

# Looking back.

## Linklaters

### Year in Review – English Law in 2012

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**Market abuse/Insider dealing:** In January, the FSA's enforcement action against US trader David Einhorn and hedge fund Greenlight Capital Inc. signalled a new approach to market abuse. The FSA applied an objective test in retrospectively concluding that the totality of the information Mr Einhorn received during a management call – specifically held on a non-wall crossed basis – nevertheless amounted to inside information. The FSA has also seen its first cross border insider dealing investigation, conducted jointly with US regulators, result in convictions both in the UK and USA. *Read more... [UK Corporate Update – Inside Information and Regulatory Investigations Update](#)*

**Stamp duty reserve tax (SDRT):** In March the 1.5% SDRT charge which arises on an issue of shares to a depositary receipt system was confirmed by the UK tax tribunal as contrary to EU law. Following this case and an earlier ECJ decision, HM Revenue & Customs accepts that the 1.5% SDRT charge is no longer applicable to issues of shares and securities to clearance services or depositary receipt systems. *Read more...*

**Carbon Reduction Commitment (CRC):** In the March Budget, the Government announced a review of CRC and the possibility of replacing it with an environmental tax. The Autumn Statement contained an announcement that the Department of Energy and Climate Change (DECC) will publish a response on the March 2012 Consultation and that the CRC will be simplified in June 2013, in particular, the performance league table will be abolished.

**Litigation privilege in regulatory investigations:** In March, the Competition Appeal Tribunal (CAT) considered whether certain Office of Fair Trading enforcement proceedings qualified as “litigation” for the purposes of establishing a claim of litigation privilege. The CAT's ruling in *Tesco v OFT* lends support to the prevailing view that communications made between a client, or its lawyer, and a third party for the dominant purpose of regulatory enforcement proceedings or investigations are capable of attracting litigation privilege. *Read more...*

**Liability of parent company for subsidiary's health & safety breaches:** In April, in *Chandler v Cape*, the Court of Appeal confirmed that a parent company owed a duty of care to an employee of its subsidiary to protect him from personal injury in the workplace. The case does not mean that a parent company will automatically be responsible for the conduct of its subsidiaries, but it is noteworthy as one of the first times that such a duty has been established. *Read more...*

**Proposed EU Bank resolution directive:** Proposals for an EU-wide bank resolution directive were published in June. Their main aim is to create a legislative framework applicable across all EU Member States to reduce the risk of widespread market disruption following a bank failure and the need to use public funds to support failing banks. *Read more ...*

**Changes to the Prospectus Directive:** These came into effect in the UK in July. The new prospectus disclosure regime will be significant for all issuers with securities admitted to trading on a regulated market, or offered to the public, in each case in an EEA Member State (including the UK). Issuers of retail debt (*Read more...*) and equity securities (*Read more...*) will be more significantly affected. The changes will also be significant for issuers of complex structured debt.

**EMIR:** The final text of the EU Regulation on OTC Derivatives, Central Counterparties and Trade Repositories (EMIR) was adopted on 4 July and came into force in all EU Member States on 16 August. ESMA and EBA have since drafted a number of draft technical standards, most of which were adopted by the European Commission in December and will become EU regulations in 2013. *Read more... [EMIR – What Corporates need to know, ESMA Consultation Paper on Technical Standards and Final text of European Market Infrastructure Regulation](#)*

**Sale of second-hand software:** In July, the ECJ gave its decision in *UsedSoft v Oracle*, finding that once software is “sold” within the EU (once a licensee has made a one-off payment for a perpetual licence to use it), the distribution right in that software is exhausted and the licensee is free to sell his licence to a third party, provided he renders his own copy unusable at the time of the resale. This applies regardless of whether the software was provided on a CD or other physical media or downloaded from the internet. However, if the licence was provided in a bundle, those rights cannot be split and sold separately. *Read more...*

**Controlled foreign company (CFC) tax reform:** Substantial changes to the UK's CFC tax rules (anti-avoidance rules for taxing non-UK resident subsidiaries in lower tax jurisdictions) were enacted in July. As well as focusing more clearly on profits “artificially diverted” from the UK, there are also special rules for non-UK resident finance subsidiaries which will

generally result in an effective tax rate on intra-group finance income of 5.25% by April 2014 (or full exemption in some cases). [Read more...](#)

**HM Treasury launches UK Guarantees Scheme to encourage investment in infrastructure:** The scheme, announced in July, is designed to encourage investment in major UK infrastructure. The Infrastructure (Financial Assistance) Act 2012 gave effect to the scheme and provides for HM Treasury to give financial assistance to support infrastructure – which is broadly defined to cover transport, utilities and energy. Projects with a capital value of around £10bn have been prequalified as eligible for a guarantee. The scheme is open until 31 December 2014. [Read more...](#) *UK Guarantees Scheme: Encouraging Growth in Infrastructure and UK Guarantees Scheme: HM Treasury announces further details at City Briefing*

**FSA changes to the Listing Rules, Prospectus Rules and Disclosure and Transparency Rules:** The key changes relate to: externally managed companies; class transactions; reverse takeovers; related party transactions; share buybacks; financial information; circulars; PDMRs and the Model Code; and sponsors. Many of the changes formalised or clarified existing practice but some have a significant effect, particularly in relation to the role and responsibilities of sponsors. All changes came into force on 1 October except those relating to sponsors, which were effective from 31 December. [Read more...](#)

**Automatic pensions enrolment:** The much-publicised duty on employers to automatically enrol certain workers into a qualifying pension scheme began to be phased in from 1 October. The requirements will be introduced over several years, starting with those employers which participate in the largest PAYE schemes.

**Anti-bribery:** In October, the Serious Fraud Office (SFO) issued revised policies indicating how it will deal with potential breaches of the Bribery Act 2010. These policies - relating to facilitation payments, gifts and hospitality - and the SFO's approach to organisations that self-report wrongdoing demonstrate its focus on investigating and prosecuting serious and complex fraud and corruption. [Read more...](#) *The Bribery Act 2010 – One year on and Back to basics – the SFO restates its approach to enforcement*

**Short selling:** The EU Short Selling Regulation came into force in the UK on 1 November (by way of the Financial Services and Markets 2000 (Short Selling) Regulations 2012). The Regulation (i) sets out a disclosure regime for net short positions in EU listed shares and EU sovereign bonds; (ii) imposes controls on short selling of EU listed shares and EU sovereign bonds; and (iii) imposes a ban on uncovered credit default swaps (CDS) on EU sovereigns. [Read more...](#) *Short Selling Fact Sheet and Client Breakfast Briefing*

**Women on boards:** In November, the European Commission announced its proposals for improving gender balance in board rooms. It has abandoned its plan to introduce a quota and has set an objective for listed companies to achieve 40% representation of “the under-represented sex” amongst non-executive directors by 2020. [Read more...](#)

**Cloud computing:** An increasing number of businesses are looking to transfer their computing operations to the “cloud” i.e. remote computer servers over which, in many cases, they have little control. This can raise security and data protection concerns but guidance over the last year, particularly from data protection regulators, suggests a more pragmatic approach. [Read more...](#)

**Data protection reform:** The European Commission has published proposals for reform of European data protection laws. Highlights include fines of up to 2% of worldwide turnover. Subsequent progress has been slow, though the target is to adopt the legislation by early 2014. A two-year implementation period means it would then come into force in 2016.

**FATCA:** Proposed regulations addressing the implementation of the U.S. tax rules known as “FATCA” were published. FATCA introduces withholding and reporting requirements for “foreign” (i.e. non-U.S.) financial institutions and certain other non-financial foreign entities, including those in the UK. Further guidance was published in November, delaying a number of important effective dates. A number of bodies, including the Loan Market Association and ISDA, have published drafting addressing FATCA. [Read more...](#) *on FATCA and the November 2012 guidance*

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