



EVERYTHING MATTERS

FINANCIAL SERVICES REGULATION

Exchange – International Newsletter

Issue 7 – February 2011

INTRODUCTION

WELCOME

DLA Piper's Financial Services International Regulatory team welcomes you to the seventh edition of 'Exchange – International' – an international newsletter designed to keep you informed of regulatory developments in the financial services sector.

This issue includes updates from the US, China - Hong Kong, Austria, France, Germany, Luxembourg, Spain and the UK as well as news of forthcoming European legislation. In this first edition of 2011 we cover key European developments such as the coming into operation of the new European supervisory authorities and the European Commission's consultation on the proposed EU framework for bank recovery. Please click on the links below to access updates for the relevant jurisdictions.

Our aim is to assist you in providing an overview of developments outside your own jurisdiction which may be of interest to you. In each issue we will also focus on a topic of wider international impact. In this edition, 'In Focus' will look at the interaction between the national financial services regulatory regimes and civil liability in both France and the UK, taking into account recent developments in this area in both jurisdictions.

Your feedback is important to us. If you have any comments or suggestions for future issues, we would be very glad to hear from you.

CONTENTS

[Europe](#) | [Austria](#) | [France](#) | [Germany](#) | [Luxembourg](#) | [Spain](#) | [UK](#)

[China – Hong Kong](#)

[United States](#)

[In Focus](#)

[Contacts](#)

USEFUL INFORMATION

If your colleagues would like to be added to our mailing list to receive future client alerts or newsletters, please [email amy.hammick@dlapiper.com](mailto:amy.hammick@dlapiper.com) with their contact details. For recent publications, legal updates and an overview of our Litigation & Regulatory capabilities please see our [global website](#).

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[Next Page >](#)

EUROPE



EUROPEAN SUPERVISORY AUTHORITIES: CHAIRS AND BOARDS ANNOUNCED

On 1 January 2011, the three new European supervisory authorities (ESAs) became operational, and each ESA has now announced the appointment of a Chairperson and Board. The Chairpersons are as follows:

- | | |
|---|-------------------|
| ■ European Banking Authority (EBA) | Andrea Enria |
| ■ European Securities and Markets Authority (ESMA) | Steven Maijoor |
| ■ European Insurance and Occupational Pensions Authority (EIOPA): | Gabriel Bernadino |

EBA

Chairperson Andrea Enria is the current Head of the Supervisory Regulations and Policies Department at the Bank of Italy. Thomas Huertas, formerly Vice-Chairman of CEBS and the current Banking Sector Director at the UK FSA, was elected EBA Alternate Chairperson.

The EBA Management Board will comprise six representatives from the national supervisory authorities.

ESMA

Newly-elected ESMA Chair Steven Maijoor's current role is Director at the Netherlands Authority for Financial Markets (AFM), where he supervises financial reporting, audit, market integrity and certain business operations. The Vice-Chair of ESMA will be Carlos Tavares, who was acting Chair in 2010.

EIOPA

Gabriel Bernadino, the recently-appointed Chair of EIOPA, is currently the Director General of the Directorate for Development and Institutional Relations at the Portuguese Insurance and Pension Funds Supervisory Authority (ISP). He has been Chairperson of CEIOPs since 2009.

EU COMMISSION PUBLISHES OMNIBUS II PROPOSAL

On 19 January 2011, the European Commission published the [Omnibus II Directive proposal](#). The proposed Omnibus II Directive is the second set of amendments to financial services directives necessitated by the reforms to the EU supervisory framework.

The Omnibus I Directive (2010/78/EU) contains the first set of amendments, which cover 11 existing Directives, but do not include amendments to the Solvency II Directive or parts of the Prospectus Directive.

A [press release](#) was published to accompany the proposed Omnibus II Directive, in which the Commission explains that the aim of the proposed Directive is to amend the Solvency II Directive (2009/133/EU) and the Prospectus Directive (2003/71/EC) to enable EIOPA and ESMA to work effectively. In the proposed Directive, the extent to which EIOPA and ESMA are able to exercise their powers under the Solvency II and Prospectus regimes is set out. This proposed Directive specifies the areas of these regimes for which the ESAs may develop draft technical standards, and sets out specific mechanisms for settling disputes among national supervisors.

The amendments proposed under Omnibus II in relation to the Solvency II Directive include:

- Extending the implementation date for Solvency II by two months (to 31 December 2012) to align with the financial year ends of the majority of insurers and reinsurers;



- Granting powers to the Commission to specify transitional measures in certain areas (to avoid market disruption and facilitate a smooth transition to the new regime) and adopt Level 2 implementing measures in certain areas; and
- Setting out the precise scope of the exercise of certain new powers by EIOPA.

The proposed Directive will now be considered by the European Parliament and the European Council.

EU COMMISSION CONSULTATION ON CSDS AND SECURITIES SETTLEMENT LAW HARMONISATION

On 13 January 2011, the European Commission published a [consultation](#) on central securities depositories (CSDs) and the harmonisation of some elements of securities settlement in the EU.

CSDs are institutions that hold accounts for securities to allow trades between securities holders to be effected by book entries, and perform services that allow the registration, safekeeping, settlement and efficient processing of securities transactions in financial markets. In the consultation, the Commission sets out its view that, because of this role, CSDs have become systemically important post-trading infrastructures. The Commission therefore considers that there is a strong need for a regulatory framework for CSDs and, in the consultation, seeks views on issues including:

- The definition of CSDs and the scope of CSD legislation;
- Rules on the authorisation and ongoing supervision of CSDs;
- Rules on access to CSDs and interoperability between CSDs; and
- Prudential standards for CSDs.

The consultation also focuses on the harmonisation of the following aspects of securities settlement in the EU:

- Settlement discipline (ensuring that a transaction settles on the intended settlement date);
- Settlement periods (the time between the conclusion of a transaction and a settlement); and
- Sanctions in the area of CSD and securities settlement regulation.

The consultation is open for responses until 1 March 2011.

On 21 January 2011 the Commission also published a roadmap on the proposed legislation and has stated that it will adopt a legislative proposal in June 2011.

EBA ANNOUNCES BANK STRESS TESTS IN FIRST HALF OF 2011

On 13 January 2011, the European Banking Authority (EBA) published a [statement](#) about the 2011 EU-wide stress testing exercise of the banking sector.

At its inaugural meeting on 12 January 2011, the EBA Board of Supervisors agreed a strategic work plan for an EU-wide stress test of the banking sector in the first half of 2011. National supervisory authorities, the European Systemic Risk Board (ESRB), the European Central Bank (ECB) and the European Commission will participate with the EBA in the implementation of the test.

The purpose of the stress test is to assess the resilience of the EU banking system to a range of events, as part of the framework being constructed under the European System of Financial Supervision.

The 2011 round of stress testing will cover a broadly similar group of banks to those tested in summer 2010. The results will be published in mid-2011. Stress tests will also be undertaken concurrently by EIOPA.



PRE-CONSULTATION ON SOLVENCY II LEVEL 3 MEASURES

In December 2010, CEIOPS (now EIOPA) commenced pre-consultation on the proposed guidelines and binding technical standards (Level 3 measures) for the Solvency II Directive with a limited group of selected stakeholders, including the European Insurance and Reinsurance Federation (CEA) and the Association of Mutual Insurers and Insurance Co-operatives in Europe (AMICE).

The pre-consultation relates to the following topics:

- Use test;
- Calibration;
- Profit and loss attribution; and
- Validation.

The selected stakeholders can comment on the pre-consultations until 11 February 2011.

The pre-consultation papers are not available for wider circulation or publication. Firms should however be able to obtain the Level 3 pre-consultation papers from their trade bodies, or, for firms that are not a member of a trade body, from their supervisory body.

EIOPA will not commence public consultation on the proposed Solvency II Level 3 measures until the Commission has published the proposed Level 2 implementing measures. The publication of the Level 2 measures is expected in June 2011.

On 19 January 2011 EIOPA published a Solvency II medium-term work plan setting out its approach to the implementation of the Directive between 2011 and 2014.

EU COMMISSION CONSULTATION ON EU FRAMEWORK FOR BANK RECOVERY

On 6 January 2011, the European Commission published a [consultation](#) on a proposed EU framework for bank recovery and resolution.

The consultation contains technical details which expand on the principles identified in the Commission's October 2010 communication on an EU framework for crisis management in the financial sector. The aim of the framework would be to provide regulators with common and effective tools and powers to deal with failing banks at an early stage.

The proposed new powers would enable regulators to:

- Require banks to have recovery and resolution plans (“living wills”);
- Require banks to make changes to their organisation or operating structure;
- Take early action to remedy problems, for example, replacing managers and directors; and
- Take action to manage unavoidable bank failure in an orderly way in relation to the transfer of assets or the write-down of debt.

The consultation also proposes the development of arrangements to ensure that regulators co-ordinate and co-operate to minimise any harmful effects of a cross-border bank failure and the introduction of financing mechanisms which avoid the use of taxpayer funds.

The deadline for responses to the consultation is 3 March 2011. The Commission intends to adopt a legislative proposal on bank recovery and resolution in June 2011.



ESMA REPORT ON NATIONAL AUTHORITIES' EMERGENCY POWERS AND CONTINGENCY MEASURES

On 18 January 2011, ESMA published a [report](#), finalised by its predecessor CESR in December 2010, setting out the emergency powers and contingency measures available to CESR members.

One of CESR's aims following the financial crisis was to improve the extent to which national authorities could take emergency actions in a co-ordinated manner. The recently published report mapping the existing emergency powers and contingency measures available to CESR members at a national level represents an initial step towards achieving this objective. ESMA's focus on this area is likely to be even greater than that of CESR, as under ESMA's establishing Regulation (Regulation (1095/2010/EU)), ESMA is to play a key role in facilitating and co-ordinating actions taken by national authorities in emergency situations, and will have the power to adopt individual decisions requiring national authorities to take necessary action.

The conclusion of the report is that, in view of the diverse powers available to national authorities and the lack of a common legal framework, it is unlikely that national authorities would be able to act in a co-ordinated way in a future crisis. For this reason, the report recommends that the further co-ordination of crisis management plans and facilitation of co-operation in emergency situations should be developed further.

BCBS CONSULTS ON BASEL II PILLAR 3 REMUNERATION DISCLOSURE

On 27 December 2010, the Basel Committee on Banking Supervision (BCBS) published a [consultation](#) on the Basel II Pillar 3 disclosure requirements for remuneration.

The consultation follows a recommendation in March 2010 by the Financial Stability Board (FSB) that the BCBS should incorporate disclosure requirements for compensation into Pillar 3 of the Basel II accord.

The proposals contained in the consultation include a requirement for banks to disclose qualitative and quantitative information about their remuneration practices and policies in areas such as governance and committee structures, the design and operation of remuneration structures and the frequency of review, risk-adjustment methodologies, links between remuneration and performance and types of remuneration.

All responses to the consultation should arrive with the BCBS by 25 February 2011.

BCBS DECISION ON REGULATORY CAPITAL LOSS ABSORBENCY

On 13 January 2011, the BCBS [announced](#) minimum requirements for regulatory capital loss absorbency in the event of a bank's non-viability.

In August 2010, the BCBS consulted on a proposal for additional minimum standards to ensure that all regulatory capital instruments are capable of absorbing losses if a bank is unable to continue to operate independently. The August 2010 proposal is that the contractual terms of any capital instruments a bank issues would have to contain provisions allowing them to be written off or converted to common shares if the bank becomes unviable. The BCBS has now amended the proposal so that the requirement to include non-viability provisions will not apply if the bank is subject to a statutory resolution regime which will result in an equivalent outcome.

The Group of Governors and Heads of Supervision, the BCBS's oversight body, has endorsed the August 2010 proposal. Instruments issued by a bank on or after 1 January 2013 must meet or exceed the minimum loss absorbency requirements announced on 13 January 2011 in order to be included in Additional Tier 1 capital or Tier 2 capital.

The loss absorbency minimum requirements apply in addition to the quality of capital requirements set out in the BCBS' December 2010 paper on the Basel III regulatory capital reforms.



ECB PUBLISHES OPINION ON EMIR

On 13 January 2011, the European Central Bank (ECB) published an [opinion](#) on the Commission's proposed European Market Infrastructure Regulation (EMIR), which would regulate over-the-counter (OTC) derivatives, central counterparties (CCPs) and trade repositories.

The Commission's legislative proposal for EMIR was published on 15 September 2010. The ECB's opinion was requested by the European Council and the European Parliament shortly afterwards.

In the opinion, the ECB sets out its view that EMIR, as currently proposed, will result in "enormous practical consequences for market participants". Operations, risk management and legal documentation are identified as areas which will be most affected. On one hand, the ECB considers that CCPs must be "strictly regulated", but on the other hand it notes the undesirability of an "excessively burdensome" EU regulatory framework for CCPs. The ECB also sets out specific drafting proposals and explanatory text in the opinion, and stresses that effective co-operation between supervisors and regulatory bodies will be needed.

The proposed draft of EMIR is currently being considered by the European Parliament and the European Council, and, if adopted, will apply from the end of 2012.

EU PARLIAMENT BRIEFING PAPER ON PROPOSED CONSUMER RIGHTS DIRECTIVE

On 13 January 2011, the European Parliament published a [briefing paper](#) (dated November 2010) on the relationship between the proposed Consumer Rights Directive and the area of financial services.

The aim of the briefing paper is to analyse the potential overlaps and inconsistencies between the proposed Consumer Rights Directive and financial services law. It also provides a gap analysis in relation to certain situations which would not be covered by either the Consumer Rights Directive or financial services law. It contains information about:

- The scope of the Directive;
- Off-premises contracts, including an explanation about overlaps with the information obligations contained in the Payment Services Directive; and
- Unfair contract terms, including an explanation as to how the Consumer Rights Directive will amend the Unfair Contract Terms Directive.

The briefing paper was requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO). It does not necessarily reflect the official position of the Parliament.

AUSTRIA



SAVINGS DOCUMENTS

Savings books and savings certificates have traditionally been the most widely held financial products in Austria. Notwithstanding developments on the capital markets, savings books are still regarded as one of the most popular types of investments in Austria. The savings book is associated with security and solidity, as well as being a distinctive and easy-to-understand product. This popular understanding of the savings book is supported by special legal information duties and duties of care.

Recently, financial instruments described by their issuer as savings books have been offered to Austrian investors. However, these products do not comply with the expectations associated with the traditional savings book. Their structure is more complicated and for this reason these products are likely to raise incorrect expectations.

To guarantee the continued trust of Austrian customers in savings books and savings certificates the Austrian regulator, the FMA, published a circular describing the requirements of sections 31 and 32 of the Austrian Banking Act (BWG) which have to be fulfilled before a product may be described as a savings book or savings certificate. The circular is addressed to all Austrian credit institutions carrying on deposit business, to all other EU credit institutions authorised to carry on deposit business and offer their services in Austria and to credit institutions from third countries if authorised to carry on deposit business and offer their services in Austria.

According to section 31 para. 1 BWG, “savings deposits refer to funds which are deposited with credit institutions and are not intended for payment transactions, but for investment, and as such can only be accepted against the delivery of certain documents (savings documents)”.

Such savings documents may only be issued by credit institutions authorised to conduct savings deposit business. Furthermore, the designations *Sparbuch* (savings book), *Sparbrief* (savings certificate) or any other combination of words containing the fragment *spar* (savings) may be used only for these documents.

Any fees charged for services in connection with savings deposits and the annual interest rate applicable to a savings deposit must be indicated in a conspicuous place in the savings document. Each change must be recorded in the savings document upon the next presentation of the savings document including an indication of the date on which the interest rate takes effect.

Savings documents with variable interest rates are permissible in certain circumstances only. The escalation clause used must be usual in the market and the currently applicable interest rate has to be indicated. Especially appropriate are interest rates like EURIBOR. It is also necessary to record each valid interest rate used since presenting the savings documents.

Savings deposits must be balanced at the end of each calendar year (closing date), unless a savings deposit is paid out in full within a calendar year. This does not apply to savings certificates.

TAXES ON CAPITAL GAINS

As part of the proposed budget for 2011-2014, the Austrian government introduced a tax on capital gains, which includes interest rates on simple bank accounts.

Until 1 January 2011, individuals were not taxed on capital gains from the disposal of stock representing less than 1% of the company’s shares held within the last five years, or on disposals of other financial assets, provided that all these assets had been held for more than one year.

The budget for 2011-2014 includes these capital gains in a comprehensive system of capital gains taxation at a rate of 25%, which is similar to the current taxation of dividends.

In short, the budget for 2011-2014 results in full taxation of capital gains at 25% income tax.

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FRANCE



FRENCH GOVERNMENT CONSULTS ON UCITS IV IMPLEMENTATION AND ASSET MANAGEMENT REGIME REFORMS

Article 33 of the French Banking and Financial Regulation Bill (loi de regulation bancaire et financière), adopted in October 2010, provides that the French Government is authorised to transpose, by way of Ordinance, EU Directive 2009/65/EC dated 13 July 2009 (“UCITS IV”). It also gives the French Government general powers to decide appropriate measures to modernise the French legal framework applicable to asset management, with a view to reinforcing investor protection and strengthening the competitiveness of the industry.

Further to this, in January 2011 the French Government launched a public consultation in relation to its initial proposals for the transposition of UCITS IV. A second consultation relating to non UCITS funds will be launched in early February 2011.

Concerning UCITS funds, the proposals contain, in addition to the measures transposed from UCITS IV (such as cross border mergers, EU passports for funds management companies and commercialisation procedures), various practical measures aimed at modernisation. These include permitting funds to be split by investors, aligning the list of eligible financial instruments with EU standards, and permitting a fund to invest up to 20% of its assets in any collective investment scheme.

Please contact jean.lhomme@dlapiper.com for further information.

This month's [In Focus](#) also deals with a further significant development in France relating to financial institutions' civil liability for breaches of financial services regulatory rules.

GERMANY



GERMAN BANK LEVY: DRAFT ORDINANCE

The draft for discussion of the Ordinance Regarding Contributions for the Restructuring Fund for Credit Institutions (Ordinance) has just been published. It deals with the details of the Restructuring Fund Act (the Act), which came into force at the beginning of 2011. The Act creates a restructuring fund to be funded until 2050 by German credit institutions with a target amount of 70 billion Euro.

Branches of European credit institutions will be exempt from the levy, taking into consideration that similar bank levies will be charged all over the European Economic Area on a comparable basis.

As far as banks with non-German shareholders are concerned, such groups will face a double burden, which, in contrast to tax law, cannot be avoided under arrangements analogous to Double-Taxation Agreements.

Presently, the basis for the assessment of the bank levy is under discussion. The European Commission has provided non-binding suggested criteria to define the basis for the assessment of bank levies. Under the Ordinance, the bank levy is based on specific derivative positions and on positions of the liability side of balance sheets.

The different composition of the basis of assessment in different jurisdictions will offer arbitrage possibilities such as transferring the assets forming the basis of assessment for the German levy to a jurisdiction where these assets do not form the basis of assessment for the local levy.

Additionally, the German bank levy is structured as a non-deductible operating expenditure. This approach is subject to decisions of the German Constitutional Court, which has placed restrictions on the treatment of operating expenditure as non-deductible.

The structure of the Ordinance can be summarised as follows: The Federal Authority for the Stabilisation of the Financial Market (FMSA) levies annual contributions on credit institutions and can, as required, levy Special Contributions. The Ordinance identifies the maximum amounts which can be imposed. Credit institutions must report the basis for assessment by 30 June of each year to the FMSA. This deadline will be extended for the first year (2011) until 30 August. The annual contribution is due on 30 September of each calendar year on notification by the FMSA.

The basis of assessment for the annual contribution consists of a calculation of “Relevant Liabilities” and “Relevant Derivatives”.

The first element of the basis of assessment, the “Relevant Liabilities”, encompasses liabilities towards credit institutions, securitised liabilities, trust liabilities and subordinated liabilities. This assessment base will be multiplied by 0,0002, 0,0003 and 0,0004 on a progressive basis.

This basis of assessment was subject to harsh criticism in the financial services industry.

The basis of assessing “Relevant Derivatives” relates to “forward transactions” positions in the balance sheet pursuant to the Ordinance Regarding Accounting Standards of Credit Institutions, and will be multiplied by 0,0000015.



The annual contribution is limited to 15% of an institution's annual return; the costs derived from the earnings paid to related enterprises are not taken into account.

The formula for calculating annual contribution can be set out as follows:

Relevant Liability Side ≤ 10 Bill. €

Relevant Liabilities x 0,0002 + Relevant Derivatives x 0,0000015

10 Billion € < Relevant Liability Side ≤ 100 Billion €

Relevant Liabilities x 0,0003 + Relevant Derivates x 0,0000015

Relevant Liability Side > 100 Billion €

Relevant Liabilities x 0,0004 + Relevant Derivates x 0,0000015

Special contributions have to be imposed by the FMSA as soon as they have stated the additional needs.

The annual and special contributions must not exceed 50% of average profits of the institution in the last three business years.

German banks must now set up provisions in their annual balance sheets for 2010. The notifications to be issued from September 2011 are expected to be contested by the banks that receive them.

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LUXEMBOURG



LUXEMBOURG FIRST TO IMPLEMENT UCITS IV

Luxembourg is the first country in the EU to implement the UCITS IV Directive into national law, following the adoption of a new law on 16 December 2010.

On 13 January 2009, the European Parliament approved a reform of the Council Directive 85/611/EEC on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (the UCITS Directive). This recast Directive is commonly referred to as the UCITS IV Directive. The UCITS IV Directive is designed to make the UCITS market more efficient through consolidation of the fragmented European investment fund industry. Consolidation is achieved both at fund level by simplifying and accelerating the cross border notification procedure, and by facilitating asset consolidation through cross border mergers and master feeder structures and at service provider level through the management company passport. This consolidation is expected to boost the industry's competitiveness by lowering costs. At the same time, investor information is improved. Member States are required to transpose the provisions of the Directive and the "implementing measures" into national law, and implement them by **1 July 2011**.

Please click [here](#) for further information on and analysis of the transposition of UCITS IV in Luxembourg.

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SPAIN



SPANISH GOVERNMENT ANNOUNCES PLAN TO STRENGTHEN FINANCIAL SECTOR

Although the Spanish financial sector has dealt effectively with the latest economic turmoil, there are currently certain issues that may affect the solvency of the Spanish financial market. In this regard, the Spanish Government is considering the implementation of certain measures to safeguard the solvency of financial institutions and their ability to deal with events such as those which took place during the economic crisis.

The Spanish Government has therefore developed a plan to strengthen the financial sector, the purpose of which is to restore confidence in financial institutions and to facilitate their financing. The plan focuses on the following issues:

- Spain will strengthen its core capital requirements in advance of the Basel III implementation timeline, in order to be in line with the Basel III requirement for 2013;
- An immediate minimum core capital requirement rate of 8% of risk weighted assets will be established, which will be subject to increase depending on the risk profile of each financial institution;
- Institutions that can not meet the minimum threshold (8%) will be provided with an extension until autumn 2011, in order to be able to obtain the necessary financial resources to reach the minimum threshold; and
- The FROB (Fund for Orderly Bank Restructuring) will provide capital to those institutions that do not meet the required threshold once the autumn 2011 deadline has passed. The provision of capital will be accompanied by a viability plan. The maximum term of an FROB investment will be five years.

OECD URGES TOUGH LINE ON SPANISH PENSION REFORM

The Organisation for Co-operation and Economic Development (OECD), suggests extending the retirement age on the basis of increased life expectancy. Notwithstanding the pension reform that the Spanish Government plans to set up by extending the legal retirement age to 67, up from 65, the OECD still feels that such reform is not enough.

Instead, the organisation suggests extending the retirement age a little every year until it reaches 67 in 2025, then automatically extending it again on the basis of life expectancy. For instance, if life expectancy grew three years by 2050, that year the retirement age would be 70. The government of Prime Minister José Luis Rodríguez Zapatero is committed to passing a reform early this year, but has promised “flexibility” on the exact terms of the bill.

Please contact Miguel.BermudezDeCastro@dlapiper.com for further information.



ELECTRONIC MONEY REGULATIONS 2011 PUBLISHED

19 January 2011

On 19 January 2011, the [Electronic Money Regulations 2011](#) were published. The Regulations implement the second Electronic Money Directive (2009/110/EC), which EU Member States are required to bring into force by 30 April 2011.

The Regulations establish a new authorisation regime for certain issuers of electronic money other than banks and building societies and set out conduct of business rules for all electronic money issuers relating to the safeguarding and redemption of customers' funds.

The Regulations come into force on 30 April 2011, with the exception of certain provisions set out in Regulation 2 which come into force on 9 February 2011.

HOME OFFICE TO LEAD PROJECT TO ESTABLISH ECA

17 January 2011

On 17 January 2011, the Home Office, the UK's lead government department for immigration and passports, drugs policy, counter-terrorism, police and science and research, published a [press release](#) announcing that it will lead the project to create the UK's new Economic Crime Agency (ECA). This follows an announcement by the government in 2010, that it would create a single agency to take on the work of tackling serious economic crime, which is currently undertaken by the Serious Fraud Office, the FSA and the Office of Fair Trading. In November 2010, however, the government confirmed that the FSA's criminal enforcement powers concerning insider dealing would be retained within the new Consumer Protection and Markets Authority, rather than passing to the ECA.

A consultation with key stakeholders will take place later this year and the government aims to have the initial elements of the ECA in place in shadow form by the end of summer 2011.

IMPLEMENTATION OF THE UCITS IV DIRECTIVE

FSA, 22 December 2010

The FSA and HM Treasury have published a joint [consultation paper](#) setting out proposals for the implementation of the revised Undertakings for Collective Investment in Transferable Securities Directive (2009/65/EC) (UCITS IV).

UCITS IV repeals the current UCITS Directive and must be implemented into national law by all European Union members by 1 July 2011. UCITS IV introduces the following changes:

- Introduction of a management company passport, which allows a UCITS management company to operate a UCITS fund authorised in a different EU Member State without the need to be established in the Member State of the fund;
- Improved investor disclosure;
- Removal of administrative barriers to the cross-border marketing of UCITS;
- A framework for mergers between UCITS funds;
- Provision for 'master-feeder' structures, where a UCITS fund (feeder) will be allowed to invest the majority of its assets into another UCITS fund (master); and
- Improved supervisory co-operation between national regulators.

Responses to the consultation paper must be received by 21 March 2011.



FSA PUBLISHES REVISED REMUNERATION CODE

FSA, 17 December 2010

The FSA has [published an updated Remuneration Code](#) to take into account changes required by the Capital Requirements Directive (CRD 3). CRD 3 aims to align remuneration principles across the EU.

The FSA's existing code requires firms to apply "remuneration policies, practices and procedures that are consistent with and promote effective risk management" and applies to the largest banks, building societies and broker dealers. The revised code will not only apply to these firms, but will also include a much larger group of firms including all banks and building societies and CAD investment firms.

Firms already within the scope of the FSA's Remuneration Code are required to comply in full with the revised Code from 1 January 2011. For other firms that are coming within scope for the first time there will be transitional rules in place. These firms must comply as soon as reasonably possible, and by 31 July 2011 at the latest.

Concurrently, the FSA has also published new rules implementing the CRD 3 requirements on disclosure of remuneration. Under these rules, firms will be required to disclose information on their remuneration policies and pay-outs. The FSA consulted on this in a separate [consultation paper](#) published on 10 November 2010.

The majority of respondents agreed with the FSA's approach and as such:

- Firms will need to disclose details of their remuneration policies at least on an annual basis; and
- The FSA will require firms to make their first disclosure in respect of 2010 remuneration as soon as practicable, and no later than 31 December 2011.

NEW DEPOSIT GUARANTEE LIMIT INCREASE TO £85,000

FSA, 17 December 2010

The FSA has announced that the new deposit compensation limit for the UK under the Financial Services Compensation Scheme (FSCS) will increase from £50,000 to £85,000 per person, per authorised firm, from 31 December 2010. This is the sterling equivalent of the €100,000 deposit compensation limit which came into force in all European Economic Area (EEA) states at the end of last year.

Further changes which came into effect on 31 December 2010 are:

- Fast payout rules, with a target of a seven day payout for the majority of claimants and the remainder within the required 20 days; and
- Gross payout, which protects customers by ring-fencing their deposits if they have savings and loans with the same firm. Currently, any outstanding loan or debt would be deducted from any compensation.

The FSCS will now begin a campaign to increase awareness of the FSCS compensation limits and to encourage customers to understand the details of the cover provided.

The FSCS is funded by the financial services industry, through a levy paid by authorised firms. On 20 January 2011 the FSCS announced an additional 2010/2011 interim levy of £326 million, which will be used to pay compensation to customers who have suffered loss following major investment failures, including those of Keydata Investment Services Limited and Wills & Co. Firms in the sub-classes to which the failures relate will be responsible for payment of the interim levy, with £93 million to be paid by investment intermediary firms and £233 million by fund management firms.



FSA CONFIRMS CHANGES TO THE EXISTING TRAINING AND COMPETENCE REGIME

FSA, 17 December 2010

The FSA has [published final rules to strengthen training and competence requirements](#) for all individuals carrying out customer facing regulated retail activities. The rules also clarify FSA expectations regarding standards of behaviour for all Approved Persons. These rules are part of the FSA's ongoing Retail Distribution Review and came into force on 1 January 2011.

Qualifications that meet FSA regulatory requirements will now be listed in the FSA Handbook so that firms and individuals will have an easily accessible and comprehensive source of approved qualifications. The rules also introduce a 30 month deadline for individuals to complete all modules of a qualification required for their role.

Further changes clarify how individuals operating in a Significant Influence Function should be responsible for ensuring the competence of employees in their designated area of the business.

FSA CONFIRMS PROFESSIONAL STANDARDS FOR INVESTMENT ADVISERS FROM 2013

FSA, 20 January 2011

The FSA has [confirmed](#) that retail investment advisers will need to hold a Statement of Professional Standing (SPS) if they want to give independent or restricted advice after January 2013. This will be in addition to the requirement to obtain FSA Approved Person status.

The SPS will be issued to bodies which:

- Act in the public interest and further the development of the profession;
- Carry out effective verification services;
- Have appropriate systems and controls in place and provide evidence to the FSA of continuing effectiveness; and
- Co-operate with the FSA on an ongoing basis.

The FSA believes that the statement will provide customers with evidence that the adviser subscribes to a code of ethics, is qualified and has kept their knowledge up to date.

ENFORCEMENT DECISIONS

FSA fines Barclays £7.7 million for investment advice failings and secures as much as £60 million in redress for customers

FSA, 18 January 2011

The FSA has [fined Barclays Bank \(Barclays\) £7.7 million](#) for failures in the relation to two funds, Aviva's Global Balanced Income Fund (the Balanced Fund) and Global Cautious Income Fund (the Cautious Fund). The fine is the highest to date imposed by the FSA for retail failings. Barclays will now have to contact customers and pay redress where appropriate. Barclays has already paid approximately £17 million in compensation, and the FSA estimates that up to £42 million more may need to be paid to customers who received unsuitable advice.



Between July 2006 and November 2008, Barclays sold the two funds to 12,331 people with investments totalling £692 million. However, there were a number of serious failings in the way the funds were sold, including the failure to:

- Ensure the funds were suitable for customers in view of their investment objectives, financial circumstances, investment knowledge and experience;
- Ensure that training given to sales staff adequately explained the risks associated with the funds;
- Ensure product brochures and other documents given to customers clearly explained the risks involved and could not mislead customers; and
- Have in place adequate procedures for monitoring sales processes and responding promptly when issues were identified.

The FSA's investigation revealed that even though Barclays had itself identified potentially unsuitable sales as early as June 2008, it did not take appropriate and timely action. During the investigation Barclays continued to carry out a past business review to evaluate the suitability of the sales of both funds: 3,099 sales of the Cautious Fund (51% of all sales) and 3,378 of the Balanced Fund (74% of all sales) have been identified as requiring further consideration.

FSA fines RBS and Natwest £2.8 million for poor complaints handling

FSA, 11 January 2011

The FSA has [fined Royal Bank of Scotland \(RBS\) and National Westminster Bank \(NatWest\) £2.8 million](#) for failings in the way they handled customers' complaints.

The FSA found a number of failings within the banks' approach to routine complaints handling, which resulted in inadequate responses to more than half the complaints reviewed by the FSA. Of the complaint files reviewed by the FSA, 53% showed deficient complaints handling, 62% showed a failure to comply with FSA requirements on timeliness and disclosure of Financial Ombudsman Service referral rights and 31% failed to demonstrate fair outcomes for consumers.

The failings were uncovered during the FSA's review of complaints handling in the UK's major retail banks. As a result of the thematic review, five banks have undertaken significant action to improve their complaints handling. The FSA subsequently published a [consultation paper](#) on 30 September 2010 on changes to complaints handling requirements, which aims to increase the quality of complaints handling across the industry and increase senior management accountability for complaints.

The failings identified include:

- Delays in responding to customers;
- Poor quality investigations into complaints, with complaints handlers failing to obtain and consider all the appropriate information when making their decision;
- Issuing correspondence that failed to fully address all of the concerns raised by customers and failed to explain why complaints had been upheld or rejected; and
- Customers not receiving their Financial Ombudsman Service referral rights within the appropriate time period.

The FSA now requires RBS and Natwest to work with an independent skilled person to undertake an extensive review of all parts of their complaints handling arrangements.



FSA fines Scottish Equitable Plc £2.8 million and announces redress of £60 million for customers

FSA, 16 December 2010

The FSA has [fined Scottish Equitable Plc](#) (Scottish Equitable) £2.8 million for causing significant consumer detriment through poor administrative procedures.

In 2009, Scottish Equitable informed the FSA that it had identified around 300 issues relating to problems in administering its policies including:

- Not issuing around 238,000 policyholder documents;
- Incorrectly calculating guaranteed minimum pension payments and future benefits of 774 customers;
- Failing to identify errors in calculating rebates to charges on pension policies for 25,000 policies;
- Not matching Department of Work and Pensions contributions to personal pensions for around 2,500 customers; and
- Failing to trace around 200,000 policyholders who had moved home without informing Scottish Equitable of their new address.

Scottish Equitable is undertaking a redress programme to compensate customers who missed out on payments or benefits that they were entitled to or who were disadvantaged by its actions. Scottish Equitable has already started to compensate consumers and will have paid £30 million in redress by the end of 2010. The total consumer detriment from the 300 issues identified by Scottish Equitable is estimated to be approximately £60 million.

Former senior manager sentenced to 27 months in prison for insider dealing and money laundering

FSA, 21 January 2011

Neil Rollins, a former senior manager of PM Onboard Limited has been found guilty of five counts of insider dealing and four counts of money laundering after he traded on the basis of information he obtained as a result of his senior position and laundered the proceeds. Rollins has been sentenced to 27 months in prison and ordered to pay £197,000.66.

Since 2009, the FSA has secured 10 convictions in relation to insider dealing and is currently prosecuting another 12 individuals.



FSA fines spread bet broker £490,000 for transaction reporting failures

20 January 2011

The FSA has [fined City Index Limited \(City Index\) £490,000](#) for failing to provide accurate transaction reports to the FSA. Firms are required to ensure they submit data for reportable transactions by close of business the day after a trade is executed.

Between November 2007 and September 2009, City Index failed to submit accurate transaction reports in respect of approximately 2 million transactions, representing nearly 60% of its reportable transactions. It failed to report approximately 55,000 transactions and reported approximately 1,970,000 transactions with one or more data fields completed incorrectly.

City Index was also found to be in breach of the FSA's Principles for Businesses as the firm failed to put in place a mechanism for ensuring the accuracy and validity of its transaction reports, and failed to identify fundamental errors in its transaction reporting process upon the implementation of a new trading platform.

This is the seventh fine the FSA has issued since August 2009 in relation to firms failing to provide accurate transaction reports.

Former analyst fined £50,000 for disclosing misleading information

FSA, 13 January 2011

The FSA has [fined Christopher Gower £50,000](#) for making misleading and inaccurate disclosures to the market about Enterprise Inns plc (ETI), which substantially impacted ETI's share price.

Gower circulated a Bloomberg instant message regarding a conversation to which he had been party concerning ETI being granted approval by HMRC to convert to a Real Estate Investment Trust. The message did not accurately reflect Gower's conversation and it gave the impression of containing inside information, although it is accepted that Gower had no such information. The message was widely circulated in the market and contributed to a substantial increase in the volume of ETI shares traded.

The FSA held that Gower failed to observe proper standards of market conduct.

CHINA – HONG KONG



REGULATION OF CREDIT RATING AGENCIES IN HONG KONG

The Hong Kong Securities and Futures Commission (SFC) has recently published its conclusions on the Consultation Paper Concerning the Regulatory Oversight of Credit Rating Agencies issued in July 2010 (Consultation Paper).

Credit rating agencies (CRAs) serve an important function in the global financial system by providing investors with an indication of the creditworthiness of issuers of securities and their debt instruments. The ratings given by CRAs often have great influence over the investment decisions of individuals, corporations and even governments. However, CRAs have recently been criticised for lacking independence and transparency in their work. It has been suggested that conflicts of interests plague the industry as many CRAs adopt the issuer-pay model, under which issuers make payments to CRAs for a rating on their organisations.

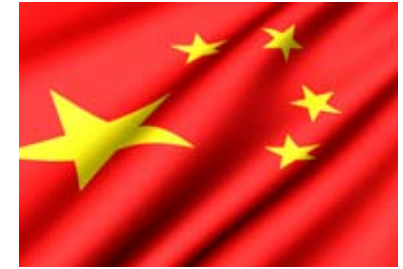
It has long been recognised that the regulatory oversight in respect of CRAs in Hong Kong is inadequate in view of the important role of CRAs in the economy and financial system. Currently, there is no formal regulatory supervision over CRAs by the Hong Kong authorities (the SFC included). In order to improve the quality of the ratings by CRAs and to ensure their independence and objectivity, the Consultation Paper was issued by the SFC in July 2010 with a view to establishing a regulatory regime over CRAs operating from Hong Kong.

The other reason for the SFC to introduce a regulatory regime in respect of CRAs was to ensure that CRAs operating in Hong Kong observe a code of conduct in line with the international standards currently applicable to CRAs. The timeframe for the introduction and implementation of the new regime was particularly important in view of the position taken by the EU that any credit ratings issued by CRAs outside the EU are unlikely to be acceptable in the EU from 7 June 2011 onwards, unless the regimes under which the relevant CRAs are regulated are “equivalent to” or “as stringent as” that which exists in the EU.

The Consultation Paper proposes various measures to regulate CRAs operating in Hong Kong, including, most notably, a licensing system under which all CRAs must be licensed to provide credit rating services. Specifically, it is proposed that a new type of regulated activity, in addition to the existing nine types, should be created under the Securities and Futures Ordinance (SFO). This will bring the provision of credit rating services within the existing regulatory regime enforced by the SFC, under which corporations or institutions must be licensed to carry out any regulated activity (e.g. dealing in securities) as defined under the SFO. Moreover, any individual performing a regulated function for a licensed corporation must also be a licensed representative accredited to that licensed corporation. It is hoped that by introducing a licensing regime, the SFC will have more effective control over the standard and quality of the services provided by CRAs by limiting entry into the industry.

Various amendments to the SFO are also being proposed under the Consultation Paper to give effect to the new licensing system. Under the proposed amendments, the preparation of credit ratings for dissemination to the public or distribution by subscription, whether in Hong Kong or elsewhere, or with a reasonable expectation that they will be so disseminated or distributed, will fall under the regulated scope of the SFO. The proposed amendments, however, expressly exclude application of the licensing requirement to the preparation of credit ratings for private or internal purposes.

The SFC has also prepared a draft Code of Conduct for Persons Providing Credit Rating Services (CRA Code), which sets out the guidelines in determining whether a person is fit and proper to be licensed for Type 10 regulated activity. The CRA Code is based on the provisions in the Code of Conduct Fundamentals for Credit Rating Agencies issued by the International Organization of Securities Commissions in May 2008. Under the CRA Code, CRAs are required to ensure that their credit rating business and other types of businesses are sufficiently segregated to avoid conflicts of interests. The CRA Code also contains guidelines in respect of the quality and methodology to be used in preparations of ratings.



Failure to comply with the standards and practices in the CRA Code may influence the SFC's decision concerning the fitness and properness of an organisation or its representative to be or to remain licensed.

In respect of the transitional arrangements, the SFC proposes to adopt a "grandfathering" approach, under which the existing staff analysts of CRAs will only be required to complete a refresher course within six months of securing licence approval. Subsequently, individuals will have to obtain various recognised industry qualifications and also pass certain local regulatory framework papers specified in the CRA Code if they wish to become licensed as responsible officers or representatives of CRAs.

The proposals contained in the Consultation Paper were met with general approval from the securities industry. It is expected that the necessary legislative amendments will be approved in the first quarter of 2011, with the licensing process to commence shortly thereafter. The SFC is confident that the licensing regime can be put in place and implemented before 7 June 2011 to bring Hong Kong's regulatory standard in line with that prescribed in the EU. However, whether the new regulatory regime will in fact improve the standard of the CRA industry as a whole, and ensure that the CRAs and their ratings are impartial and independent, remains to be observed after its implementation later this year.

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REFORMING MINIMUM CAPITAL REQUIREMENTS: U.S. REGULATORS' VIEWS ON IMPLEMENTATION OF BASEL III

For those seeking insights on the approach that might be taken by U.S. bank regulators in their efforts to conform U.S. banking standards to the norms required by international capital adequacy agreements, a recent speech by Federal Reserve Governor Daniel K. Tarullo provided a keen insight into the thinking of senior officials at this critically important bank regulatory agency. Speaking on 12 November 2010 on the topic of “Next Steps in Financial Regulatory Reform,” at a conference sponsored by the George Washington University Center for Law, Economics and Finance, Governor Tarullo provided a broad overview of the history of the implementation of Basel I and Basel II standards for U.S. banking institutions, and the prospects for conforming U.S. regulatory provisions to the forthcoming requirements of the Basel III convention. Although noting that additional definitional and interpretative work remained to be undertaken by the Basel Committee on Banking Supervision and other consultative bodies, some broad themes were evident as to the new approaches to capital adequacy standards to be introduced by Basel III. These include the following:

- Basel III will create a new minimum common equity capital requirement, involving a definition of common equity that will prevent firms or national regulators from including in the calculation of common equity certain assets that could dilute its “loss-absorbing” character;
- The minimum common equity ratio will be set at 4.5% of risk-weighted assets, with an additional requirement for a 2.5% “conservation buffer”. This conservation buffer is a new feature of capital regulation, structured to absorb those losses that a bank may suffer during unusual periods of financial stress. As a related point, while banks that are under stress may allow their common equity ratio to drop below the 7% level that is the sum of these two requirements, restrictions on dividends and other capital distributions will become more severe as the common equity ratio drops closer to the 4.5% level;

- Risk weights associated with a banking institution’s traded assets and counterparty exposures will be changed as a result of Basel III, reflecting the unfavourable experience under current capital standards during the recent financial crisis and the tendency to arbitrage credit risk by turning certain positions into traded assets with lower risk weights;
- The establishment of a new leverage ratio that is generally similar to those requirements already in place under applicable U.S. banking regulation will be expressly provided for under the new standards of the Basel III convention; and
- Complex transition periods will be created under this new international standard, with all the aforementioned Basel III requirements being phased in between January 1, 2013 and January 1, 2019. While preferring a shorter transition period, the U.S. bank regulatory community, according to Governor Tarullo, accepted these time periods in the interests of securing an overall international agreement.

In outlining these views, Governor Tarullo expressed concern about the pro-cyclicality inherent in the new Basel III standards, and stressed the importance of securing technical interpretations that would enforce the prudential nature of the new provisions. Rejecting the proposition that U.S. banks might be advantaged in the move toward Basel III standards by the fact that Basel II is not yet operative for many large U.S. banking entities, Governor Tarullo noted that U.S. banking regulators had already, as a result of the U.S. Troubled Asset Relief Program and other crisis-related actions, imposed the need for higher capital requirements on U.S. banks. In fact, as the Governor noted, such a step was in contrast to the observation that capital levels for some non-U.S. banks actually declined under Basel II from Basel I levels.



The positions taken in Basel III, according to Governor Tarullo, echo closely the new capital requirements incorporated by the recently enacted Dodd Frank Wall Street Reform and Consumer Protection Act, particularly in said legislation's mandate to the Federal Reserve that stricter capital requirements be imposed on large, interconnected financial institutions that might engender a comparatively greater systemic risk. U.S. interests are best served, according to this view, in fostering the Federal Reserve's plans to fulfil these new domestic statutory obligations in full participation with this international process, realising thereby the goal of the convergence of international capital adequacy standards and U.S. banking regulation.

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REGULATORY OBLIGATIONS AND CIVIL LIABILITY: FRENCH AND ENGLISH LAW COMPARED

French Supreme Court establishes professional obligations as a general legal basis for civil liability claims against financial institutions

With the new European Supervisory Authorities (ESAs), ESMA, EBA and EIOPA having started to operate in January 2011, concerns have been expressed in many EU Member States, including France, that regulatory formulation is moving into new (European) territory – which is less likely to accommodate local cultures and practices.

In essence, the ESAs are, following the recommendations of the de Larosière group, designed to “strengthen European supervisory arrangements to better protect its citizens and rebuild trust in the financial system”. They have increased responsibilities, legal powers and authority, and are expected to make a decisive contribution to the definition of a truly single European regulatory space in the area of banking and financial services through the development of detailed fully harmonised rules and common supervisory requirements and approaches.

In the context of the financial crisis, French banking officials have voiced concerns that the ESAs, confronted with the major banking crisis and the failures of “light touch” regulation in certain jurisdictions, might be inclined to impose across the board a strict and severe approach to the regulation and supervision of financial institutions. The fear is that such a “hard line” approach would adversely and indiscriminately affect industry champions operating even under national regulatory supervision which proved more effective in the light of the events that occurred during the financial crisis.

Such concerns are reinforced in the specific French judicial context, in the light of recent decisions of the *Cour de cassation* (French supreme court) relating to the civil liability of financial institutions. These decisions have the effect of substantially extending the scope of such institutions’ exposure to clients’ claims for damages.

Traditionally, in France, professional (or regulatory) obligations, such as rules of conduct, imposed upon banks, investment services providers and other financial institutions are strictly confined within the “regulatory sphere”. Designed to protect the general interest, and in particular the integrity of financial markets, such regulatory obligations only give rise, in the case of violations, to disciplinary sanctions by appropriate financial services regulators, namely, in France, the *Autorité des marchés financiers* (AMF), the French financial markets regulator, and the *Autorité de contrôle prudentiel* (ACP), the French banking and insurance regulator.

Outside such “regulatory sphere”, and on the basis of principles set out in the French civil code (in particular art. 1147), French case law has developed, over the years (since the *Buon* decision of 5 November 1991), a specific framework of obligations imposed upon financial institutions in their dealings with their clients. The violation of such obligations constitutes a *faute civile* (civil negligence) giving rise to a civil liability of such institutions, i.e., an obligation on their part to pay damages to clients to compensate their proven losses. The essential obligations thus recognised by case law relate to the *obligations d’information et de mise en garde* (obligations to inform and to “warn”), which apply within a set of circumstances defined principally by reference to the clients’ (in)ability to assess risks (*client non averti*) and to the speculative and complex nature of the financial services and products proposed by financial institutions.

It is interesting to note that, in the area of investment services, such criteria and categories were not aligned with the categorisation and obligations regime resulting from the Markets in Financial Instruments Directive (2004/39/EC) (MiFID), with the result that the distinction was reinforced between the two regimes of civil liability and disciplinary sanctions.

Breaking away from this distinction, however, in a decision dated 26 February 2008, the *Cour de cassation* has accepted that a violation by a financial institution of its regulatory obligation (pursuant to the AMF Rulebook) to make appropriate margin calls



in relation to the purchase of forwards provided legal grounds for a claim in damages against such institution. The importance of this decision, as a reversal of existing case law, appears to have been overlooked by French legal commentators, until further recent confirmatory decisions of the *Cour de cassation*, which clearly establish the new principle that violations by financial institutions of any of their regulatory obligations generally constitute a *faute civile* (civil negligence), eligible as such to claims in damages by clients of such institutions, provided only that such obligations are designed not only to protect the financial markets but also the interests of clients.

The distinction between regulatory obligations exclusively designed to protect the financial markets and those that are also designed to protect clients of financial institutions may be further clarified by the Courts. It is, however, clear, considering the legal basis adopted by the *Cour de cassation* in its recent decisions (art. L533-11 *et seq.* of the French monetary and financial code), that MiFID rules of conduct, as transposed in France, must generally be regarded as “designed to protect clients’ interests”. Beyond these, certain organisational rules arising from MiFID, such as those relating to the management of conflicts of interests, should also, in our view, qualify as client protection rules.

In the absence, so far, of class actions in France (in spite of recent initiatives by French members of Parliament – which have consistently been rejected), the practical effect of these decisions will, however, remain relatively limited as retail clients will continue to face complex and costly procedures to establish their claims.

Civil actions in the United Kingdom

In contrast to the French context of separate (although ever more closely converging) spheres, in the United Kingdom there is substantial overlap between the regulatory and civil jurisdictions. The first point to note is that the provisions in the Financial Services and Markets Act 2000 (the Act) (some of which are summarised below) do not remove any common law causes of action a person may have; rather, the Act provides certain additional rights.

Section 26 of the Act provides that an agreement made by an unauthorised person in the course of carrying on a regulated activity in contravention of the general prohibition in section 19 of the Act is unenforceable against the other party. The other party is entitled to recover any money or property paid or transferred under the agreement and compensation for any loss sustained as a result of having parted with it.

Likewise, under section 30 of the Act, an agreement resulting from unlawful communications is unenforceable against the other party if he enters into it as a customer, but the court may allow the agreement to be enforced if it is satisfied that it is just and equitable in the circumstances of the case. Much depends on whether the person who made the unlawful communication reasonably believed that he was not making an unlawful communication and whether the customer knew that the agreement was entered into in consequence of the unlawful communication.

Under section 150 of the Act, where an authorised person contravenes an FSA rule, a private person who has suffered loss as a result of the contravention may bring an action for damages. It should be noted that section 150 does not apply to a breach of the FSA’s overarching Principles for Businesses, but only to breaches of specific rules. The remedy under section 150 is only available to private individuals and so is not available to individuals who carry on investment business or firms which carry on business of any kind. The right of action is subject to the defences applying to actions for breach of statutory duty and section 150 does not remove any common law causes of action which the individual might otherwise have.

There is one exception in relation to financial promotions. Authorised firms must ensure that a communication or financial promotion is fair, clear and not misleading (this rule is derived from Article 19 of MiFID). Provided a firm takes reasonable steps to ensure that a communication or financial promotion complies with the fair, clear and not misleading rule, a contravention of that rule does not give rise to a right of action under section 150.



The overlap between the regulatory regime and an action for damages under section 150 was considered in a recent High Court decision (*Andrews v SBJ Benefits Consultants* (4 November 2010)). The claimant claimed damages under section 150 when he had previously accepted a determination by the Financial Ombudsman Service in his favour. By virtue of section 228(5) of the Act, if a claimant accepts a determination of the Ombudsman, it is binding and final. The Ombudsman awarded damages of £100,000 which was the statutory limit for an Ombudsman award (section 229(4) of the Act). The Ombudsman also recommended that the defendant pay an additional sum. This recommendation was not binding. Although the claimant's claim under section 150 had a different legal basis to his complaint to the Ombudsman, the court held that once the claimant had accepted the Ombudsman's determination, which was binding, the claimant could not bring a separate claim under section 150 and his right of action had merged with the earlier Ombudsman award.

Conclusion

This comparison between the French and English regimes makes it clear that, in this era of increasing EU-wide regulation and supervision, Member States' pre-existing domestic regimes present an important additional dimension. This is particularly relevant in the light of the EU's increased reliance on directly effective legislation, which will, in theory, impose identical requirements on all Member States. It remains to be seen, however, whether uniformity of approach will be increased in practice, given the varying contexts in which Member States will have to interpret such legislation.

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