ALLEN & OVERY

Key Regulatory Topics: Weekly Update

25 October 2019 – 31 October 2019



BREXIT

Please refer to the Markets and Markets Infrastructure section for an update regarding the made Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment etc and Transitional Provision) (EU Exit) (No 2) Regulations 2019 and The Markets in Financial Instruments Exemption Directions 2019.

Please refer to the Payment Services and Payment Systems section for an update regarding a policy statement on RTS for SCA and common and secure open standards of communication.

Exiting the European Union: Dispute Resolution: Complaints (Amendments) Instrument 2019

On 31 October, the FCA published the Exiting the European Union: Dispute Resolution: Complaints (Amendments) Instrument 2019. The instrument makes amendments to specific provisions of the Dispute Resolution: Complaints sourcebook (DISP) by replacing references to "1 April 2019" with references to "exit day". The instrument comes into force on exit day. Read more

The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019

On 30 October, the UK government made the European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019, which came into force immediately after being made and amend the definition of exit day to 31 January 2020 at 11.00 pm, rather than 31 October at 11.00pm. Read more

ESMA update on Brexit preparations

On 30 October, ESMA informed stakeholders with a press release that, following the European Council's decision to extend the period under Article 50(3) relating to the UK's withdrawal from the EU, its previous statements relating to its preparations for a no-deal Brexit will no longer apply as of 31 October. The reference date for Brexit in all of ESMA's previously published measures and actions, including public statements, issued regarding the possibility of a no-deal Brexit scenario, should now be read as 31 January 2020. Given the nature of the current extension ESMA will issue further announcements and updated measures as matters develop.

Read more

Temporary Permissions Regime: amended directions

On 30 October, the FCA published amended directions to the Temporary Permissions Regime, including; (i) The Alternative Investment Fund Managers Regulations 2013, as amended, in particular by the Alternative Investment Fund Managers (Amendment etc.) (EU Exit) Regulations 2019; (ii) Temporary permission and variation under the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018; (iii) The Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019;

and (iv) Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018. The amended directions extend the notification window for firms wishing to enter the TPR to 30 January 2020. Without a transition period, the TPR will come into force when the UK leaves the EU.

The Alternative Investment Fund Managers Regulations 2013

Temporary permission and variation under the EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018

The Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019

Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (1)

Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (2)

FCA's statement following Article 50 extension

On 30 October, the FCA published a statement stipulating, given the extension to the deadline for the UK's departure from the EU: (i) firms do not need to take action to implement Brexit contingency plans for 31 October; (ii) fund managers now have until 15 January 2020 to inform the FCA if they want to make changes to their existing notification for entry into the TPR – other firms have until 30 January 2020; and (iii) firms should continue to comply with existing regulatory requirements, including those relating to MiFID transaction reporting and EMIR trade reporting requirements.

Read more

Third extension to Article 50 period

On 29 October, the UK and the European Council agreed to a third extension to the Article 50 period by up to three months, i.e. 11:00 pm on 31 January 2020 (UK time). Read more

WTO implications for banks in case of no-deal

On 28 October, the European Banking Federation published a new fact sheet that explains which global trade rules will apply to European banks in the event of a no-deal Brexit. In particular, the following consequences are expected to occur: (i) the General Agreement on Trade in Services (GATS), considered the WTO basic agreement on trade, including also the banking sector, will come into force; and (ii) while the GATS does not replicate EU membership, it will still play an important role in case of a no-deal Brexit. GATS rules will be helpful to handle the absence of agreements. The GATS will provide a baseline of protection. In principle, it will not allow the EU (or the UK) to discriminate against EU/UK banking services and service suppliers as compared to like services and services suppliers from other WTO members. Furthermore, the GATS establishes key rules on recognition of prudential requirements: The WTO does not require its members to recognise the prudential requirements of other members. However, where it does, it must offer adequate opportunity to other WTO members for similar treatment.

CONSUMER/RETAIL

EBA publishes Opinion proposing to further strengthen depositor protection in the EU

On 30 October, the EBA published its second opinion addressed to the EC on the implementation of the Deposit Guarantee Schemes Directive (DGSD) in the EU. The Opinion focuses on the payouts by deposit guarantee schemes (DGSs) and proposes a number of changes to the EU legal framework, aimed at strengthening depositor protection, improving depositor information, enhancing financial stability and reinforcing operational effectiveness of DGSs. More specifically, based on recent real-life cases, the Opinion proposes changes aimed at ensuring that depositors are not unduly left without access to their funds when the decision that deposits have become unavailable has not (yet) been made by the authorities. The Opinion proposes that, in such instances, depositors should have access to an appropriate daily amount from their deposits.

Read more

Financial Services Duty of Care Bill

On 29 October, the Financial Services Duty of Care Bill 2019-20 had its first reading in the House of Lords. The Bill aims to amend FSMA with a new section "137CA FCA general rules: duty of care" which stipulates: (i) the power of the FCA to make general rules includes the power to introduce a duty of care owed by authorised persons to consumers in carrying out regulated activities under this Act; (ii) "Duty of care" means an obligation to exercise reasonable care and skill when providing a product or service; (iii) "Consumer" has the meaning given in section 2(3) of the Consumer Rights Act 2015; and (iv) the FCA must make rules in accordance with section 137CA which comes into force no later than six months after the day on which this Act comes into force.

Read more

Changes to mortgage responsible lending rules and guidance

On 28 October, the FCA published a policy statement which sets out the changes it is making to its responsible mortgage lending rules and guidance based on the proposals from the March consultation paper (CP19/14) and the feedback the FCA received. The changes include: (i) mortgage lenders can choose to carry out a modified affordability assessment where a consumer: (a) has a current mortgage; (b) is up-todate with their mortgage payments (and has been for the last 12 months); (c) does not want to borrow more, other than to finance any relevant product, arrangement or intermediary fee for that mortgage; and (d) is looking to switch to a new mortgage deal on their current property; (ii) inactive lenders, and administrators acting for unregulated entities, must review their customer books and develop and implement a communication strategy for contacting relevant consumers to tell them it could be simpler for them to remortgage: (iii) mortgage lenders that use the modified assessment must tell consumers the basis on which their affordability has been assessed and provide additional disclosures about potential risks; and (iv) mortgage lenders are required to report which sales have involved the modified assessment when they submit Product Sales Data to the FCA. Lenders can start to use the modified assessment as soon as they are ready and the FCA expects firms to report on the use of the modified assessment once they start using it. The FCA will publish the technical documents, the data reference guide, in February 2020. Read more

FINANCIAL CRIME

Public consultation on FATF draft guidance on digital identity

On 31 October, the FATF published draft guidance on which it is seeking public consultation. The guidance aims to clarify how digital identity (digital ID) systems can be used for customer due diligence (CDD). The areas of focus include: (i) Are there any specific money laundering / terrorist financing risks, that arise from the use of digital ID systems for CDD, other than those already mentioned in Section IV of the guidance? (ii) What is the role of digital ID systems in ongoing due diligence or transaction monitoring? (iii) How can digital ID systems support financial inclusion? And (iv) Does the use of digital ID systems for CDD raise distinct issues for implementing the FATF record-keeping requirements? The deadline for responding is 29 November.

Read more

Best Practices on Beneficial Ownership for Legal Persons

On 25 October, the FATF published a report which identifies the most common challenges that countries face in ensuring that the beneficial owner(s) of legal persons is identified, and suggests key features of an effective system. The report also suggests options for jurisdictions to obtain beneficial ownership information of overseas entities. The FATF has finalised best practices with examples from across the global network of FATF and FATF-Style regional bodies' members, which will help countries implement the FATF's requirements. The report highlights that jurisdictions using a multi-pronged approach with several sources of information are often more effective in preventing the misuse of legal persons for criminal purposes. Read more

Cryptoassets: AML / CTF regime

On 25 October, the FCA published a new webpage regarding its role as the AML/CTF supervisor of UK cryptoasset businesses under the MLRs 2017. The website includes timelines for the registration of cryptoasset businesses: (i) 10 January 2020 – FCA Gateway opens for businesses to submit applications for entry to the register. A business must comply with the MLRs in relation to cryptoasset activities; (ii) 30 June 2020 – latest date for applications to be received for priority review to check that they are complete and ready to be determined; (iii) 10 October 2020 – latest date for complete applications ready to be determined by 10 January 2021; and (iv) 10 January 2021 – any firm not registered must cease trading. HMT aims to amend the MLRs 2017 in order to reflect the FCA's new role as part of the implementation of MLD5 in the UK. HMT also published a consultation paper concerning its proposals in April. Read more

FINTECH

Curtain up for the future of payments - from bigtechs and fintechs to smartphones and stablecoins

On 30 October, Mr. Burkhard Balz, Member of the Executive Board of the Deutsche Bundesbank, gave a speech regarding the future of payments. His speech looked at: (i) FinTechs and BigTechs: new actors in the payments markets; (ii) Smartphones: changes in user and payment behaviour; and (iii) Stablecoins: the challenge of Libra.

Read more

MARKETS AND MARKETS INFRASTRUCTURE

Decision 78/2019 and 85/2019 of the EEA Joint Committee

On 31 October, Decision 78/2019 of the EEA Joint Committee regarding the incorporation of MiFIR, MiFID II, Delegated Regulation (EU) 2016/1033 and Directive (EU) 2016/1034 amending MiFID II into Annex IX (Financial services) to the EEA Agreement, was published in the OJ. In addition, Decision 85/2019 regarding the incorporation of a variety of Commission Delegated Regulations, such as Commission Delegated Regulation (EU) 2016/2020 of 26 May 2016 supplementing Regulation (EU) No 600/2014 on markets in financial instruments with regard to RTS on criteria for determining whether derivatives subject to the clearing obligation should be subject to the trading obligation, into Annex IX (Financial services) to the EEA Agreement, was also published in the OJ. The date of entry into force of Decision 78/2019 is the day following the last notification under Article 103(1) of the EEA Agreement. The date of entry into force of Decision 78/2019 is the twentieth day following that of its publication in the OJ. Decision 78/2019

Decision 85/2019

ESMA publishes validation rules and XML schemas for SFTR reporting

On 31 October, ESMA published further technical details for the reporting of Securities Financing Transactions (SFTs) as required under the SFTR. The publication includes the validations rules applicable to SFTR reports as well as the XML schemas reporting entities should use, including: (i) counterparty and TR data exchange; (ii) intra-TR data exchange; and (iii) TR to authority data exchange. Under the SFTR, both parties to an SFT need to report new, modified or terminated SFTs to a registered or recognised trade repository (TR), including the composition of the collateral. Read more

The banking union – a personal view on its past, present and future

On 30 October, the Chair of the Supervisory Board of the ECB, Andrea Enria, gave a speech looking at the banking union's past, present and future. In her speech, Andrea Enria stipulated, amongst others, that: (i) the most urgent priorities the banking union faced have been addressed. The capital position of euro area banks has been significantly strengthened. Capital is of a better quality, also due to the ECB's strong emphasis on Common Equity Tier 1, the highest quality capital, which can absorb losses in a going concern situation; (ii) a common supervisory approach has been developed to promote a more active management of NPLs. In 2014, NPLs stood at almost $\in 1$ trillion. As a result of the consistent framework for dealing with NPLs across the entire euro area, the $\in 1$ trillion of NPLs has gone down to less than $\in 600$ billion, with significant progress in the last two years; and (iii) the lack of confidence in the internal models used by banks to calculate risk-weighted assets has also largely been addressed. The EBA standards and guidelines, together with the targeted review of internal models conducted by the ECB, are driving a transition towards more robust modelling practices and ensuring consistency across banks.

Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment etc and Transitional Provision) (EU Exit) (No 2) Regulations 2019 made

On 29 October, the Over the Counter Derivatives, Central Counterparties and Trade Repositories (Amendment etc and Transitional Provision) (EU Exit) (No 2) Regulations 2019 were published with an explanatory memorandum. The Regulations address deficiencies in retained EU law in EMIR as amended by EMIR Refit and ensure it will continue to operate when the UK leaves the EU. Part 1 and 3 of the Regulations come into force on 30 October while Parts 2 and 4 come into force on exit day. The Regulations were laid before Parliament in July.

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Statutory instruments
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Explanatory memorandum

Due Diligence for Responsible Corporate Lending and Securities Underwriting

On 29 October, the OECD released the first guidance for environmental and social risk management for corporate lending and underwriting activity. The new OECD paper helps banks and other financial institutions implement the due diligence recommendations of the OECD Guidelines for Multinational Enterprises in the context of their corporate lending and underwriting activities. Currently no widely recognized standard on responsible business conduct (RBC) exists for these type of transactions, although they represent a significant portion of client services of commercial banks. The paper provides a common global framework for financial institutions to carry out due diligence to identify, respond to, and publically communicate on environmental and social risks associated with their clients. The key considerations for responsible business conduct (RBC) due diligence are divided into six parts, each of which corresponds to a step of the due diligence process: (i) embedding RBC into policies and management systems; (ii) identifying actual and potential adverse RBC impacts; (iii) the cessation, prevention and mitigation of such adverse impacts; (iv) tracking implementation and results; (v) communicating how impacts are addressed; and (vi) providing for or cooperating in remediation when appropriate.

Speech by the ESMA Chair, Steven Maijoor, on ESMA's role under the BMR

On 29 October, ESMA published a speech by the ESMA Chair, Steven Maijoor, which addresses ESMA's role under the BMR and the adaptation of interest rate benchmarks to the new European regulation on benchmarks. The speech sets out, amongst others, that: (i) in the next weeks, ESMA expects to finalise a MoU with the Monetary Authority of Singapore, which sets out their cooperation agreement; (ii) market participants are reacting very rapidly to €STR since its first publication. A large clearing house is already offering clearing of Euro-denominated swaps benchmarked to €STR, while the European Investment Bank already issued 1 billion of short-term bonds linked to €STR; (iii) together with the publication of €STR, at the beginning of October the value of EONIA became anchored to the value of €STR. The smooth transition to the new methodology of EONIA is an important accomplishment for the Working Group, who first proposed the new methodology which was subsequently adopted by the EONIA administrator, EMMI; and (iv) by the end of 2021, the supervision of third-country administrators recognised in the EU and the supervision of EU critical benchmarks will be ESMA's responsibility. Read more

EBA report on potential impediments to the cross-border provision of banking and payment services On 29 October, the EBA published a report on the potential impediments to the cross-border provision of banking and payment services. The report highlighted, amongst others, that: (i) it is necessary to identify when an activity is considered to be a cross-border service and, if it is, whether it is carried out under the 'freedom to provide services' or 'right of establishment'. This is of particular relevance at a time when financial services are being provided increasingly using digital means; (ii) the need for the EC to update its 1997 Communication in order to promote greater convergence of practices in determining when business is to be regarded as being provided crossborder under the freedom to provide services, taking particular account of technological developments; and (iii) In the area of authorisations and licensing, to promote supervisors' visibility of institutions' crossborder activities, changes to Level 1 legislation would be desirable to strengthen requirements for institutions to report on a more uniform and timely basis their cross-border activities. The EBA recommends the EC to take certain actions in order to remove the barriers to entry and facilitate the scaling-up of banking and payments activities across the EU. Read more

The Markets in Financial Instruments Exemption Directions 2019

On 28 October, HMT published the Markets in Financial Instruments Exemption Directions 2019. The Directions provide that, for the purposes of Regulation (EU) No 600/2014 of the EP and of the Council of 15 May 2014, the central bank of Norway and the central bank of Iceland is a relevant organisation within the meaning of Article 6 of that Regulation and, accordingly, an organisation to which Article 7 of that Regulation applies. The Directions were made by HMT exercising the powers conferred to it under regulation 3(1)(g)(a) of the Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc) (EU Exit) Regulations 2019. HMT can make equivalence directions and exemption directions for the EU and EEA member states under these powers for a period lasting until twelve months after exit day. In a related written statement, the Economic Secretary to HMT, John Glen, stipulates that the Markets in Financial Instruments Exemption Directions 2019 "is necessary because adaptations to the EEA Agreement granting the relevant exemption are not yet operative for all affected EEA central banks. This direction will therefore ensure that those affected EEA central banks can continue to carry on their activities in the UK without disruption at exit."

Read more

Regulators must act to reduce unacceptable number of IT failures in financial services sector

On 28 October, the House of Commons Treasury Committee published a report on IT failures in the financial services sector. Key conclusions and recommendations include: (i) the number of IT failures is increasing, with the impact ranging from inconvenience or harm to customers though to threats to a firm's viability. However, the lack of consistent and accurate recording of data on such incidents is concerning; (ii) the regulators must intervene to improve the operational resilience of the financial services (FS) sector, as has been required recently with financial resilience. They must maintain a very low tolerance for service disruption by providing guidance on what level of impact should be tolerated; (iii) the regulators must use the tools at their disposal to hold individuals and firms to account for their role in IT failures and poor operational resilience. The Senior Managers Regime should be expanded to include Financial Market Infrastructure firms, such as payment systems; (iv) firms are not doing enough to mitigate the operational risks that they face from their own legacy technology, which can often lead to IT incidents. Regulators must ensure that firms cannot use the cost or difficulty of upgrades as excuses to not make vital upgrades to legacy systems; (v) there are many cases where FS firms use the same third-party providers, such as cloud services. The regulators should highlight potential concentration risks and consider whether mitigating action is required; and (vi) as the impact on customers when IT failures occur can be harmful, firms are right to adopt a 'when not if approach, ensuring that they have robust procedures in place in the event of an incident. Firms must resolve complaints and award any compensation guickly. Read more

ECB guideline amending guideline on TARGET2

On 25 October, the ECB published ECB/2019/30, guideline of the ECB amending Guideline ECB/2012/27 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2). The amendments: (i) clarify the conditions under which investment firms may participate in TARGET2; and (ii) clarify that participants in TARGET2 component systems must adhere to the TARGET2 self-certification requirement and to the endpoint security requirements of TARGET2 network service providers and inform the relevant Eurosystem central bank of any crisis prevention or management measures to which they are subject. From 17 November, central banks of EU member states whose currency is in euro must comply with the guideline.

Read more

LEI Eligibility for General Government Entities

On 25 October, the LEI ROC published a consultation paper on the LEI eligibility for general government entities. The CP is broken down into four sections: (i) is there some need for identifying general government entities? (ii) potential difficulties for identification of general government entities in the Global LEI System (GLEIS) current framework; (iii) evaluation of the convenience for a new item to identify general government entities; and (iv) scope and appropriateness of system of national account definitions. The deadline for responding is 6 December.

Read more

PAYMENT SERVICES AND PAYMENT SYSTEMS

Please refer to the FinTech section for an update regarding a speech by Mr. Burkhard Balz, Member of the Executive Board of the Deutsche Bundesbank, on bigtechs and fintechs to smartphones and stablecoins.

Please see the Markets and Markets Infrastructure section for an update regarding an EBA report on potential impediments to the cross-border provision of banking and payment services and a report on IT failures in the financial services sector.

Policy Statement: RTS for SCA and Common and Secure Open Standards of Communication

On 25 October, the FCA published a policy statement (PS), in response to the December 2018 consultation paper (CP18/44), which confirms the RTS for SCA and common and secure open standards of communication in the event of a no-deal Brexit. In CP18/44, the FCA proposed to make these standards substantially the same as EU RTS after a no-deal exit. This PS summarises the feedback the FCA received from CP18/44 and publishes the UK RTS together with Handbook changes that the FCA will make in the event of a no-deal exit.

Read more

PRUDENTIAL REGULATION

Reliability of regulatory returns

On 31 October, the PRA published a Dear CEO letter from Sarah Breeden, Executive Director UK Deposit Takers Supervision and David Bailey, Executive Director International Banks Supervision. The letter highlighted that the PRA expects firms to submit complete, timely and accurate regulatory returns. In addition, the PRA expects firms, if asked, to be able to respond promptly to a request in order to; (i) demonstrate how the design and operation of the governance, controls and other processes deliver regulatory reporting of appropriate quality. Firms should also be able to provide details of the key interpretations and judgements made relating to regulatory reporting errors identified, together with an explanation of the actions taken to remediate them. As part of the PRA's ongoing focus on the integrity of regulatory reporting, it intends to commission reports from skilled persons (Section 166 of Financial Services and Markets Act 2000) to focus on the Common Reporting framework.

Basel Committee discusses policy and supervisory initiatives

On 30-31 October, the Basel Committee on Banking Supervision met to discuss a range of policy and supervisory issues, and to take stock of its members' implementation of post-crisis reforms. At its meeting, the Committee: (i) agreed to consult on a final set of limited and targeted adjustments to the credit valuation adjustment risk framework; (ii) agreed to consult on a set of revised disclosure requirements related to the market risk framework finalised in January and to consult on disclosure templates related to banks' sovereign exposures which would be voluntary in nature, with jurisdictions free to decide whether or not to implement them. These papers will be published next month; (iii) agreed to publish a discussion paper on the prudential treatment of cryptoassets; (iv) agreed to consult on guidelines to enhance cooperation between prudential regulatory authorities and authorities in charge of anti-money laundering and combatting the financing of terrorism. These proposed guidelines will be published next month; and (v) reviewed the reports that assessed the implementation of the Net Stable Funding Ratio and large exposures standards in Argentina and China. Publication of these reports is expected in November.

RECOVERY AND RESOLUTION

Single Resolution Board Publishes 2020 Work Programme

On 28 October, the SRB published its work programme for 2020. A focus for the year ahead will be on ensuring that the SRB's internal policies, resolution plans and MREL decisions reflect the requirements of the new banking package. Other important priorities will be operationalising the political agreements on the backstop reached in 2019, as well as increasing preparedness for potential new Banking Union members with regard to SRF contributions. The SRB will move to a uniform 12-month resolution planning cycle in 2020, for all banks under its remit. This will start in April 2020 (to coincide with data submissions) and will end in March 2021. The SRB also states that it will explore possibilities to leverage the SRF with a view to fostering a Banking Union resolution liquidity solution. The year will also see the SRB operate at full staff capacity for the first time, with close to 400 colleagues on hand to deliver the SRB's ambitious programme. Read more

OTHER DEVELOPMENTS

FCA Handbook Notice No 70

On 31 October, the FCA published Handbook Notice No 70 which highlights legislative changes made to: (i) the Overdrafts (Information and Tools) Instrument 2019; (ii) Mortgages (Regulatory Reporting) Instrument 2019; (iii) Conduct of Business Sourcebook (Retirement Outcomes Review) (No 2) Instrument 2019; (iv) Supervision Manual (Reporting No 11) Instrument 2019; and (v) Fees (Miscellaneous Amendments) (No 14) Instrument 2019.

Read more

The future of financial services regulation in the UK

On 29 October, the Executive Director of International at the FCA, Nausicaa Delfas, gave a speech on the future of financial services regulation in the UK at the UK Financial Services Industry Beyond Brexit Summit.

Her speech looked at: (i) Brexit perparations, including a no-deal scenario; (ii) the FCA's future relationship with Europe, including how, due to their common rulebooks, the UK regime will be the most equivalent in the world to the EU's. The FCA expects both jurisdictions to be able to find each other equivalent on an outcomes basis; (iii) international engagement, for example, the FinTech Network, the FCA has led work on new digital 'coin' ideas, assessing the possible implications of such a product for securities regulators; and (iv) the FCA's future approach to regulation, providing technical support and advice on free trade agreements covering financial services, as well as other mechanisms for enhancing trade and regulatory cooperation. Read more