

ALLEN & OVERY

Key Regulatory Topics: Weekly Update

10 May 2019 – 16 May 2019



CAPITAL MARKETS

ISDA Publishes Two Consultations on Benchmark Fallbacks

On 16 May, ISDA launched two new consultations on benchmark fallbacks. One covers adjustments that would apply to fallback rates in the event certain interbank offered rates (IBORs) are permanently discontinued, and the other relates to pre-cessation issues for LIBOR and certain other IBORs. The first consultation sets out options for adjustments that will apply to the relevant risk-free rates (RFRs) if fallbacks are triggered for derivatives referencing US dollar LIBOR, Hong Kong's HIBOR and Canada's CDOR. Feedback is also sought on a proposed fallback for Singapore's SOR following a permanent cessation of US dollar LIBOR, given US dollar LIBOR is currently used as an input to calculate the Singapore rate. The other consultation relates to pre-cessation issues, and seeks comments on how derivatives contracts should address a regulatory announcement that LIBOR or certain other IBORs categorised as critical benchmarks under the EU Benchmarks Regulation are no longer representative of an underlying market. The deadline for responding to the consultations is July 12.

[Interbank Offered Rate \(IBOR\) Fallbacks for 2006 ISDA Definitions](#)
[Consultation on Pre-Cessation Issues for LIBOR and Certain Other IBORs](#)

Public consultation by the working group on euro risk-free rates on the EONIA to €STR legal action plan

On 15 May, the ECB published the third public consultation by the working group on euro risk-free rates (the working group). This consultation gives interested parties the opportunity to comment on the legal action plan for the transition from the euro overnight index average (EONIA) to a euro short-term rate (€STR), including the different legal options discussed by the working group over the last few months. The deadline for responding to the consultation is 12 June. The ECB will summarise the feedback received and this summary will be published on its website and considered by the working group at its meeting on 4 July.

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Shareholder Rights Directive: The Proxy Advisors (Shareholders' Rights) Regulations 2019

On 14 May, the government published the Proxy Advisors (Shareholders' Rights) Regulations 2019. The instrument transposes Article 3j of the revised EU Shareholder Rights Directive into UK law and places requirements on proxy advisors, which primarily offer voting services and/or advice to shareholders in publicly listed companies, to make certain disclosures about the way in which they conduct their business. Proxy advisors will be required to: (i) disclose reference to a code of conduct which they apply, and report on the application of the code. If proxy advisors apply a code of conduct but depart from its recommendations, they must declare the parts of the code from which they depart, why they depart from it and indicate any alternative measures adopted. Where proxy advisors do not apply a code of conduct at all, they must explain why this is the case; (ii) disclose information on their research capabilities and how they produce their advice

and voting recommendations; and (iii) identify and disclose any actual or potential conflicts of interests or business relationships that may influence the preparation of their research. The Regulations enter into force on 10 June.

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ESMA publishes data for the systemic internaliser calculations for equity, equity-like instruments and bonds

On 10 May, ESMA published an update of the systematic internaliser (SI) regime data which covers equity, equity-like instruments and bonds. The data reveals the total number of trades and total volume over the period between October 2018 and March for the purpose of the SI calculations for 24,909 equity and equity-like instruments and for 315,615 bonds. The published data also incorporates OTC trading to the extent it has been reported to ESMA and includes data for instruments which are no longer available for trading on EU trading venues from the end of March. The publication of the data for the SI calculations for derivatives and other instruments has been delayed until 2020 at the latest, as set out in the updated plan announced by ESMA on 30 January.

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CONSUMER/RETAIL

FCA updates its webpage on price discrimination in the cash savings market

On 14 May, the FCA updated its webpage on its July 2018 discussion paper on price discrimination in the cash savings market. The update set out the FCA's priorities, which include: (i) setting out proposals for tackling price discrimination in cash savings; (ii) assessing the role and impact of Open Finance; and (iii) considering the role of a Duty of Care in its future approach to regulation. The update also highlighted the FCA's next steps, which are (i) considering the responses to its discussion paper; and (ii) publishing either a Consultation Paper or Feedback Statement in the second half of this year which will outline the feedback received.

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Treasury Committee report on consumers' access to financial services

On 13 May, the House of Commons Treasury Committee published a report on consumers' access to financial services. The Committee considers maintaining financial inclusion be of the utmost priority for financial services providers, the Government, and financial regulators. The report addresses a number of issues, and contains a series of recommendations including: (i) steps to increase financial inclusion: Basic bank accounts should be accessible to all customers; Financial services providers should offer customers the opportunity to exclude themselves either from borrowing altogether or from spending excessive sums in short spaces of time and UK Finance should work with firms to find ways to increase the variety of self-exclusion spending and lending blocks available to customers; The Government and the FCA should consult on how the use of power of attorney works in practice with regard to financial services; (ii) whether vulnerable customers pay more: Pursuing a policy of encouraging vulnerable customers to use specialist insurers is not the optimum solution and it reduces choice for vulnerable customers; the Committee expects the FCA to act upon its investigations on the existence of loyalty penalties within the mortgage, insurance and cash savings markets swiftly once they are concluded; the FCA must redouble its efforts to make switching a simpler process; and the FCA should make it mandatory for firms to publish the size of their loyalty penalties on an annual basis to consumers; (iii) bank branch closures: Large sections of society rely on bank branches to carry out their banking needs. If the financial services market is unwilling to innovate in order to halt the closure of bank branches, market intervention by the Government or the FCA may be necessary; Free access to cash must be maintained for those that need it; (iv) the Equality Act and the provision of reasonable adjustments. The Government should give the FCA the power to take on the enforcement of individual cases relating to financial firms' compliance with the Equality Act, in addition to the EHRC; Financial services providers should ensure that interpretation services are made available to consumers, both for British Sign Language users and those for whom English is not their first language, as a matter of urgency and alert customers to the existence of such services. The FCA should make it clear such provision is expected of financial services providers under its principle of treating customers fairly; The Committee expects the PSR to set out in response to this report whether it will mandate firms to make the adjustments to ATMs, debit and credit cards and chip and pin pads to make them accessible for visually impaired consumers; The FCA should set a minimum level of communication channels or methods that firms are required to offer to their customers and include clear requirements for firms to provide information in all formats; All financial services providers should reduce the length of their terms and conditions, and reduce the required reading age of all their communication material to that of the average reader, which the FCA

state is that expected of an 11 to 12 year old; and (v) defining vulnerability: The FCA must set clear expectations of how financial service providers should identify and treat vulnerable consumers through the guidance it plans to publish; Firms should design their interactions with customers to enable them to identify their customers' vulnerabilities, and must not use a customer's lack of disclosure as an excuse not to provide the support required; All retail financial services should be acting in their customer's best interests at all times. If the FCA is unable to enforce such behaviour, the Committee would support a legal duty of care.

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FINANCIAL CRIME

Please refer to the Markets and Markets Infrastructure section for a speech published by the BoE on its operational resilience work programme.

FCA gives evidence to the House of Commons Treasury Committee on fraud prevention by banks

On 15 May, the FCA gave evidence to the House of Commons Treasury Committee on fraud prevention by banks. Megan Butler, the FCA's executive director of supervision, investments, wholesale and specialist, said that the industry should focus on fraud prevention not just the "reimbursement" of its victims. The Financial Ombudsman Service (FOS) reported in May that it had received 12,195 complaints in relation to fraud and scams in the 2018/19 financial year - up 43% from the 8,523 seen in 2017/18. The complaints involved all types of fraud including ID theft, online transfers and authorised push payments, with the FOS warning banks there was a "high bar to meet" before they can refuse to refund a customer's money. In January the FOS's remit was extended such that the FOS can now hold to account the bank which received a fraudulent payment, a function it did not previously hold. Ms Butler pointed to this extension as helping tackle fraud in the industry. She said: "The extension of the FOS regime and its remit to more clearly encompass the range of issues that people who have suffered and have been victims of push payment fraud, now means people have a greater capacity to go to the ombudsman and complain if their bank, or indeed the payee bank, has not stepped up to the mark."

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Delegated Regulation on RTS on measures to mitigate money laundering and terrorist financing risk under MLD4 published in OJ

On 14 May, Commission Delegated Regulation (EU) 2019/758 supplementing MLD4 with regard to RTS for the minimum action and the type of additional measures credit and financial institutions must take to mitigate money laundering and terrorist financing risk in certain third countries, was published in the OJ. The provisions of the Regulation should be without prejudice to the duty of competent authorities of the home Member State to exercise additional supervisory actions as stipulated in Article 45(5) of MLD4 in cases where the application of additional measures defined by this Regulation will prove insufficient. The Regulation is based on draft RTS developed by the ESAs and submitted to the EC. The Delegated Regulation will enter into force on 3 June. It will apply from 3 September, to allow credit institutions and financial institutions sufficient time to adjust their policies and procedures in line with this Regulation's requirements.

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EC requests technical advice from ESMA on report under Article 38 of the Market Abuse Regulation

On 14 May, ESMA published a letter from Olivier Guersent, EC Director General for Financial Stability, Financial Services and Capital Markets Union, to Steven Maijoor, ESMA Chair, highlighting the EC's formal request to ESMA for technical advice on the report to be submitted by the EC under Article 38 of MAR. Under Article 38, the EC is required to submit, by 3 July, a report to the EP and to the Council of the EU on: (i) the application of MAR; and (ii) the level of thresholds set out in Article 19(1a)(a) and (b) in relation to managers' transactions in certain specific circumstances. The EC requests ESMA to consider in its technical advice not only the mandatory elements (under Article 38) but also: (a) whether spot FX contracts should be covered by MAR; (ii) the scope of reporting obligations under the exemption for buyback programmes; (iii) the effectiveness of the mechanism to delay disclosure of inside information; (iv) the usefulness of insider lists drawn up by issuers and persons acting on their behalf or on their account pursuant to Article 18 in investigating market abuse; (v) adequacy of the requirement to notify managers' transactions as applied to collective investment undertakings; (vi) the appropriateness of certain aspects of the requirement to notify managers' transactions; and (vii) cross-border enforcement of sanctions. The EC encourages ESMA to widely consult market participants in carrying out its analysis. The EC has requested ESMA's advice by no later than 31 October 2019.

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NCA: £2.7bn investment in law enforcement required to combat serious and organised crime

On 14 May, the National Crime Agency's (NCA) published the National Strategic Assessment of Serious and Organised Crime. Director General Lynne Owens said that a £2.7bn investment in law enforcement will be required to combat serious and organised crime over the next three years. Reported fraud continues to increase volume. According to the Office for National Statistics, in calendar year 2018, reports of fraud rose by 12% compared to the previous year, to a total of 3.6 million incidents. Fraud as a whole continues to be significantly underreported. In 2017/18, only 3% of reported fraud led to criminal charges, summons, cautions or community resolutions, limiting meaningful analysis of the organised crime groups involved.

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ECB executive on the role of central banks in cybersecurity

On 10 May, Sabine Lautenschläger, a member of the executive board of the ECB, spoke on cybersecurity and the role of central banks at the G7 2019 conference on "Cybersecurity: Coordinating efforts to protect the financial sector in the global economy" in Paris. Ms Lautenschläger outlined a number of ways in which the ECB is addressing cyber-risk, including setting the Eurosystem cyber resilience strategy, red-teaming, and fostering strategic engagement between regulators and industry. Ms Lautenschläger argued that banks, in particular, need to simplify their IT landscape: 'Simpler IT landscapes have a smaller attack surface. And the easier these systems are to understand and maintain, the better they can be protected.' She also expressed concern that 'a significant number' of financial market infrastructures still lack dedicated cyber-incident response plans. Discussing trends in financial sector cybercrime and cyber-resilience, Ms Lautenschläger highlighted four areas: (i) the close interconnection and complexity of the financial system creates vulnerabilities which can be exploited by cyber attackers; (ii) attackers seem to be gaining a deeper understanding of how the financial system operates, enabling them to swiftly detect and exploit weaknesses more efficiently; (iii) banks and financial market infrastructures are struggling to find staff with the skills and experience needed to fend off cyber-attacks. Ms Lautenschläger said all relevant stakeholders need to urgently work on strategies to make sure that the workforce has the right skills for the future economies; and (iv) fintech might disrupt financial markets in positive ways, but it also comes with risks. Fiercer competition could lead some market players to embrace and adopt new technologies, services or methods before fully grasping the related risks. Ms Lautenschläger also flagged that many supervised institutions now outsource their IT to a single provider: 'A classic case of putting all their eggs in one basket, this creates a concentration risk that should not go unnoticed.'

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FUND REGULATION

EP non-objection to Delegated Regulation supplementing EuVECA Regulation

On 15 May, the EP updated its procedure file on the Delegated Regulation supplementing the European Venture Capital Funds Regulation (EuVECA) with regard to conflicts of interest to indicate that the delegated act was not objected to by the EP. Regulation (EU) No 345/2013 of the EP and of the Council of the EU establishes an EuVECA label and introduces measures to allow venture capitalists to market their funds across the EU using a single set of rules. Under the Regulation, every fund using the label has to prove that a high percentage of investments (70% of the capital received from investors) is spent on supporting small companies. The next step is for the Council to consider the Delegated Regulation. If the Council does not object, it will be published in the OJ, enter into force 20 days thereafter and apply six months after entry into force.

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EP non-objection to Delegated Regulation supplementing EuSEF Regulation

On 13 May, the EP updated its procedural file on the Delegated Regulation supplementing the European Social Entrepreneurship Funds Regulation (EuSEF Regulation) with regard to conflicts of interest, social impact measurement and information to investors. The Regulation establishes a EuSEF label, which enables investors to identify investment funds that focus on social businesses. Moreover, it sets out conditions in which investment funds use the EuSEF label provided that they demonstrate a high percentage of investments of at least 70% of the capital social businesses. The next step is for the Council of the EU to consider the Delegated Regulation. If the Council does not object, it will be published in the OJ, enter into force 20 days thereafter and apply six months after entry into force.

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INSURANCE

BoE speech on use and misuse of insurance models

On 14 May, the BoE published a speech by David Rule, BoE Executive Director of Insurance Supervision, on model use and misuse in the insurance sector, which considers the growing importance of model risk management. In conclusion of his speech, Mr. Rule's states that as insurers deploy increasing numbers of models, drawing on massive amounts of data and with new analytical techniques, it is vital that they give sufficient attention to effective model risk management. Insurers need to be sufficiently confident to use their models but not so over-confident that they misuse them. Mr Rule also briefly discussed LIBOR transition. The PRA will shortly be publishing the main points arising from responses to its September 2018 Dear CEO letter. The PRA is aware that insurers need clarity about when and how the Solvency II discount curves will transition to replacement risk-free rates. The FCA understands the challenges posed and it is working constructively with EIOPA and others to address these issues. The FCA encourages insurers to continue to focus on the actions within their control, such as identifying where LIBOR exposure is on their balance sheets, engaging with counterparties and preparing for operational changes.

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EC adopts Delegated Regulation on adapting base euro amounts for PII and financial capacity of intermediaries under IDD

On 13 May, the EC adopted a Delegated Regulation amending Directive (EU) 2016/97 on insurance distribution (IDD) with regard to RTS adapting the base euro amounts for professional indemnity insurance and for financial capacity of insurance and reinsurance intermediaries under Articles 10(4) and (6) of the IDD to take into account the 4.03% increase in the European index of consumer prices as published by Eurostat, over the period 1 January 2013 to 31 December 2017. The Regulation shall enter into force 20 days after being published in the OJ and it shall apply six months thereafter.

[Read more](#)

MARKETS AND MARKETS INFRASTRUCTURE

ESMA: Keynote speech by Verena Ross at ICMA Annual General Meeting and Conference

On 16 May, ESMA Executive Director, Verena Ross, delivered a keynote speech at the ICMA Annual General Meeting and Conference on transitions and challenges for the European securities markets and their regulators. In her speech, she highlighted various factors that are encouraging an unprecedented transition in the European securities markets, specifically: (i) sustainable finance; and (ii) benchmarks. Additionally, she addressed challenges, such as Brexit and highlighted the impact MiFID II has had on data collection and furthering transparency across the EU.

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Council of EU adopts EMIR Refit Regulation at first reading

On 14 May, the Council of the EU announced that it had adopted at first reading the proposed EMIR Refit Regulation. The text of the regulation as adopted was also published. The regulation will be signed in the week of 20 May and will enter into force 20 days after publication in the OJ.

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PRUDENTIAL REGULATION

Sam Woods speech on post-Brexit UK style of regulation

On 16 May, the BoE published a speech given by Sam Woods, BoE Deputy Governor for Prudential Regulation and PRA CEO, on the style of UK financial services after Brexit. In his speech, Mr. Woods spoke about the 'style' of regulation that the BoE should aim for and explores the differences between EU and UK approaches to implementing regulatory rules. Mr. Woods set out six principles of an effective framework of regulation, namely: (i) robust prudential standards; (ii) responsible openness based on international collaboration and standards; (iii) proportionality and sensitivity to business models and promoting competition; (iv) dynamism and responsiveness; (v) consistency; and (vi) accountability. Further, he stated that using an existing British approach – the model of legislation which has been used to introduce the Senior Managers and Certification Regime (SMCR) – is the best way to deliver these principles in the future.

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BoE speech on operational resilience work programme

On 14 May, the BoE published a speech given by Nick Strange, BoE Director, Supervisory Risk Specialists, on the BoE's current operational resilience work programme. In his speech, Mr. Strange flags that: (i) the

BoE will publish a consultation paper later this year on its proposed policies and approach to supervising operational resilience. Where possible, the BoE will build on existing policies and rules, placing them within a clear and consistent framework; and (ii) the BoE will build on its experience with financial (concurrent) stress testing, to pilot cyber stress testing. Specifically, later this year, the BoE will test an impact tolerance for payments in a hypothetical scenario where firms' IT systems supporting their payments function become unavailable. The BoE will also be working with a small number of firms to 'test the test' and also gather some initial information on whether an end-of-value date tolerance for this vital service would be appropriate from a financial stability point of view. The FPC also indicated that in future it may consider a data integrity scenario. Mr. Strange suggests that the cyber stress testing may reveal that on their own, firms cannot meet the FPC's proposed tolerance for payments systems outage. If this were the case, then it would either fall to the public or private sector to come up with a collective solution.

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Council of EU adopts banking reform package at first reading

On 14 May, the Council of the EU announced that it had adopted BRRD II, SRMR II, CRR II and CRD V (the banking reform package) at first reading. The instruments will now be signed (scheduled for the week of 20 May), then published in the OJ in the course of June and enter into force 20 days later.

[Read more](#)

Decision on rules regarding transfer of personal data to national authorities for criminal or financial investigations published in the OJ

On 13 May, a Decision of the Bureau of the EP, on the implementing rules relating to the transfer of personal data by the EP to national authorities conducting criminal or financial investigations, was published in the OJ. The EP has to carry out, on a case-by-case basis, an assessment of the necessity and proportionality of the restriction, taking into account the risks to the rights and freedoms of data subjects, before any particular restriction is applied. Furthermore, the EP has to provide justification as to why the restrictions are strictly necessary and proportionate in a democratic society and respect the essence of the fundamental rights and freedoms concerned.

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RECOVERY AND RESOLUTION

Please refer to the Prudential Regulation section for an update regarding the Council of EU adopting the banking reform package at first reading.

OTHER DEVELOPMENTS

ESMA speech on its current priorities

On 13 May, ESMA published a keynote speech, delivered by Evert van Walsum, Head of ESMA's Investors and Issuers Department, at the Swedish Investment Fund Association's Annual Conference 2019. His speech touched upon three core themes, which also highlight ESMA's current priorities: (i) Sustainable finance. The ESAs are starting to work on the mandated technical standards on improving disclosure requirements for how institutional investors should integrate environmental, social and governance factors into their risk processes; (ii) Fund fees. National practices on performance fees are not always consistent both in terms of disclosure and the way performance fees are calculated. In fact, some performance fee models are permitted in some Member States but not in others, including different frequencies for performance fees computation and payments; and (iii) Consumer protection. ESMA has begun work on a review of the PRIIPs Delegated Regulation and expects to consult publicly in the third quarter of this year.

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