foreign jurisdiction's regulatory regime; and (2) the data sought to be accessed by a foreign regulatory authority has been reported to such registered SDR pursuant to the foreign jurisdiction's regulatory regime (even if that data also has been reported pursuant to the CEA and CFTC regulations).

Comments are due within 30 days of publication in the Federal Register

## **RECENT CLIFFORD CHANCE BRIEFINGS**

### **Cross-border M&A: Perspectives on a changing world**

There is increasing appetite for cross-border deals, as businesses seek growth outside their home markets. Findings from Clifford Chance's new report 'Cross-border M&A: Perspectives on a changing world' – a major multi-regional survey into how large companies view the opportunities and risks to cross-border M&A – reveals that emerging, high-growth markets are the main focus for future growth.

If you would like to request a copy of the 'Cross Border M&A: Perspectives on a changing world' report, please register via the link below. The report will also be available on the Clifford Chance Global M&A Toolkit from June 2012.

Registration page

<http://globalmandatoolkit.cliffordchance.com/specials/eiu/comingsoon>

Global M&A Toolkit

<http://globalmandatoolkit.cliffordchance.com/home.aspx/Global-M-and-A-Toolkit>

### **Resource Nationalism II: Expropriation – Any rights or remedies?**

Direct expropriation or nationalisation is on the rise again. In mid-April, Argentina dramatically announced the nationalisation of most of Repsol's 57.4% stake in Argentina's biggest oil group, YPF. YPF's interests include rights to the valuable Vaca Muerta shale gas discovery. Repsol had purchased its stake in YPF in 1999 for USD 13 billion and Repsol will no doubt seek very substantial compensation. But will it get fair value? And when?

It is not surprising that resource nationalism has repeatedly been identified as one of the key risks for investors in the natural resources sector in recent years. This briefing discusses what rights and remedies are available to foreign investors whose investments are expropriated.

Please contact Mhairi Appleton by email at [mhairi.appleton@cliffordchance.com](mailto:mhairi.appleton@cliffordchance.com) for a copy of this briefing.

#### **Use your noodle! Choosing the right international arbitration body in East Asia**

To coincide with the new China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules which enter into force on 1 May 2012 and Clifford Chance's global arbitration practice being enhanced by two eminent arbitrators – Jason Fry, currently Secretary-General of the International Chamber of Commerce International Court of Arbitration (ICC), who will re-join us as Partner in our Paris office and co-head of the International Arbitration Group in September later this year, and Simon Greenberg, former Deputy Secretary-General of the ICC who has joined as Counsel in our Paris office – this briefing examines the importance of choosing the right international arbitration body, and looks at some of the notable features of popular arbitral bodies in East Asia.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/use\\_your\\_noodle\\_choosingtherightinternational.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/use_your_noodle_choosingtherightinternational.html)

#### **A Greek Tragedy: ACG v Olympic Airlines – English Court finds in favour of Operating Lessor; Airline bound by Certificate of Acceptance**

Judgment has been handed down on the long-awaited case, ACG Acquisition XX LLC v Olympic Airlines (in

special liquidation) [2012] EWHC 1070 (Comm), involving the delivery condition of an aircraft leased by ACG to Olympic, the effect of a signed certificate of acceptance and the airline's absolute and unconditional obligation to pay rent.

This briefing discusses the judgment.

[http://www.cliffordchance.com/publicationviews/publications/2012/04/a\\_greek\\_tragedy\\_acgvolympicairlines-englis.html](http://www.cliffordchance.com/publicationviews/publications/2012/04/a_greek_tragedy_acgvolympicairlines-englis.html)

#### **New US Sanctions Measures to Prevent Evasion of Iran and Syria Embargoes**

In response to evasion by non-US persons of US sanctions against Iran and Syria, President Obama has issued an Executive Order 'Prohibiting Certain Transactions with and Suspending Entry into the United States of Foreign Sanctions Evaders with Respect to Iran and Syria'. The Executive Order gives the US Secretary of the Treasury authority to designate non-US individuals and entities that have violated, attempted to violate, conspired to violate, or caused a violation of US sanctions against Iran or Syria, or that have facilitated deceptive transactions for persons subject to US sanctions concerning Syria or Iran.

This briefing discusses the Executive Order.

[http://www.cliffordchance.com/publicationviews/publications/2012/05/new\\_us\\_sanctionsmeasurestopreventevasio.html](http://www.cliffordchance.com/publicationviews/publications/2012/05/new_us_sanctionsmeasurestopreventevasio.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.

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

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

© Clifford Chance LLP 2012

Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571

Registered office: 10 Upper Bank Street, London, E14 5JJ

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

If you do not wish to receive further information from Clifford Chance about events or legal developments which we believe may be of interest to you, please either send an email to [nomorecontact@cliffordchance.com](mailto:nomorecontact@cliffordchance.com) or by post at Clifford Chance LLP, 10 Upper Bank Street, Canary Wharf, London E14 5JJ

---

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh\* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

\*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.