

International Regulatory Update

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- Recent Clifford Chance briefings: Transaction Services Newsletter – October 2012; and more. [Follow this link to the briefings section.](#)

Liikanen report on reforming structure of EU banking sector published; European Commission launches consultation

The high-level expert group on reforming the structure of the EU banking sector, chaired by Erkki Liikanen, has presented its final report to the European Commission. The group's mandate was to determine whether, in addition to ongoing regulatory reforms, structural reforms of EU banks would strengthen financial stability and improve efficiency and consumer protection and, if so, to make proposals as appropriate.

The group's final report recommends a set of five measures to augment and complement the set of regulatory reforms already enacted or proposed by the EU, the Basel Committee and national governments, including:

- mandatory separation of proprietary trading and certain other trading activities;
- possible additional separation of activities conditional on the recovery and resolution plan;
- possible amendments to the use of bail-in instruments as a resolution tool;
- a review of capital requirements on trading assets and real estate related loans; and
- a strengthening of the governance and control of banks.

The European Commission has launched a consultation on the recommendations. Comments are due by 13 November 2012. The Commission has also published the responses to the expert group's May 2012 consultation on bank structural reform.

[Liikanen final report](#)
[Chairman's statement](#)
[High-level expert group page](#)
[Commission consultation page](#)
[Responses to May 2012 consultation](#)

Recovery and resolution of non-bank financial institutions: European Commission consults on possible framework

The European Commission has published a [consultation paper](#) on a possible recovery and resolution framework for financial institutions other than banks. The consultation

seeks to ascertain how and when the failure of a financial institution other than a bank can threaten financial stability. The main institutions considered in this respect are financial market infrastructures, such as central counterparties and central securities depositories, and systemic insurance companies.

The paper then considers what arrangements could be needed to prevent their failure from compromising financial stability. The Commission has emphasised that the focus is on the extraordinary measures which could be necessary to contain the fallout from failure, not on the regulation which is necessary to mitigate any risks and negative externalities associated with their business. The consultation is intended to complement the Commission's Green Paper on shadow banking, which considers the degree to which the regulation of such entities and activities should be reinforced.

The consultation paper also considers whether payment systems and payment institutions merit specific focus from a recovery and resolution perspective and whether any other nonbank financial institutions should be covered by specific recovery and resolution provisions and which precise tools could be effectively used.

Responses are due by 28 December 2012.

MiFID review: Cyprus 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).

[Proposed directive – Presidency compromise](#)
[Proposed regulation – Presidency compromise](#)

Short selling regulation: ESMA publishes list of exempted shares

ESMA has published a [list of exempted shares](#) under the regulation on short selling and certain aspects of credit default swaps (CDS). The regulation requires the relevant competent authorities to identify shares having their principal trading venue located in a third country and ESMA to publish a list of these exempted shares, to which provisions of Article 5, 6, 12 and 15 do not apply.

ESMA has emphasised that national competent authorities are responsible for the content of the list and that any queries regarding the content should be addressed directly to the relevant competent authority for that share.

ESMA and EBA publish 2013 work programmes

ESMA has published its work programme for 2013, which sets out its priorities regarding the introduction of new and the overhaul of existing legislation, its supervisory role in relation to credit rating agencies and trade repositories, and coordination, monitoring and analysis of financial markets. The work programme covers the Single Rulebook, ESMA's contribution to financial stability, financial consumer protection, supervision convergence, and ESMA's operational set up. ESMA has also published a multi annual work programme for the period 2013-2015.

In addition, EBA has published its work programme for 2013. The fundamental objective for the EBA in the regulatory policy area will be to play a central role in the development of the single rule book, with the aim to contribute to achievement of a level playing field for financial institutions as well as to raise the quality of financial regulation and the overall functioning of the Single Market. EBA's work in this area relates in particular to the CRD 4/CRR legislative framework, including liquidity and remuneration, as well as to the crisis recovery and resolution legislative framework.

EBA's oversight activities will focus on identifying, analysing and addressing risks in the EU banking sector, including analysing the consistency of outcomes in risk weighted assets, the sustainability of banks' business models and reviews of banks' asset quality, promoting supervisory cooperation and convergence and continuing its work in colleges of supervisors to strengthen European supervision of cross-border banking groups.

Finally, EBA will focus its consumer protection activities on developing guidelines on responsible mortgage lending, and on arrears handling and forbearance in the mortgage market, and regulatory technical standards on professional indemnity insurance.

[ESMA 2013 work programme](#)

[ESMA 2013-2015 multi annual work programme](#)

[EBA 2013 work programme](#)

[Annex to EBA work programme – tasks and priorities](#)

ESMA consults on further amendments to recommendations regarding prospectus requirements for mineral companies

ESMA has published a [consultation paper](#) on proposals to amend its recommendations for the consistent implementation of the European Commission's Prospectuses Regulation (809/2004) as they impact mineral companies. In March 2011 ESMA updated and revised paragraphs 131-133 of the CESR recommendations on the consistent implementation of the Prospectuses Regulation, which address the information that should be disclosed by mineral companies in prospectuses. The system established in March 2011 provided that reserves and resources disclosure in prospectuses should be in accordance with one of a number of internationally recognised mineral reserves and resources reporting codes endorsed in the ESMA update of the CESR recommendations.

The consultation paper sets out ESMA's proposals for endorsement of a further reporting code, clarifications of and amendments to the recommendations concerning mineral companies and to align the content with the amended prospectus disclosure regime which entered into force on 1 July 2012. ESMA is also taking this opportunity to address a number of issues that have been brought to its attention by Member States since the entry into force of the revised recommendations.

Responses are due by 21 December 2012. ESMA expects to publish the revised guidelines during the second quarter of 2013.

Germany and France call on European Commission to develop proposal for enhanced cooperation on financial transaction taxation

The German Federal Finance Minister and the French Finance Minister have written a joint letter calling on the European Commission to develop a proposal for enhanced cooperation in the area of financial transaction taxation. The letter is a reaction to the failure of an earlier proposal of the Commission for a Council Directive on a common system of financial transaction tax to meet the requisite approval of all the EU Member States in the Council of Finance Ministers.

In a further joint letter, the German Federal Finance Minister and the French Finance Minister have called on the Finance Ministers of the other EU Member States to participate in the initiative. The German Federal Government has indicated that it will seek to persuade as

many EU Member States as possible to participate in the enhanced cooperation.

[Press release \(DE\)](#)

FSA issues Quarterly Consultation No. 34

The FSA has published its [Quarterly Consultation \(No. 34\) \(CP12/27\)](#) in which it invites comments on miscellaneous amendments to the Handbook. Amongst other things, the consultation paper proposes to:

- amend the Conduct of Business sourcebook (COBS) and Glossary so that the wording of the exemption from the Retail Distribution Review (RDR) rules for certain Holloway policies reflects the FSA's policy intention;
- amend the Senior Management Systems and Controls sourcebook (SYSC) to make the rules on voiding and recovery consistent with the FSA's revised approach to the application of the remuneration principles proportionality rule to firms subject to the Remuneration Code;
- update the FSA's rules and guidance in accordance with the revised Basel Core Principles to address transactions with related parties;
- make changes to the appropriate qualifications lists in the Training and Competence sourcebook (TC);
- make amendments to the Retail Distribution Review (RDR) adviser charging and remuneration rules regarding referrals to discretionary investment managers; and
- make changes to the Enforcement Guide and Decision Procedure and Penalties manual (DEPP) to include investigation and enforcement powers for financial and non-financial counterparties under the European Market Infrastructure Regulation (EMIR) and the EMIR statutory instrument.

Comments on chapters 2, 3, 5, 6 and 9 are due by 5 November 2012 and on chapters 4, 7, 8 and 10 by 5 December 2012.

FSA consults on regulatory reform: PRA and FCA regimes for approved persons

The FSA has published a [consultation paper \(CP12/26\)](#) on proposed changes to existing regulatory rules and guidance relating to approved persons following the introduction of the Financial Services Bill in January 2012, which will create a new framework for financial regulation in the UK. CP12/26 consults on changes to the existing FSA Handbook which are required to align the new rulebooks

with the future objectives and functions of the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA).

Comments are due by 7 December 2012.

FSA consults on changes to Listing Rules

The FSA has published a [consultation paper \(CP12/25\)](#) on a number of proposed changes to the Listing Rules that are intended to enhance the effectiveness of the Listing Regime. The proposed changes follow the FSA's January 2012 consultation paper on the premium listing regime, amid market debate on the issues of free float, minority shareholder protection, corporate governance and the IPO market in general.

CP12/25 also sets out proposed amendments to the Listing Rules relating to the implementation of the AIFM Directive.

Comments are due by 2 January 2013.

Short selling: Belgian regulatory provides information on notification process for significant net short positions and market-making activities and primary market operations

The Financial Services and Markets Authority (FSMA) has published a [communication](#) on the notification process for significant net short positions and for market maker and authorised primary dealer exemptions under the EU regulation on short selling and certain aspects of credit default swaps (CDS).

The regulation will be directly applicable in Belgium from 1 November 2012.

Short selling regulation: German Federal Parliament agrees on implementing Act

The Federal Parliament has agreed on an Act on the implementation of the EU regulation on short selling and certain aspects of credit default swaps (CDS), the core provisions of which will apply from 1 November 2012 onwards. The Act the Bundestag has agreed on amends the German Securities Trading Act, the German Banking Act and the German Exchange Act.

In particular, the Act provides for:

- the publication of net short positions in the Federal Journal;
- reporting obligations of operators of multilateral trading facilities;
- supervisory powers of the German Federal Financial Supervisory Authority (BaFin) including the power to

take measures, e.g. impose administrative fines, in cases of violations of duties under the EU regulation; and

- the power of supervisory bodies of the German exchanges to restrict short selling of financial instruments temporarily in the case of a significant fall in prices.

The Act as agreed on by the Federal Parliament will have to be signed into law by the Federal President.

[Federal Government draft \(DE\)](#)
[Amendments by the Federal Parliament Financial Committee \(DE\)](#)

BaFin consults on draft circular on information sheets in respect of financial instruments

The German Federal Financial Supervisory Authority (BaFin) has published a [draft circular](#) on the product information sheets which have to be provided by investment firms to retail clients when providing investment advice. Since 1 July 2011, investment firms providing investment advice to retail clients are obliged to publish a straightforward product information sheet when they recommend the purchase of financial instruments under the Securities Trading Act. The draft circular is intended to provide information on BaFin's administrative practice on a number of questions that have arisen in respect of this requirement.

BaFin has launched a [consultation](#) and will accept submissions until 21 November 2012. At a later stage, BaFin intends to incorporate the circular into its comprehensive circular on minimum requirements on compliance and further rules on conduct, organisation and transparency in accordance with sections 31 et seqq. of the Securities Trading Act.

Hong Kong government consults on subsidiary legislation for implementation of new Companies Ordinance

The Hong Kong government has published the first phase of a [consultation paper](#) on the subsidiary legislation to be made for the implementation of the new Companies Ordinance. The new Companies Ordinance, gazetted on 10 August 2012, provides a modernised legal framework for the incorporation and operation of companies in Hong Kong. The two-phased consultation exercise will cover 12 pieces of subsidiary legislation.

Comments on the first phase of the consultation are invited by 9 November 2012. The second phase of the

consultation exercise is expected in late 2012. The government aims to complete the legislative process by July 2013 and to bring the new Companies Ordinance and the subsidiary legislation into operation in 2014.

SGX consults on proposed rule changes for clearing of customers' OTC financial derivatives transactions

The Singapore Exchange Derivatives Clearing Limited (SGX-DC) has published a [consultation paper](#) proposing changes to its clearing rules to enable its clearing members to clear over-the-counter financial derivatives (OTCF) contracts for their customers. Until now, clearing members have only been permitted to clear proprietary OTCF contracts. The proposed changes also include an Enhanced Customer Collateral Protection model which will provide an option for all customers clearing OTC contracts and OTCF contracts through SGX-DC to protect against the use of their collateral in the event of default of other customers.

Comments are due by 24 October 2012.

SGX consults on proposed rule changes in relation to offer structure of initial public offers

The Singapore Exchange (SGX) has published a [consultation paper](#) to propose new share allocations for retail investors participating in initial public offers (IPOs). The consultation paper proposes revisions to the SGX's rules to raise the proportion of IPO shares available for retail investment for Mainboard IPOs with high retail demand. Amongst other things, the proposed new rules include:

- the introduction of a prescribed minimum allotment of 5% of the total invitation shares to the public subscription tranche - for example, when 100 million new shares are issued in the IPO, at least 5 million shares must be offered for public subscription;
- the introduction of a claw-back mechanism that increases the number of shares allocated to the public subscription tranche when the total demand for shares in the tranche exceeds prescribed thresholds; and
- when the demand through public subscription is below the prescribed thresholds, a reverse claw-back mechanism can be introduced to transfer shares from the public subscription tranche to the placement tranche.

Comments are due by 29 October 2012.

MAS consults on proposed amendments to Notice 637 to implement capital requirements for bank exposures to central counterparties

The Monetary Authority of Singapore (MAS) has published a [consultation paper](#) on proposed amendments to Notice 637 on Risk Based Capital Requirements for Banks Incorporated in Singapore, to implement the Basel Committee on Banking Supervision's capital requirements for bank exposures to central counterparties (CCPs). The proposed amendments are intended to strengthen the capital framework for trade exposures and default fund exposures of banks to CCPs. It also sets out the requirements to be met by a CCP for the purpose of determining the applicable capital requirements for bank exposures to the CCP. The MAS has indicated that the proposed revisions will take effect from 1 January 2013. The draft amendments to the Notice are appended in Annex 1 of the consultation paper.

Comments are due by 29 October 2012.

Implementing Basel III in Australia: APRA publishes final standards

The Australian Prudential Regulation Authority (APRA) has published its [final set of prudential and reporting standards](#) giving effect to Basel III capital adequacy requirements in Australia. The package includes APRA's response to submissions on its draft proposals issued in March and June 2012.

The key features of the Basel III capital reforms that will apply to authorised deposit-taking institutions (ADIs) in Australia include:

- a new definition of regulatory capital under which common equity is the predominant form of Tier 1 capital;
- a stricter approach to regulatory adjustments under which most deductions from capital are to be from Common Equity Tier 1 capital;
- an increase in the minimum amounts of capital that ADIs must hold against risk – Common Equity Tier 1 Capital must be at least 4.5% of risk-weighted assets and the Tier 1 Capital ratio at least 6%, an increase of 2.5 and 2.0%, respectively, over the existing minimum requirements;
- a new capital conservation buffer of 2.5% that places increasing constraints on capital distributions where an ADI's capital level falls within the buffer range;

- a countercyclical buffer of up to 2.5% that will apply when excessive credit growth and other indicators point to a system-wide build up of risk; and
- a simple, transparent leverage ratio to help contain the build up of leverage in the banking system.

According to APRA, Australian banks meet these requirements already and therefore the accelerated introduction of Basel III capital adequacy (without phasing in of various elements referred to in the BIS papers) has been adopted.

The new Australian standards will come into effect on 1 January 2013. All capital instruments not submitted to APRA for review before 28 September 2012 must comply with the new requirements to qualify as eligible regulatory capital. The formal adoption of other aspects of Basel III, such as the strengthening of the counterparty credit risk capital framework, will be released in November 2012.

'Clearing and Settlement in Europe' published

A new book on the law and practice of clearing and settlement in the UK and Europe, written by Dermot Turing, a partner at Clifford Chance, is being published by Bloomsbury Professional. This new textbook is the first to cover this subject-area, and includes introductions to the key topics of clearing, securities settlement and payments, and features in-depth analysis of new and existing legislation, such as:

- EU Regulation on OTC Derivatives, Central Counterparties and Trade Repositories (EMIR);
- Proposed EU Regulation on CSDs;
- CPSS Principles for Financial Market Infrastructures;
- Settlement Finality Directive and UK implementing regulations; and
- Part VII, UK Companies Act 1989.

For more information about how to order a copy, please click on the link to '[Clearing and Settlement in Europe](#)' on the Bloomsbury Professional website

RECENT CLIFFORD CHANCE BRIEFINGS

Transaction Services Newsletter – October 2012

Transaction Services Newsletter is a bi-monthly publication designed for business and legal professionals working in cash management and securities services. This issue is unashamedly about London 2012. Not to be out-done by the athletes and paralympians, the UK's regulatory bodies

have spent the summer working on some record-breaking initiatives. The impact of these developments is going to reach well beyond the shores of Britain....

http://www.cliffordchance.com/publicationviews/publications/2012/10/transaction_servicesnewsletter-october2012.html

Lehman Brothers Treasury trustees publish 13th bankruptcy report and announce Manifest Error Bar Date

On 1 October 2012, the Bankruptcy Trustees of Lehman Brothers Treasury Co. BV published the 13th public report in the bankruptcy of LBT. The key messages are that: (1) a Manifest Error Bar Date has been set; (2) LBT received a distribution from LBHI of over USD 1 billion; (3) the Bankruptcy Trustees will use a composition plan; and (4) the approximate timing of formal claims filing has been disclosed.

This briefing outlines the significance of these key messages.

http://www.cliffordchance.com/publicationviews/publications/2012/10/lehman_brothers_treasurytrusteespublish13t.html

Business and human rights – putting principles into practice

Compared with legal regimes for combating bribery and corruption – which entail heavy penalties – recent measures to tackle business related human rights impacts look ‘soft’. But does this mean there is no pressure to comply?

This briefing discusses the United Nations Guiding Principles on Business and Human Rights and recent steps taken by international organisations, governments and private sector actors towards their implementation.

http://www.cliffordchance.com/publicationviews/publications/2012/10/business_and_humanrightsputtingprinciple.html

Listing Rules changes implemented on 1 October 2012 and further consultation launched

On Monday 1 October 2012, a significant number of changes took effect to the UK Listing Rules, along with more limited changes to the Prospectus Rules and the Disclosure and Transparency Rules. The changes were announced on Friday 28 September 2012, giving companies and their advisers very little time to get to grips with them. The FSA also published changes to the sponsor regime which will take effect at the end of this year.

Following the announcement of these changes, the FSA published a new consultation paper (CP12/25) on 2 October 2012, setting out its proposals for further amendments to the Listing Rules and, in particular, changes to the free float requirements for admission to listing and enhanced corporate governance requirements for companies with a controlling (30% or more) shareholder.

This briefing discusses the rule changes taking effect on 1 October 2012 and the key proposals set out in CP12/25.

http://www.cliffordchance.com/publicationviews/publications/2012/10/listing_rules_changesimplementedon1octobe.html

Bill of Law transposing the AIFM Directive

On 24 August 2012, Bill of law N°6471 relating to the transposition of the AIFMD Directive was deposited with the Luxembourg Parliament. The full legislative process is still to be completed in Luxembourg. However, it is anticipated that Bill 6471 will be adopted before end 2012, i.e. six months before the deadline for implementation provided for in the AIFMD. As was the case in 2002 and 2010 with respect to the UCITS III and UCITS IV Directives, Luxembourg could henceforth be one of the first Member States to implement the AIFM Directive.

This briefing discusses the Bill.

http://www.cliffordchance.com/publicationviews/publications/2012/10/bill_of_law_transposingtheaifmdirective.html

Distributions to shareholders under the new Dutch private company law

With effect from 1 October 2012 Dutch private company law will be substantially overhauled. One set of changes likely to be troublesome in practice are the new rules concerning distributions to shareholders. These rules will affect a wide array of transactions from ordinary course matters, such as final or interim profit distributions, through to event driven transactions, such as share buy-backs, share capital reductions, debt push down, intra-group re-organisations, debt restructurings and similar financing arrangements.

This briefing discusses the changes.

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

Dutch Law on management and supervision to enter into force

The Law on management and supervision was adopted by the Dutch Upper House of Parliament in 2011. Before it

could enter into force, certain provisions had to be clarified. The bill containing these clarifications was adopted by the Upper House on 25 September 2012. The new rules will most likely enter into force on 1 January 2013.

This briefing outlines the highlights of these rules.

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

ASX consults on changes to reporting requirements for resources companies

In October 2011, the Australian Securities Exchange (ASX) began a comprehensive consultation process on the method of reserves and resources disclosure by mining and oil and gas companies. In mid-September this year, the ASX released a consultation paper setting out a revised Chapter 5 of the Listing Rules dealing with reserves and resources disclosure. At the same time, the Australasian Joint Ore Reserves Committee (JORC) released an exposure draft of an updated JORC Code intended to support the proposed amendments to the Listing Rules.

Public comment on both documents is being sought until 26 October 2012 and both documents should be considered in parallel to fully understand the potential impact on an individual listed entity.

This briefing discusses both sets of proposals.

http://www.cliffordchance.com/publicationviews/publications/2012/10/asx_consults_on_changestoreportingrequirement.html

Conflict minerals – Dodd-Frank turns a light on the DRC

New rules have been adopted in the US requiring annual disclosures of the use in manufacturing of 'conflict minerals' sourced from and around the Democratic Republic of the Congo. The rules will bite from 2013, giving affected organisations only a few months to finalise their preparations.

This briefing discusses the rules.

http://www.cliffordchance.com/publicationviews/publications/2012/10/conflict_mineralsdodd-frankturnsalightto.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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