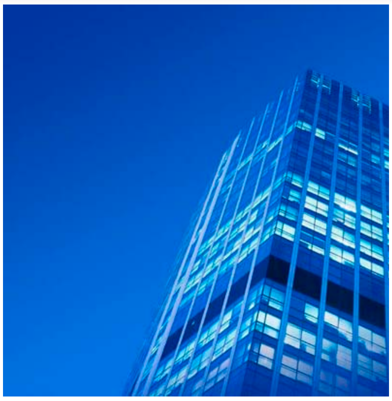
Deloitte.



Governance, Regulation & Compliance

Regulatory Radar

Regulatory Newsletter, Issue 40, November - December 2011

Newsletter on banking and financial regulation

In this issue

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The past months, the FSB published its overview report on the implementation of the G20 recommendations for strengthening financial stability. The report details the general progress made in developing and implementing global policy reforms since the G20 Seoul Summit in November 2010. The FSB found, that while progress is being made, a number of issues still need to be addressed e.g. establishing legal frameworks for effective intervention in failing firms and weaknesses in their supervisors' mandates.

The Basel Committee on Banking Supervision (BCNS) issued several interesting documents on Basel III e.g. consultation papers on the definition of capital disclosure requirements and on the application of own risk credit adjustments to derivatives as well as a third set of Basel III frequently asked questions. Next to this the BCBS published a consultation paper on internal audit functions in banks. The paper sets out 20 principles with respect to the internal audit function in banks, organised in three sections: A) Supervisory expectations relevant to the internal audit function, B) The relationship of the supervisory authority with the internal audit function, and C) Supervisory assessment of the internal audit function.

On EU level, REMIT, the regulation on wholesale energy market integrity and transparency was published as well as further initiatives relating to the regulation of credit rating agencies. The EC also published two proposals relating to the fund industry i.e. a proposal for Regulation on European Venture Capital Funds and a proposal for a Regulation on European Social Entrepreneurship Funds.

On a national level, the NBB published the circular NBB_2011_09 of 20 December 2011 regarding the reporting of the effective management on the internal control system. The Circular mainly aims to align the reporting of the effective management on the internal control system with the Twin Peaks supervisory structure. This results amongst others in a separate report that has to be drafted by the effective management on the assessment of the internal control system in relation to investment services and investment activities. A summarized overview of all the changes is available here in ➲Dutch and in ➲French.

Finally, this issue also includes a ➲briefing note setting out the key requirements of the European Markets Infrastructure Regulation (EMIR), comparing them to the corresponding requirements in the Dodd-Frank Act and identifying a number of key considerations for firms.

We hope you enjoy the reading.

The Editorial Board.

Financial Services Industry

Normative documents

Official Journal of Belgium (BS/MB)

AML/CFT

On 6 December, the ➲Law of 26 November 2011 amending the Law of 11 January 1993 on preventing the use of the financial system for purposes of money laundering and terrorist financing was published in official journal. The amendment to the Law of 11 January 1993 makes the FPS Finance responsible for supervising compliance by Bpost with its AML/CFT obligations in relation to the financial services it offers.

Remuneration of non-executive directors

On 23 November, the ➲Law of 7 November 2011 amending the Companies Code with respect to the variable remuneration of non-executive directors of listed companies was published in the official journal. This amendment to the Companies Act extends the requirement that agreements granting variable remuneration are approved by the General Shareholders Meeting to all non-executive directors of listed companies. Previously the requirement only applied to independent directors.

Settlement finality and financial collateral arrangements

On 10 November, the ➲Law of 26 September 2011 transposing the Directive 2009/44/EC amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims was published in the official journal. The law amends the Law of 29 April 1999 transposing Directive 98/26/EC on settlement finality in payment and securities settlement systems and the Law of 15 December 2004 on financial collateral arrangements to transpose Directive 2009/44/EC into Belgian law.

Financial collateral arrangements and judicial reorganization

On 10 November, the ➲Royal Decree of 7 November

2011 determining the derivatives and other financial transactions referred to in article 4, §3 en §4 of the Law of 15 December 2004 on financial collateral arrangements. The amendments to the Financial Collateral Law made by the Law of 26 September 2011 (see above) introduced among other things a rule stating that the netting will no longer be possible:

- During a judicial reorganisation procedure where the debtor who is subject to the procedure is a corporate creditor;
- During a judicial reorganisation procedure where the debtor is a public or financial institutions but the creditor is not such an entity;
- In case of emergency measures against financial institutions, by a creditor which is not a public or financial institutions.

On the above mentioned rule, there are however several exceptions. One of these exceptions is netting pursuant to a financial collateral agreement, netting agreement and close-out netting agreement entered into in relation to derivatives and other financial transactions specified by Royal Decree, i.e. Royal Decree of 7 November 2011. Pursuant to the Royal Decree the “protected transactions” will include (i) derivatives, transactions (such as sale, resale and lending) in respect of securities and other types of instruments and spot transactions, (ii) lending in relation to the settlement of financial instruments, and (iii) guarantees, sureties, and letters of credit in respect of any of the above.

Official Journal of the European Union (OJ)

Wholesale energy market integrity and transparency

On 8 December, the ➲Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency was published (REMIT) in OJ L326. The regulation:

- Prohibits use of inside information when selling or buying at wholesale energy markets. Exclusive and price-sensitive information should be disclosed before trades can take place.
- Outlaws manipulative transactions or the spreading of incorrect information that give false or misleading signals about the supply, demand or prices.
- Obliges energy traders to report their transactions to the Agency for the Cooperation of Energy Regulators (ACER), either directly or through a third party (e.g. a broker or trade reporting system). These data include the price, volumes, date and time of the transaction, the name of the seller and the buyer and the beneficiary. This particular obligation will become applicable with an implementing Regulation, which will be developed in the months to come and will clarify the exact details of the data to be passed on.
- Makes (ACER) responsible for independent monitoring of all the trades and checking whether rules are followed. On the basis of the data received, ACER will be able to conduct its own analysis. Once its initial assessment confirms a suspicion of market abuse, it

will request national regulators to investigate the case on the spot. In case of cross-border manipulations it will also coordinate the investigations. If regulators establish a breach of rules they will apply appropriate penalties which have to reflect the damage caused to consumers.

AML/CFT and sanctions

In December, the following documents related to AML/CTF and sanctions measures were published in the Official Journal:

- Council Implementing Regulation (EU) No 1244/2011 of 1 December 2011 implementing Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria in OJ L319 of 2 December 2011;
- Council Implementing Regulation (EU) No 1245/2011 of 1 December 2011 implementing Regulation (EU) No 961/2010 on restrictive measures against Iran in OJ L319 of 2 December 2011;
- Council Decision 2011/782/CFSP of 1 December 2011 concerning restrictive measures against Syria and repealing Decision 2011/273/CFSP in OJ L319 of 2 December 2011;
- Council Decision 2011/783/CFSP of 1 December 2011 amending Decision 2010/413/CFSP concerning restrictive measures against Iran in OJ L319 of 2 December 2011;
- Council Regulation (EU) No 1295/2011 of 13 December 2011 amending Regulation (EU) No 1284/2009 imposing certain specific restrictive measures in respect of the Republic of Guinea in OJ L330 of 14 December 2011;
- Council Implementing Regulation (EU) No 1320/2011 of 16 December 2011 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus in OJ L335 of 17 December 2011;
- Council Implementing Decision 2011/847/CFSP of 16 December 2011 implementing Decision 2010/639/CFSP concerning restrictive measures against Belarus in OJ L335 of 17 December 2011;
- Council Implementing Decision 2011/848/CFSP of 16 December 2011 implementing Decision 2010/788/CFSP concerning restrictive measures against the Democratic Republic of the Congo in OJ L335 of 17 December 2011;
- Council Decision 2011/859/CFSP of 19 December 2011 amending Decision 2010/232/CFSP renewing restrictive measures against Burma/Myanmar in OJ L338 of 21 December 2011;
- Council Decision 2011/860/CFSP of 19 December 2011 amending Decision 2010/800/CFSP concerning restrictive measures against the Democratic People's Republic of Korea in OJ L338 of 21 December 2011;
- Council Regulation (EU) No 1360/2011 of 20 December 2011 amending Regulation (EU) No 204/2011 concerning restrictive measures in view of the situation in Libya in OJ L341 of 22 December 2011;

- ➲ Council Decision 2011/867/CFSP of 20 December 2011 amending Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya in OJ L341 of 22 December 2011;
- ➲ Council Implementing Regulation (EU) No 1375/2011 of 22 December 2011 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 687/2011 in OJ L343 of 23 December 2011.

In November, the following documents related to AML/CTF and sanctions measures were published in the Official Journal:

- ➲ Commission Implementing Regulation (EU) No 1097/2011 of 25 October amending Council Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo in OJ L235 of 1 November 2011;
- ➲ Council Regulation (EU) No 1139/2011 of 10 November 2011 amending Regulation (EU) No 204/2011 concerning restrictive measures in view of the situation in Libya in OJ 293 of 11 November 2011;
- ➲ Council Decision 2011/729/CFSP of 10 November 2011 amending Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya in OJ 293 of 11 November 2011;
- ➲ Council Regulation (EU) No 1150/2011 of 14 November 2011 amending Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria in OJ 296 of 15 November;
- ➲ Council Implementing Regulation (EU) No 1151/2011 of 14 November 2011 implementing Regulation (EU) No 442/2011 concerning restrictive measures in view of the situation in Syria in OJ 296 of 15 November;
- ➲ Council Regulation (EU) No 1215/2011 of 24 November amending Regulation (EC) No 131/2004 concerning certain restrictive measures in respect of Sudan in OJ 310 of 25 November.

National Bank of Belgium (NBB)[1]

Adequacy of the internal control system

On 20 December, the NBB published the circular NBB_2011_09 of 20 December 2011 regarding the reporting of the effective management on the internal control system (➲in Dutch and ➲in French). It supersedes the existing circular CBFA_2008_12 of 9 May 2008 for the financial institutions which are subject to the prudential supervision of the NBB (i.e. credit institution, stockbroking firms, settlement institutions and institution equivalent to settlement institutions, payment institutions

[1] As of 1 April 2011, the new “Twin Peaks” supervisory architecture has come into force in Belgium. The new architecture replaces the Banking, Finance and Insurance Commission (CBFA) with two new regulators, the National Bank of Belgium (NBB) and the newly created Financial Services and Markets Authority (FSMA). Within the new framework NBB is responsible for the macro prudential supervision and micro-prudential supervision of credit institutions including financial services groups, stockbroking firms, insurance and reinsurance companies, clearing and settlement institutions payment institutions and institutions for electronic money and surety companies.

and financial holdings under Belgian law). The Circular mainly aims to align the reporting of the effective management on the internal control system with the Twin Peaks supervisory structure. This results amongst others in a separate report that has to be drafted by the effective management on the assessment of the internal control system in relation to investment services and investment activities. The information contained in this separate report will be provided to the FSMA. A summarized overview of all the changes is available here ➲in Dutch and ➲in French.

Own capital reporting

On 15 December, the NBB published updated tables for Scheme A, Book III reporting (in ➲Dutch and in ➲French) (own capital reporting) and an ➲updated taxonomy file.

Consultative or informative documents

Committee on the Global Financial System (CGFS)

Liquidity

On 13 November, the CGFS published a report, entitled ➲"Global liquidity - concept, measurement and policy implications". The report analyses global liquidity from a financial stability perspective, using two distinct liquidity concepts. One is official liquidity, which can be used to settle claims through monetary authorities and is ultimately provided by central banks. The other concept is private (or private sector) liquidity, which is created to a large degree through cross-border operations of banks and other financial institutions. It finds that quantitatively, private liquidity dominates official liquidity. Private global liquidity displays both an increasing trend and a strong cyclical component. The increasing trend is a result of deeper financial integration between countries and financial innovation (spurred, among other things, by regulatory changes). But private global liquidity is also highly cyclical because it is driven by divergences in growth rates, monetary policies and, above all, risk appetite. Private liquidity can give rise to international spillovers as many financial institutions provide liquidity both domestically and in other countries. As such, globally, private liquidity is linked to the dynamics of gross international capital flows, including cross-border banking or portfolio movements. This international component of liquidity can be a potential source of instability. Furthermore, the report notes that there is some interaction between official and private liquidity. In normal times and particularly in boom periods, the supply of global liquidity will be largely determined by international banks (either directly or through financial markets). In times of stress, the supply of global liquidity will depend crucially on the private sector's access to official liquidity. The report concludes by recommending the creation of a policy framework for addressing global liquidity that considers all phases of global liquidity cycles, countering both surges and shortages. Such a framework should rest on three lines of defence:

- The first line of defence is the prevention of excessive liquidity surges through strengthened regulatory frameworks. It will limit the probability and frequency of liquidity disruptions by increasing the resilience of global financial intermediation. It will also dampen the amplitude of global liquidity cycles by limiting the intrinsic procyclicality of our financial systems;
- Domestic policies are a second line of defence. They include, inter alia, macro prudential measures and central bank liquidity provision;
- Cooperative measures for the provision of liquidity in crisis situations provide the third line of defence.

European Commission

Supervision of financial conglomerates

In a ➲press release of 9 December, the European Commission announced the coming into force of the ➲amended European rules on the supervision of financial conglomerates. The new rules will allow supervisors to apply banking supervision, insurance supervision and supplementary supervision at the same time, as appropriate and necessary, thereby remedying the unintended loopholes identified during the financial crisis. In this way, supervisors should be able to obtain better information at an earlier stage should a financial conglomerate run into trouble and be better equipped to intervene. In addition, banking groups, insurance groups and conglomerates will be obliged to publish basic elements of a resolution plan for the group or conglomerate, their legal structure as compared to their business structure. Finally, managers of alternative investment funds (for example hedge fund managers) will be included in the scope of supplementary supervision when they are part of a conglomerate.

Acquisitions and holdings in the financial sector

On 8 December, the European Commission launched a ➲consultation on the application of Directive 2007/44 EC as regards acquisitions and increase of holdings in the financial sector. The aim of ➲Directive 2007/44/EC was to ensure that supervisory authorities are as specific and transparent as possible if they have doubts about the sound and prudent management of the financial institution concerned, and to minimize the scope for public authorities to invoke prudential rules in order to hinder cross-border mergers and acquisitions for protectionist reasons.

Credit Rating Agencies

On 15 November, the European Commission published its proposal to amend the framework regulation the activities of Credit Rating Agencies (CRAs). The proposal consists of a ➲Directive and a ➲Regulation. It aims to address the weaknesses in the existing EU rules on credit ratings that have been highlighted both by the financial crisis and more recent euro debt crisis such as non-transparent sovereign ratings, investors' over-reliance on ratings, conflicts of interest threaten independence of CRAs and high market concentration and (absence of) liability of CRAs. To deal with these issue, the proposal contain the following measures:

- More transparent and more frequent sovereign debt ratings: Member States would be rated more frequently (every six months rather than 12 months) and investors and Member States would be informed of the underlying facts and assumptions on each rating. To avoid market disruption, sovereign ratings should only be published after the close of business and at least one hour before the opening of trading venues in the EU. The possible suspension of sovereign ratings is a complex issue which is believed to merit further consideration.
- More transparency and less investors' reliance on ratings: Investors will have to conduct their own assessment on the creditworthiness of the debt instruments in which they invest. In addition, more and better information underlying the ratings would need to be disclosed by CRAs and by the rated entities themselves, so that professional investors will be better informed in order to make their own judgments. At the same time, credit rating agencies will have to consult issuers and investors on any intended changes to their rating methodologies. Such changes would have to be communicated to ESMA which would check that applicable rules on form and due process have been respected.
- More diversity and stricter independence of credit rating agencies to eliminate conflicts of interest: Issuers would have to rotate every three years between the agencies that rate them. In addition, two ratings from two different rating agencies would be required for complex structured finance instruments and a big shareholder of a credit rating agency should not simultaneously be a big shareholder in another credit rating agency.
- Liability of Credit Rating Agencies: Investors will be able to sue a credit rating agency which, intentionally or with gross negligence, fails to respect the obligations set out in the CRA Regulation, thereby causing damage to investors. They will only have to provide facts that suggest that there was an infringement. The Credit Rating Agency involved will have to prove it applied the necessary care.

The publication of the proposals was accompanied by a ➲Frequently Asked Questions and an ➲Impact Assessment.

European Insurance and Occupational Pensions Authority (EIOPA)[2]

Financial literacy and education initiatives by the competent authorities

On 16 December, EIOPA published its ➲Report on Financial Literacy and Education Initiatives by Competent Authorities. The report is an initial “stock-taking exercise” of existing national initiatives with respect to financial literacy and education. It will be up-dated periodically. Based on the aforementioned exercise, the report comes to the following general conclusions:

[2] EIOPA has replaced the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), as of 1 January 2011.

- Most EIOPA Members neither have a national strategy on financial education nor have one under preparation.
- The common approach amongst those EIOPA Members where there is a national strategy on financial education (6 Members) or one which is under preparation (5 Members) is that the national strategy is approved by either the government or the Parliament. Typically, therefore, the strategy is formulated in primary legislation. A few EIOPA Members have, instead of formulating a national strategy, set up a separate body specifically for financial education.
- Most national supervisory authorities are competent in the field of financial education by virtue of the fact that the competence is enshrined in national laws directly or the competence derives from classical financial consumer protection objectives. Those authorities which have no legal obligation still do carry out some education/information activity.
- At the domestic level, there are two areas of (formal or informal) collaboration in the public sector for almost all countries:
    - The first one is cooperation between supervisors and the various entities involved in consumer protection. Some countries have felt the necessity to give an official status to such collaboration by co-ordinating the various entities through an ad hoc body.
    - The other one is cooperation between supervisors and schools, universities and academic bodies for the promotion of the financial education of teachers, students and the general public; although such promotion is present – to various degrees and sometimes (when there is no official strategy) on an informal basis – in all countries, only 9 have formalized their collaboration with the Ministry of Education.
- At the international level, the OECD and its International Network on Financial Education seem to play the major role as regards co-operation in this field, mainly as a forum for the development of research, methodologies, data collection as well as analytical and comparative work, guidelines and principles and the sharing of ideas.
- Apart from initiatives aimed at the general public, Members' activities in this area have been focusing on specific target groups.
- As far as national tools and programs are concerned, there is a wide variety of tools used by Members, the most common being the Internet/websites. In addition, from the initiatives covered by this Report, a trend can be noted towards more accessibility of/to the tools and more appealing content.
- It is also possible to conclude that, there are not only experiences from pilot projects but also real assessments being made on an on-going basis, in view of identifying the need to update, revise or redevelop the programs in place.
- Furthermore, it is worth noting that there are not only a large number of programs in place, but also a significant amount of planned projects, revealing the issue of financial education and literacy is gaining importance in the scope of EIOPA Members' activities.

- Some national experiences, either carried out by Members on their own initiative or through cooperation, may be mentioned as a reference of successful projects in this context.
- EIOPA Members are at different stages of development with regard to the processes they use to evaluate their financial education programmes.
- There is not enough information to fully assess how the national evaluation processes compare to those recommended by the OECD Guide to Evaluating Financial Education Programmes.

European Parliament

SEPA

In a ➲press release of 20 December, the European Parliament announced that a deal has been reached between MEPs and Member State negotiators with respect to the technical requirements for credit transfers and direct debits within the context of the SEPA Regulation. The key issue in reaching the deal was to set a legally-binding deadline for banks to ensure that their payment schemes comply with the SEPA Regulation. The Parliament's negotiators insisted on a single deadline for all payments (both credit transfers and direct debits) in order to make the shift to the new system easier to understand for EU citizens. The agreed deadline is 1 February 2014. The deal still needs to be approved by the full Parliament and the Council.

European Securities and Markets Authority (ESMA)[3]

Credit Rating Agencies

On 22 December, ESMA published the following four reports on Regulatory Technical Standards (RTSs) supplementing the Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies ("CRA Regulation"):

- ➲ The final report on the draft Regulatory Technical Standards (RTS) on the content of ratings data periodic reporting to be requested from credit ratings agencies for the purpose of on-going supervision by ESMA;
- ➲ The final report on the draft Regulatory technical standards on the information for registration and certification of credit rating agencies.
- ➲ The final report on the draft Regulatory Technical Standards on the assessment of compliance of credit methodology with the CRA Regulation;
- ➲ The final report in draft Technical Standards on the presentation of the information that credit rating agencies shall disclose in accordance with Article 11 (2) and point 1 of Part II of Section E of Annex I to Regulation (EC) No 1060/2009.

The reports set out a summary of the responses received by ESMA during ➲the public consultations on the respective RTS's. They also describe material changes to

[3] ESMA has replaced the Committee of European Securities Regulators (CESR), as of 1 January 2011.

the proposed RTS's and the cost-benefit analyses carried out by ESMA and include the final draft RTS's which will be submitted to the Commission. The Commission has three months to decide whether to endorse ESMA's draft RTS's. If the endorsed, the standards will be published in the form of Regulations.

Corporate Governance

On 22 November, ESMA published ➲its response to the European Commission's ➲Green Paper entitled, "The EU corporate governance framework". In the response, ESMA indicates that there is a strong consensus view within the European securities regulators that companies on a regulated market should not be subject to differing standards of corporate governance. However, according to the Supervisor a set of principles that these companies could as a minimum be subject to should be determined. A certain element of flexibility (one of which may be the size of the company) could be build into these principles. On the subject of the board of directors, ESMA emphasizes the importance of the distinction between the functions and duties of chairperson of the board of directors and the chief executive officer and indicated that these functions should be clearly divided. This notwithstanding, it is of the opinion that the mandatory implementation of such a division may not be appropriate in smaller companies. In such a situation the risk of combining the two roles can be mitigated by other counterbalancing measures. Furthermore, ESMA recognizes the importance of diversity on boards. The ultimate priority should be to ensure that there is sufficient experience and technical knowledge and independence on the board. In this respect ESMA indicates that it does not think that the introduction of a European-wide absolute limit of the number of mandates is the best way to ensure that directors devote sufficient time to their role. More oversight within the company on non-executive directors coupled with greater transparency and accountability are however areas that, according to ESMA, the Commission should consider. With respect to remuneration policy, the Supervisor states that the disclosure of an annual remuneration report and the remuneration of directors should be a key principle of the framework. On the subject of risk management, ESMA notes that it is important that the board sets a company's risk appetite and its risk strategy, taking into account the interest of the shareholders it represents. The board should also ensure that control systems are effective and in accordance with the company's risk profile. Reporting of risk appetite is also considered key by the Supervisor. In this respect, ESMA states that regular reporting of risk appetite is more appropriate for financial institutions than non-financial institutions. According to ESMA, in non-financial companies the risks concerned are more often to do with the nature of the business itself and a decision regarding whether those risks will already have been taken when the company decided to enter the particular market. Regarding the remuneration and independence of asset managers managing long-term institutional investors' portfolio, ESMA stated that addition EU level measures for asset managers do not seem necessary in this respect given the Alternative Investment Fund Managers Directive and/or the UCITS Directive. With respect to proxy advisors, the Supervisor expresses its support for transparency for proxy advisors as a means to avoiding conflicts of interest. It mentioned that it is currently preparing a discussion paper on proxy advisors. To conclude, ESMA sets out its views on the "comply or explain"-framework. The Supervisor emphasizes that explanations for non-compliance are the very essence of the universal application of the corporate governance codes. However ESMA indicated that an important element, namely a common set of principles encapsulating all elements that are good governance for listed companies is lacking in the EU. Furthermore ESMA is of the view that the completeness and the quality of explanations provided by companies could be improved. Monitoring bodies can help in this by issuing guidance on the fulfilment of disclosure requirements. The minimum monitoring carried out by the bodies should consist of checking disclosures and periodically publishing the results.

Financial Services and Markets Authorities (FSMA)[4]

Transparency requirements

On 10 November, the FSMA published an updated version of its guide to the Transparency legislation (in ➲Dutch, in ➲French and in ➲English). The document sets out practical guidelines for holders of securities to enable them to determine when they have to notify a holding and what they have to report.

Financial Stability Board (FSB)

Systemic systemically important financial institutions (SIFIs)

In a ➲press release of 4 November, the FSB announced endorsement by the G20 of the implementation of an ➲integrated set of policy measures to address the risks to the global financial system from systemically important financial institutions (SIFIs), and the timeline for implementation of these measures. Specific measures focus on global SIFIs (G-SIFIs) to reflect the greater risks that these institutions pose to the global financial system. The policy measures comprise:

- A new international standard as a point of reference for reforms of national resolution regimes, to strengthen authorities' powers to resolve failing financial firms in an orderly manner and without exposing the taxpayer to the risk of loss;
- Requirements for resolvability assessments, recovery and resolution plans and institution-specific cross-

[4] As of 1 April 2011, the new "Twin Peaks" supervisory architecture has come into force in Belgium. The new architecture replaces the Banking, Finance and Insurance Commission (CBFA) with two new regulators, the National Bank of Belgium (NBB) and the newly created Financial Services and Markets Authority (FSMA). Within the new framework FSMA is responsible for the supervision of the financial markets and the "conduct of business" rules, the micro-prudential supervision of portfolio management and investment advice companies, UCI management companies and UCI's, institutions for occupational pension, financial intermediaries, the financial education of investors and their protection against the illicit provision of financial products and services.

border cooperation agreements for G-SIFIs;
- Requirements for additional loss absorption capacity above the Basel III minimum for global systemically important banks; and
- More intensive and effective supervision through stronger supervisory mandates, and higher supervisory expectations for risk management functions, risk data aggregation capabilities, risk governance and internal controls.

On the same day, the FSB also published ➲a report on progress in implementing the FSB's November 2010 ➲Recommendations on Intensity and Effectiveness of SIFI Supervision. The report describes the progress many supervisors are making in intensifying their supervision of SIFIs and improving their supervisory tools and methods. The FSB found that while progress is being made, supervisors are being hampered by a number of factors. At the forefront are inadequate information systems (IT) and data architectures at SIFIs which are hindering risk management practices such as stress testing and implementation of effective risk appetite frameworks. Resource constraints at many supervisory authorities also hinder their ability to intensify supervision. As such the report sets out five additional recommendations to help enhance supervision, in particular of SIFIs:

1. The FSB, in collaboration with the standard setters, will develop a set of supervisory expectations to improve, data aggregation capabilities of firms, particularly SIFIs, to a level where supervisors, firms, and other users (e.g. resolution authorities) of the data are confident that the Management Information Service reports accurately capture the risks. A timeline will be set for all SIFIs to meet supervisory expectations; the deadline for G-SIBs to meet these expectations is the beginning of 2016, which is the date when the added loss absorbency requirement begins to be phased in for G-SIBs.
2. The FSB will by end-2012 assess in more detail the adequacy of resources at supervisory agencies for the supervision of SIFIs, including the approaches supervisors are taking to intensify their supervision of SIFIs and the kinds of resources that are needed to do so. Governments should follow up on their November 2010 commitment to ensure supervisors have the capacity to resource themselves to effectively meet their mandate, which in some jurisdictions is expanding to include areas of consumer protection.
3. By end-2012, the FSB will review supervisors' progress in improving the use of supervisory tools and methods (e.g. for assessing use of models by SIFIs, risk appetite frameworks, and SIFI business models), and consider further recommendations as appropriate.
4. The FSB will review risk governance, which is critical to ensuring a strong risk management culture at firms. The review would assess risk governance practices at firms, focusing on the risk committee of executive boards and the risk management functions (e.g. the CRO organisation, Chief Auditor) and how supervisors assess their effectiveness.

5. The FSB recommends that the BCBS should review its 2008 report External Audit Quality and Banking Supervision in the light of recent experience in order to reinforce supervisors' confidence in audit quality; improve quality controls at global accounting firms; and facilitate more meaningful dialogue between supervisors and audit firms, particularly of SIFIs. Supervisors should also engage with both securities regulators, who enforce consistent application of standards, and audit oversight bodies, who are charged with reviewing audit quality.

Standard for Resolution Regimes of SIFIs

On 4 November, the FSB published ➲a new internationally-agreed standard that sets out the responsibilities, instruments and powers that national resolution regimes should have to resolve a failing systemically important financial institution (SIF). The standard also includes requirements for resolvability assessments and recovery and resolution planning for global SIFIs (G-SIFIs), as well as for the development of institution-specific cooperation agreements between home and host authorities. More specifically, the new standard requires jurisdictions to:

- Ensure they have designated resolution authorities with a broad range of powers to intervene and resolve a financial institution that is no longer viable, including through transfers of business and creditor-financed recapitalisation ("bail-in" within resolution), that allocate losses to shareholders and unsecured and uninsured creditors in their order of seniority;
- Remove impediments to cross-border cooperation and provide resolution authorities with incentives, statutory mandates and powers to share information across borders and achieve a coordinated solution that takes into account financial stability in all jurisdictions affected by a financial institution's failure;
- Ensure that recovery and resolution plans are put in place for all G-SIFIs, which are regularly reviewed and updated, under the control of top officials, and informed by rigorous annual resolvability assessments that assess the feasibility and credibility of resolution strategies for each G-SIFI;
- Maintain Crisis Management Groups for all G-SIFIs, bringing together home and key host authorities and underpinned by institution-specific cross-border cooperation agreements.

The FSB indicate that it will initiate an iterative process of peer reviews of its member jurisdictions to assess implementation of the Key Attributes beginning in 2012 and extending into 2013.

G20 Recommendations

On 4 November, the FSB published an ➲overview report on progress in the implementation of the G20 recommendations for strengthening financial stability. The report details the general progress made in developing and implementing global policy reforms since the G20 Seoul Summit in November 2010. The FSB found, that while progress is being, made the following issues still need to be addressed:

- Much work remains to establish legal frameworks for effective intervention in failing firms, including those that operate in multiple jurisdictions, and to remove impediments under existing national law to cross-border resolution. The standards set out in the FSB's newly agreed Key Attributes of Effective Resolution Regimes (see above) are designed to address this. Their implementation will require legislative changes in many jurisdictions.
- Many jurisdictions need to address weaknesses in their supervisors' mandates, to ensure sufficient independence to act, appropriate resources, and a full suite of powers to proactively identify and address risks. The Basel Core Principles for Effective Banking Supervision are being strengthened in this area, raising the international standards that are the subject of IMF-World Bank assessments.
- With only just over one year until the end-2012 deadline for implementing the G20 commitments on OTC derivatives reform, few FSB members have the necessary legislation or regulations in place. Jurisdictions should aggressively push forward to meet the G20 deadline in as many areas as possible, and the FSB will step up its coordination of international policies in this area, including appropriate sequencing.
- International accounting standards will not have converged by the end-2011 deadline previously set by the G20 and, while progress has been made in a number of areas, in some other areas the path to convergence has yet to be identified. The FSB will continue to encourage accounting standard-setters in their ongoing work to complete the convergence process.

Detailed overviews per country of the measures being taken to implement the G20 Recommendations can be found ➲here.

In addition to the report, the FSB Secretariat published ➲a summary table providing a simple visual overview of the progress made in global policy development and implementation of financial reforms at the G20 level.

Joint Forum

Principles for the supervision of financial conglomerates

On 19 December, the Joint Forum (consisting of the BCBS, IOSCO and IAIS) published ➲a consultative paper on Principles for the Supervision of Financial Conglomerates. The proposed principles, which revise the Joint Forum's 1999 principles, provide national authorities, standard setters and supervisors with a set of internationally agreed principles that support consistent and effective supervision of financial conglomerates and in particular those financial conglomerates that are active across borders. They aim to address complexities and gaps in the supervision of financial conglomerates resulting from cross-sectoral activities that became apparent during the financial crisis. The proposed principles are organised into five sections and expand on and supplement the 1999 Principles in a number of ways:

- **Supervisory powers and authority:** The principles are directed to both policy makers and supervisors highlighting the need for a clear legal framework that provides supervisors with the necessary powers, authority and resources to perform, with independence and in coordination with other supervisors, comprehensive group-wide supervision.
- **Supervisory Responsibility:** The principles reaffirm the importance of supervisory cooperation, coordination and information exchange. They clarify the importance of identifying a group-level supervisor whose responsibility is to focus on group-level supervision and the facilitation of coordination between relevant supervisors. New principles have been included which relate to the role and responsibilities of supervisors in implementing minimum prudential standards, monitoring and supervising activities of financial conglomerates and taking corrective action as appropriate.
- **Corporate governance:** The principles reaffirm the importance of fit and proper principles and also provide, through a series of new principles, guidance for supervisors intended to ensure the existence of a robust corporate governance framework for financial conglomerates. These new principles relate to the structure of the financial conglomerate, the responsibilities of the board and senior management, the treatment of conflicts of interest and remuneration policy.
- **Capital adequacy and liquidity:** The principles highlight the role of supervisors in assessing capital adequacy on a group basis, taking into account unregulated entities and activities and the risks they pose to regulated entities. They include new principles on group-wide capital management. The principles also provide guidance on internal capital planning processes that rely on sound board and management decisions, incorporate stressed scenario outcomes, and are subject to adequate internal controls. A new principle on liquidity assessment and management is also introduced – providing guidance for supervisors intended to ensure that financial conglomerates properly measure and manage liquidity risk.
- **Risk management:** The principles set out the need for a financial conglomerate to have a comprehensive risk management framework to manage and report group-wide risk concentrations and intra-group transactions and exposures. Greater emphasis is placed on the financial conglomerate's ability to measure, manage and report all material risks to which it is exposed, including those stemming from unregulated entities and activities. The principles focus on group-wide risk management culture and appropriate tolerance levels; addressing risks associated with new business areas and outsourcing; group-wide stress-tests and scenario analyses for the prudent aggregation of risks; bringing off-balance sheet activities within the scope of group-wide supervision.

Comments on the consultative paper can be submitted until 16 March 2012.

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Credit institutions and investment firms

Normative documents

Official Journal of Belgium (BS/MB)

Resolution fund

On 30 December, the Law of 28 December 2011 introducing a contribution for the financial stability and amending the Royal Decree of 14 November 2008 implementing the Law of 15 October 2008 on measures to promote financial stability and in particular, to set up a state guarantee for loans granted and other transactions in the context of financial stability, with regard to the protection of deposits and life insurance, and amending the law of 2 August 2002 on regulation of the financial sector and financial services was published in the official journal. The Law establishes the so-called “resolution fund” within the Deposito- en Consignatiekas/Caisse de dépôts et consignations. The fund is tasked with ensuring the financing of measures meant to limit the impact on the financial system and the economic and social welfare of Belgium in case a credit institution defaults on its obligations. All credit institutions governed by Belgian law will be required to annually contribute to the fund. This contribution will amount to 0,035% of their total liabilities minus their own capital and deposits which are guaranteed by Special Protection Fund for Deposits and Life Insurance.

Official Journal of the European Union (OJ)

Terms and conditions of TARGET2-ECB

On 22 November, the ➲Decision of the European Central Bank of 15 November 2011 amending Decision ECB/2007/7 concerning the terms and conditions of TARGTE2-ECB was published in OJ 303. The Decision amends the Annex to Decision ECB/2007/7 of 24 July 2007 concerning the terms and conditions of TARGET2-ECB to incorporate certain elements from Guideline ECB/2011/15 into the terms and conditions of TARGET2-ECB. Guideline ECB/2011/15 modified Guideline ECB/2007/2 of 26 April 2007 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) to include the ‘grounds of prudence’ among the criteria on the basis of which an application for participation in TARGET2 may be rejected, and a participant’s participation in TARGET2 or its access to intraday credit might be suspended, limited or terminated; and to reflect new requirements for TARGET2 participants related to the administrative and restrictive measures. Therefore, it was necessary to also amend the terms and conditions of TARGET2-ECB.

Basel Committee on Banking Supervision (BCBS)

Basel III - Application of own credit risk adjustments to derivatives

On 21 December, the BCBS published a ➲consultation paper on the Application of own credit risk adjustments to derivatives. Paragraph 75 of the Basel III rules text requires banks to “[d]erecognise in the calculation of Common Equity Tier 1, all unrealized gains and losses that have resulted from changes in the fair value of liabilities that are due to changes in the bank’s own credit risk.” This rule ensures that an increase in credit risk of a bank does not lead to a reduction in the value of its liabilities, and thereby an increase in its common equity. According to the BCBS, the application of paragraph 75 to derivatives is not straightforward since their valuations depend on a range of factors other than the bank’s own creditworthiness, 2 such as interest rates and other market factors that can affect the exposures value. The consultative paper sets out the options that the Basel Committee has considered to apply the underlying concept of paragraph 75 to over-the-counter (OTC) derivatives (and securities financing transactions (SFTs)). It proposes that debit valuation adjustments (DVAs) for these products should be fully deducted in the calculation of Common Equity Tier 1 (CET1).
Comments on the consultation paper can be submitted until 17 February.

Core principles for effective banking supervision

On 20 December, the BCBS published a ➲consultative paper on the revised "Core principles for effective banking supervision. The consultative paper updates the BCBS's 2006 ➲Core principles for effective banking supervision and the associated ➲Core principles methodology, and merges the two documents into one. The revision includes a reordering of the Core Principles, highlighting the difference between what supervisors do themselves and what they expect banks to do: Principles 1 to 13 address supervisory powers, responsibilities and functions, focusing on effective risk-based supervision, and the need for early intervention and timely supervisory actions. Principles 14 to 29 cover supervisory expectations of banks, emphasizing the importance of good corporate governance and risk management, as well as compliance with supervisory standards. The revision has also modified the Core Principles to take into account the lessons of the last financial crisis. As such important enhancements have been introduced into the individual Core Principles, particularly in those areas that are necessary to strengthen supervisory practices and risk management. In addition, the revision has taken account of several key trends and developments that emerged during the last few years of market turmoil such as the need for greater intensity and resources to deal effectively with systemically important banks. Given fundamental deficiencies in banks' corporate governance that were exposed in the last crisis, a new Core Principle

on corporate governance has also been added during the revision by bringing together existing corporate governance criteria in the assessment methodology and giving greater emphasis to sound corporate governance practices. Similarly, the key role of robust market discipline in fostering a safe and sound banking system is emphasized by expanding an existing Core Principle into two new ones dedicated respectively to greater public disclosure and transparency, and enhanced financial reporting and external audit.
Comments on the consultation paper can be submitted until 20 March.

Basel III - Regulatory capital disclosure requirements

On 19 December, the BCBS published ➲a consultation paper on the Definition of capital disclosure requirements.
To ensure that banks back their risk exposures with a high quality capital base, Basel III introduced a set of detailed requirements to raise the quality and consistency of capital in the banking sector. In addition, Basel III established certain high level disclosure requirements to improve transparency of regulatory capital and enhance market discipline. The Basel Committee noted that it would issue more detailed Pillar 3 disclosure requirements in 2011. The consultation paper sets out these detailed requirements for consultation. It contains the following proposals:

- A common template is proposed for banks to use to report the breakdown of their regulatory capital when the transition period for the phasing-in of deductions ends on 1 January 2018. It is designed to meet the Basel III requirement to disclose all regulatory adjustments, including amounts falling below thresholds for deduction, and thus enhance consistency and comparability in the disclosure of the elements of capital between banks and across jurisdictions.
- A 3 step approach for banks to follow is proposed to ensure that the Basel III requirement to provide a full reconciliation of all regulatory capital elements back to the published financial statements is met in a consistent manner. This approach is not based on a common template because the starting point for reconciliation, the bank’s reported balance sheet, will vary between jurisdictions due to the application of different accounting standards.
- A common template is proposed for banks to use to meet the Basel III requirement to provide a description of the main features of capital instruments.
- Related to the requirements on non-regulatory ratios, the Basel Committee proposes that banks should be prohibited from using the terms Common Equity Tier 1, Additional Tier 1, Tier 1, Tier 2 and Total Capital (and ratios based on these) if they are not calculated in accordance with the Basel III minimum requirements as implemented under national law.
- Related to the requirement for banks to make available the full terms and conditions of instruments on their websites will allow supervisors and market participants to investigate the specific features of individual capital instruments. The Basel Committee proposes that all banks be required to maintain a Regulatory Disclosures

section of their websites, where all of the information relating to disclosure of regulatory capital is made available to market participants.

- The BCBS proposes that Banks use a modified version of the post 1 January 2018 template during the transitional phase. This proposal aims to meet the additional Basel III requirement for banks to disclose the components of capital that are benefiting from the transitional arrangements.

Comments on the consultation paper can be submitted until 17 February.

High cost credit protection

On 16 December, the BCBS issued a ➲statement on high cost credit protection. The statement is intended to alert banks that supervisors will closely scrutinize credit protection transactions, given recent concerns about potential regulatory capital arbitrage related to these transactions. In the statement, the Committee is clarifying that supervisors will consider the cost of credit protection that has not yet been recognized in earnings when assessing whether credit protection purchased should be recognized for purposes of regulatory capital, including whether a bank meets the Basel standards for significant credit risk transference within the securitization framework contained in paragraphs 554(a) and 555(d) of the Basel comprehensive framework. In order for exposures to be derecognised for risk-based capital purposes under the securitization framework, significant credit risk associated with the securitized exposures must be transferred to third parties. Material costs of credit protection should be considered in this analysis. More generally, banks and supervisors should consider the relevant costs of protection purchased - whether in the context of the Basel securitization framework or within the credit risk mitigation framework - when assessing a bank's capital adequacy. Furthermore, banks should analyze and document the economic substance of credit protection transactions that have unusually high-cost or innovative features to assess the degree of risk transference and the associated impact on the bank's overall capital adequacy. Banks should bring to the attention of their supervisor any innovative positions which fall under this guidance to ensure they are subject to appropriate prudential treatment. The analysis also should specify how the transaction aligns with the bank's overall risk management strategy.

Basel III - Definition of capital

On 16 December, the BCBS published the ➲answers to a third set of Basel III frequently asked questions. The FAQ aims to answer interpretation questions that have been raised with respect to the definition of capital and loss absorbency of capital at the point of non-viability. The set supplements a first set and a second set of FAQs that were published in July and October respectively.

Internal audit function in banks

On 2 December, the BCBS published a ➲consultation paper on the internal audit function in banks. The paper

sets out 20 principles with respect to the internal audit function in banks, organised in three sections: A) Supervisory expectations relevant to the internal audit function, B) The relationship of the supervisory authority with the internal audit function, and C) Supervisory assessment of the internal audit function. This approach seeks to promote a strong internal audit function within banking organisations and addresses supervisory expectations for the internal audit function and the supervisory assessment of that function. It also encourages bank internal auditors to comply with and to contribute to the development of national and international professional standards, such as those issued by The Institute of Internal Auditors, and it promotes due consideration of prudential issues in the development of internal audit standards and practices. An annex to the consultative document details responsibilities of a bank's audit committee. The consultation paper builds on the Committee's ➲Principles for Enhancing Corporate Governance which require banks to have an internal audit function with sufficient authority, stature, independence, resources and access to the board of directors. Independent, competent and qualified internal auditors are vital to sound corporate governance.
Comments on the consultation paper can be submitted until 2 March.

Basel III - Counterparty credit risk rules

On 21 November, the BCBS published a ➲Frequently Asked Question on Basel III's counterparty credit risk rules. The document sets out the answers to a number of interpretation questions with respect to counterparty credit risk charge, the credit valuation adjustment (CVA) capital charge and asset value correlations.

Basel III – Market Risk Framework

On 16 November, the BCBS published an updated version of its interpretive issues with respect to the revisions to the market risk framework. The document provides responses to interpretive issues regarding the ➲Revisions to the Basel II market risk framework ("the Revisions"), the ➲Guidelines for computing capital for incremental risk in the trading book ("the IRC Guidelines") and ➲the International convergence of capital measurement and capital standards: A revised framework.

Additional capital requirements for global systemically important banks

On 4 November, the BCBS published the text ➲Global Systemically important: Assessment methodology and the additional loss absorbency requirement for Global systemically important banks which sets out the Basel Committee's framework on the assessment methodology for global systemic importance, the magnitude of additional loss absorbency that global systemically important banks (G-SIBs) should have and the arrangements by which the requirement will be phased in. The assessment methodology for global systemic importance developed by the BCBS is based on an indicator-based measurement approach. The selected indicators are chosen to reflect the different aspects of what generates negative externalities and makes a bank critical for the stability of the financial system. Based on the score produced by the indicator-based measurement approach, G-SIBs will be grouped together into different categories of systemic importance. GSIBs will be initially allocated into four buckets with varying levels of additional loss absorbency requirements ranging from 1% to 3,5% applied to the different buckets. With respect to the Instruments to meet the additional loss absorbency requirement, the BCBS indicates that G-SIBs should be required to meet their additional loss absorbency requirement with Common Equity Tier 1 only. Given the going-concern objective of the additional loss absorbency requirement, it is not appropriate for G-SIBs to be able to meet this requirement with instruments that only absorb losses at the point of non-viability. Going-concern contingent capital should also not be used to fulfil the requirement.

Capitalisation of bank exposures to central counterparties

On 2 November, the BCBS published ➲its second consultation paper on the Capitalisation of bank exposures to central counterparties. The paper sets out the Committee's new proposed framework for capitalising exposures to a central counter party (CCP).The proposal takes into account the responses to the ➲first consultation paper in December 2010 as well as the results of various quantitative impact assessments. With respect to the capitalisation of exposures to CCP a difference is made between exposures to CCPs which comply with the CPSS-IOSCO international Principles for Financial Market Infrastructures (FMIs)(i.e. qualifying CCPs) and CCPs which do not comply with the Principles (i.e. non-qualifying CCPs). The Committee proposes that trade exposures to a qualifying CCP will receive a 2% risk weight, and that default fund exposures to a CCP will be capitalised in accordance with a risk sensitive approach based on the actual financial resources of each CCP and its hypothetical capital requirements. If an institution trades with a non-qualifying CCP, it will have to capitalise the trade-related exposures as in the bilateral framework, and apply the corresponding risk weight under the Standardised Approach for credit risk. As such, the applicable risk weight would be at least 20% (if the CCP is a bank) or 100% (if it is a corporate financial institution according to the definition included in paragraph 272 of the Basel framework, revised by Basel III). In turn, the institution will have to deduct from capital the funded and unfunded, but quantifiable and committed, contributions to the default fund of non-qualifying CCP. Furthermore when a client of a clearing members enters into a trade which is centrally cleared, it will be able to capitalise the exposures arising from such a trade under the proposed framework for CCPs only if certain segregation and continuity requirements are met. Otherwise, the client will capitalise its exposure to the clearing member as a bilateral trade.

Centre for European Policy Studies (CEPS)

Capital stress tests

On 2 December, CEPS published a commentary, entitled ➲"Placing EU Banks under Undue Stress". The commentary assesses the latest round of stress tests administered to EU banks by the European Banking Authority (EBA) and finds their exclusive focus on a single measure of capital, the Tier 1 capital ratio of Basel III, short-sighted. While the first two stress tests underestimated the capital needs in the European banking system, the third test risks overestimating the picture in some cases. By solely employing a 9% Tier 1 ratio, with a correction for market valuation of sovereign exposures, the overall end result is that banks with higher risk-weighted assets in embattled sovereigns need to put up more capital than those with lower risk-weighted assets in the core eurozone countries. According to the commentary, this has the effect of unduly penalising banks that provide credit to the real economy in those member states where it is most needed.

European Banking Authority (EBA)[5]

Supervisory reporting requirements

On 20 December, the EBA published a ➲consultation paper on draft Implementing Technical Standards (ITS) on supervisory reporting requirements for institutions. The consultation paper puts forward a draft ITS related to Articles 95 (own funds and financial information) and 96 (losses stemming from lending collateralized by immovable property) of the Capital Requirements Regulation. This draft ITS aims at implementing uniform reporting requirements which are necessary to ensure fair conditions of competition between comparable groups of credit institutions and investment firms. Uniform requirements will ultimately make institutions more efficient and result in a greater convergence of supervisory practices. The ITS has been developed on the basis of the COREP and FINREP guidelines, given that these have been implemented already in various Members States and have been proved in practice to improve convergence in the field of supervisory reporting. Given that there is not as yet harmonization on the underlying accounting frameworks applied in the various Member States, the ITS has taken this into account when defining the formats and frequency of supervisory reporting. The ITS does not intend to harmonize the underlying valuation measures.
Comments on the consultation paper can be submitted until 20 March.

Guidelines on Internal Governance

On 16 December, the EBA published the ➲compliance table regarding ➲its Guidelines on Internal Governance. The table provides an overview of which national competent authorities intend to comply with the aforementioned guidelines. For Belgium, the NBB has

[5] EBA has replaced the Committee of European Banking Supervisors (CEBS), as of 1 January 2011.

indicated that it will comply with the guidelines.

2011 EU Capital Exercise

On 8 December, the EBA published a ➲formal Recommendation, and the final figures, related to banks' recapitalisation needs. These measures form part of a broader European package to address the current situation in the EU by restoring stability and confidence in the markets. The formal Recommendation adopted by the EBA's Board of Supervisors states that national supervisory authorities should require the banks included in the sample to strengthen their capital positions by building up an exceptional and temporary capital buffer against sovereign debt exposures to reflect market prices as at the end of September. In addition, banks will be required to establish an exceptional and temporary buffer such that the Core Tier 1 capital ratio reaches a level of 9% by the end of June 2012. The amount of any capital shortfall identified is based on September 2011 figures and the amount of the sovereign capital buffer will not be revised. Sales of sovereign bonds will not alleviate the buffer requirement to be achieved by June 2012. The buffers are explicitly not designed to cover losses in sovereigns but to provide a reassurance to markets about the banks' ability to withstand a range of shocks and still maintain adequate capital. The sovereign capital buffer is a one-off measure and, once the deployment of the new EFSF's capacity becomes effective in addressing the sovereign debt crisis by lifting sovereign bond valuations from today's distressed prices, the EBA will reassess the ongoing need for and size of capital buffers against banks' sovereign exposures. National supervisory authorities may, following consultation with the EBA, agree to the partial achievement of the target by the sales of selected assets that do not lead to a reduced flow of lending to the EU's real economy but simply to a transfer of contracts or business units to a third party. These latter actions are not considered as deleveraging for the financial system as a whole, as assets are transferred to third parties rather than reduced. Reductions in risk weighted assets due to the validation and roll-out of internal models to additional portfolios should not be allowed as a means of addressing a capital shortfall unless these changes are already planned and under consideration by the competent authority. Banks should first use private sources of funding to strengthen their capital position to meet the required target, including retained earnings, reduced bonus payments, new issuances of common equity and suitably strong contingent capital, and other liability management measures.

Guidelines on incremental default and migration risk charge (IRC)

On 30 November, the EBA published a ➲consultation paper on guidelines to the Incremental Default and Migration Risk Charge (IRC). The guidelines provide guidance with respect to:

- The positions that are subject to IRC modelling and the permanent partial use of IRC models;

- The use and sources of individual parameters and ratings in IRC modelling;
- The interdependence between risk factors;
- The use of transition matrices;
- The use of liquidity horizons and the rebalancing of positions;
- How ratings changes are turned into impact on market prices and on the computation of P&L;
- Defining a liquidity horizon as well as the key factors for determining the relevant liquidity horizon as well as on the monitoring of liquidity horizons;
- The validation process for IRC models;
- The minimum requirements for the use of IRC models and their related documentation;
- How to deal with IRC models that are “not fully compliant with the IRC approach”;
- The minimum calculation requirements of the IRC.

European Banking Federation (EBF)

Principles for Sound Residential Mortgage Underwriting Practices

On 12 December, the EBF published ➲its response to the ➲Financial Stability Board consultation on Principles for Sound Residential Mortgage Underwriting Practices.

Basic payment account

On 16 November, the EBF published its ➲preliminary observations on the ➲European Commission’s Recommendation on access to a basic payment account and the ➲IMCO Working Document.

European Banking Industry Committee (EBIC)

Revision of FATF Recommendations

On 16 December, EBIC published ➲its proposals for amendments to the proposed revision of the FATF Recommendations.

Current account fees

In a ➲press release of 18 November, EBIC called upon the European Commission to accept its self-regulatory initiative on transparency and comparability of personal current account fees. It puts forward a set of principles that should guide the 27 national banking communities in introducing additional measures to enhance transparency and comparability, and that should reach consumers’ needs. The principles represent a significant step forward as they will lead to the enhancement, within each national market, and in close involvement of consumer stakeholders, of harmonized tools: uniform terminology for the most common services within that market, glossaries to explain the terms used; a standardised general presentation on applicable fees and individualized periodic reporting on fees paid.
The press release was accompanied by the publication of ➲a Q&A on the initiative.

European Central Bank (ECB)

Crisis management and bank resolution

In December, the ECB published a working paper, entitled ➲"Crisis management and bank resolution: Quo vadis, Europe?". The paper summarizes the main legal challenges for crisis management of credit institutions and identifies the key features of an effective bank resolution regime. In this respect, it assesses and compares the special resolution regimes put in place by the United Kingdom and Germany in the aftermath of the financial crisis. In addition, the paper analyses the emerging response at European and international level, focusing in particular on bail-ins, the suspension of netting and other rights, treatment of groups and systemically important financial institutions. Regarding the main legal challenges for crisis management, the paper identifies four main legal issues as having crucial relevance for an effective bank resolution regime: (a) the particular characteristics of banking triggering the need to make special provision for creditor and shareholder rights during resolution; (b) cross border aspects to the banking business; (c) the group dimension; and (d) the leveraged problems arising in the case of SIFIs. On the subject of the assessment of the German and UK special resolution regimes, the paper states that the major legal disadvantage of the German regime, in comparison with the UK regime, is the fact that it is not contained in one comprehensive statute but dispersed across various laws. Its main advantage is however the fact that it addresses the funding of resolution measures through the establishment of a restructuring fund. The paper also finds that while national special resolution regimes are capable of addressing the characteristics of credit institutions at national level, they are unable to convincingly address cross-border and group issues. This highlights the very essence of cross-border problems, which can only be comprehensively addressed at a cross-border level, that is, at the European or international level.

Eurofinas

Capital requirements

On 8 December, Eurofinas published its comments on the European Commission's ➲Proposal for a Directive on the access to the activity and the prudential supervision of credit institutions and investment firms and accompanying ➲Proposal for a Regulation on prudential requirements for credit institutions and investment firms.

Financial Law Institute

Credit cards, overdraft facilities and European Consumer protection

In December, the Financial Law Institute published a working paper, entitled "Credit cards, overdraft facilities and European Consumer protection: A black cheque for unfairness?". The paper investigates to which extent European consumer legislation is an adequate means to tackle potential unfairness regarding overdraft charges and provides several theoretical insights on imperfect markets for consumer finance and consumer (un)awareness and biases when contracting for money. It finds that informational market power and exploitation of consumers“ cognitive limitations may lead to an unjustified distortion of the theory of equal bargaining power between creditors and an (overdraft) borrower and that such distortion might be welfare reducing, even in the absence of a „smoking gun“ linking consumer credit to personal insolvency. The paper stresses that European consumer protection should safeguard consumers from behaviour diverging from (perfect) rationality. It should therefore abandon narrow legal reasoning and include ethical, economical and social norms. In this regard, a multi-layered protection (including point of sale disclosure and tailored monthly statements) is to be preferred over the prevailing one-size fits all approach. The paper also notes that if light touch regulation is insufficient to remedy consumer’s imperfect rationality, more substantial regulation should be put in place. According to the paper, article 15 of the Belgian Law on Consumer Credit Code which stipulates that a creditor is only allowed to extend credit if he reasonably could asses that the borrower will be able to meet his contractual obligations is a useful instrument in this regard.

Organisation for Economic Co-operation and Development (OECD)

Capital Requirements

On 12 December, the OECD published a working paper, entitled ➲“Systemically Important Banks and Capital Regulation Challenges”. The paper discusses aspects of the failure of bank regulation and market discipline. It provides a perspective on the unintended consequences of bank regulation and argues that capital regulation might have contributed to or even reinforced adverse systemic shocks that materialised during the financial crisis. The paper also analyses the conflict between the original role of banks in the economic system, which is to evaluate and provide loans to credit-worthy borrowers, and the decline in the profitability of this activity relative to other sources of bank income. It finds that the economic costs of redirecting bank attention away from unconventional business practices are low. In addition, the paper examines the relationship between the level of systemic importance of banks and their leverage. To conclude, a number of Financial market policy considerations and conclusions are formulated.

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Investment products and asset management

Normative documents

Official Journal of Belgium (BS/MB)

Holding of dematerialized securities denominated in a foreign currency

On 23 December, the Royal Decree of 5 December 2011 amending the Royal Decree of 14 June 1994 on the rules applicable on the holding of dematerialized securities denominated in a foreign currency on an account was published in the official journal. The Royal Decree modifies the Royal Decree of 14 June 1994 to enable settlement institutions (other than Euroclear Bank, Euroclear France and Clearstream Banking) and institutions acting as paying agents for current issuances in the securities settlement system of the NBB to hold dematerialized securities denominated in a foreign currency on an account with the aforementioned settlement system. Other changes made by Royal Decree of 5 December 2011 include a new definition of “foreign currency”, i.e. the currencies for which the European Central Bank publishes daily reference exchange rates against the euro.

Consultative or informative documents

CEA

Professional indemnity in the AIFM Directive

On 13 December, the CEA published a ➲position paper with respect to the requirement for fund managers to hold a professional indemnity insurance (Article 9 of the AIFMD).

Committee on the Global Financial System (CGFS)

Access to central counterparties in OTC derivatives markets

On 17 November 2011, the CGFS published a ➲report on the macro financial implications of alternative configurations for access to central counterparties in OTC derivatives markets. The G-20 leaders' commitment that all standardised over-the-counter (OTC) derivatives will be centrally cleared by the end of 2012 is intended to increase the safety and resilience of the global financial system. Achieving these objectives depends importantly on the arrangements through which market participants obtain access to central clearing. Such arrangements could include increased use of existing global Central Counterparties (CCPs); the establishment of domestic CCPs in a number of jurisdictions; and the possible construction of links between CCPs. The aforementioned report analyses the potential implications for financial stability and efficiency of these alternative access arrangements to CCPs. It concludes that:

- Expanding direct access to CCPs may reduce the concentration of risk in the largest global dealers. As direct access is broadened, it is essential that CCPs' risk management procedures be adapted appropriately to ensure their continued effectiveness;
- Both large global and smaller regional or domestic CCPs will probably play a role in meeting G20 commitments. In both cases, developing and adopting international standards will be essential to avoid regulatory arbitrage and promote effective cross-border monitoring of infrastructure and participants; and
- CCPs and authorities should consider enhancements

where needed to strengthen the safety and efficiency of indirect clearing that comply with international standards. Effective segregation, as well as portability of positions and collateral belonging to a direct clearer's clients, will be needed to realise the benefits of systemic risk reduction.

European Banking Federation (EBF)

Prospectus Directive

On 5 December, the EBF published ➲its comments to the European Commission following ➲ESMA's technical advice on possible delegated acts concerning the Prospectus Directive

European Capital Markets Institute (ECMI)

MiFID II

In November, the ECMI published ➲a commentary on the ➲MiFID II proposals, entitled "MiFID 2.0 Unveiled". The commentary explains how the original legislation has been amended with the principal aim of levelling the playing field and examines its novel features.

European Commission

European Venture Capital Funds

On 17 December, the European Commission published a ➲Proposal for a Regulation on European Venture Capital Funds. The proposal sets out a new "European Venture Capital Fund" label and includes new measures to allow venture capitalists to market their funds across the EU and grow while using a single set of rules. The key elements of the proposal are:

- *A uniform "single rule book" governing the marketing of funds under the designation "European Venture Capital Funds". A "European Venture Capital Fund" is defined by three essential requirements: 1. It invests 70% of the capital committed by its sponsors in SMEs; 2. it provides equity or quasi-equity finance to these SMEs (i.e. 'fresh capital'); and 3. it does not use leverage (i.e. the fund does not invest more capital than that committed by investors so is not indebted). All funds that operate under this designation must abide by uniform rules and quality standards (including disclosure standards to investors and operational requirements) when they raise funds across the EU. The "single rule book" will ensure investors know exactly what they get when they invest in European Venture Capital Funds.*
- *A uniform approach for the categories of investors which are eligible to commit capital to a "European Venture Capital Fund". Eligible investors will be professional investors as defined in MiFID and certain other traditional venture capital investors (such as high net-worth individuals). The uniform rules on venture capital investors will make sure that marketing can be tailor-made to the needs of these investor categories.*
- *All managers of qualifying venture capital funds will be provided with a European marketing passport allowing access to eligible investors across the EU. This is a*

marked improvement over the existing rules in the area of asset management, in particular the Alternative Investment Fund Managers Directive (AIFMD) as the existing passport provided under AIFMD is only applicable to managers whose assets under management are above a threshold of EUR500 million. In addition, the rules of the AIFMD create a legal framework typically aimed at hedge funds and private equity firms, and are less suitable for the typical venture capital fund which would get a tailor-made regime.

The publication of the proposal with accompanied by a ➲Frequently Asked Questions and ➲an impact assessment.

European Social Entrepreneurship Funds

On the same day, the European Commission also published its Proposal for a Regulation on European Social Entrepreneurship Funds. The proposal sets out a new "European Social Entrepreneurship Fund" label, so investors can easily identify funds that focus on investing in European social businesses. The approach taking by the Commission is simple: once the requirements defined in the proposal are met, managers of social investment funds will be able to market their funds across the whole of Europe. To get the label, a fund will have to prove that a high percentage of investments (70% of the capital received from investors) is spent in supporting social business. Uniform rules on disclosure will ensure that investors get clear and effective information on these investments. The key elements of the proposal are:

- A recognised EU brand for social entrepreneurship funds: Currently, investors can find it difficult to identify funds that are investing in social businesses and this can undermine trust in the social business market. Meanwhile, social investment funds can find it difficult to differentiate themselves from other funds and this can undermine the growth of the sector. The Regulation adopted today creates a common brand: the “European Social Entrepreneurship Funds”. With this label, investors will know that the majority of their investment is going into social businesses. In addition, the common EU-wide brand will make it much easier for investors throughout the EU to locate these funds.
- Improved investor information: Just as investors can find it difficult to identify funds investing in social businesses, the information available about these funds and what they are doing can be difficult to compare and use. Setting a common EU framework for this information is therefore vital. All funds that use the new brand should in the future clearly publish information about the kinds of social businesses they target, the ways they are selected, the ways the fund will help the social businesses, and how social impacts will be monitored and reported.
- Better performance measures: The projected impact is an important factor for investors in choosing between various social investment funds. The proposed measures will set out clear requirements for funds to inform investors on how they will go about monitoring

and reporting on impacts. However, more is likely to be needed. The Commission will undertake further work to develop better and more comparable ways on how the social performance of investments can be measured. This will allow for the development of a more transparent investment market and greater investor confidence.

- Break down barriers to fundraising across Europe: Rules targeting social investment funds differ per Member State and are often onerous and complex. For this reason, the new proposals will simplify rules. For example, a European passport would ensure that social entrepreneurship funds could raise funds across Europe. Fund managers will not be forced to use the new framework, but if they do, they will be able to gain access to investors across the EU and to a clearly recognisable EU brand that investors will grow to trust and seek out.
- Availability to investors: Because investing in social businesses can be risky, the "European Social Entrepreneurship Funds" label would at the start only be available to professional investors. Once the framework is up and running, the Commission will examine possible measures to make such investments also available to retail customers.

The publication of the proposal with accompanied by a ➲Frequently Asked Questions and ➲an impact assessment.

Short Selling and Credit Default Swaps

On 24 November, the European Commission announced that it has requested the ESMA to provide ➲advice on possible delegated acts concerning the ➲proposed Regulation on short selling and certain aspects of Credit Default Swaps. ESMA is invited to provide technical advice on the following issues:

- The specification of the definitions laid down in Article 2(1) of the Regulation on short selling and certain aspects of Credit Default Swaps and in particular specifying when a natural or legal person is considered to own a financial instrument for the purposes of the definition of short sale in Article 2(1p) (Article 2(2) Regulation on short selling and certain aspects of Credit Default Swaps);
- The specification of: the cases in which a natural or legal person is considered to hold a share or debt instrument for the purposes of Article 3(2) of the Regulation on short selling and certain aspects of Credit Default Swaps, the cases in which a natural or legal person has a net short;
- Position for the purposes of Article 3(4) and (5) of the Regulation on short selling and certain aspects of Credit Default Swaps and the method of calculation of such position and the method of calculating positions for the purposes of Article 3(4), (5) and (6) Regulation on short selling and certain aspects of Credit Default Swaps when different entities in a group have long or short positions or for fund management activities related to separate funds (Article 3(7) Regulation on short selling and certain aspects of Credit Default Swaps);

- The specification of: the cases in which a credit default swap transaction is considered to be hedging against a default risk and the method of calculation of an uncovered position in a credit default swap and the method of calculating positions where different entities in a group have long or short positions or for fund management activities related to separate funds (Article 4(2) Regulation on short selling and certain aspects of Credit Default Swaps);
- The specification of the amounts and incremental levels of notification thresholds referred to in Article 8(2) Regulation on short selling and certain aspects of Credit Default Swaps for net short positions relating to the issued sovereign debt of a sovereign issuer (Article 8(3) Regulation on short selling and certain aspects of Credit Default Swaps);
- the specification of the parameters and methods for calculating the threshold of liquidity referred to in Article 12a(1b) Regulation on short selling and certain aspects of Credit Default Swaps in relation to the issued sovereign debt for suspending restrictions on short sales of sovereign debt (Article 12a(1c) Regulation on short selling and certain aspects of Credit Default Swaps);
- The specification of what constitutes a significant fall in value for financial instruments other than liquid shares (Article 19(4b) Regulation on short selling and certain aspects of Credit Default Swaps).

Stability Bonds

On 23 November, the European Commission published the ➲Green Paper on the feasibility of introducing Stability Bond. The paper analyses the feasibility of a joint issuance of sovereign bond as such an issuance could have significant potential benefits. For example the prospect of Stability Bonds could potentially quickly alleviate the current sovereign debt crisis, as the high-yield Member States could benefit from the stronger creditworthiness of the low-yield Member States. The bonds would also make the euro-area financial system more resilient to future adverse shocks and so reinforce financial stability. As such the paper assesses the benefits and preconditions of the following three approaches to the joint issuance of debt in the euro area (based on the degree of substitution of national issuance and the nature of the underlying guarantee implied):

- The full substitution by Stability Bond issuance of national issuance, with joint and several guarantees;
- The partial substitution by Stability Bond issuance of national issuance, with joint and several guarantees;
- The partial substitution by Stability Bond issuance of national issuance, with several but not joint guarantee.

For each of the abovementioned approaches, the paper also analyses the likely effects on Member States' funding costs, European financial integration, financial market stability and the global attractiveness of EU financial markets. The publication of the Green Paper was accompanied by a memo setting out the main principles of the stability bonds. Comments on the Green Paper could be submitted until 8 January.

European Parliament

Short Selling and Credit Default Swaps

On 15 November, the European Parliament adopted its position on ➲the proposal for a regulation of the European Parliament and of the Council on Short Selling and certain aspects of Credit Default Swaps. The text adopted by the Parliaments is the result of a compromise negotiated between the European Parliament and the Council and makes the following a number of amendments to the ➲Commission's initial Proposal. The main amendments are:

- A natural or legal person who has a net short position in relation to the issued share capital of a company that has shares admitted to trading on a trading venue shall disclose details of that position to the public whenever the position reaches or falls below a relevant publication threshold referred to in the Regulation. A relevant publication threshold is a percentage that equals 0.5% of the issued share capital of the company concerned and each 0.1% above that. The European Supervisory Authority (European Securities and Markets Authority – ESMA) may issue an opinion to the Commission on adjusting the thresholds referred to in the regulation, taking into account the developments in financial markets;
- A natural or legal person who has a net short position relating to the issued sovereign debt of a sovereign issuer must notify the relevant competent authority whenever such position reaches or falls below the relevant notification thresholds for the Member State concerned or the Union. ESMA shall publish on its website the notification thresholds for each Member State;
- The relevant time for calculation of a net short position shall be at midnight at the end of the trading day on which the natural or legal person has the relevant position. It shall apply to all transactions irrespective of the means of trading used, including transactions executed through either manual or automated trading, and irrespective of whether the transactions have taken place during normal trading hours;
- Restrictions are placed on uncovered short sales in shares and in sovereign debt and on uncovered credit default swaps in sovereign debt. Where the liquidity of sovereign debt falls below certain threshold determined or sovereign debt market is not functioning properly, the restrictions may be temporarily suspended by the relevant competent authority. Before suspending these restrictions, the relevant competent authority shall notify ESMA and other competent authorities about the proposed suspension;
- Requirements are imposed on Central counterparties relating to buy-in procedures and fines for failed settlement of transactions in shares and sovereign debt;
- The amended texts provides that the competent authority of a Member State may, under certain

conditions, require natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify it or to disclose to the public details of the position whenever the position reaches or falls below a notification threshold fixed by the competent authority;

- Where the price of a financial instrument on a trading venue has significantly fallen during a single trading day in relation to the closing price on that venue on the previous trading day, the competent authority of the home Member State for that venue will be required to consider whether it is appropriate to prohibit or restrict natural or legal persons from engaging in short selling of the financial instrument on that trading venue or otherwise limit transactions in that financial instrument on that trading venue in order to prevent a disorderly decline in the price of the financial instrument;
- ESMA may, on the request of one or more competent authorities, the European Parliament, the Council or the Commission or on its own initiative conduct an inquiry into a particular issue or practice relating to short selling or relating to the use of credit default swaps to assess whether that issue or practice poses any potential threat to financial stability or market confidence in the Union. ESMA shall publish a report setting out its findings and any recommendations relating to the issue or practice within three months as from the end of the inquiry;
- ESMA may adopt guidelines to ensure a consistent approach is taken concerning the measures, sanctions and penalties to be established by Members States. ESMA shall publish on its website and update regularly a list of existing administrative measures, sanctions and penalties per Member State;
- The competent authorities of Member States shall wherever possible conclude cooperation arrangements with competent authorities of third countries concerning the exchange of information with competent authorities in third countries, the enforcement of obligations arising under this Regulation in third countries and the taking of similar measures in third countries by their competent authorities.

European Securities and Markets Authority (ESMA)[6]

Systems and controls in an automated trading

On 22 December, ESMA published its ➲final report on guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities. The guidelines require that regulated markets, Multilateral Trading Facilities (MFTs) and investment firms operating electronic trading systems to put in place adequate arrangement to ensure the orderly functioning of the markets. With respect to

[6] ESMA has replaced the Committee of European Securities Regulators (CESR), as of 1 January 2011.

the specific arrangement that need to be put in place the guidelines make a distinction between regulated markets and MTFs and investment firms.

The arrangements that regulated markets and MTFs operating electronic trading systems must put in place, should include:

- Adequate pre-trade controls, such as the possibility to limit the number of orders which each member/participant or user can send to the trading platform; and
- Conformance tests to ensure that members/participants' or users' IT systems are compatible with the trading platforms' electronic trading systems; and
- Automatic and discretionary mechanisms to constrain trading or to halt trading in response to significant variations in price to prevent trading becoming disorderly; and
- Undertaking adequate due diligence of the member/participant or user before accepting their market access and the ability to check their respective controls and arrangements afterwards; and
- Clear organizational requirements for members who are not regulated entities; and
- Rules and procedures designed to prevent, identify and report instances of possible market abuse and market manipulation that are proportionate to the nature, size and scale of the business done through the trading platform.

Investment firms using algorithms, according to the ESMA guidelines, must put in place the following arrangements:

- Adequate organisational arrangements to maintain fair and orderly trading;
- An appropriate governance process for developing or buying algorithms, rolling out the live use of the algorithm in a cautious fashion and staff with necessary up-to-date skills and expertise to run and monitor the behaviour of their live algorithms; and
- Pre-trade controls which address erroneous order entry and maintain pre-set risk management thresholds, including thresholds on maximum exposure to individual clients; and
- Conduct adequate due diligence on clients using direct market access and sponsored access services and ability to immediately halt trading by these clients;
- Policies and procedures to minimise the risk that their automated trading activity gives rise to market abuse (in particular market manipulation).

In addition, regulated markets, MTFs and investment firms must keep adequate records of their systems and controls covered by the guidelines to enable competent authorities to assess their compliance with MiFID and other relevant regulatory obligations.

MiFID compliance function requirements

On 22 December, ESMA published a ➲consultation paper on guidelines on certain aspects of the MiFID compliance function requirements. The paper sets out for consultation draft ESMA guidelines on certain aspects of the MiFID compliance function requirements. The purpose of the proposed guidelines is to enhance clarity and foster convergence in the implementation of the MiFID organizational requirements relating to certain aspects of the compliance function. They are also aimed at reinforcing the importance of the compliance function. As such guidelines are set out with respect to:

- The effective fulfilment of the responsibilities of the compliance function as set out in set out in Article 6(2) and 9(2) of the MiFID Implementing Directive (i.e. the requirements for monitoring and assessment of the level of the compliance risk the investment firm faces, reporting on material compliance matters, and advising and assisting investment firm staff);
- Organizational arrangements in order to assist investment firms in complying with article 6(2) of the MiFID Implementing Directive which requires investment firms to establish and maintain a permanent, effective and independent compliance function and article 6(3)(a) which requires the compliance function to have the necessary authority, resources and expertise, as well as access to all relevant information. Guidelines are also provided regarding the application of the exception provided for in Article 6(3), the combining of the compliance function with other control functions, as well as for outsourcing the compliance function;
- The review of the compliance function by competent authorities.

Comments on the draft guidelines can be submitted until 24 February.

MiFID suitability requirements

On 22 December, ESMA published ➲a consultation paper on guidelines on certain aspects of the MiFID suitability requirements. The paper sets out for consultation draft ESMA guidelines on certain aspects of the MiFID suitability requirements. The draft guidelines focus mainly on the need for firms to have in place appropriate policies and procedures in order to know their clients when recommending suitable investment choices. They cover the following aspects of the suitability requirements:

- Information to clients about the suitability assessment;
- Arrangements necessary to understand clients and investments;
- Qualifications of investment firm staff;
- Extent of information to be collected from clients (proportionality);
- Reliability of client information;
- Updating client information;
- Client information for legal entities or groups;
- Arrangements necessary to ensure the suitability of an investment;
- Record-keeping.

Comments on the draft guidelines can be submitted until 24 February.

Pre-trade transparency waivers

On 15 December, ESMA published an ➲updated overview of CESR positions and ESMA opinions on functionalities subject to the pre-trade transparency waiver process. The new version of the document contains an additional example of a "reference price waiver". Such waiver can be granted by competent authorities for systems operated by an MTF or a regulated market when they are based on a trading methodology by which the price is determined in accordance with a reference price generated by another system, where that reference price is widely published and is regarded generally by market participants as a reliable reference price. The added example describes reference price waiver granted to a platform operator intending to set up a system where the prices is determined by the European best bid/offer ("EBBO"). The European best bid/offer ("EBBO") providing the reference prices at which orders may be executed is calculated and published by the trading platform. Under the trading platform's EBBO policy, eligible MTFs which are candidates for inclusion in the EBBO are assessed for reliability and viability. The market operator provides a market data service through a proprietary system, which is made available (on a non-discriminatory basis at a reasonable cost) to both users of the platform and non-users wishing to subscribe to the service. The prevailing EBBO in each security offered is widely published in real time via the market data service.

Prospectus Directive

On 13 December, ESMA published a ➲consultation paper on ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU. The paper sets out ESMA proposed technical advice with respect to the content to use a prospectus in a retail cascade (articles 3 and 7 Prospectus Directive) and review of the provisions of the Prospectus Regulation (articles 5 and 7 Prospectus Directive). With respect to retail cascades, ESMA indicates that it of the view that if a financial intermediary wishes to make an offer or sub-offer and none of the exemptions from the obligation to publish a prospectus stated in Article 3.2 Prospectus Directive applies, such offer or sub-offer has to comply with the terms and conditions described in the prospectus or base prospectus/final terms, in order to be able to rely on the prospectus published by the issuer. The prospectus has to disclose e.g. the price or the method of determining the price and the process for its disclosure and any subsequent offer or placement by the intermediary would need to be in accordance with these terms (normally the market price reflecting the prevailing market conditions). That means that in case the issuer intends to use a retail cascade for the distribution of securities, the issuer needs to anticipate and include in the prospectus information e.g. on the method of determining the price and the process for its disclosure which applies also for the offer by the intermediaries. ESMA considers it not possible that in retail cascade the intermediary can offer securities under conditions different from those described in the prospectus or final terms; as such offer would conflict with the content of the prospectus. The issuer or the person responsible for the prospectus can only grant its consent to use the prospectus for offers that are in accordance with the terms and conditions described in the prospectus and for which it accepted liability. ESMA is of the opinion that the period for which the consent to use the prospectus is granted cannot extend beyond the validity of the prospectus. In a retail cascade it is the responsibility of the issuer or the person responsible for drawing up the prospectus to ensure that the prospectus stays up-to-date for the whole period it consented that the prospectus can be used by a financial intermediary. On the subject of the review of the provisions of the Prospectus Regulation, the European Commission invited ESMA in to consider some technical adjustment and clarification to four requirements of the Prospectus Regulation, i.e. 1) Information on Taxes withheld at source, 2) Index Composed by the Issuer, 3) Profit Forecast and Estimate and 4) Audited Historical Financial Information. With respect, the disclosure of information on Taxes withheld at source ESMA states that it is in favour of keeping the current requirement of the Prospectus Regulation on tax information. ESMA also indicates that it is in favour of keeping the requirement to produce an index description in the prospectus if the index is composed by the issuer and to extend the requirement to situations where the index is composed by any entity belonging to the same group as the issuer, or by an entity acting in association with, or on behalf of, the issuer. According to ESMA, Issuers should only be required to indicate where information about the index can be found instead of having to provide a description of the composition of the index. On the subject of the requirement that profit forecasts and estimates must be accompanied by reports prepared by independent accountants or auditors, ESMA states that it is not in favour of repealing the relevant report for profit forecasts or estimates. Furthermore, ESMA notes it would be most appropriate to revise the Prospectus Regulation, as to include a definition of “preliminary statements”, based on the criteria above, and to exclude “preliminary statements” from the definition of “profit estimate”. Finally, with regard to Audited Historical Financial Information, ESMA states that it is not in favour of the reducing the provided financial information with respect to shares and depositary receipts issued over shares to the latest two financial years, as proposed by the European Commission. According ESMA, the reduction disclosure requirements of audited historical financial information for shares and depositary receipts issued over shares can be viewed as inappropriate in the context of the current volatility of stock markets world-wide resulting from a weakening global economy.

Legislative initiatives impacting the fund sector

On 29 November, ESMA published ➲the speech its chairperson, Steven Maijoor, gave at the EFAMA Investment Management Forum. In his speech Mr. Maijoor mainly focused on the new regulatory requirements imposed on investment funds which are meant enhance investor protection:

- AIFMD: Mr. Maijoor indicated that overall the consultation round carried out by ESMA with respect to the AIFMD has been extremely successful. Furthermore, ESMA was able to submit its advice to the European Commission on possible implementing measures of AIFMD by the mid-November deadline. Mr. Maijoor highlighted that in the advice ESMA has introduced very important clarifications on some of the core elements of the AIFMD which are linked to investor protection such as the transparency requirements, the duties of the depositary and its liability regime, and the rules applying to the delegation to third country managers and depositaries. He also mentioned that ESMA's work on the AIFMD has not stopped with the advice. The authority has already determined certain areas on which it is its intention to complement our advice through the development of further guidelines (for instance, on the advanced method of calculation of leverage) and are willing to lead the negotiation of the co-operation agreements with the non-EU competent authorities which are foreseen by the AIFMD provisions on third countries. Furthermore, ESMA is progressing with its work on the regulatory technical standards on the types of AIFM, which should be adopted in parallel with the Level 2 implementing measures, and will start working shortly on the other measures – such as the guidelines on sound remuneration policies – foreseen by the Directive.
- Exchange Traded Funds (ETFs) and Structured UCITS: On the subject of ETFs and Structured UCITS, Mr. Maijoor mentioned that ESMA is currently focusing its effort on future guidelines on ETFs and structured UCITS, which will ensure a better regulatory framework for investors. It is ESMA's intention is to introduce certain rules which are specific to ETFs, such as a requirement for such funds to use an identifier, as well as new provisions ensuring an adequate level of protection of retail investors dealing on the secondary market. However overall ESMA intends identify clearly those provisions which are relevant to all UCITS funds, with only some rules being specific to ETFs and reflecting their characteristics (for example, the aforementioned issues relating to the secondary market trading). For issues arising from securities lending activities, for instance, the approach that we intend to follow is to cover all kinds of UCITS – ETFs and non-ETFs – engaging in such activity.
- Packaged Retail Investment Products (PRIPs): With respect to the PRIPs, Mr. Maijoor stated that ESMA is very supportive of the idea of creating a level playing field for all the retail investment products in terms of disclosure and selling practices rules. He indicated that ESMA is aware that for selling practices in particular a horizontal legislative approach may raise some issues in relation to the areas of competence of securities and insurance regulators in those EU Member States where they are not integrated and that the Commission already presented a proposal for the review of the MiFID rules. Should the Commission decide not to

adopt a horizontal legislative approach for the harmonisation of both disclosure rules and selling practices for PRIPs, ESMA strongly hopes that at least, in order to ensure the necessary consistency, the revised Insurance Mediation Directive (IMD) will provide that the MiFID II rules on selling practices apply to those PRIPs which are within the scope of the IMD.

- MiFID II: On the subject of the ➲recent MiFID II proposal, Mr. Maijoor noted that the proposal foresees some reinforced supervisory powers which, in compliance with the general powers which ESMA is already now empowered with in relation to investor protection, would allow the Supervisor to temporarily ban certain products or activities considered risky from an investor protection or a financial stability perspective. The intervention would be limited to certain specific circumstances and a condition for ESMA to step in would be that national authorities have not taken any action to address the threat. A permanent ban on a specific product or activity would remain within the remit of the national authorities, but ESMA would have to play a facilitation and coordination role and ensure that the action taken by the national authority(ies) is justified and proportionate.

To conclude Mr. Maijoor made two remarks on generic issues relating to the capabilities of ESMA to build our organization and deliver its ambitious work programme. First, while the overall level of funding of ESMA looks reasonable considering the tasks envisaged when we started this year, since then there have been many suggestions for additional tasks. It is very important that any new task for ESMA is accompanied with an assessment of additional resources required to fulfil that new task. Spreading limited resources over a larger number of tasks risks that we do not achieve our objective of high quality regulation and supervision. Second, one of the most important new powers of ESMA is the writing of technical standards, which is important for achieving a single rule book in the EU. The quality of technical standards is crucial for the proper implementation of Directives and Standards. ESMA has made clear that on average it takes about 12 months to accomplish all steps required for good technical standards.

Short selling

On 21 November, ESMA published an ➲updated list of measures adopted by competent authorities to either to limit, or to introduce stringent requirements or further reporting obligations by firms to supervisory authorities on short-selling. The update includes new measures taken by Austria.

AIFMD

On 16 November, ESMA published its ➲final advice on the detailed rules underlying the Alternative Investment Fund Managers Directive (AIFMD). The rules proposed by ESMA will establish a comprehensive framework for alternative investment funds, their managers and depositaries. They are also designed to help achieve the AIFMD's objective of increased transparency and tackling systemic risk, ultimately contributing to a more sound protection of investors. The advice consists of four main parts. The first part of the advice clarifies the operation of the thresholds that determine whether a manager is subject to the Directive. ESMA proposes to require AIFMs to have additional own funds and/or professional indemnity insurance to cover risks arising from professional negligence. Many of the rules in this section, such as on conflicts of interest, record keeping and organisational requirements are based on the equivalent provisions of the MiFID and UCITS frameworks. The second part of the advice sets out the framework governing depositaries of AIFs. Key issues include the criteria for assessing whether the prudential regulation and supervision applicable to a depositary established in a third country has the same effect as the provisions of the AIFMD. ESMA has identified a number of criteria for this purpose, such as the independence of the relevant authority, the requirements on eligibility of entities wishing to act as depositary and the existence of sanctions in the case of violations. Another crucial point is the liability of depositaries, the first element of which relates to the circumstances in which a financial instrument held in custody should be considered as 'lost'. This assessment is crucial in determining whether a depositary must subsequently return an asset. ESMA's advice proposes three conditions, at least one of which would have to be fulfilled in order for an asset to be considered lost. These are that a stated right of ownership of the AIF is uncovered to be unfounded because it either ceases to exist or never existed; the AIF has been permanently deprived of its right of ownership over the financial instruments; or the AIF is permanently unable to directly or indirectly dispose of the financial instruments. Another important concept which ESMA's advice aims to clarify relates to which events would constitute external events beyond the reasonable control of the depositary. Finally, the advice clarifies the objective reasons that would allow a depositary to contractually discharge its liability. In the third part of the advice ESMA clarifies the definition of leverage, how it should be calculated and in what circumstances a competent authority should be able to impose limits on the leverage a particular AIFM may employ. ESMA considers it appropriate to prescribe two different calculation methodologies for the leverage (commitment and gross methods) as well as a further option (the advanced method) that can be used by managers on request and subject to certain criteria. The AIFMD also aims to increase transparency of AIFs and their managers. In this context, ESMA's advice specifies the form and content of information to be reported to competent authorities and investors, as well as of the information to be included in the annual report. In the final part of the advice, ESMA sets outs view with respect to supervisory co-operation and exchange of information within the AIFMD's third country regime. ESMA envisages that the arrangements between EU and non-EU authorities should take the form of written agreements allowing for exchange of information for both supervisory and enforcement purposes.

Organisation for Economic Co-operation and Development (OECD)

OTC Derivatives and Sovereign Debt Management Practices

On 12 December, the OECD published on report, entitled ➲"Regulatory Reform of OTC Derivatives and Its Implications for Sovereign Debt Management Practices". The report analyses the possible implications for public debt management practices arising from regulatory changes for over the counter derivatives (OTCD) that are being developed worldwide to strengthen the resiliency of the financial system. It finds that sovereigns will have to revaluate their current collateralization policies, since banks may look to pass on additional capital charges under Basel III to their clients including sovereigns. Sovereigns may also be required to centrally clear their OTCD products, since many jurisdictions are mandating central clearing of standardized OTCD products. According to the OECD, issues around sovereign exemptions and the transition of existing OTCD portfolios will also pose challenges. Moreover, as sovereigns develop their funds management policies, they may also need to account for the broader public policy implications of their decisions. To maintain well-functioning domestic capital markets and help ensure effective implementation of the regulatory changes, sovereigns may also need to consider adjusting their funding strategies.

Securities and Markets Stakeholder Group (SMSG)[7]

Exchange traded UCITS

On 29 November, the SMSG published ➲its advice on ESMA's public consultation on UCITS Exchange-trade funds (ETFs) in the European Union. In the advice, the Group states that is generally agrees with the concerns raised by ESMA in its Consultation Paper, which relate mainly to the fact that ETFs have become increasingly complex, and may raise significant issues both in respect to investor protection and to systemic risk. However, ETFs are a low cost and straightforward investment proposition for investors, and as such, the Group is of the opinion that ESMA should investigate how to make indexed ETFs more offered to retail investors, In respect to the prevention and mitigation of the risks that may arise from ETFs, while the whole Group agrees that greater disclosures are required, the majority of the Group members believes that, in addition to these disclosure requirements, regulators should adopt a more interventionist approach. The Group also believes it necessary to avoid any type of regulatory arbitrage, by subjecting all UCITS products and exchange-traded products to similar rules. As such the Group states that it supports the recommendations made by ESMA, and agrees that:

[7] The Securities and Markets Stakeholder Group has been set up by ESMA to help facilitate consultation with stakeholders in areas relevant to the tasks of ESMA. The Group will be consulted on actions concerning regulatory technical standards and implementing technical standards.

- UCITS ETFs should use an identifier in their titles, fund rules, Key Investor Document, prospectus and marketing material;
- Investors should be provided with sufficient details to understand the index tracking policy used;
- There is a need for greater disclosures in respect to synthetic ETFs, notably in relation to underlying exposure, counterparty(ies) and the portfolio fund, as well as for stricter requirements in respect to the quality of the collateral, in the form of quantitative requirements on the quality (notably the liquidity) of the collateral, overcollateralization requirements in specific circumstances, the regulators (and potentially ESMA) being responsible for regularly controlling the quality of the collateral. In addition, risks of conflicts of interests should be limited by prohibiting entities from the same group from acting at the same time as the ETF provider and the derivative counterparty;
- Securities lending should be made more transparent to investors, should be forbidden in respect to the collateral received in exchange for the swap in the case of synthetic ETFs, and the lending agent must be required to indemnify the UCITS when a counterparty defaults for all types of ETFs (synthetic and physical);
- Actively-managed UCITS ETFs should be subject to greater disclosure requirements;
- It is necessary to specify, in the product title of leveraged UCITS ETFs, that they constitute leveraged ETFs, as well as the level of leverage;
- Greater protection of secondary investors would be achieved by informing investors of their redemption rights, the ETF manager being made responsible for paying the difference between the collateral and the index underlying the swap if a counterparty defaults;
- Total return swaps and strategy indices need to be better regulated.

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Insurance, reinsurance and pensions

Normative documents

National Bank of Belgium (NBB)[8]

Supplementary provisions in life and industrial accident insurance

On 19 December, the NBB published the Circular NBB_2011_08 of 15 December 2011 on supplementary provisions in life and industrial accident insurance (in ➲Dutch and in ➲French). The Circular sets out the key

[8] As of 1 April 2011, the new "Twin Peaks" supervisory architecture has come into force in Belgium. The new architecture replaces the Banking, Finance and Insurance Commission (CBFA) with two new regulators, the National Bank of Belgium (NBB) and the newly created Financial Services and Markets Authority (FSMA). Within the new framework NBB is responsible for the macro prudential supervision and micro-prudential supervision of credit institutions including financial services groups, stockbroking firms, insurance and reinsurance companies, clearing and settlement institutions payment institutions and institutions for electronic money and surety companies.

interest rate that must be taking into account for calculating the supplementary provisions that must be established when the guaranteed interest rate exceeds 80% of the average interest rate over the last five years of Linear Bonds (OLOs) with a 10 year maturity with more than 10 base points (0,1%). It indicates that the interest that must be taking into account on 31/12/2011 is 3,26%.

Consultative or informative documents

CEA

Impact from gender ban for insurance consumers

On 7 December, the CEA published a report, ➲entitled "Impact from gender ban for insurance consumer". In the report the economic impact on European consumers of prohibiting insurers from using gender in the calculation of premiums and benefits is analysed. The report concludes that premiums could increase as a result of the redistribution of premiums from high-risk to low-risk groups. On average:

- Men could see a reduction in pension income from annuities of around 5% or more;
- Women could see term life insurance premiums rise by around 30% or more;
- Young women could see motor insurance premiums rise by 11% or more.

The study also found that such changes in premium are likely to affect consumer demand, leading to wider social implications, including disincentives for people to save for old age.

Solvency II

In a ➲press release of 16 November, the CEA warned of a considerable adverse impact on consumers if a number of key issues in the development of the new Solvency II regulatory regime for insurers are not addressed. According to the Federation, long-term guarantee products that are very popular — particularly during periods of financial turmoil — could become unviable at acceptable prices because Solvency II's requirements. Furthermore, overly conservative capital requirements for insurers could translate into increased prices and a more limited choice of products for consumers, just when they most need insurance.

Anti-Discrimination Directive

On 4 November, the CEA published ➲its comments on the revised wording of Article 2(7) of the ➲proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (the "Anti-discrimination proposal") dated 19 October 2011. According the Federation, the revised version of Article 2(7) helps enhance legal certainty for insurers in light of the recent ECJ ruling on the Test-Achats case. The aforementioned article states that "*in the provision of financial services, […]*

- *Proportionate differences in treatment on the grounds* *of age [...] do not constitute discrimination for the purposes of this Directive, if age [...] is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and relevant and reliable statistical data [...];*

- *Proportionate differences in treatment on the grounds of disability do not constitute discrimination for the purposes of this Directive, if the health condition underlying the disability is a determining factor in the assessment of risk for the service in question and this assessment is based on actuarial principles and relevant and reliable statistical data or, where such data are not available or sufficient, on relevant and reliable medical knowledge*.

European Commission

Gender guidelines

On 22 December, the European Commission adopted ➲guidelines to help the insurance industry implement unisex pricing, after the Court of Justice of the European Union ruled that different premiums for men and women constitute sex discrimination. In its ruling on the Test-Achats case on 1 March 2011, the Court of Justice gave insurers until 21 December 2012 to treat individual male and female customers equally in terms of insurance premiums and benefits. The guidelines cover a series of issues which emerged from in-depth consultations with Member States and stakeholders. For example, they clarify that the ruling applies only to new contracts, in particular to contracts concluded as from 21 December 2012. They also give specific examples of what is considered a "new contract" to ensure a comprehensive application of the unisex rule at EU level from the same date. In addition, the guidelines provide examples of gender-related insurance practices which are compatible with the principle of unisex premiums and benefits, and therefore will not change because of the Test-Achats ruling. These practices are very diverse, ranging from the calculation of technical provisions to reinsurance pricing, medical underwriting or targeted marketing.

European Insurance and Occupational Pensions Authority (EIOPA)[9]

Solvency II - Add-on Quantitative Financial Stability Reporting Templates

On 21 December, EIOPA published a ➲consultation paper on the Proposal for Quantitative Reporting Templates for Financial Stability Purposes. The consultation paper is an add on to the ➲consultation on the general reporting requirements and sets out additional information reporting requirements for large insurance groups and large solo undertakings not being a member of a group. It is proposed that the scope of the financial stability add-on is derived from a size criterion already known from the Financial Conglomerate Directive which is a balance sheet total of 6 bn EUR. Introducing a limited scope is also seen

[9] EIOPA has replaced the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS), as of 1 January 2011.

in line with general proportionality provisions.
The Consultation Paper is accompanied by ➲spreadsheets and a ➲LOG document, all setting out the additional reporting requirements pertaining to the future Financial Stability work of EIOPA.

Solvency II – Calibration of risk factors in the standard formula

On 12 December, EIOPA published the ➲report of the Joint Working Group (JWG) on the "Calibration of the Premium and Reserve Risk Factors in the Standard Formula of Solvency II" related to the non-life and health-non-similar-to-life-technique (non-SLT) calibration. The report summarises the findings and recommendations of the JWG on the settings of the premium and reserve risk factors in the non-life and health non-SLT underwriting risk module of the SCR standard formula. With respect to the setting of risk factors, the report recommends the use of an approach which combines the advantages of a pan-European approach (the factors are set on basis of the pooled European data set) and an averaging approach (the factors are set at a regional (country) level).
Under this combined approach:

- As in the averaging approach, the European factor is derived as a weighted average of regional factors.
- The regional factors are derived by a unified and consistent methodology across both premium and reserve risk. In addition to the regional factors, the methodology provides information on the nature of dependency between the portfolio size and the degree of volatility of an undertakings' business.
- Compared to the simple averaging approach, the methodology of the averaging is improved to be fully consistent with the results of the statistical analysis.
- The calibration is conceptually based on the median size of the portfolio in the EEA (an additional factor, described in section 6.8, is included in the calibration to ensure this). However, where the portfolios larger than the median portfolio represent more than 95% of policyholders, the calibration is reduced to ensure that at least 95% of policyholders belong to portfolios for which the risk is not underestimated.

Pre-enrolment information to pension plan members

In December, EIOPA published a ➲report on Pre-enrolment information to pension plan members. The report analyses and compares the requirements and practices concerning information before or at enrolment of pension plans in each of the EU Member States. It finds among other things that these requirements and practices differ substantially across European countries and between kinds of pension plans. Two general objective factors contribute to this result: the absence of a general EU regulation of pre-enrolment requirements for pension plans, and the structural differences between pension plans. Each of the two factors deserves a detailed assessment. First, one must consider that the IORP Directive covers only a subset of the plans that exist across Europe. Leaving aside occupational plans that do not qualify as IORPs (such as book reserves schemes14), personal pension plans currently are under a variety of EU regulations (UCITS, consolidated Life Assurance Directive, CRD, MIFID) or, often, only under national regulations. Moreover, the IORP Directive does not make a clear distinction between information that should be delivered at or before enrolment and information to be made available ongoing. Second, the structural differences in information requirements observed for different kinds of pension plans appear linked primarily to the range of choices that are available to members in the enrolment phase. For occupational DB plans, and for occupational DC plans that do not offer investment choice to individual members, there is little emphasis on specific information to be delivered at or before enrolment.

Complaints-Handling by Insurance Undertakings

On 9 November, EIOPA published its proposed ➲Guidelines on Complaints-Handling by Insurance Undertakings. The proposed guidelines aim clarify the expectations relating to an insurance undertaking's internal control system as regards complaints-handling and possible follow-up and render it more effective and give guidance on the provision of information to consumers and procedures for responding to complaints, thereby ensuring the adequate protection of policyholders and beneficiaries.

The proposed guidelines where accompanied by a report on ➲Report on Best Practices by Insurance Undertakings in handling complaints. The report contains a list of best practices for handling complaints by insurance undertakings.

Solvency II - Quantitative Reporting Templates

On 8 November, EIOPA published its draft proposal on Quantitative Reporting Templates. The proposal consists of a ➲consultation paper, accompanying ➲solo and ➲group-specific reporting spreadsheets, ➲LOGs and Summary Documents. The consultation paper provides a summary of the requirements related to templates, and an overview of all templates and their applicability to solo undertakings / groups, their frequency and their possible public disclosure. The accompanying spreadsheets contain a presentation of the data tables, with cell numbers that refer to the LOG documents, which include a definition, examples and the purpose of each cell item. There is one LOG for each template, and they are filed by categories of templates (BS – Balance Sheet, OF – Own Funds, SCR / MCR – Solvency Capital Requirement/Minimum Capital Requirement, VA – Variation Analysis, Assets, TP L – Technical Provisions Life, TP NL – Technical Provisions Non Life, Reinsurance, Group-specific templates). Finally, summary documents aim at gathering in a clear and synthetic way information for each template on: purpose, potential benefits and costs, application to groups, materiality thresholds, public disclosure, and frequency (including details on possible exemptions for certain quarterly templates).

Solvency II - Quantitative Reporting Templates

On the same day, EIOPA also published ➲its draft proposal for Guidelines on Narrative Public Disclosure & Supervisory Reporting, Predefined Events and Processes for Reporting & Disclosure. The proposal covers following subjects:

- Narrative Solvency and Financial Condition Report (SFCR) & Regular Supervisory Report (RSR), further detailing the requirements from the Directive and Delegated Act, with the Guidelines applying either to solo undertakings and groups, only to groups, only to undertakings belonging to a group, or only to undertakings using an internal model to calculate their SCR;
- Reporting upon occurrence of pre-defined events, further explaining article 35 (2) (a) (ii) and article 245 (2) of the Solvency II Directive; specific attention should be given to the explanatory text in that area;
- Processes with regards to disclosure & reporting, further explaining articles 35, 53, 54, 55 & 256 of the Solvency II Directive, as to disclosure & reporting policies, non-disclosure of information, references to other documents in the SFCR, additional voluntary disclosures, RSR as a stand-alone document, and approval of the RSR by the administrative, management or supervisory body.

Solvency II - Guidelines on Own Risk and Solvency Assessment

On 7 November, EIOPA published ➲a Consultation Paper on the Proposal for Guidelines on Own Risk and Solvency Assessment (ORSA). The proposed guidelines cover general issues such as the principle of proportionality, the role of the administrative, management or supervisory body and documentation of the ORSA, as well as specific issues, for example, the assessment of the overall solvency needs, the continuous compliance with the requirements on regulatory capital and technical provisions and the deviations from assumptions underlying the SCR calculation. However, they do not consider the role of the supervisory authority. This will be covered by the guidelines on the Supervisory Review Process.

Financial Services and Markets Authorities (FSMA)[10]

Life table

On 3 November, the FSMA published the Opinion nr. 34 of the Commission for Supplementary Pensions on the draft Regulation determining the life table for the conversion of capital into income (in ➲Dutch and in ➲French). As no consensus could be reached between the

[10] As of 1 April 2011, the new "Twin Peaks" supervisory architecture has come into force in Belgium. The new architecture replaces the Banking, Finance and Insurance Commission (CBFA) with two new regulators, the National Bank of Belgium (NBB) and the newly created Financial Services and Markets Authority (FSMA). Within the new framework FSMA is responsible for the supervision of the financial markets and the "conduct of business" rules, the micro-prudential supervision of portfolio management and investment advice companies, UCI management companies and UCI's, institutions for occupational pension, financial intermediaries, the financial education of investors and their protection against the illicit provision of financial products and services.

members of the Commission, the opinion provides an overview of the individual opinions of the Commission Members. The draft regulation aims to implement the new MR/FR-5 life tables which have been developed by the FSMA.

International Association of Insurance Supervisors (IAIS)

Insurance and Financial Stability

On 15 November, the IAIS published ➲a paper, entitled "Insurance and Financial Stability". The paper provides the perspective of insurance supervisors on the role of the insurance industry and its interaction with the financial system and other financial market institutions. It notes that that insurance underwriting risks are in most cases not correlated with the economic business cycle and financial market risks and that the magnitude of insurance liabilities are, in very broad terms, not affected by financial market losses. While impacted by the financial crisis, insurers engaged in traditional insurance activities were not a concern from a systemic risk perspective. According to the paper, the financial crisis did however reveal that insurance groups and conglomerates operating in traditional lines of business may suffer considerable distress and become globally systemically important when they expand significantly in non-traditional and non-insurance activities. In this respect the paper describes how insurance groups and conglomerates that engage in non-traditional or non-insurance activities are more vulnerable to financial market developments and thus more likely to amplify, or contribute to, systemic risk. Examples of such non-traditional and non-insurance activities include credit default swaps (CDS) transactions for non-hedging purposes or leveraging assets to enhance investment returns.

Organisation for Economic Co-operation and Development (OECD)

Good Practices on Pension Funds' Use of Alternative Investments and Derivatives

On 6 December, the OECD published the ➲OECD/IOPS Good Practices on Pension Funds' Use of Alternative Investments and Derivatives. The good practices reflect what pension regulatory and supervisory authorities usually expect to examine when assessing the risk management of pension funds that use alternative investments and derivatives. They outline how supervisors should oversee such investments and suggest possible regulatory controls. The good practices encourage the establishment of robust and efficient risk-management policies and techniques to measure risks associated with this activity, the implementation of appropriate internal governance processes and risk control procedures, the conduct of due diligence investigation when assigning such investments to external asset managers and the promotion of open communication with shareholders on the results and costs of the use of alternative investments and derivatives. They also provide guidance with respect to specific legal/regulatory measures and supervisory policies to efficiently limit and monitor the risks of these instruments.

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Tax

Normative documents

Official Journal of Belgium (BS/MB)

Measures of the 2012 budget impacting the financial sector and financial instruments

On 30 December, the ➲Law of 28 December 2011 on miscellaneous measures was published in the Official Journal. The Law implements the following tax measures which were agreed upon in the 2012 budget agreement and which impact the financial sector and financial instruments:

- **Withholding tax rates:** On dividends, the reduced withholding tax rate of 15% is increased to 21%. The 15% rate applied to (i) dividends related to shares that have been publicly issued from 1994; (ii) dividends related to shares issued in exchange of private (non-public) cash contributions made from 1994 and (iii) dividends related to shares in recognized investment companies.
  The default withholding tax rate for dividends is maintained at 25%. Liquidation boni remain subject to 10% withholding tax. Share buy-backs would no longer benefit from the 10% rate, and would also be subject to a 21% withholding tax. The existing withholding tax exemptions are not affected. The default withholding tax rate on interest would be increased from 15% to 21%.
  For interest from government bonds, the withholding tax rate is maintained at 15% for bonds issued and subscribed during the period from 24 November to 2 December 2011. All other government bonds become subject to the 21% default rate. Savings from regulated saving deposits continue to be subject to a 15% withholding tax rate for the portion in excess of the tax-exempt bracket. The exemption for interest up to 1,770 EUR (per taxpayer- amount for tax year 2012) remains available at source.
  Individual taxpayers with movable income (interest and dividends – as defined by article 17, § 1, 1° and 2° ITC) exceeding net 13,675 EUR per year become subject to a separate 4% surcharge tax on the movable income exceeding the threshold. Net amount means the amount collected or received, before deduction of any collection and other similar expenses, and increased with the withholding tax and domicile state levy (if any). The amount of 13,675 EUR is indexed and would

amount to 20,000 EUR for tax year 2013. Movable income qualifying for the determination of the threshold does not include tax-exempt interest from regulated savings deposits and other interest and dividends which are not taxable according to article 21 ITC (e.g. buyback or liquidations from certain investment companies), interest on State bonds issued and subscribed in the period 24 November – 2 December 2011 and liquidation dividends. Similarly, the 4% surcharge is not due on tax exempt interest from regulated saving deposits and other interest and dividends which are not taxable according to article 21 ITC, on said State bonds and on liquidation boni. The 4% surcharge is also not due on interest and dividends subject to withholding tax at the rate of 25%. For purposes of calculating the 20,000 EUR threshold, interest and dividends taxed at 25%, as well as taxed interest on savings deposits, are taken into account first. The Law of 28 December 2011 containing miscellaneous measures further confirms that no communal surcharge can be levied on top of the 4% surcharge.
The withholding tax rate for royalties remains at 15%. The increased withholding tax rates apply to interest and dividends paid or attributed as of 1 January 2012.

- **Notional interest deduction:** The NID rate continues to be determined annually based on the OLO rate but the previous maximum of 6.5% for large companies and 7% for SME's is decreased to 3% for large companies and 3.5% for SME's. These new maximum rates apply as of tax year 2013.
- **Tax regime of stock options:** The Law of 28 December 2011 provides for an increase of the percentages which need to be used to determine the taxable benefit in kind for non-quoted stock options: the default rate is increased from 15% to 18%, whereas the reduced percentage of 7.5% is increased to 9%.
- **Stock exchange tax:** The new budget measures implement an increase of around 30% of the stock exchange tax for transactions executed as from 1 January 2012. This leads to the following new rates:
  - 0.22% standard rate;
  - 0.09% reduced rate;
  - 0.65% rate for capitalisation unit trust.

  The maximum tax amounts per transaction also increase from 500 EUR to 650 EUR (standard) and from 750 EUR to 975 EUR (capitalisation unit trust).
- **Bank levy:** Two separate measures are foreseen in the Law of 28 December 2011:
  - A financial stability contribution will apply to all Belgian established banks, amounting to 35 base points (bps) on the total amount of liabilities minus equity and deposits subject to the guarantee scheme.
  - The contribution to the deposit Protection Fund which was already applicable in previous years will be fixed for 2012 at 24.5 bps on the total amount of deposits subject to the guarantee scheme. For 2013, the rate will be reduced again to 15 bps.
- **Tax on conversion of bearer securities:** The Law of

28 December 2011 introduces a tax on the conversion of bearer shares to be dematerialized or registered securities. The taxable event is the conversion, i.e. the dematerialization of bearer shares through deposit on a securities account with a financial institution or the registration with the issuing company as registered shares. Securities representing public sector debt (governed by the Law of 2 January 1991), with a maturity date prior to 1 January 2014, are not in scope. The tax rate will be 1% for conversions in 2012 and 2% for conversions in 2013.
The taxable base for quoted securities will be the most recent quoted value before the date of deposit on a securities account or with the issuer. For non-quoted securities, the taxable base will be:

- The nominal value for bonds and other debt securities;
- The most recent inventory value for parts in investment institutions with a variable number of parts;
- The book value on the date of deposit (excl. interest) for any other securities.

The tax will have to be withheld by the financial intermediary (for conversions in dematerialised securities) or the issuer (for conversions in registered securities).

Further information on the Federal Budget Plan 2012 can be found on http://www.budget2012.be/.

Capital gains tax regime and banking secrecy

On 10 November, the Law of 7 November 2011 containing tax and other measures has been published. The main tax measures in this law are a modification of the deferred capital gains tax regime to make it more EU-compliant and some clarifications in respect of recent changes to the banking secrecy rules. In this respect contains some changes to Articles 319bis and 333/1 ITC to avoid any interpretation issues that might have arisen further to the new bank secrecy rules, introduced by the Law of 14 April 2011 and applicable as of 1 July 2011. These changes are made to leave no doubt as to the fact that the release of the bank secrecy requires a detailed prior notification to the taxpayer, not only in case of tax fraud but also in case the tax authorities want to establish the tax burden based on signs and indicia. No such notification is required in case the release of the bank secrecy is requested by a foreign tax administration and the bank secrecy does under no circumstance apply to tax collectors.

Consultative or informative documents

Belgian Tax Authorities

Removal of advices of the Ruling Commission

On 12 December 2011, the Ruling Commission removed all draft advices from its website further to the announcement of the Belgian government that the general anti-abuse measure will be amended and that its scope will be extended.

CEA

Data protection and FATCA

On 5 December, the CEA published ➲a letter it had sent to the Art. 29 Data Protection Working Party with respect to the conflict between the EU Data Protection Directive and the Foreign Account Tax Compliance Act ("FATCA"). FATCA requires that financial institutions enter into agreements with the IRS on transfer of data protection prior to July 1, 2013.

However, currently the EU Data Protection laws bars European insurers from transferring identification and personal data to entities in the US without explicit consent by the data subject. According to Art. 25 of EU Data Protection Directive, an adequate level of protection has to exist in third country for transmittal of identification data (i.e. name or identifying numbers). As the European Commission has issued an official opinion stating that the US does not offer such an adequate level of privacy protection, the CEA is of the opinion that transmittal of such data to US entities, without the data subject's consent, is in violation of EU data protection law. In this respect, the CEA in letter strongly encourage the Art. 29 Working Party to conclude an opinion clarifying the conflicts between US FATCA and the EU data protection legislation.

European Fund and Asset Management Association (EFAMA)

Financial Transaction Tax

On 30 November, EFAMA published ➲its comments the ➲European Commission's proposal for a Council Directive on a common system of financial transaction tax

European Commission

Taxation of certain types of income from capital

In a ➲press release of 24 November 2011, the European Commission announced that it has officially asked Belgium to abolish the additional taxation of certain types of income from capital, i.e. when non-EEA source portfolio dividends and interest which have not been received/collected by an intermediary established in Belgium are subject to the additional taxation.

Double taxation of interest and royalties

On 11 November 2011, the European Commission published ➲a Communication on Double Taxation in the Single Market. The communication identifies cross-border double taxation problems and their impact on the internal market. It explains which solutions have already been explored by the Member States and the EU institutions and which areas need further coordinated actions firstly to prevent double taxation cases and then to ensure an effective, quick and low-cost method to solve disputes in double taxation conflicts.

European Fund and Asset Management

Association (EFAMA)

On 30 November, EFAMA published ➲its comments the ➲European Commission's proposal for a Council Directive on a common system of financial transaction tax.

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We are always interested in your feedback. Please let us know what you think of this newsletter and send your comments to Regulatory Radar.

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