

# ALLEN & OVERY



## *Key Regulatory Topics: Weekly Update*

20 December 2019 – 9 January 2020

### **BREXIT**

Please see the Markets and Markets Infrastructure section for the publication of Commission Implementing Decision (EU) 2019/2211 on CCP regulatory framework equivalence in the OJ and ESMA's related amended recognition decisions.

#### **FCA statement on post-Brexit implementation period**

On 20 December, the FCA broadly indicated what a Brexit implementation period would mean should the UK leave the EU on 31 January 2020, entering the 11 month transition period. EU law will continue to apply, meaning that there will be no changes to passporting or consumer rights and protections. Any new EU legislation during the period will be applicable. The FCA implores firms to consider how the end of the implementation period will affect them and their customers and how best to prepare.

[Read more](#)

### **CAPITAL MARKETS**

#### **ESMA strategic orientation for 2020-2022**

On 9 January, ESMA published its strategic orientation 2020-22, which sets out ESMA's future focus aiming to contribute to mitigating the challenges faced by the EU. It also reflects ESMA's expanded responsibilities and powers following the ESAs review and the coming into force of EMIR 2.2 and the Investment Firm Regime. ESMA's new responsibilities include direct supervision of securitisation repositories, critical benchmarks, data service providers, third-country central counterparties (CCPs) and other third-country firms in a number of different areas. This is ESMA's second ever Strategic Orientation. ESMA's key priorities will be to ensure the consistent implementation of the single rulebook across the EU; and to significantly step up its risk-based approach to supervisory convergence using innovative tools like Common Supervisory Actions. Other challenges ESMA identified include the need: (i) to diversify capital markets funding sources by developing a large retail investor base; (ii) to promote sustainable finance, meeting the UN's Sustainable Development Goals; (iii) to embrace the opportunities of advancing technology, whilst ensuring adequate protection against cybercrime; and (iv) to ensure the openness of EU financial markets, cooperating with third-country authorities and promoting global standards.

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#### **FMLC response to EC consultation on 2019 the Benchmark Regulation (BMR) review**

On 31 December, the Financial Markets Law Committee (FMLC) published its response to the EC's October consultation on the 2019 review of the BMR. The FMLC generally welcomes the review, commenting that the BMR has had a significant impact on the financial markets. The key areas that they have identified, which have caused legal uncertainty, do not entirely fall within the scope of the questions in the consultation paper. Of these, the FMLC recognises that uncertainties arising from the interplay of Brexit and the transition from LIBOR may have been unforeseen at the time the BMR was being drafted, but these now give the FMLC the greatest cause for concern.

[Read more](#)

#### **ESMA follow-up report on fees charged by CRAs and TRs**

On 20 December, ESMA published a follow up to its January 2018 thematic report on the current fee structures of credit ratings agencies (CRAs) and trade repositories (TRs). ESMA provides an update on the

work that it has conducted and highlights developments in industry practice. Whilst TRs and CRAs have made improvements in the areas of transparency, fee setting and costs monitoring, further work is required regarding costs recording and monitoring. ESMA expects costs to be recorded at a sufficient level of granularity to show that the fees charged are cost-based (CRAs) and cost-related (TRs). ESMA found that the access to and use of credit ratings published on the websites of the three largest CRAs was severely limited. It is also concerned that CRAs do not exercise any direct control over the credit ratings distribution and licence services provided by information services companies affiliated to CRAs.

[Read more](#)

## **CONDUCT**

### **Financial Services Regulatory Partners Phoenixing Group progress**

On 20 December, the FCA provided an update on the working group, the Financial Services Regulatory Partners Phoenixing Group. It was launched in April to tackle "phoenixing", the practice of firms and individuals deliberately seeking to avoid their liabilities or poor conduct history by closing down firms only to re-emerge in a different legal entity. The group will focus on using data analytics and machine learning in 2020 to predict and identify instances of phoenixing and will meet again in May 2020.

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## **CONSUMER/RETAIL**

### **House of Lords first reading of Duty of Care Bill**

On 9 January the first reading of the Financial Services Duty of Care Bill (Bill) took place in the House of Lords. The Bill proposes to amend the FSMA to require the FCA to make rules for all authorised persons to owe a duty of care to consumers in their regulated activities. The date of the second reading is yet to be announced.

[Read more](#)

### **FCA press release on Citizens Advice 'loyalty penalty' super-complaint to the CMA**

On 9 January, the FCA published a press release providing an update on the work it has been undertaking in the light of the CMA's response to the Citizens Advice super-complaint on the 'loyalty penalty'. The loyalty penalty is a cross-sector issue whereby long term customers pay significantly more than new ones. In its press release, FCA highlights a number of its work streams: (i) the October 2019 interim market study report looking at pricing practices for home and motor insurance; (ii) the March 2019 Mortgage Market Study; and (iii) the single easy access rate consultation paper. The FCA states that it plans to publish updates on its cross-cutting work relating to fair pricing in financial services and its consultation on guidance for firms on the fair treatment of vulnerable customers (GC19/3) in the first quarter of 2020.

[Read more](#)

### **FCA consultation paper on introducing single easy access rate for cash savings**

On 9 January, the FCA published consultation paper (CP20/1) on proposals to introduce a single easy access rate (SEAR) for cash savings. The paper is the next step in the FCA's work to address problems identified in the easy access cash savings market following its July 2018 Discussion Paper (DP 18/6) and January 2020 Occasional Paper. The objective is to address the pricing discrimination in this market where long-standing consumers are on the lowest interest rates, without hampering the competition that exists for new customers. The FCA is consulting on two complementary proposals, namely that firms: (i) introduce SEARs; and (ii) publish data on their SEARs to make them easily comparable. The SEAR was originally referred to as the Basic Savings Rate in DP18/6, but was renamed to emphasise that it would be a single rate of interest that applies no later than the first anniversary of the account and across all easy access accounts set by the firm. Firms would be able to offer multiple introductory rates for up to 12 months, but would then need to choose one SEAR for all their easy access accounts and one for their easy access cash savings ISAs. The deadline for comments is 9 April 2020. If, following the consultation, the FCA considers it necessary then its final instrument will be published in the second half of 2020, implementing the proposals in this paper at the start of 2021/22 tax year.

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### **UKRN on performance scorecards customer experience**

On 9 January, the UK Regulators Network (UKRN) published a report entitled "Moving forward together - performance scorecards" which provides insight into how effectively companies in water, energy, telecoms and essential financial services are delivering their services to consumers. Working with the FCA, Ofgem, Ofcom, Ofwat and the Consumer Council for Water, the UKRN has brought together key consumer metrics

covering service quality, price differentials and satisfaction levels. The intention is that the scorecards help regulators: (i) identify where to focus action; (ii) increase the incentive for suppliers to improve performance; (iii) help identify any common challenges across sectors; and (iv) assist consumers in comparing how well companies are delivering their services. Each regulator has also published links to more detailed analysis on their individual websites.

[Read more](#)

## **FINANCIAL CRIME**

### **Money Laundering and Terrorist Financing (Amendment) Regulations 2019 and new FCA related webpage**

On 20 December, the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (the Regulations) were published, together with an explanatory memorandum. They transpose 5MLD by way of amendments to the MLRs 2017. The Regulations come into force on 10 January (except for regulation 5 (5) (c) which comes into force on 10 July, and regulations 6 and 12, which comes into force on 10 September). On 23 December, the FCA published a new webpage highlighting the changes that firms need to comply with in view of the Regulations. The changes include the following: (i) amendments to regulation 33 of the MLRs requiring firms to include new additional high-risk factors when assessing the need for enhanced due diligence; (ii) amendments to regulation 38 of MLRs regarding when electronic money institutions can forego customer due diligence measures; (iii) new regulation 30A requiring firms to report discrepancies to Companies House between the information the firm holds on their customers compared with the information on the Companies House Register; and (iv) a requirement that businesses carrying out certain cryptoasset activities will need to comply with the MLRs in relation to those activities from 10 January, and will need to register with the FCA this year.

[MLTF \(Amendment\) Regulations 2019](#)

[Explanatory Memorandum](#)

[FCA webpage](#)

### **NCA issues a call to action to government and police bodies to improve the response rate to fraud**

On 20 December, the NCA issued a call to action to various government and police bodies, referred to as a tasking, to improve the response to fraud. The tasking applies to all police forces and Regional Organised Crime Units in England and Wales, Police Scotland, the Police Service of Northern Ireland, the SFO, HMRC and the FCA. It is focused on improving the intelligence picture on fraud, pursuing offenders causing the highest harm and increasing the priority of fraud across the system. Broader reforms to the current system for tackling fraud are being considered in the Government's review of serious and organised crime.

[Read more](#)

## **FINTECH**

Please see the Financial Crime section for the publication of the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 together with an explanatory memorandum.

### **FCA and BoE report on findings of phase 2 of the Digital Regulatory Reporting pilot**

On 7 January, the FCA in collaboration with the BoE and seven large regulated firms have published the Phase 2 Viability Assessment report of the Digital Regulatory Reporting (DRR) project. The report was built on: (i) addressing issues in the first phase of the DRR pilot; (ii) determining whether continued investment in DRR was viable; (iii) identifying gaps requiring closure prior to any implementation; and (iv) exploring technical solutions for DRR. The regulators have committed to continue to work together, including by exploring joint work on common data standards, commissioning a joint review of the legal implications of writing reporting instructions as code and commissioning a joint independent review of some of the technical solutions explored as part of the pilot.

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## **MARKETS AND MARKETS INFRASTRUCTURE**

### **ISDA guide to cross-border application of US, EU and Japan margin rules for non-cleared derivatives**

On 7 January, ISDA published a guide to the cross-border application of US, EU and Japan margin rules for non-cleared derivatives. A large number of counterparties will come into scope of initial margin (IM) requirements for non-cleared derivatives in 2020 and 2021, which has increased the focus on the applicability of the rules to cross-border trading relationships. There are practical challenges in analysing

multiple foreign rules sets and firms will need to understand the different aggregate average notional amount calculations that are relevant to them, the IM thresholds that apply to their trading relationships and the substantive requirements they will have to meet. The guide focuses on the position of an entity that is not a swap dealer, but is either directly subject to margin rules or is obliged to comply with the margin requirements of its counterparties. Rules examined in the guide include those of the US Commodity Futures Trading Commission, the US Securities and Exchange Commission, the European Commission and the Japan Financial Services Agency.

[Read more](#)

### **ESMA final report on CCPs' membership criteria and due diligence**

On 7 January, ESMA published a final report following a survey on all 16 central counterparties' (CCPs) membership criteria and due diligence and whether there is a need for measures to strengthen CCPs compliance with EMIR and the CPMI-IOSCO principles in this regard. It is a response to the default in September 2018 of a physical person acting as a direct clearing member at an authorised CCP, which highlighted the importance of membership criteria as a first line of defence of CCPs to control counterparty credit risk. The survey focused on: (i) whether individuals are allowed to be clearing members; (ii) what membership criteria CCPs apply; (iii) how CCPs monitor on-going compliance with requirements. In relation to individuals acting as clearing members, ESMA has also published an updated version of its Q&As on the implementation of EMIR to include a new Q&A 23(c) on the level of stringency in admission criteria.

[ESMA's Final Report](#)

[EMIR Q&As](#)

### **ESMA guidance on SFTR reporting under Articles 4 and 12 SFTR**

On 6 January, ESMA published a final report and guidelines on reporting under Articles 4 and 12 of the Regulation on reporting and transparency of securities financing transactions (SFTs) ((EU) 2015/2365) (SFTR). They aim to clarify a number of the SFTR's provisions and provide practical guidance on their implementation, including: (i) the reporting start date; (ii) the SFT reporting obligation; (iii) the approach used to link SFT collateral with SFT loans; (iv) the number of reportable SFTs; (v) the population of a number of reporting fields; and (vi) the Trade Repositories' (TRs) obligations including to generate feedback and provide authorities access to data. The guidelines apply from 7 January or if later, the date on which the relevant reporting obligation (Article 33(2)(a) of the SFTR) becomes applicable. Separately, ESMA has published a statement on implementation of the legal entity identifier (LEI) requirements under the SFTR reporting regime. The statement clarifies ESMA's expectations regarding reporting of LEIs for issuers of securities used in SFTs and the relevant supervisory actions to be carried out by national competent authorities (NCAs). ESMA is aware of the different levels of LEI coverage between EU (88%) and third country jurisdictions (30%). Accordingly, to support the smooth introduction of the SFTR's LEI requirements, for up to twelve months from the SFTR reporting start date of 13 April 2020, reports without third-country issuers' LEIs of securities will be accepted. ESMA has also published amended validation rules for SFTR reporting. The amended rules are fully up to date with the statement and the updated XML schemas that ESMA published in December 2019.

[ESMA's Final Report](#)

[ESMA's Guidelines](#)

[ESMA's Statement on LEI Requirements](#)

[ESMA's Amended Validation Rules for SFTR reporting](#)

### **Commission Implementing Decision (EU) 2019/2211 on CCP regulatory framework equivalence published in the OJ**

On 23 December, Commission Implementing Decision (EU) 2019/2211 was published in the OJ. This amends Commission Implementing Decision (EU) 2018/2031 (Temporary Equivalence Decision) extending, until 31 January 2021, the determination that the regulatory framework applicable to central counterparties under EMIR in the UK is equivalent to the EU's framework. This Temporary Equivalence Decision will not apply if the UK leaves the EU with a deal.

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## **ESMA extends recognition decisions for UK CCPs in the event of a no-deal Brexit following Implementing Decision 2018/2031 extension**

On 23 December, ESMA announced that it has extended the recognition decisions for the three UK CCPs to reflect the extension of the expiry date of the Commission Implementing Decision (EU) 2018/2031 on the equivalence of the UK CCP legal framework.

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## **PAYMENT SERVICES AND PAYMENT SYSTEMS**

### **PSR publishes script of card acquiring market review survey**

On 24 December, the Payment Systems Regulator (PSR) published the final version of the merchant survey questionnaire to be used as part of the PSR's on-going card-acquiring market review, launched in January 2019. The PSR is examining whether the supply of card-acquiring services is working well for merchants and consumers. The survey focuses on the factors that might affect the demand for card-acquiring services, including questions about the use of card transactions, relationships with providers of these services, switching, and alternative payment channels.

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## **RECOVERY AND RESOLUTION**

### **FSB decides not to proceed with guidance on public disclosures on resolution planning and resolvability**

On 20 December, the FSB published a summary of comments on its June discussion paper that explored how general and firm-specific disclosures on resolution planning and resolvability on an ex ante basis could be further enhanced. Respondents to the paper expressed general support for transparency and disclosure regarding resolution planning and resolvability, although several indicated caution regarding firm-specific disclosures and the need to protect commercially sensitive information. The FSB has decided not to develop further guidance on resolution disclosures until 2022 at the earliest.

[Read more](#)

### **FSB decides not to proceed with guidance on solvent wind-down of derivatives and trading portfolios**

On 20 December, the FSB published a summary of comments on its June discussion paper on the solvent wind-down (SWD) of derivatives and trading book activities of global systemically-important banks (G-SIBs) that may be relevant for recovery and resolution planning. Respondents to the paper supported the view that SWD planning is an integral part of recovery and resolution planning and needs to be consistent with the home authority's resolution strategy and plan. They suggested that any guidance should be considered in a way that: (i) would limit or reduce regulatory divergence; (ii) acknowledge differing business models; and (iii) be principles-based and capabilities-focused. The FSB decided not to develop further guidance at this stage.

[Read more](#)

## **STRUCTURAL REFORM**

Please see the Other Developments section for the publication of the European System of Financial Supervision legislative reform package published in OJ.

## **SUSTAINABLE FINANCE**

### **EU technical expert group issue handbook on climate benchmarks and ESG disclosures**

On 20 December, the EU technical expert group on sustainable finance (TEG) published a handbook as a response to frequently asked questions on the EU climate Transition Benchmark, the EU Paris Aligned Benchmark and the benchmarks' disclosure guidance on Environmental social or governance (ESG) issues. Aspects the handbook covers include: (i) the 7% reduction trajectory; (ii) terminology; (iii) anti-greenwashing measures; (iv) data sources and estimation techniques; and (v) ESG disclosures.

[Read more](#)

## **OTHER DEVELOPMENTS**

### **BoE discussion paper on the future of data collection in the UK financial sector**

On 7 January, the Bank of England (BoE) published a discussion paper on transforming data collection from the UK financial sector. The paper forms the first part of a comprehensive review in response to the June 2019 Future of Finance (FoF) report, which called for the BoE to develop a new digital data strategy over the next decade, to improve efficiency, analytical effectiveness, and decrease the burden on industry participants. Although regulatory data represents the bulk of what is collected, the paper's scope covers all structured data collected from firms. It explores the ideas put forward in the FoF report and pilot on digital regulatory reporting, building on and working in collaboration with efforts the FCA has made, especially the development of its Future Data Collection Platform. In addition to the paper, the BoE will establish industry working group(s) over the course of 2020; and will host a webinar on 29 January covering the main aspects of the paper. The deadline for comments is 7 April 2020.

[Read more](#)

### **FCA updates its data strategy**

On 7 January, the FCA published its refreshed data strategy, due to the considerable technological and data analytics developments and increase in FCA-regulated firms since the original in 2013. The new strategy covering the next 5 years aims to, among other things: (i) deepen the FCA's understanding of how markets work and consumers behave; and (ii) swiftly identify, connect and react to firm and market issues, minimising harm. The FCA will publish regular progress updates.

[Read more](#)

### **European System of Financial Supervision legislative reform package published in OJ**

On 27 December, two Regulations and a Directive were published in the OJ, entering into force on 30 December: (i) the Omnibus Regulation (EU) 2019/2175, relating to, inter alia, the powers, governance and funding of the ESAs; (ii) the Regulation amending the ESRB Regulation (EU) 2019/2176; and (iii) the Omnibus Directive (EU) 2019/2177, amending, inter alia, MiFID II and Solvency II.

[Omnibus Regulation \(\(EU\) 2019/2175\)](#)

[Regulation amending the ESRB Regulation \(\(EU\) 2019/2176\)\)](#)

[Omnibus Directive \(\(EU\) 2019/2177\)](#)

### **PRA's 2018/19 feedback survey**

On 20 December, the PRA published the aggregated results of its 2018/19 firm feedback survey. The purpose of the survey is to assess the effectiveness and quality of the PRA's supervisory framework and approach. Among other things, firms have expressed concerns about the timeliness of SMCR approvals and commented that it would be helpful to have a better information flow that includes what candidates could do while awaiting approvals and they also called for improved co-ordination between the PRA and FCA. The PRA highlights poor quality applications as the main cause of delays and that there are plans in place to work to help improve the quality of applications.

[Read more](#)

### **Andrew Bailey to be new BoE Governor**

On 20 December, HM Treasury published a press release announcing that Andrew Bailey will succeed Mark Carney as the new BoE Governor from 16 March for an eight year term. Mr Bailey is currently the FCA's Chief Executive, having previously held the position of BoE Deputy Governor for Prudential Regulation, PRA CEO and has been a member of the BoE's Financial Policy Committee since 2012. To ensure continuity, an interim FCA Chief Executive will be appointed ahead of Mr Bailey's departure until a permanent successor is chosen by HM Treasury.

[Read more](#)