FIG Bulletin

Recent developments

2 August 2021

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General

Draft Markets in Financial Instruments, Benchmarks and Financial Promotions (Amendment) (EU Exit) Regulations 2021

HM Treasury has published a draft version of the Markets in Financial Instruments, Benchmarks and Financial Promotions (Amendment) (EU Exit) Regulations 2021, together with an explanatory memorandum. The draft Regulations:

- address deficiencies in retained EU law, including the UK Markets in Financial Instruments Regulation (UK MiFIR), in relation to the non-discriminatory access regime for exchange-traded derivatives (ETDs), which requires trading venues and central counterparties to grant each other non-discriminatory access;
- amend the low carbon benchmarks regime, which sets out requirements and voluntary standards for firms that administer benchmarks under the Benchmarks Regulation (UK BMR); and
- makes technical amendments to certain exemptions to the financial promotions regime for relevant markets to ensure that they apply to UK markets following the UK's departure from the EU.

Once made, the draft Regulations indicate that they will come into force on 13 October 2021.

UK FTA with Iceland, Norway and Liechtenstein

The Department for International Trade (DIT) has published the full text of the free trade agreement (FTA) between the UK and Iceland, Norway and Liechtenstein (EEA EFTA states). It is accompanied by supporting documents, including a joint declaration on financial services which affirms the intention of the parties to "support financial services market access through deference arrangements at each Party's discretion", including, but not limited to, equivalence decisions.

The publication follows the announcement of the signing of the agreement on 8 July 2021.

UK financial services overseas framework: HM Treasury response to call for evidence

HM Treasury has published a response to its December 2020 call for evidence on the overseas framework. In the response, HM Treasury summarises the submissions received and outlines its views and proposed next steps.

The Treasury concludes that, working with the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and the Bank of England (BoE), it will review the overseas regulatory perimeter. This review will seek to identify:

- whether the balance of the perimeter remains appropriate for the UK following its exit from the EU in order to ensure resilient and safe financial markets;
- whether there are elements of the perimeter that need updating to reflect modern working patterns and advancements in technology, such as the "in the UK" test; and
- areas of the perimeter that could be clarified to allow greater transparency and clarity for firms.

Following the review, HM Treasury will consult on potential changes to the regime in Q4 2021. In particular, it will consult on:

- any proposed changes to the regulatory perimeter;
- any proposed changes to the overseas persons exemption (OPE), including the option to remove the overlap between the OPE and the equivalence provisions under Title VIII of UK MiFIR;
- whether the current operation of the regime appropriately balances openness while mitigating risks to the resilience and safety of financial markets, the protection of consumers and market integrity, and the promotion of competition;
- whether further regulatory powers are needed for recognised overseas investment exchanges (ROIE) and the OPE; and
- options for amending exemptions in the Financial Promotion Order relating to insurance distribution with an overseas element.

UK AML/CTF regulatory and supervisory regime: HM Treasury call for evidence

HM Treasury has published a call for evidence on a review of the UK's anti-money laundering (AML) and counter terrorist financing (CTF) regulatory and supervisory regime.

The call for evidence supports the review which will aim to assess the UK's AML/CFT regulatory (Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs 2017) and Office for Professional Body Anti-Money Laundering Supervision (OPBAS) regulations) and supervisory regimes. A final report setting out the findings of the review and, where relevant, possible options for reform will be published no later than 26 June 2022. Further consultation may be conducted in response to the findings of this review.

The call for evidence covers three themes:

- the overall effectiveness of the regimes and their extent (i.e. the sectors in scope as relevant entities);
- whether key elements of the current regulations are operating as intended; and
- the structure of the supervisory regime including the work of OPBAS to improve effectiveness and consistency of supervision by professional body AML supervisors.

The government is keen to ensure that the UK's AML/CTF regime effectively deters money laundering and terrorist financing activity, while being proportionate and managing burdens on businesses.

The deadline for responses is 14 October 2021.

A consultation on amendments to the MLRs 2017 is being run in parallel to this call for evidence (see below).

UK MLRs 2017: HM Treasury consultation

HM Treasury is consulting on potential amendments to the MLRs 2017. Any which are adopted subject to this or subject to further internal consideration will be taken forwards through focused secondary legislation due to be laid in Spring 2022. The consultation looks at potential changes in five areas:

- changes in scope to reflect latest risk assessments;
- clarificatory changes to strengthen supervision;
- expanded requirements to strengthen the regime;

- information sharing and gathering; and
- transfers of cryptoassets.

The consultation closes on 14 October 2021.

Greensill Capital inquiry: Treasury Committee report

The House of Commons Treasury Committee has published its Sixth Report of Session 2021-22 which focuses on the lessons learnt following its inquiry into Greensill Capital. Among other things, the Committee noted:

- the FCA and HM Treasury should seriously consider revising the definition of "securitisation" within the Securitisation Regulation, given that it appears to have been too narrow;
- the FCA and HM Treasury should consider reforms to the appointed representative regime, with a view to limiting its scope and reducing opportunities for abuse of the system;
- the failure of Greensill has highlighted risks around the growth of the non-bank sector and the expansion of non-banks into areas of financial intermediation traditionally dominated by banks. The Committee welcomes the BoE's focus on the importance of enhancing data on the non-bank financial sector. In addition to international work to intensify global cooperation and data-sharing on non-bank finance, HM Treasury should work with the BoE and the FCA to consider which domestic data gaps could be addressed; and
- as a matter of urgency, there should be reform of the change in control process that regulates who can acquire the ownership of an already existing bank. This should ensure that the PRA has the powers necessary to ensure that existing banks do not fall into the hands of owners who would not be granted a banking licence in their own right.

Net zero and green finance: responses to Treasury Committee recommendations

On 15 July 2021, the House of Commons Treasury Committee published its First Special Report of Session 2021-22, which contains responses from the FCA, the BoE and HM Treasury to its April 2021 report on net zero and the future of green finance. Points of interest in the responses include:

- the market for ESG and sustainable investment products is currently the fastest growing segment of the investment market. Reflecting this, the FCA has seen a significant increase in applications for authorisation of funds with an ESG focus. As applications are received, the FCA reviews the strategy, investor documentation and model portfolios of applications to ensure that they meet expectations. The FCA requires changes to the way information is presented to consumers if it is concerned that they are not clear, or if there is a risk that consumers may be misled;
- the FCA is finalising a set of principles on the design, delivery and disclosure of ESG and sustainable investment products, and will publish them in summer 2021. One of the findings of the FCA's consumer behavioural research is that clear, objective fund labels are important. The FCA is working with industry associations and the British Standards Institution to develop a sustainable investment label;
- the BoE is of the view that the regulatory capital framework should not be used as a tool for internalising the external cost of emissions nor for creating policy incentives for greening the economy. Fiscal and other government tools are better suited to this task; and

- the government is required to make technical screening criteria (TSC) via secondary legislation for climate change mitigation and climate change adaptation no later than 1 January 2023. HM Treasury confirms these TSC will be subject to consultation. In addition, the government will publish a roadmap setting out the approach to green finance regulation ahead of COP26 in November 2021.

UK digital markets: DCMS and BEIS consult on new pro-competition regime

On 20 July 2021, the Department for Digital, Culture, Media & Sport (DCMS) and Department for Business, Energy and Industrial Strategy (BEIS) published a consultation and impact assessment on a new pro-competition regime for digital markets and the establishment of the Digital Markets Unit (DMU). This digital competition consultation is the latest step towards the establishment of a new regulatory regime for digital markets. The government's proposed approach builds on recommendations by the Digital Competition Expert Panel, chaired by Professor Jason Furman, and is informed by advice from the Digital Markets Taskforce.

Proposals in the consultation include:

- the criteria and mechanisms that will identify which firms fall within scope of the regime;
- the objectives for the Digital Markets Unit and how it will work with other regulators, such as Ofcom, the Information Commissioner's Office and the FCA;
- a new code of conduct to promote open choices, fair trading and trust and transparency;
- "pro-competition interventions";
- the powers that the Digital Markets Unit will need to ensure the regime is effective; and
- the changes being considered for a distinct merger regime for firms within scope of the regime.

The BEIS has also published two research reports related to this consultation: Retailer's experience of using digital platforms and Competition and innovation in digital markets.

The consultation closes on 1 October 2021.

UK consumer protection law: BEIS consults on reforms

BEIS has published proposals for reforms to consumer law. Included are proposed changes to:

- protect consumers from subscription traps, for example by requiring that auto-renewal should always be an opt-in choice, and from fake reviews, by introducing relevant new practices which are always unfair under the Consumer Protection from Unfair Trading Regulations 2008 (CPUT);
- prevent negative behavioural nudges (sludges) in particular by changes to CPUT to address drip pricing and undisclosed paid-for advertising and to protect consumers from losing advance payments on trader insolvency, including by secondary legislation under the Consumer Rights Act 2015;
- reform the CMA's civil consumer enforcement powers under Part 8 of the Enterprise Act 2002 enabling the CMA to take action without going to court and to change the way undertakings given to the CMA are enforced;
- introduce fines for failing to cooperate with a CMA investigation or comply with an undertaking and for infringements of consumer protection law. For infringements fines could be up to 10% of global turnover; and
- strengthen consumer alternative dispute resolution (ADR) and widen its scope, including by halving the period regulated businesses have to resolve complaints before a consumer can request ADR, requiring that all ADR providers be accredited

and making the use of ADR compulsory in the motor vehicle and home improvement sectors.

The government also asks whether it should change the UK's collective redress regime to make it easier to gather many individual claims together into a single lawsuit, how it can improve business awareness of consumer protection law and how Local Authority Trading Standards can better work with the national trading standards bodies. Suggestions for how to remove red tape for businesses while maintaining consumer protection are also sought.

The consultation closes on 1 October 2021.

PRA approach to supervising international banks: PS19/21

Following its consultation in CP2/21, the PRA has published feedback and its final policy statement on its approach to branch and subsidiary supervision of international banks (PS19/21). Appendix 1 to PS19/21 also contains the PRA's final supervisory statement, "SS5/21 - International banks: The PRA's approach to branch and subsidiary supervision", which is now in force and replaced "SS1/18 - International banks: the Prudential Regulation Authority's approach to branch authorisation and supervision" from 26 July 2021.

PS19/21 is relevant to all existing or prospective PRA-authorised banks and designated investment firms that are headquartered outside the UK or are part of a group based outside of the UK.

Material Risk Takers: PRA PS18/21, updated templates and modification by consent

On 21 July 2021, the PRA published a policy statement, PS18/21, correcting an error in the definition of "higher paid material risk taker" in the PRA Rulebook. In PS18/21, the PRA amends the definition, as set out in the Remuneration Part, so that it will apply to an individual either whose annual variable remuneration exceeds 33% of their total remuneration or whose total remuneration exceeds £500,000. Previously, the definition only applied to individuals that satisfy both of these conditions. The amendment came into effect on 23 July 2021 and corrects an error that was introduced from 29 December 2020 following the PRA's final rules on the implementation of the Capital Requirements Directive (CRD) V.

Firms are not required to apply the corrected definition to remuneration that has been paid, vested, or is subject to an obligation to pay or vest created before 23 July 2021 in respect of the first performance year beginning on or after 29 December 2020.

On 23 July 2021, the PRA further published a direction for modification by consent concerning the Remuneration Part of the PRA Rulebook relating to the identification of individuals as Material Risk Takers (MRTs). It has also published guidelines on the modification and updated its webpage on waivers and modifications. The modification is relevant to all CRR firms seeking to exclude employees from identification as MRTs under Article 7 of the MRT Regulation (the draft regulatory technical standards (RTS) published by the European Banking Authority (EBA) in June 2020 on criteria to define categories of staff whose professional activities have a material impact on an institution's risk profile).

On 26 July 2021, the PRA also updated the remuneration section of its webpage on strengthening accountability with the publication of a number of amended remuneration policy statement templates for banking firms. The PRA advises firms to read the templates in the light of its May 2021 statement on updating requirements on the identification of MRTs. The PRA states that it will publish the remaining RPS templates in November 2021.

FCA statement on non-enforcement of financial promotion breaches concerning relevant UK markets

The FCA has published a statement on information for firms that use certain exemptions to the Financial Promotion Order 2005 (FPO). It explains that, following onshoring changes made to the FPO, the definition of "relevant market" inadvertently no longer includes relevant UK markets. This means that the exemptions under articles 37, 41, 67, 68 and 69 of the FPO do not cover financial promotions relating to relevant UK markets or investments traded on such markets. These exemptions will be restored by a statutory instrument (SI). However, until the SI comes into force, the FCA does not propose to take enforcement action against persons for breach of the financial promotion restriction if the breach only arises because the relevant exemption no longer applies on account of this omission.

The FCA reserves the right to pursue enforcement action where there is misconduct by an affected person that goes beyond a failure to meet the criteria for exemption.

IFPR: FCA PS21/9 second policy statement

The FCA has published its second policy statement, PS21/9, on the implementation of the Investment Firms Prudential Regime (IFPR). In PS21/9, the FCA sets out details of feedback that it received to its first April 2021 consultation paper on the IFPR (CP21/7) and its approach to the issues raised in feedback. PS21/9 covers aspects of the IFPR relating to, among other things:

- remuneration;
- own funds requirements;
- risk management and governance; and
- the basic liquid asset requirement.

The FCA intends to publish a third consultation paper in Q3 2021, which will be followed by a third policy statement in Q4. The IFPR is intended to come into force on 1 January 2022.

IFPR authorisation and permissions: FCA updates and new MIFIDPRU forms

The FCA has updated its webpage on authorisation for wholesale investment firms to add information on the IFPR. The FCA explains that the IFPR will come into force on 1 January 2022, impacting all UK investment firms authorised under MIFID. Any firm submitting a new authorisation or variation of permission application should consider the requirements that would arise, if approved, under this new regime.

During the application process, the FCA will expect applicants to demonstrate to it how they will meet their ongoing requirements under the current and new prudential regimes, as part of the FCA's threshold conditions assessment.

The FCA warns that it cannot guarantee that any application received at this stage will be concluded before the expected start date of IFPR. It reminds firms that the application of some of the transitional provisions in the IFPR will be determined by the prudential categorisation of a firm as of 31 December 2021. Firms should therefore consider the transitional provisions in the IFPR rules.

On its updated webpage on capital requirements permissions, the FCA states that, when the IFPR comes into force, the majority of existing waivers and modifications to prudential rules in the FCA Handbook will no longer apply. In addition, the majority of existing CRR permissions will no longer apply to FCA investment firms. The new IFPR rules contain transitional provisions

that give some existing waivers and permissions status under the new regime; firms should consider these transitional provisions for more details. Firms will also need to consider applying for permissions, or rule waivers and modifications, of rules in the new sourcebook (that is, MIFIDPRU).

The FCA refers firms to its webpage on the IFPR for further information. This webpage has also been updated. The FCA has published a number of forms and added three new sections to the webpage:

- MIFIDPRU applications and notifications;
- changes to MiFID authorisation applications; and
- IFPR set-up questionnaire.

The FCA will make the remaining MIFIDPRU application forms and all notification forms available in autumn 2021. It advises firms to consult chapter 15 of its second consultation paper on the IFPR (CP21/7) for details of these forms. In its third consultation paper on the IFPR, due to be published in Q3 2021, the FCA will consult on three additional MIFIDPRU forms. Once these forms are finalised, they will also be made available on Connect later in 2021.

Platforms: FCA portfolio letter on supervision approach

The FCA has published a portfolio strategy letter setting out its concerns, expectations and strategy for supervising platforms over the coming months. Areas of concern elaborated on in the letter fall under the following headings:

- technology and operational resilience – unavailability of services;
- SUP 15 notification requirements;
- transfer times;
- Brexit; and
- diversity and inclusion.

The FCA also confirms that all the key areas of harm identified in its February 2020 platforms portfolio letter remain relevant and it continues to review progress in mitigating them.

Fair treatment of vulnerable consumers: FCA FAQs

The FCA published a set of frequently asked questions (FAQs) on the fair treatment of vulnerable consumers. The FAQs reflect the questions the FCA was asked following a webinar it held in May 2021 (now available on demand) to help firms understand their role in treating vulnerable customers fairly and other external engagement. They are grouped by theme and the FCA's answers link to key chapters and paragraphs in its finalised guidance on the fair treatment of vulnerable customers (FG21/1), its feedback statement (FS21/4) and other relevant documents, including its recent consultation on a new consumer duty (CP21/13).

COVID-19: FCA update on workstreams delayed due to pandemic

The FCA has published an update on four key workstreams that were delayed due to the COVID-19 pandemic: Assessing suitability review; Diagnostic review of business models; Rules extending SME access to Financial Ombudsman Service (FOS); and De-anchoring remedy for credit cards.

FCA regulated fees and levies for 2021/22: FCA updates PS21/7

The FCA has published a revised version of its policy statement, PS21/7, on regulated fees and levies rates for 2021/22 to correct errors relating to the 2021/22 levy rate for the Money and Pensions Service pensions guidance levy.

PRIIPs: FCA CP21/23 on changes to disclosure regime

The FCA has published a consultation paper, CP21/23, on proposed targeted amendments to address concerns with the Packaged Retail and Insurance based Investment Products (PRIIPs) disclosure regime. Specifically, the FCA is proposing amendments to address the lack of clarity on the PRIIPs scope, misleading performance scenarios and summary risk indicators, and to address concerns with elements of the transaction costs calculation methodology.

The proposals on clarifying the scope of the regime and on performance information follow enabling legislative changes made under the Financial Services Act 2021. The other proposals exercise the FCA's pre-existing power to amend technical standards following the UK's exit from the EU.

The consultation closes on 30 September 2021. The FCA plans to make the final rules and amend the PRIIPs RTS by the end of 2021, with any changes made coming into effect on 1 January 2022.

FCA Handbook Notice 90

The FCA has published Handbook Notice 90, which sets out changes to the FCA Handbook made by the FCA board on 24 June 2021 and 22 July 2021 and by the board of the Financial Ombudsman Service (FOS) on 22 June 2021. The Handbook Notice reflects changes made to the Handbook by the following instruments:

- FCA Standards Instrument: The Technical Standards (Bilateral Margining) Instrument 2021 (FCA 2021/21), in force since 30 June 2021;
- Periodic Fees (2021/2022) and Other Fees Instrument 2021 (FCA 2021/22), in force since 1 July 2021;
- Fees (Miscellaneous Amendments) (No 16) Instrument 2021 (FCA 2021/23), in force since 1 July 2021;
- Funeral Plans Instrument 2021 (FCA 2021/26 FOS 2021/4), which came into force on 29 July 2022; and
- Fees (Pre-Paid Funeral Plans) Instrument 2021 (FCA 2021/27), which comes into force on 1 September 2021.
- Fees and Decision-Making (Cancellation of Permission) Instrument 2021 (FCA 2021/28), which came into force on 23 July 2021;
- Insurance Distribution (Professional Indemnity Insurance (Limits of Indemnity)) Instrument 2021 (FCA 2021/30), which came into force on 1 August 2021; and
- Consumer Credit (High-Cost Short-Term Credit Refinancing and Peer-to-Peer Lending Information sheets) Instrument 2021 (FCA 2021/31), which comes into force on 25 October 2021.

FOS periodic independent review

The FOS has announced that its board has commissioned a periodic independent review of the FOS. The review will focus on ensuring that the FOS can continue to meet the needs of its

customers, both consumers and business. The review is being conducted during summer 2021. The FOS will publish the results of the review in autumn 2021.

FOS Ombudsman News 163

The FOS has published issue 163 of its Ombudsman News. Among other things, this issue includes an overview of the FOS' general approach to complaints about flood damage and an update on complaints about business interruption insurance following the FCA's test case.

SFDR: European Commission confirms delay to application date of RTS

On 23 July 2021, the European Commission published a letter (dated 8 July 2021) to the European Economic and Financial Affairs Council (ECOFIN) and the Council of the EU, which confirms that the date of application of RTS under the Sustainable Finance Disclosure Regulation (SFDR) has been delayed until 1 July 2022. The letter also confirms that the Commission intends to use a single delegated act for these RTS, and other RTS being prepared by the European Supervisory Authorities (ESAs) that focus on the content and presentation of sustainability disclosures under Articles 8(4), 9(6) and 11(5) of the SFDR.

The delay follows a January 2021 letter from the Joint Committee of the ESAs raising concerns about the application of the SFDR.

SFDR: European Commission adopts answers to ESAs' questions

On 26 July 2021, ESMA published an internal Commission Decision and annex containing a set of answers about the application of the SFDR, which the European Commission adopted on 6 July 2021. The answers respond to questions the ESAs forwarded to the Commission in January 2021. They cover the following areas of uncertainty relating to the application of the SFDR:

- the application of the SFDR to non-EU alternative investment fund managers (AIFMs) and registered AIFMs;
- the application of the 500-employee threshold for principal adverse impact reporting on parent undertakings of a large group;
- the meaning of "promotion" in the context of products promoting environmental or social characteristics;
- the application of Article 9 of the SFDR (transparency of sustainable investments in pre-contractual disclosures); and
- the application of SFDR product rules to portfolios and dedicated funds.

EU AML/CTF action plan: European Commission adopts package of measures

The European Commission has adopted a package of measures to implement its AML and CTF action plan adopted by the Commission in May 2020. The package includes the following legislative proposals which are intended to modernise the EU AML/CTF regime by establishing a new framework for the regulation of AML/CTF in the EU:

- a proposed Regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010;
- a proposed Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing

- a proposed Directive on the mechanisms to be put in place by the member states for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849; and
- a proposed Regulation on information accompanying transfers of funds and certain cryptoassets (recast).

The consultation period on the legislative proposals closes on 17 September 2021.

Alongside the proposed legislation, the Commission has published an impact assessment on the package of measures, FAQs and a Factsheet: Stronger EU Rules to fight financial crime.

The legislative proposals will now be considered by the European Parliament and the Council of the EU. The full AML/CTF rulebook, including technical standards, is expected to be in place and apply by the end of 2025.

EU AML/CTF framework: European Commission consults on guidance on rules applicable to use of public-private partnerships

The European Commission has launched a consultation on guidance on the rules applicable to the use of public-private partnerships in the framework of preventing and fighting money laundering and terrorist financing. In an accompanying consultation strategy document, the Commission explains that public-private partnerships entail the sharing of information between competent authorities and the private sector and can take various forms. As a result of differences in the legal frameworks and practical arrangements across the EU, the Commission considers it essential to provide guidance and share good practices for public-private partnerships in relation to, in particular, antitrust rules, safeguards and limitations in relation to data protection and guarantees on fundamental rights.

The consultation closes on 2 November 2021. Responses will be made available on a dedicated webpage.

The Commission is also consulting on a roadmap relating to the guidance on the rules applicable to the use of public-private partnerships. The consultation for the roadmap closes on 20 August 2021.

CRD: EBA final report on monitoring threshold for establishing intermediate EU parent undertaking

Following its consultation in January 2021, the EBA has published a final report setting out guidelines on the monitoring of the threshold and other procedural aspects for establishing an intermediate EU parent undertaking (IPU) under Article 21b of the Capital Requirements Directive (CRD). The guidelines specify how third country groups should calculate and monitor the total value of their assets in the EU to ensure timely application of the IPU requirement.

The guidelines will apply two months after the translations of the guidelines have been published.

CRR: EBA consults on RTS on criteria for identifying shadow banking entities

The EBA is consulting on draft RTS on criteria for the identification of shadow banking entities under Article 394(4) of the Capital Requirements Regulation (CRR).

While developing the draft RTS, the EBA has relied as far as possible on the guidelines on limits on exposures to shadow banking, yet having due regard to international developments in shadow

banking and taking into account the lack of third-country equivalence for institutions in certain jurisdictions.

The consultation closes on 26 October 2021. The EBA will hold a public hearing on 29 September 2021. Following this, it will submit the RTS to the Commission for endorsement, after which they will be subject to scrutiny by the European Parliament and the Council of the EU.

Proportionality assessment methodology: EBA discussion paper

The EBA has published a discussion paper on proportionality assessment methodology, with a view to gathering preliminary input on how to standardise the proportionality assessment methodology for credit institutions and investment firms. All market participants affected by the proportional treatment in the application of EBA regulatory products are invited to provide their input.

The consultation closes on 22 October 2021. The EBA will consider any feedback, following which it will finalise the document and make it a point of reference for proportionality assessments.

Banking and Finance

Bank of England Act 1998 (Macro-prudential Measures) (Amendment) Order 2021

The Bank of England Act 1998 (Macro-prudential Measures) (Amendment) Order 2021 (SI 2021/869) has been published, together with an explanatory memorandum. The Order sets out amendments to the statutory instruments that give the Financial Policy Committee (FPC) the power to direct the PRA and the FCA to take action with respect to specified macro-prudential measures. The intention of these amendments is to ensure that the macro-prudential measures Orders made under sections 9I(2) and 9L of the Bank of England Act 1998 appropriately track the PRA's new powers that are being introduced under the Financial Services Act 2021.

The Order came into force on 21 July 2021.

Frozen banks accounts: Treasury Select Committee requests information from FCA

The House of Commons Treasury Select Committee published a letter it has sent to the Financial Conduct Authority (FCA) on frozen bank accounts. The Committee is concerned about recent press reports that the bank accounts of some vulnerable customers on low incomes may have been frozen for no apparent reason. The FCA is asked to respond to a number of questions by 9 August 2021. The FCA's response will be published.

Executing bail-in: BoE operational guide

The Bank of England (BoE) has published an operational guide on executing bail-in. This operational guide provides practical information on the ways in which the BoE might execute a bail-in resolution, and in particular the operational processes and arrangements that may be involved. The BoE has also published three draft template resolution instruments: a Bail-in Resolution Instrument, a Supplemental Resolution Instrument, and an Onward Transfer Resolution Instrument, all available on the BoE website. The BoE states that the template resolution instruments would be a useful starting point for the preparation of the instruments and other documents required for a bail-in.

In light of the fact that bail-in is a crisis management tool, the BoE reserves its full discretion to depart from the approach in the operational guide and template resolution instruments should it be judged appropriate in the circumstances of a particular case.

MREL framework: BoE consultation

Following its December 2020 discussion paper on the topic, the BoE has published a consultation paper on proposed changes to its minimum requirement for own funds and eligible liabilities (MREL) framework. Annex 1 of the consultation paper also includes the BoE's feedback to the points raised in response to its discussion paper, which have informed its proposals. Proposed changes to the text of the BoE's MREL statement of policy are set out in Annex 2 to the consultation paper.

The consultation closes on 1 October 2021. The BoE intends to make any policy changes by the end of 2021, taking account of feedback received.

BBLS: FCA Dear CEO letter on lenders reporting fraudulent activity

The FCA has published a Dear CEO letter setting out its expectations of lenders in reporting any instances where an FCA firm, as a borrower of the Bounce Back Loan Scheme (BBLS), has committed or otherwise been involved in fraudulent activity.

The FCA states that, if there are allegations of fraud regarding an authorised firm (or a firm registered for supervision under the Money Laundering Regulations 2017 (Annex 1 firms)), the FCA expects the lender, after completing its initial investigations to understand the validity of the allegation, to inform the FCA in line with its Principles of Business, PRIN 11.

Once a report has been submitted, the firm should continue its own investigations and take appropriate action (notification to the FCA is complementary to and not a replacement for other obligations being fulfilled). The FCA will engage with firms on cases that are of particular interest to it and may request additional information about the loan or the firm's investigation.

The FCA also asks firms to be alert to the possibility of fraud when undertaking BBLS collection and recovery activities. The scheme rules for the BBLS set out the obligations on a firm, as a scheme lender, to inform the British Business Bank (BBB). They should also report BBLS fraud to Action Fraud or Police Scotland and the FCA asks firms to consider the need to report alleged or identified fraud to other professional bodies or regulators linked to the borrower.

More generally, where fraud is identified or alleged, the FCA reminds firms to consider their obligations under the Proceeds of Crime Act to report suspicions of money laundering.

The FCA also reminds firms of its key messages relating to the fair treatment of customers through regulated collections and recoveries. It also reminds firms that it is important that senior managers under the senior managers and certification regime (SMCR) are taking reasonable steps to ensure that the business of the firm for which they are responsible is controlled. The FCA emphasises that a senior manager's accountability stretches across both regulated and unregulated lending.

COVID-19: ECB repeals recommendation to banks on dividend distributions from 30 September 2021

On 29 July 2021, European Central Bank (ECB) recommendation ECB/2021/31 was published in the Official Journal of the EU. Recommendation ECB/2021/31 repeals, from 30 September 2021, the ECB's recommendation ECB/2020/35 on banks' dividend distributions during the COVID-19 pandemic with effect from 30 September 2021.

The ECB has also published an updated version of its FAQs on the supervisory measures it has taken in reaction to the COVID-19 pandemic, which details that the original recommendation for banks to suspend and then to curtail their distributions was an exceptional measure intended for exceptional circumstances. The latest macroeconomic projections confirm the economic rebound and point to a further reduction in the level of economic uncertainty, which is improving the reliability of banks' capital projections when compared to the beginning of the pandemic. These elements allow the ECB to repeal the recommendation with effect from the end of September 2021. The ECB states that supervisors are well prepared to go back to the previous supervisory practice of discussing capital trajectories and dividend or share buy-back plans with each bank in the context of the normal supervisory cycle.

CRR: SRB approach to prior permissions regime

The Single Resolution Board (SRB) has published guidance on "Information requirements for applications for permission in line with the draft RTS on own funds and eligible liabilities, Section 2 Subsection 2 – 'Permission for reducing eligible liabilities instruments'".

The SRB explains in a related press release that banks need authorisation under Articles 77 and 78a of the Capital Requirements Regulation (CRR) to redeem eligible liabilities. Article 78a of the CRR provides for the development of regulatory technical standards (RTS) to specify certain elements of that authorisation. To date, pending the RTS, the SRB applied a provisional procedure to assess and authorise banks' applications. Under the provisional procedure, 1 January 2022 is the deadline for institutions to comply with the intermediate MREL targets set under the SRM Regulation.

In May 2021, the European Banking Authority (EBA) published final draft RTS on own funds and eligible liabilities under the CRR, which includes the permission regime to be applied as of 1 January 2022. The European Commission will finalise the draft RTS by adopting them in the form of a delegated regulation in due course. However, for procedural reasons, the SRB explains that this is unlikely to be achieved by January 2022.

To contribute to a smooth transition to the framework in the upcoming delegated regulation, the SRB will amend its provisional policy in line with the draft RTS for all permissions effective as of 1 January 2022. This will limit the need for banks to re-submit a second authorisation application for general prior permissions within the same calendar year (that is, once the delegated regulation enters into force). It means that applications for permission for redemptions of eligible liabilities should be compliant with the requirements in the RTS. Exceptionally, banks can file their applications until the end of September 2021, to allow them to familiarise themselves with the details.

An additional communication on the new regime will be published in early September. Banks are encouraged to contact the SRB with any additional questions.

CRR: EBA consults on amendments to ITS on currencies with constraints on availability of liquid assets

The EBA is consulting on proposed amendments to the implementing technical standards (ITS) on currencies with constraints on the availability of liquid assets supplementing the CRR.

Article 419 of the CRR relates to currencies with constraints on the availability of liquid assets for the purpose of the calculation of the liquidity coverage ratio. It allows for one or more derogations where the justified needs for liquid assets in the light of the liquidity coverage requirement exceed the availability of those liquid assets in a currency. Commission Implementing Regulation (EU) 2015/2344 contains ITS made under Article 419(4) of the CRR identifying the currencies that should benefit from a derogation and the extent to which such a derogation should be available. Currently only one currency, the Norwegian Krone (NOK), is specified in the ITS.

In the consultation paper, the EBA sets out proposals to amend Commission Implementing Regulation (EU) 2015/2344 by removing NOK from the list of currencies. The EBA states that there has been a change in the supply of and demand for NOK-denominated liquid assets since the assessment underlying the existing ITS and, as there is no longer a shortage in the supply of liquid assets in the NOK currency, the derogations are no longer deemed necessary.

The EBA states that it does not intend to update Commission Delegated Regulation (EU) 2016/709, which contains RTS specifying the conditions for the application of the Article 419 derogations. It will propose updates to those RTS if a currency is added to the list in Commission Implementing Regulation (EU) 2015/2344 in future.

The deadline for responses is 16 October 2021. The EBA expects to submit the final draft amendments to the ITS to the European Commission before the end of 2021.

Proposed Directive on cross-border law enforcement access to bank account registries: European Commission consultation

The European Commission has adopted a legislative proposal and launched a consultation on a Directive amending Directive (EU) 2019/1153 as regards access of competent authorities to centralised bank account registries through the single access point.

Under the Fourth Money Laundering Directive (MLD4), member states must establish national centralised automated mechanisms, which allow the timely identification of any natural or legal person holding or controlling payment accounts, bank accounts and safe-deposit boxes held by credit institutions established in a member state. Examples include central registries or central electronic data retrieval systems, and these are referred to as "national centralised bank account registers".

In addition to the MLD4 requirements, Directive (EU) 2019/1153 on the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, sets out a number of measures to ensure that law enforcement authorities have swift access to information held in national centralised bank account registers. It also requires member states to ensure certain rules relating to accessing national centralised bank account registers are transposed by 1 August 2021.

The proposed Directive seeks to extend access to the national centralised bank account register single access point, as introduced by the new anti-money laundering (AML) directive, to the authorities competent for the prevention, detection, investigation or prosecution of criminal offences that are designated as competent authorities under Article 3(1) of Directive (EU) 2019/1153. It will allow designated authorities to establish quickly whether an individual holds bank accounts in other member states, without having to request to all their counterparts in all EU member states.

The Commission has also published a staff working document on the proposal.

The consultation closes on 16 September 2021. Comments received will be summarised and presented to the European Parliament and Council of the EU to feed into their consideration of the proposed legislation.

The initiative forms part of the Commission's AML and counter-terrorist financing action plan. Further steps taken to implement the action plan are reported in our Financial institutions' general regulatory news section.

Mystery shopping: EBA methodological guide

The EBA published a report containing a methodological guide to mystery shopping. The purpose of the guide is to support national competent authorities (NCAs) in the design and implementation of mystery-shopping activities. For these purposes, mystery shopping is an undercover research approach used by NCAs to measure quality of customer service or gather information about financial products and services and the conduct of financial institutions

towards consumers. The guide sets out seven steps that NCAs can consider and adapt when carrying out mystery shopping activities for retail banking products and services.

G-SIB assessment methodology review process: BCBS consults on technical amendments

The Basel Committee on Banking Supervision (BCBS) has published a consultation paper on technical amendments to its global systemically important bank (G-SIB) assessment methodology review process. At present the BCBS is committed, under SCO40.30 in the Basel framework, to undertake a review of the methodology used to determine the list of G-SIBs every three years. In the consultation, the BCBS sets out proposals for revisions to SCO40.30 to replace the three-year review cycle with a new process of ongoing monitoring and review. This process will include monitoring:

- recent developments in techniques or new indicators that can be used for the assessment of systemic risk;
- emerging evidence on the effectiveness of the G-SIB regime; and
- structural changes that could impact the effectiveness of the regime.

The BCBS decided to change its approach to the review of the methodology following the decision of the Group of Governors and Heads of Supervision in November 2020 that any further potential adjustments to the Basel framework should be limited in nature and consistent with the BCBS' evidence-based evaluation work.

The consultation closes on 3 September 2021.

Consumer Finance

FCA mortgage prisoners review: terms of reference

The Financial Conduct Authority (FCA) has published the terms of reference for its mortgage prisoners review. Working closely with HM Treasury, and engaging with interested stakeholders, the FCA states that it will provide information on the following areas:

- data review: the FCA will review and update its data to consider the demographic and loan characteristics of mortgage prisoners; and
- interventions review: the FCA will review the effect of its recent interventions to remove regulatory barriers to switching. It will explore how firms have used the flexibility provided by FCA rules to ensure borrowers who have mortgages with inactive lenders benefit from switching options and whether any barriers remain.

The FCA plans to carry out the data review and analysis between July and October 2021. It will engage with stakeholders in July and August 2021. It will report to HM Treasury on the outcome of the review and it will be laid before Parliament by the end of November 2021.

Payments

Confirmation of Payee Phase 2: PSR letter to Specific Direction 10 banks and UK Finance

The Payment Systems Regulator (PSR) has published a letter it has sent to the UK's six biggest banking groups (directed under the PSR's Specific Direction 10 and referred to as SD10 banks) and UK Finance. The letter responds to an unpublished letter (dated 25 June 2021) from the SD10 banks and UK Finance to Chris Hemsley, Managing Director of the PSR, outlining their plans and publicly committing to deliver the first part of Phase 2 of Confirmation of Payee (CoP).

The PSR welcomes the banks' commitment, which it says will help avoid unnecessary delays to more payment service providers (PSPs) joining Phase 2. The PSR states that if the SD10 banks act as promised there should be no need for it to direct them to be present in the Phase 2 environment by the end of 2021 (the approach the PSR contemplated in its May 2021 call for views on Phase 2).

The PSR will continue to engage with the SD10 banks and Pay.UK to monitor the delivery of the commitment. If appropriate, it will take steps to direct delivery, for example, should progress stall.

The PSR is separately considering the feedback received to its call for views to decide whether action is needed on the remaining parts of Phase 2. This includes the option to direct more PSPs to implement CoP, to direct the collecting and sending of secondary reference data, and to end dual running in March 2022.

The PSR clarifies that it does not want PSPs to change or slow down any plans to progress the other elements of Phase 2 while waiting for the PSR to decide whether to mandate all, or some parts of it.

New Payments Architecture: PSR policy statement and consultation on lowering risk to delivery

Following its consultation in CP21/2, the PSR has published a policy statement and consultation, CP21/8, on lowering risk to delivery of the New Payments Architecture (NPA). Annexes 1 and 2 and 3 and 4 have been published separately. The PSR has decided that Pay.UK should phase the development of the NPA by narrowing the scope of the NPA central infrastructure services (CIS) contract. Pay.UK must secure this contract through a competitive tender. The PSR is also consulting on the draft legal instruments to implement its decisions. The PSR intends to vary Specific Directions (SDs) 2 and 3.

Having considered the responses to its consultation, the PSR states that it will require Pay.UK to narrow the scope of the CIS contract by mandating that Pay.UK:

- must, as a minimum, buy services needed to support single-push payments (which will allow most Faster Payments transactions to migrate to the NPA); and
- may buy additional services and system functionality only if the PSR does not object (which will include taking account of the adequacy of Pay.UK's consultation with industry on its proposals).

The consultation ends on 10 September 2021. The PSR plans to give the directions to vary the SDs later this year. It also plans to publish a separate policy statement by the end of the year

informed by feedback following its consultation on mitigating risks to competition and innovation relating to when the NPA is operational.

Proposed codified Regulation on cross-border payments: Council of EU publishes text

The Council of the EU has published the text of the proposed Regulation on cross-border payments in the EU, codifying and replacing the existing Regulation on cross-border payments.

According to a Council information note dated 25 June 2021, the European Parliament adopted the Regulation at first reading on 23 June 2021. The note states that the Parliament's position reflects what had been agreed between the institutions in informal contacts and consequently the Council should be in a position to approve the Parliament's position. The Council's Permanent Representatives Committee (COREPER) voted to approve the Regulation on that basis on 7 July 2021, according to a Council note dated 14 July 2021. Following COREPER's vote, the next step will be for the Council to approve the Parliament's position.

Securities and Markets

SMCR for FMIs: HM Treasury consultation

HM Treasury has published a consultation paper proposing a Senior Managers and Certification Regime (SMCR or SM&CR) for financial market infrastructures (FMIs). The consultation closes on 22 October 2021. HM Treasury intends to legislate for the new regime when parliamentary time allows.

Read more in our separate briefing: SMCR for Financial Market Infrastructures: HM Treasury Consultation.

LIBOR cross-currency swaps market participants: FCA and BoE encourage switch to RFRs

The Financial Conduct Authority (FCA) and Bank of England (BoE) have published a statement encouraging liquidity providers in the LIBOR cross-currency swaps market to adopt new quoting conventions for interdealer trading based on risk-free rates (RFRs) instead of LIBOR from 21 September 2021. This is to facilitate a further shift in market liquidity toward RFRs, bringing benefits for a wide range of users as they move away from LIBOR.

An FCA survey of UK market participants identified strong support for a change in the interdealer quoting convention, which would see RFRs rather than LIBOR become the default price from 21 September 2021. Therefore, the FCA and BoE encourage participants to take necessary steps to implement these changes to market conventions.

In the period leading up to 21 September 2021, the FCA and the BoE will continue to engage with market participants and international authorities to determine whether market conditions allow the switch to proceed.

The European Securities and Markets Authority (ESMA) has also published a document setting out recommendations from the Working Group on Euro Risk-Free Rates on the switch to risk-free rates in the interdealer market.

LR and DTR: FCA CP21/24 on diversity on boards and executive committees

The FCA has published a consultation paper, CP21/24, on proposals to amend the Listing Rules (LR) and the Disclosure Guidance and Transparency Rules (DTR) in relation to diversity on boards and executive committees. Among other things, the FCA is proposing to change the LR to require companies to disclose annually on a comply or explain basis whether they meet specific board diversity targets and to publish diversity data on their boards and executive management.

The consultation closes on 22 October 2021. Subject to consultation feedback and FCA Board approval, the FCA aims to make the final rules by late 2021.

LR: FCA PS21/10 on SPACs

The FCA has published a policy statement, PS21/10, on its proposed changes to the LR for certain special purpose acquisition companies, along with its final amendments to the LR and the final text of its amendments to its technical note, Cash shells and special purpose acquisition companies (SPACs) (UKLA/TN/420.2).

The new rules and guidance come into force on 10 August 2021.

EU securitisation framework: European Commission consultation

The European Commission published a targeted consultation on the functioning of the EU securitisation framework. The consultation forms parts of the Commission's efforts to complete a comprehensive review of the EU securitisation framework in accordance with the its action plan on the Capital Markets Union, published in September 2020 and coincides with the report it is due to submit on the functioning of certain topics by 1 January 2022 under Article 46 of the Securitisation Regulation.

The consultation closes on 17 September 2021.

MiFID: ESMA report on common supervisory action on suitability rules

ESMA has published a statement presenting the results of the 2020 common supervisory action (CSA) with national competent authorities (NCAs) relating to the suitability requirements under the Markets in Financial Instruments Directive (MiFID). The CSA has shown an adequate level of firms' compliance with key elements of suitability requirements, for example, firms' understanding of products and clients and the processes and procedures to ensure the suitability of investments. However, ESMA has identified areas for improvement.

Therefore, in 2021/22, ESMA plans on updating its guidelines on suitability to address some areas where a lack of convergence has emerged or/and to further clarify some of the new MiFID II requirements. It may also complement the guidelines with examples of good and poor practices. ESMA states that the review of the guidelines will also aim to align the suitability guidelines with its draft guidelines on appropriateness and execution-only and the MiFID II Delegated Regulation on sustainable finance.

MiFID: ESMA report on sanctions and measures imposed

ESMA has published a report on sanctions and measures imposed under MiFID II in 2020. In the report, ESMA sets out an overview of the sanctions and measures imposed by NCAs under the MiFID framework as required under Article 71(4) of MiFID.

MiFID: ESMA consults on draft guidelines on certain aspects of remuneration requirements

ESMA is consulting on draft guidelines on certain aspects of the remuneration requirements under MiFID. The purpose of the draft guidelines is to enhance clarity and foster convergence in the implementation of certain aspects of the MiFID II remuneration requirements. ESMA considers that the implementation of the guidelines should strengthen investor protection, which is one of its key objectives.

ESMA proposes that the new remuneration guidelines will replace its existing 2013 guidelines. The consultation paper builds on the text of the 2013 guidelines, which ESMA has substantially confirmed (albeit clarified, refined and supplemented where necessary). To avoid any unnecessary repetitions, ESMA has deleted those of the 2013 guidelines that have been incorporated directly into the MiFID framework or that have become unnecessary. The paper also takes account of new requirements under MiFID II and the results of supervisory activities conducted by NCAs on the topic.

The consultation closes on 19 October 2021. ESMA will consider the responses it receives and expects to publish the final report and guidelines by the end of Q1 2022.

MiFID: European Commission adopts Delegated Regulation specifying criteria for ancillary activity test

The European Commission has adopted a Delegated Regulation, supplementing MiFID by specifying the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level.

Article 2(1)(j) of the MiFID II Directive exempts persons dealing on own account, or providing investment services to clients, in commodity derivatives, emission allowances or related derivatives, provided this is an ancillary activity to their main business on a group basis and the main business is not the provision of investment services.

The Commission adopted Delegated Regulation (EU) 2017/592 (RTS 20) specifying the criteria for establishing when an activity is to be considered ancillary to the main business of a group. However, the MiFID Quick Fix Directive amended the ancillary activity exemption and empowered the Commission to adopt a Delegated Regulation to replace RTS 20.

The Council of the EU and the European Parliament will now scrutinise the Delegated Regulation.

MiFIR: ESMA updates MiFIR data reporting Q&As

ESMA has updated its Q&As on data reporting under the Markets in Financial Instruments Regulation (MiFIR). ESMA has amended its answer to Q&As 5 and 6, which relate to legal entity identifier (LEI) reporting in RTS 23 and related regulatory technical standards (RTS) and implementing technical standards (ITS) under Article 4 of the Market Abuse Regulation (MAR).

MiFIR: ESMA annual report on RTS 2

ESMA has published its annual report following a review of the RTS supplementing MiFIR, set out in Commission Delegated Regulation (EU) 2017/583 (RTS 2). The report covers the mandate under Article 17 of RTS 2. This requires ESMA to analyse whether it is appropriate to move to the following stage in terms of transparency with regard to the average daily number of trades threshold used for the quarterly liquidity assessment of bonds, and the trade percentile used for determining the pre-trade size specific to the instrument (SSTI) thresholds.

Considering the limited transparency in the bond market, ESMA confirms in its report the proposal to move to stage three for the liquidity criterion "average daily number of trades" and the SSTI threshold for bonds, and not to move to stage two for the SSTI threshold for other non-equity instruments. The proposals to move to stage three are expected to improve the currently limited pre- and post-trade transparency available to market participants in the bond market.

In light of the assessment undertaken and the conclusions reached, ESMA has prepared an amended version of the applicable RTS as foreseen in RTS 2. The report will be submitted to the European Commission and the amended RTS are expected to be adopted and published in the Official Journal of the EU.

CSDR: ESMA report to European Commission on provision of banking-type ancillary services

ESMA has published a report to the European Commission providing suggestions for enhancing the authorisation process for central securities depositories (CSDs) to provide banking-type ancillary services under the Central Securities Depositories Regulation (CSDR). ESMA was asked

to provide an assessment of the conditions under which banking-type ancillary services can be provided under CSDR in the context of the Commission's targeted review of CSDR, which it launched in 2020.

ESMA proposes that the Commission considers, in the context of the CSDR targeted review: allowing banking CSDs to provide banking-type ancillary services to non-banking CSDs, modifying the approach to access to commercial banks and imposing less stringent requirements to non-banking CSDs offering only settlement in foreign currencies as banking-type services.

BMR: ESMA updates Q&As

ESMA updated its Q&As on the Benchmarks Regulation (BMR) on 16 and 29 July 2020. It has updated the document to:

- include a new Q&A on the disclosure requirements that an administrator of an EU Climate Transition Benchmark or an EU Paris-aligned Benchmark should comply with; and
- add a new Q&A 4.7 clarifying that no BMR provision specifies that only public authorities located in the EU may be excluded from the BMR's scope of application. Accordingly, supervised entities in the EU can continue to use benchmarks provided by public authorities located in third countries after the end of the transitional period applicable to third country benchmarks where those public authorities meet the definition in article 3(1)(29) of the BMR and comply with the conditions set out in Article 2(2)(b) of the BMR. This answer was provided by the European Commission.

CRA Regulation: ESMA updates Q&As

ESMA has updated its Q&As on the implementation of the Regulation on Credit Rating Agencies (CRA Regulation), inserting a new Part VII to provide clarification on the interactions between CRA Regulation and MAR (Q&As 13 to 15).

REMIT: ACER updates guidance and Q&A

The Agency for the Cooperation of Energy Regulators (ACER) has published the 6th edition of its guidance on the application of the Regulation on wholesale energy market integrity and transparency (REMIT). ACER has made significant changes to the guidance to take into account:

- the expected market developments resulting from the implementation of the European Green Deal; and
- the experience gained so far, including the feedback received from national regulatory authorities, market participants and other stakeholders.

The structure of the guidance has been fully revised to make it more intuitive. ACER has also included additional content on the scope of REMIT (in a new chapter 2) and on the core prohibitions on insider trading and market manipulation (in a new chapter 6), which are laid down in Articles 3 and 5 of REMIT.

ACER has also published an updated version (25th edition) of its Q&As on REMIT.

Fallbacks for LIBOR ICE Swap Rates: ISDA results of consultation

The International Swaps and Derivatives Association (ISDA) has announced the results of its consultation on implementing fallbacks for GBP LIBOR ICE Swap Rate (GBP LIBOR ISR) and USD LIBOR ICE Swap Rate (USD LIBOR ISR), both published by ICE Benchmark

Administration. The results of the June consultation indicated a significant majority of respondents agreed with the fallback provisions set out in the ISDA draft amendments attached to the June consultation (June draft amendments). The June draft amendments reflect:

- for GBP LIBOR ISR, a SONIA ISR, as suggested in February 2021 by the Working Group on Sterling Risk-Free Reference Rates; and
- for USD LIBOR ISR, a spread-adjusted Secured Overnight Financing Rate (SOFR) Swap Rate, as suggested in March 2021 by the Alternative Reference Rate Committee.

The respondents to the June consultation satisfied the criteria ISDA had specified for it to publish:

- a supplement to the 2006 ISDA Definitions to help parties to legacy derivative contracts incorporate the GBP LIBOR ISR fallback provisions or the USD LIBOR ISR fallback provisions into their agreements; and
- template language that counterparties may use to negotiate bilateral amendments into legacy transactions.

ISDA will begin finalising the June draft amendments to implement fallbacks for GBP LIBOR ISR as soon as possible and will finalise amendments to implement fallbacks for USD LIBOR ISR once a SOFR swap rate is published that can be referenced in financial instruments. A report analysing the June consultation results will be available in the future from ISDA.

ESG ratings and data products providers: IOSCO consults on recommendations

On 26 July 2021, the International Organization of Securities Commissions (IOSCO) published a consultation report on a set of proposed recommendations regarding environmental, social and governance (ESG) ratings and data providers. IOSCO states that the report aims to assist its members in understanding the implications of the activities of ESG ratings and data providers and in establishing frameworks to mitigate risks stemming from these activities. IOSCO proposes a set of recommendations to mitigate these risks and address some of the challenges faced by users of products and services from ESG ratings and data providers, and the companies that are the subject of these ESG ratings and data products.

The consultation closes on 6 September 2021.

FMIs and business continuity planning: CPMI and IOSCO report

The Committee on Payments and Market Infrastructures (CPMI) and the International Organization of Securities Commissions (IOSCO) have published a report on implementation monitoring of the Principles for financial market infrastructures (PFMI), looking specifically at business continuity planning. This report is a "level 3" peer review examining the consistency in the outcomes of the implementation of the PFMI and implementation of the responsibilities by authorities.

A sample of 38 FMIs from 29 jurisdictions participated in the assessment. The assessment identified one serious issue of concern and one issue of concern which could be subject to future analysis. All FMIs (including those not part of the sample), as well as their supervisors, regulators and overseers, should consider whether any issues of concern identified in this report are relevant to them.

Use of Term SONIA reference rates: FMSB final Standard

The FICC Markets Standards Board (FMSB) has announced the publication of the finalised version of Standard on use of Term SONIA reference rates. The finalised version is based on a transparency draft issued in March 2021. Certain minor changes have been made to the final standard in response to comments received since the publication of the transparency draft.

The Standard, which applies to Sterling fixed income and wholesale lending products, has been developed to help market participants decide when they should adopt Term SONIA. SONIA is the Sterling Overnight Index Average, as published by the Bank of England, and Term SONIA refers to forward-looking benchmarks.

The FMSB explains that the UK authorities and the Working Group on Sterling Risk-Free Reference Rates have made clear they expect the use of such forward-looking benchmarks to be relatively limited. Instead, the expectation is that Sterling fixed income and wholesale lending markets should predominantly transition to SONIA compounded in arrears as part of the move away from LIBOR.

However, there will be some circumstances where the use of a rate compounded in arrears is not appropriate or operationally achievable. This Standard has therefore been developed with the aim of identifying where there may be robust rationales for using Term SONIA and sets out certain expected behaviours of market participants.

This Standard applies to participants in the Sterling fixed income and wholesale lending markets, including Sterling legs of multi-currency products.

Insurance

Solvency II review: PRA QIS material and related Dear CEO letter on data gathering

The Prudential Regulation Authority (PRA) has updated its Solvency II Review Quantitative Impact Study (QIS) webpage with the QIS materials, and has published a related Dear CEO letter from Charlotte Gerken, PRA Executive Director, Insurance, introducing the QIS and setting out the PRA's thinking on the risk margin and the matching adjustment. The updated QIS webpage includes links to the QIS templates and instructions for completion, a QIS Q&A to assist firms with the completion of the QIS and SONIA spreadsheets.

The deadline for submitting responses to the QIS is 20 October 2021. The PRA intends to publish a series of qualitative questions to inform its thinking about other aspects of Solvency II reform in August 2021.

Recalculation of the transitional measure on technical provisions: PRA statement

The PRA has published a statement on the PRA's approach to the recalculation of the transitional measure on technical provisions (TMTP), relevant to PRA-regulated insurance firms.

The PRA states that, in line with its supervisory statement, "SS6/16 - Maintenance of the 'transitional measure on technical provisions' under Solvency II", the PRA has been monitoring market conditions since the previous biennial TMTP recalculation in December 2019. The PRA also considers whether changes in market conditions since then can reasonably be considered to have been sustained. In the PRA's view, recent movements in risk free rates (RFR) meet the threshold for a material change in risk profile as set out in SS6/16.

The PRA will accept applications from firms to recalculate TMTP as at 30 June 2021. In any application, the PRA expects firms to be able to demonstrate that a material change in risk profile has occurred. In the period up to 31 July 2021, the PRA considers that it would be reasonable for a firm to take a forward-looking view that encompasses how the risk profile is expected to evolve as a result of the GBP RFR transition to SONIA.

In order to expedite the application process, the PRA expects applications at this time to use firms' existing TMTP calculation methodology. Furthermore, the PRA states that applications received at this time would be in addition to the expected biennial TMTP recalculation on 31 December 2021.

Part VII FSMA insurance business transfers: PRA CP16/21

The PRA has published a consultation paper, CP16/21, on updating its approach to insurance business transfers under Part VII of the Financial Services and Markets Act 2000 (FSMA) and the Friendly Societies Act 1992. The changes reflect legislative changes following the UK's withdrawal from the EU and the completion of the transition period. It also provides additional guidance for independent experts IEs and firms on the PRA's expectations. The proposals in CP16/21 would result in changes to the PRA's statement of policy on its approach to insurance business transfers.

The consultation closes on 28 October 2021. The PRA proposes that the implementation date for the changes is 29 November 2021.

We reported on 19 July 2021 that the FCA has published a guidance consultation, GC21/3, on proposed changes to the guidance on its approach to the review of Part VII insurance business transfers.

Travel insurance: FCA updates COVID-19 expectations of general insurance firms

On 19 July 2021, the Financial Conduct Authority (FCA) updated its webpage on its expectations of general insurance firms in the light of COVID-19 to clarify its expectations about travel insurance. The FCA states that it expects firms to take account of the changes to the travel landscape in their marketing, sale, design and monitoring of travel insurance products and to consider their regulatory requirements given the changed travel market. This includes requirements relating to communication (including marketing), sale standards, demands and needs, product governance (all of which are covered in greater depth on the webpage) and relevant coronavirus guidance that the FCA has issued. The FCA emphasises that its expectation is that firms must ensure they continue to treat customers fairly during the whole product cycle.

Solvency II: EIOPA supervisory statement on ORSA in context of COVID-19

On 19 July 2021, the European Insurance and Occupational Pensions Authority (EIOPA) published a supervisory statement on the own risk and solvency assessment (ORSA), required of undertakings under the Solvency II Directive, in the context of COVID-19. The supervisory statement is addressed to national competent authorities and aims to promote supervisory convergence. It focuses on the supervision of undertakings' internal processes that are necessary for a good quality ORSA and guiding undertakings through supervisory expectations under the current situation triggered by the COVID-19 pandemic.

While the statement addresses the current situation of COVID-19, EIOPA states that the recommendations are applicable to any similar situation with the necessary adaptions.

The statement covers the following topics:

- ORSA as a management tool;
- timing of the regular ORSA and ad-hoc ORSAs; and
- scenarios used in the ORSA.

Solvency II: EIOPA consults on supervisory statement on supervision of run-off undertakings

EIOPA has published a consultation paper on a draft supervisory statement on supervision of run-off undertakings under the Solvency II Directive. The draft supervisory statement is intended to ensure that supervision of run-off undertakings or portfolios subject to regulation under Solvency II is of high-quality and convergent.

EIOPA explains that acquisition of run-off portfolios and run-off undertakings by other insurance undertakings is increasing and is attracting interest from specialised investment entities, such as private equity. It believes that it is therefore necessary to specify supervisory expectations to address the risks arising from run-off business models. Supervision of run-off undertakings is challenging because of the specific risk profile of such undertakings (for example, relating to the changes in ownership), and the lack of specific regulation for run-off undertakings in the Solvency II framework.

The supervisory statement covers the authorisation of acquisition of run-off undertakings or portfolio, the ongoing supervision, and prudential and conduct of business issues. In particular,

EIOPA recommends potential acquirers engage in an early dialogue with national supervisors to communicate the intention to run off the full (or material) part of insurance obligations. As part of the ongoing supervision, national supervisory authorities should perform a business model analysis with a specific focus on how the undertaking is expected to remain profitable in the near future. National supervisory authorities should also focus on ensuring compliance with Solvency II rules, such as technical provisions, investments, reinsurance and making sure that policyholders are treated fairly.

The deadline for responses is 17 October 2021.

EIOPA will consider the feedback received and develop the impact assessment based on the responses received. It will then publish a final report on the consultation and submit the final version of the supervisory statement for adoption by its Board of Supervisors.

Solvency II: EIOPA consults on amendments to ITS and guidelines on supervisory reporting and disclosure requirements

EIOPA is consulting on amendments to implementing technical standards (ITS) set out in Commission Implementing Regulations (EU) 2015/2450 and 2015/2452 relating to supervisory reporting and disclosure requirements under the Solvency II Directive, as well as related guidelines. EIOPA's proposals and impact assessment are set out in documents available on the webpage for the consultation.

The proposed amendments reflect recommendations made by EIOPA in its December 2020 report on quantitative reporting templates, which was published alongside EIOPA's opinion on the 2020 review of Solvency II. However, EIOPA's view is that these amendments should now be implemented without waiting for the outcome of the Solvency II review.

EIOPA states that the proposals include simplification of quarterly reporting for all undertakings, the elimination of some reporting templates for all undertakings and new thresholds to promote better risk-based and proportionate reporting requirements. This will lead to a reduction of the number of templates to be reported for the majority of the undertakings.

The consultation closes on 17 October 2021.

EIOPA updates conduct of business supervision strategy

EIOPA has published an updated paper setting out its 2021 strategic approach to a comprehensive risk-based and preventive framework for conduct of business supervision on a European level. To ensure robust and effective implementation of this framework, EIOPA will submit a report of the findings from an implementation review to its Board of Supervisors in spring 2023.

Funds and Asset Management

ESG and sustainable investment funds: FCA guiding principles

On 19 July 2021, the Financial Conduct Authority (FCA) published a Dear Chair letter addressed to the chairs of authorised fund managers (AFMs) on improving the quality and clarity of authorised environmental, social and governance (ESG) and sustainable investment funds. The letter includes guiding principles explaining the FCA's expectations in this area to help AFMs comply with existing requirements by ensuring that fund disclosures accurately reflect the nature of the fund's responsible or sustainable investment strategy in both the pre-contractual documentation (for example, the prospectus) and on an ongoing basis.

The FCA states that it is essential that funds marketed with a sustainability and ESG focus describe their investment strategies clearly and any assertions made about their goals are reasonable and substantiated. The FCA has seen numerous applications for authorisation of investment funds with an environmental, social and governance (ESG) or sustainability focus, a number of which have been poorly drafted and have fallen below its expectations. It gives examples of such applications in the letter. The FCA warns that applications falling below its expectations are likely to fail and it expects issues to have been addressed in the product design phase, prior to authorisation applications. The FCA expects to see material improvements in future applications. It also expects clear and accurate ongoing disclosures to consumers where funds make ESG-related claims, and for funds deliver on their stated objectives and/or strategy.

The FCA acknowledges that, while the EU Sustainable Finance Disclosure Regulation (SFDR) has not been onshored in the UK, some UK authorised firms may also be complying with its requirements in relation to their cross-border business in the EU. The intent of the FCA's guiding principles is to be complementary to obligations under the SFDR.

The FCA also flags that the guiding principles are "not the end point" of setting out its expectations in this space, and they have been developed with the aim of being compatible with prospective future disclosure rules for responsible and sustainable investment fund products, including the government's plan to introduce economy-wide Sustainability Disclosure Requirements and sustainable investment labels.

PRIIPs KID exemption: European Commission adopts legislative proposal for amendments to UCITS Directive

The European Commission has adopted a legislative proposal for a Directive amending the UCITS Directive as regards the use of key information documents (KIDs) by management companies of UCITS.

The proposed Directive inserts a new Article 82a in the UCITS Directive. This states that where a KID is drawn up, provided, revised and translated for a UCITS pursuant to PRIIPs Regulation, it should be considered as satisfying the requirements applicable to key investor information for the purposes of the UCITS Directive. Member states are expected to apply measures implementing the amending Directive from 1 July 2022.

UCITS qualify as PRIIPs for the purposes of the PRIIPs Regulation, which requires that all PRIIPs be accompanied by a KID. However, Article 32 of the PRIIPs Regulation also provides for a transitional arrangement for management companies, investment companies and persons advising on, or selling, units of UCITS and non-UCITS, temporarily exempting them from the requirement to provide retail investors with a key KID. The arrangement currently applies until

31 December 2021. The Commission has adopted a legislative proposal for amendments to the PRIIPs Regulation extending the Article 32 transitional period until 30 June 2022.

UCITS Directive and AIFMD: sanctions imposed in 2020

The European Securities and Markets Authority (ESMA) has published its annual report on penalties and measures issued under the UCITS Directive and its annual report on penalties and measures issued under the Alternative Investment Fund Managers Directive (AIFMD). In the reports, ESMA provides an overview of the applicable legal framework and information on the sanctions imposed by national competent authorities from 1 January 2020 to 31 December 2020.

AIFMD and UCITS Directive: ESMA updates Q&As

ESMA has updated its Q&As on the application of the AIFMD and on the application of the UCITS Directive, adding new Q&As relating to ESMA's guidelines on performance fees in UCITS and certain types of alternative investment funds (AIFs) relating to performance fee scenarios where:

- an authorised alternative investment fund manager has delegated the portfolio management function to different delegated portfolio managers; and
- a new compartment or share class in an existing AIF/UCITS has been created in the course of its financial year or where a new AIF/UCITS has been created.

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