

ALLEN & OVERY

Key Regulatory Topics: Weekly Update

18 October 2019 – 24 October 2019



BREXIT

The Financial Services (Miscellaneous) (Amendment) (EU Exit) (No.3) Regulations 2019

On 24 October, the Financial Services (Miscellaneous) (Amendment) (EU Exit) (No.3) Regulations 2019 were made, and an explanatory memorandum was published. The Regulations make amendments to: (i) Criminal Justice Act 1993; (ii) the Insider Dealing (Securities and Regulated Markets) Order 1994; (iii) the Financial Services and Markets Act 2000 (Markets in Financial Instruments) Regulations 2017; (iv) the Data Reporting Services Regulations 2017; (v) the Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019; (vi) the Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc.) (EU Exit) Regulations 2019; (vii) the Financial Regulators' Powers (Technical Standards etc.) (Amendment) (EU Exit) Regulations 2018; (viii) the Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018; (ix) the Money Market Funds (Amendment) (EU Exit) Regulations 2019; (x) the Solvency 2 and Insurance (Amendment, etc.) (EU Exit) Regulations 2019; (xi) the Securitisation (Amendment) (EU Exit) Regulations 2019; (xii) the Public Record, Disclosure of Information and Cooperation (Financial Services) (Amendment) (EU Exit) Regulations 2019; and (xiii) the Financial Services (Miscellaneous) (Amendment) (EU Exit) Regulations 2019. Most of the regulations come into force on exit day, except regulations 4, 5, 7 and 8 which come into force on the day which the Regulations were made, and regulations 9 to 14 that come into force immediately before exit day.

[Financial Services \(Miscellaneous\) \(Amendment\) \(EU Exit\) \(No.3\) Regulations 2019 Explanatory Memorandum](#)

The Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019

On 24 October, the Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019 were made, and an explanatory memorandum was published. The Regulations amend: (i) Solvency II; (ii) FSMA; (iii) the Regulated Activities Order; (iv) the Financial Services and Markets Act 2000 (Disclosure of Confidential Information) Regulations 2001; (v) the Financial Services and Markets Act 2000 (Rights of Action) Regulations 2001; (vi) the Electronic Commerce Directive (Financial Services and Markets) Regulations 2002; (vii) the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005; and (viii) the Electronic Commerce Directive (Financial Services and Markets) (Amendment) Order 2015. The Regulations came into force on the day after the day on which they were made.

[Electronic Commerce and Solvency 2 \(Amendment etc.\) \(EU Exit\) Regulations 2019 Explanatory Memorandum](#)

FMLC letter on resuscitating the Financial Services (Implementation of Legislation) Bill

On 23 October, the FMLC published a letter to HMT regarding the Financial Services (Implementation of Legislation) Bill. The FMLC considers that it is essential that the Bill is resuscitated and passed to ensure continuity and certainty for the financial services industry. The FMLC notes that the Bill will need to be amended, given the lapse of time since it was initially introduced, and section 1 of the Bill should be

amended to: (i) remove items that will now fall within the scope of EUWA; and (ii) include other pieces of legislation that came into force on or after 1 April, but which will not come into effect before 1 November or 1 February 2020 (potential dates on which the UK may leave the EU).

[Read more](#)

FMLC paper on legal uncertainties relating to retained Benchmarks Regulation (BMR)

On 23 October, the FMLC published a paper, “Onshoring” Statutory Instruments Comment Series: Benchmark Regulation’. The paper highlights the challenges of providing a new benchmark into the EU once the UK is a third country post-Brexit and the legal uncertainties arising from the BMR statutory instrument (SI), including: (i) the central bank exemption; (ii) transitional provisions in the BMR SI; and (iii) scope.

[Read more](#)

Cross-Border Distribution of Funds, Proxy Advisors, Prospectus and Gibraltar (Amendment) (EU Exit) Regulations 2019

On 22 October, the Cross-Border Distribution of Funds, Proxy Advisors, Prospectus and Gibraltar (Amendment) (EU Exit) Regulations 2019 were made, and an explanatory memorandum was published. The Regulations amend: (i) Proxy Advisors (Shareholders' Rights) Regulations 2019; (ii) Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019 and the new Prospectus Regulation; and (iii) Packaged Retail and Insurance-based Investment Products (Amendment) (EU Exit) Regulations 2019. The Regulations will come into force immediately before exit day, except for regulations 5 (Amendment of the Proxy Advisors (Shareholders' Rights) Regulations 2019), 6 (Amendment of Regulation (EU) 2017/1129) and 7 (Revocation of Regulation (EU) 2019/1156), which will come into force on exit day.

[Cross-Border Distribution of Funds, Proxy Advisors, Prospectus and Gibraltar \(Amendment\) \(EU Exit\) Regulations 2019](#)

[Explanatory Memorandum](#)

House of Commons European Scrutiny Committee first report of Session 2019-20

On 22 October, the House of Commons European Scrutiny Committee published its first report of session 2019/20. The report states that barriers to the UK obtaining and maintaining equivalence are being raised, because Brexit means substantial volumes of financial services into the EU could take place outside the scope of EU law if the UK were to obtain equivalence. Recent amendments to EU financial services legislation have already been adopted to make equivalence for the UK in certain areas more difficult. Given the economic importance of the financial services industry, and the volume of its exports likely to be affected by Brexit, the Committee is disappointed with the ‘paucity’ of the recent explanatory memorandum on equivalence. The Committee asks the Economic Secretary to clarify, by 31 October, if the government is seeking any changes to the sections of the political declaration regarding financial services, and, if so, which specific pieces of EU legislation is equivalence being prioritised under.

[Read more](#)

CONSUMER/RETAIL

Joint ESA supervisory statement on application of the PRIIPs Regulation to bonds

On 24 October, the ESAs published a joint supervisory statement on the application of the PRIIPs Regulation to bonds. The statement seeks to mitigate the risk of divergent application by NCAs of the PRIIPs Regulation in respect of determining the type of bonds for which it is necessary to draw up a KID. An annex to the statement sets out guidance on the practical application of the provisions determining the scope of the PRIIPs Regulation. The ESAs recommend that NCAs monitor whether PRIIP manufacturers draw up and publish KIDs on their website for bonds that fall within the scope of the PRIIPs Regulation, and whether sellers of these bonds comply with the requirements in Article 13 of the Regulation. Where NCAs identify non-compliance with the requirements, they should take appropriate measures, including administrative steps under Chapter V of the PRIIPs Regulation.

[Read more](#)

EBA opinion on disclosure to consumers of banking services through digital means

On 23 October, the EBA published an opinion on the disclosure to consumers of banking services through digital means under the Distance Marketing of Consumer Financial Services Directive (DMFSD). The EBA has assessed the extent to which the current disclosure requirements under EU law are suitable and facilitate the operation of the EU single market at a time when financial services are being increasingly sold through digital means, such as the internet and mobile devices. The opinion focuses on: (i) the scope and

consistency of disclosure rules; (ii) timing of disclosure; (iii) presentation and format; (iv) provision of information; (v) accessibility and effectiveness of the information; and (vi) monitoring effectiveness.

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CONDUCT

FCA Market Watch Newsletter No. 62

On 18 October, the FCA published Issue 62 of its Market Watch Newsletter on market conduct and transaction reporting issues. In the newsletter, the FCA shares its concerns about personal account dealing (PAD), and sets out the findings from its study into PAD activity, policies, processes, and systems and controls using a sample of wholesale broking firms. The FCA is concerned that such firms have not adequately identified or managed the PAD risks or conflicts of interest specific to their business model. As such, when designing their PAD policy, the FCA asks firms to consider the following matters, inter alia: (i) instances where PAD creates conflict of interest or market abuse risk within a firm's business model; (ii) how such risks can be adequately mitigated; (iii) how the firm ensures that employees are aware of their obligations; and (iv) whether senior managers are leading by example when engaging in PAD and act as advocates of strict compliance with the firm's PAD rules.

[Read more](#)

FINANCIAL CRIME

Please see the Fintech section for an update on FMLC's paper on exchange tokens.

FATF publication on best practices on beneficial ownership for legal persons

On 24 October, FATF published a paper on the best practices on beneficial ownership for legal persons. The results of FATF mutual evaluations indicate that jurisdictions find it challenging to achieve a satisfactory level of transparency regarding the beneficial ownership of legal persons. The paper aims to provide suggested solutions, supported by cases and examples of best practices. FATF suggests a 'multi-pronged approach' in relation to the transparency of the beneficial ownership of legal persons, using several sources of information to ensure sufficient transparency. Under this approach, it is crucial that there is effective monitoring of key gatekeepers (company formation agents, lawyers, etc.) for compliance with their CDD obligations and enforcing those requirements - including identifying and shutting down those who facilitate misuse of corporate structures.

[Read more](#)

FCA's speech entitled 'Turning technology against financial crime'

On 23 October, the FCA published a speech by Megan Butler, Executive Director of Supervision - Investment, Wholesale and Specialists on the challenges of financial crime. Key highlights of the speech include: (i) financial crime and the criminal activity it facilitates causes incalculable damage to society - it is the FCA's endeavor to monitor entry, devise controls and erect barriers powerful enough to stop criminals from causing further harm; (ii) new technologies give the FCA unprecedented access to innovative products and services; and (iii) used to the right ends, these technologies can be gamechangers in the fight against financial crime, for both the industry and the regulator.

[Read more](#)

FATF's public statement on DPRK and Iran

On 18 October, FATF issued a public statement to call on its members and other jurisdictions to apply counter-measures to protect the international financial system from the ongoing and substantial money laundering and financing of terrorism risks, specifically in relation to the Democratic Peoples' Republic of Korea (DPRK) and Iran.

[Read more](#)

FCA's letter regarding Suspicious Activity Reports (SARs) and Suspicious Transaction and Order Reports (STORs)

On 18 October, the FCA published a letter from Julia Hoggett, FCA Director of Market Oversight, to Stephen Jones, Chief Executive of UK Finance, providing information on the application of SARs and STORs, as agreed at the SARs Collaboration Working Group in July. Ms Hoggett's comments include, among other things: (i) that the FCA receives STORs from firms that are required to notify it under MAR, and the NCA is responsible for receiving SARs; and (ii) that there is a significant overlap between the definition of market abuse in MAR, and certain financial crimes i.e., the criminal insider dealing offences under the Criminal

Justice Act 1993 and the criminal offences of misleading statements and misleading impressions in the Financial Services Act 2012. It is therefore common that a firm becomes aware of, or reasonably suspects, both the civil offence of market abuse (as described by MAR) and financial crime through a single suspicious order or transaction.

[Read more](#)

FATF's statement on money laundering risks from stablecoins and other emerging assets

On 18 October, FATF published a statement on the money laundering risks arising from stablecoins and other emerging assets. FATF notes that emerging assets such as global "stablecoins", and their proposed global networks and platforms, could potentially cause a shift in the virtual asset ecosystem and have implications for the money laundering and terrorist financing risks. FATF identifies two concerns: (i) mass-market adoption of virtual assets; and (ii) person-to-person transfers, without the need for a regulated intermediary. FATF states that together these changes could have serious consequences for its ability to detect and prevent money laundering and terrorist financing. FATF is actively monitoring emerging assets including global "stablecoins", and will continue to examine their characteristics and risks, and consider further clarifications on how FATF standards apply to global "stablecoins" and their service providers, as well as whether further updates are necessary.

[Read more](#)

FATF identifies jurisdictions with AML/CFT deficiencies

On 18 October, FATF identified several jurisdictions that have strategic AML/CFT deficiencies. The jurisdictions are: (i) the Bahamas; (ii) Botswana; (iii) Cambodia; (iv) Ghana; (v) Iceland; (vi) Mongolia; (vii) Pakistan; (viii) Panama; (ix) Syria; (x) Trinidad and Tobago; (xi) Yemen; and (xiii) Zimbabwe. Ethiopia, Sri Lanka and Tunisia are no longer subject to monitoring.

[Read more](#)

FINTECH

FMLC's paper on exchange tokens

On 23 October, the FMLC published a paper discussing issues of legal uncertainty surrounding exchange tokens. The FMLC is concerned that the limited definition of virtual currencies in MLD5 could give rise to a number of unintended and unhelpful consequences, including the direct consequences of under-regulation and confusion as to the categorisation of virtual currencies and how legislative definitions apply. In the paper, the FMLC: (i) provides a brief summary of regulatory and non-legislative developments with regards to virtual currencies; (ii) explores the possible characterisation of exchange tokens as property, money and/or e-money; and (iii) analyses the approach to virtual currencies taken by the EU in its AML regime, the uncertainty arising from such approach and the impact of the uncertainty.

[Read more](#)

FSB's paper on the regulatory issues of stablecoins

On 18 October, the FSB published a paper on the regulatory issues relating to stablecoins, which it recently delivered at a meeting of the G20 finance ministers and central bank governors. To implement the G20 mandate, the FSB will: (i) take stock of existing supervisory and regulatory approaches and emerging practices in this field, with a focus on cross-border issues and taking into account the perspective of emerging markets and developing economies; (ii) consider whether existing supervisory and regulatory approaches are adequate and effective in addressing financial stability and systemic risk concerns that could arise from the individual components of a stablecoin arrangement or their interaction as an ecosystem as a whole; and (iii) advise on possible multilateral responses, if deemed necessary, including developing regulatory and supervisory approaches to addressing financial stability and systemic risk concerns at the global level. The FSB intends to submit a consultative report to the G20 in April 2020, and a final report in July 2020.

[Read more](#)

INSURANCE

EIOPA launches call for research proposals

On 21 October, EIOPA announced that it is launching a call for research proposals to address open questions on insurance regulation. EIOPA states that there are many questions arising from ongoing policy and regulatory debates about the EU financial system that require theoretical foundations and a deep empirical analysis. As such, EIOPA is launching a call for research proposals aimed at addressing open

questions in relation to: (i) investment allocations of insurers and pension funds; (ii) liquidity stress testing in the insurance sector; and (iii) economic valuation of insurers' liabilities, best estimate and risk margin. The deadline for proposals is 15 December.

[Read more](#)

MARKETS AND MARKETS INFRASTRUCTURE

Please see the Brexit section for an update on the FMLC's paper on legal uncertainties relating to the retained EU law version of Benchmarks Regulation.

Council of EU adopts Disclosure Regulation and Low Carbon Benchmarks Regulation (BMR)

On 24 October, the Council of the EU adopted the following texts: (i) Disclosure Regulation - this regulation deals with disclosures relating to sustainable investments and sustainability risks in the financial services sector); and (ii) the Low Carbon Benchmarks Regulation. The Disclosure Regulation will enter into force 20 days after publication in the OJ and will apply from 15 months following the date of publication (subject to certain exceptions). The Low Carbon Benchmarks Regulation will enter into force on the day after publication in the OJ.

[Disclosure Regulation](#)

[Low Carbon Benchmarks Regulation](#)

The Working Group on Sterling Risk-Free Reference Rates' letters to the EC, Basel Committee on Banking Supervision (BCBS), PRA and FCA regarding regulatory barriers to transition from LIBOR

On 23 October, the BoE announced that the Working Group on Sterling Risk-Free Reference Rates had written to the EC, the BCBS, the PRA and the FCA on regulatory barriers to the transition from LIBOR. The letters identify regulatory barriers that the Working Group consider are likely to impede the adoption of SONIA.

[Letter to the EC](#)

[Letter to the BCBS](#)

[Letter to the PRA](#)

[Letter to the FCA](#)

ESMA and ASIC memorandum of understanding (MoU) on benchmarks

On 20 October, ESMA published a MoU with the Australian Securities and Investments Commission (ASIC) outlining co-operation arrangements relating to Australian benchmarks, which was signed on 9 October. On 29 July, the EC recognised Australia's legal and supervisory framework applicable to the administrators of certain financial benchmarks as equivalent to the corresponding requirements under the BMR, and recognised that those requirements are subject to effective supervision and enforcement. The MoU sets out appropriate co-operation arrangements to complement the EU's equivalence decision, as well as to ensure effective information exchange and supervisory coordination.

[Read more](#)

PAYMENT SERVICES AND PAYMENT SYSTEMS

CPMI toolkit: reducing risk of wholesale payments fraud related to endpoint security

On 22 October, the CPMI published a toolkit to support central banks to reduce the risk of wholesale payments fraud related to endpoint security in their institutions and jurisdictions. To reduce the risk, the CPMI has developed a strategy designed to address all areas relevant to preventing, detecting, responding to and communicating about wholesale payment fraud. The toolkit sets out the following steps that central banks could take to operationalise that strategy: (i) promoting the strategy; (ii) initial stocktaking of current arrangements; (iii) engagement with stakeholders; (iv) development of an action plan; and (v) monitoring progress.

[Read more](#)

PRUDENTIAL REGULATION

BoE's consultation paper on review of the capital regime applicable to credit unions

On 24 October, the BoE published a consultation paper (CP28/19) on proposed changes to the capital requirements that apply to credit unions. The key proposed changes are: (i) for credit unions with more than £10 million of total assets, to provide a greater degree of flexibility and remove barriers to growth by replacing the current regime with a 'graduated rate' approach and removing the 2% capital buffer; and (ii) to

reduce complexity in the capital regime by removing the association between credit union activities/membership size and capital requirements and to address the risks posed by these factors by other means. The deadline for comments is 24 January 2020.

[Read more](#)

Council of EU adopts IFR and IFD

On 23 October, the Council of the EU adopted: (i) the IFR; and (ii) the IFD. The IFD and the IFR will both enter into force 20 days after publication in the OJ. Most of the provisions of the IFR will apply 18 months after it enters into force.

[Investment Firms Regulation](#)

[Investment Firms Directive](#)

EBA's opinion on the regulatory treatment of non-performing exposure securitisations

On 23 October, the EBA published an opinion on the regulatory treatment of non-performing exposure (NPE) securitisations. The purpose of this opinion was to examine the role of securitisation as a funding tool for reducing NPEs in credit institutions' balance sheets and outline the specific constraints on this role arising from the securitisation regulatory framework in EU law, which were not addressed by the Council's Action plan-related legislation. The EBA: (i) recommends calibration of the securitisation regulatory capital methods for NPE securitisations, and caps for NPE securitisations; and (iii) considers the treatment of NPE securitisations in the Securitisation Regulation - specifically, the EBA recommends revisions to the Securitisation Regulation's risk retention requirements and a specific treatment for NPE securitisations and other third party-originated assets securitisations as regards the obligation to verify that the originator or original lender applied "sound and well defined credit granting criteria" as per Article 9.

[Read more](#)

EC consults on alternative standardised approach for market risk

On 22 October, the EC published a consultation paper on an alternative standardised approach for market risk under the CRR. The alternative standardised approach laid down in the CRR lacks technical specifications to be fully operational, and the EC explains that these specifications should be aligned with the Basel Committee on Banking Supervision's (BCBS) minimum capital requirements for market risk. Changes to the standardised approach for market risk agreed in the second BCBS review could not be incorporated in the EU banking package before its adoption. As a consequence, the EC was given the power to introduce them by means of a delegated act. The EU co-legislators decided to keep the current market risk framework prevailing under the CRR for the purpose of own funds requirements, and to introduce the final BCBS market risk framework as a reporting requirement only until a full assessment of its impact on firms established in the EU could be carried out. The text of the draft Commission Delegated Regulation amending the CRR with regard to the alternative standardised approach for market risk has been published in addition to the consultation paper. The EC advises that this Delegated Regulation contains the necessary elements to make the new reporting requirement operational. The deadline for comments is 11 November.

[Consultation Paper](#)

[Commission Delegated Regulation draft text](#)

RECOVERY AND RESOLUTION

Single Resolution Board's consultation entitled 'Expectations for banks 2019'

On 23 October, the SRB announced the launch of a consultation on a draft version of a document, 'Expectations for Banks 2019'. The consultation covers: (i) the definition of resolvability and the role of the SRB and banks in respect of resolvability; (ii) the seven 'dimensions' of resolvability, including governance, loss absorbing and recapitalisation capacity and liquidity and funding in resolution; and (iii) the dialogues between banks and the SRB's internal resolution teams on identified impediments to resolvability and the formal procedure for removing substantive impediments. The deadline for comments is 4 December.

[Read more](#)

OTHER DEVELOPMENTS

FCA's speech on the perimeter and attitude to risk-taking by firms

On 24 October, the FCA published a speech by Andrew Bailey, its Chief Executive, on the perimeter and attitude to risk-taking by firms. Highlights of the speech include: (i) that there are strong benefits associated with free trade and open global financial markets, and the FCA continues to support these; (ii) how the FCA will reconcile risk taking with investor protection; and (iii) the importance of FinTech.

[Read more](#)

ESMA's statement on enforcement priorities

On 22 October, ESMA issued its annual Public Statement defining the European common enforcement priorities and highlighting other considerations for 2019 annual financial reports of listed companies. The statement outlines the areas which ESMA and national enforcers will pay particular attention to when monitoring and assessing the application of all relevant requirements.

[Read more](#)

FCA's speech on regulation in a changing world

On 21 October, the FCA published a speech, given by Christopher Woolard, FCA Executive Director of Strategy and Competition, on regulation in a changing world. In his speech Mr Woolard notes: (i) that the FCA is asking itself if its regulatory model is still the right one, and if it is ready to respond to the changes coming down the track; (ii) that the FCA will be issuing an open invitation for thoughts and ideas on the future of its regulation; and (iii) in deciding on the future of regulation, the FCA recognises that the first step is agreeing the outcomes in the market to be achieved.

[Read more](#)

BoE announces date of stress test results for UK banking system

On 18 October, the BoE announced that it has set out the timetable for the publication of the UK annual stress test results, which will be published on 10 December. The 2019 annual cyclical scenario assesses the resilience of the UK banking system to deep simultaneous recessions in the UK and global economies, large falls in asset prices and a separate stress of misconduct costs. The BoE has received banks' initial stress testing submissions and are in the process of analysing the results.

[Read more](#)