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Expect the unexpected:

The year ahead for the Financial Institutions Sector

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Rachel Kent and Emily Reid

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Introduction

There's nothing new about change in the financial institutions sector. As in previous years, change for firms will be driven largely by regulation and technology.

What is new is the need to expect the unexpected.

Brexit was the beginning of this trend. Since then, geo-political risk has been at the top of the agenda, so, unusually, our timeline includes the major European elections scheduled for this year. An unexpected outcome in any of these elections could have an impact on our negotiations for leaving the EU and shape thinking on where to locate a future EU headquarters. We should also look for unexpected developments following the commencement of a Trump presidency. With a Republican held House and Senate, government approaches to the financial institutions sector and the regulation controlling it could change considerably and, more generally, the growth of nationalism, witnessed in many other countries in 2016, may affect business expansion plans just when the UK has set its sights on opportunities beyond the EU.

This time next year we hope to have something definitive, rather than speculative, to say about the impact of Brexit on the financial institutions sector. To date, we have been working with TheCityUK on a report (to be published on January 23rd) setting out the various options for Brexit and making recommendations. We have also been in active discussions with various government departments and MEPs in Brussels as well as the wider industry.

When the Government publish their plan it is likely that, if they choose 'hard' Brexit, a full review of laws will be undertaken since, theoretically, we would be free from the 'shackles' of EU law. It would certainly be possible to review and reconsider any areas of regulation which are inconsistent with the UK's future objectives, but we have heard from Andrew Bailey of the FCA that a "bonfire of regulation" will not gain much traction (not least because much of it comes from wider international initiatives to which the UK subscribes enthusiastically).

If, on the other hand, there is a so called 'soft' Brexit, that perhaps involves signing up to some form of equivalence under one or more of the third country regimes, or a bespoke arrangement, the ability of the UK to deviate from EU law, both current and future, will be restricted, possibly significantly, as, in return for a level of access to the single market, UK laws would need to remain in line with EU law to a greater or lesser extent. Although those regimes were designed to employ "outcome-based" tests, in practice they have tended to involve a direct comparison of relevant provisions at quite a detailed level. So, the scope for divergence under an 'equivalent' regime is questionable.

Even in a world of 'equivalence' though, it may be possible to follow the example of Jersey and adopt a 'dual regime'. This would involve maintaining the option of compliance with EU equivalent law for those who want to continue to access the EU but would allow a more relaxed regime for those looking only at domestic or possibly other non-EU markets. An obvious example for this could be the FinTech community, which typically looks to the domestic market, at least in their early stages, and may well benefit from a lighter touch regime.

What can be expected in 2017? With a whole host of major regulatory change due in 2018, a significant amount of preparation will be required. Changes introduced by European laws lead the charge and the FCA was quick to remind firms after the referendum result that they should continue to implement these changes. No firm in the sector will be unaffected by one or more of PSD2, the GDPR, MiFID II and PRIIPs and the effects will not be minor. Other ground-breaking initiatives will take effect in 2017, including the first of the CMA remedies for dealing with competition in the personal and business current account market.

Change, in itself, provides an opportunity for innovation. We expect 2017 to see developments in RegTech, Blockchain, Robo-advice and AI, with established institutions continuing to adapt and compete, but increasingly choosing to collaborate with new market entrants. In the post-Brexit era, it is even more important for the UK to be a centre of financial innovation. At the end of last year, Treasury ministers repeated their support for the FinTech sector. We expect this to continue and for the FCA to continue to be in the forefront of innovation among international regulators , although the competition is hotting up as other countries see the power and positive potential of technology in the sector. Following on from the success of the Regulatory Sandbox, safe testing of innovative products may be further supported by the creation of an Industry Sandbox (to be consulted on soon) giving access to real data, an initiative we continue to support the Treasury, the FCA and Innovate Finance on.

Finally, we can confidently expect another busy year for financial institutions. We hope our view of 'The Year Ahead' helps you to prepare.

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At a glance: Calendar of key events

January

PSD2: EBA Guidelines on Insurance

Regulatory Sandbox 2nd Cohort deadline

FCA consultation on extending Senior Managers Regime

CJEU decision on durable medium expected

FCA mortgage payment shortfall remediation consultation closes

US Presidential Inauguration

February

PSD2: EBA RTS on Strong Customer Authentication

CMA Retail Banking Order

EIOPA technical advice on IDD Level 2 measures

FCA High Cost Short Term call for input closes

March

Open Banking Read data to be released

First FCA policy statement on MiFID II

SMR: firms to have identified and assessed individuals as fit and proper

Brexit: Article 50 triggered

UK Budget

Dutch elections

April

Introduction of civil penalties and deferred prosecution agreements for breach of sanctions

French elections (first round)

May

Consultation on new offence of failing to prevent economic crime

French elections (second round)

June

Second FCA policy statement on MiFID II

MLD 4 and WTR come into force

FCA to conclude review of High Cost Short Term credit

Anticipated during H1

FCA report on CCA Retained Provisions

FCA consultation on long-term persistent debt

FCA consultation on creditworthiness and affordability

Revised PRIIPs framework

HMT Consultation on PSD 2

FCA consultation on PSD Approach Document and BCOBS

July

Deadline for transposition of MiFID II into national law

PSD2: EBA Guidelines on security reporting

August

CMA: introduction of maximum monthly overdraft charge

September

CMA: account switching improvements

Q4

New consolidated payments systems operator in place

UK Autumn Budget

German elections

Q1 2018

PSD2 implementation

Open Banking transaction data made available under CMA remedies

MiFID II rules come into force

PRIIPs Regulation comes into force

GDPR comes into force

IDD implementation

Benchmark Regulation comes into force

- Payments
- Financial Services
- Credit
- Politics

Anticipated during H2

Further consultation on reforms to UK corporate insolvency regime

Start of PPI deadline publicity campaign

FCA consultation on P2P lending rule changes

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FinTech: The future is now

Emily Reid, Partner

Quick read

- 2017 will be the year that FinTech stops being the sideshow and moves to centre stage
- Start-ups and established institutions will continue to eye up their options, balancing creativity and flexibility against brand recognition, trust and the cost of customer acquisition
- Expect consolidations; for some the opportunities are too big to go it alone

Until 2016, FinTech was a phenomenon driven most visibly by a smallish number of entrepreneurs, with a fairly limited number of active applications, for example in payments, digital currencies, alternative lending, investment management and robo-advice. By 18 November 2016, when the FCA published its list of successful applicants for the regulatory sandbox, the range of applications from a mix of established players, start-ups and collaborations showed how far FinTech has developed. In addition to the applications traditionally associated with FinTech, insurance, money management tools using APIs to, savings, identification and authentication solutions, issuing and managing securities and blockchain or distributed ledger technologies (DLT) were featured as well as products that support financial inclusion or have a social benefit.

The innovative ideas that won places in the regulatory sandbox are a small selection of the change we're witnessing in the sector as every stage of the product lifecycle from selling, on-boarding, making agreements and servicing is treated as an opportunity for improvement using technology and customer-focussed, creative thinking.

Even the underlying infrastructure is being considered with blockchain and DLT providing the potential for cheaper, quicker and more secure alternatives to many of the existing ways of holding, exchanging or transferring assets and value of all kinds.

The explosion of innovation over the last couple of years means that even the term FinTech has now become too generic – in its place we are now seeing the more specific RegTech, InsurTech, PayTech and many others.

What will the FinTech sector be doing in 2017?

Preparing for Open Banking and Third Party Payment Providers (TPPs)

As from 13 January 2018, the largest UK banks will have to make personal and business current account data available to third parties if requested to do so by their customers and all banks will have to allow TPPs to access payment account information and/or to initiate payments from payment accounts where they have their (and the bank's) customer's consent (see more on page 54).

TPPs need to have robust security procedures and be able to comply with new rules on authenticating payments. They also need to be authorised for these new activities, including holding appropriate insurance so this will be a focus for FinTech companies looking to extend the services they currently offer on banking portals or launch into this area. On the product side, they will need to be checking that their services are fully compliant, that they have suitable (clear, comprehensive and ideally short) customer agreements and that they are commercially protected with robust supplier contracts.

Greater value exchange for data

Open Banking will make much more data available to drive decisions. How that data is used and the value exchange for it will increasingly come under focus as the GDPR comes into force and as new FinTechs emerge whose focus is on capitalising on the availability of this data.

We anticipate, for example, that FinTechs will seek to use the Open Banking APIs to be much clearer with customers about how they can add value by using data "If you allow us access to your bank data, we will do x,y,z which will bring you the following benefits". Whether this is monitoring purchases to recommend cheaper alternatives elsewhere, helping customers budget, reminding them of upcoming renewals and showing them alternatives that are available, this is likely to lead to an increased interest and expectation from customers of what financial institutions can do for them with their data.

Rolling out RegTech

By automating compliance solutions, RegTech seeks to bring down the cost of compliance while reducing the risk of getting it wrong. Regulatory compliance and regulatory change is a massive challenge for the financial services sector and an equally massive opportunity for anyone in the FinTech sector. RegTech itself is a broad term. Potential solutions include AML compliance, real time data analysis to identify risks, automation of management information reporting, employee surveillance, and automated compliance tools such as our own Regulatory Accelerator to help FinTechs navigate the FCA authorisation process.

2016 was the year in which regulators started to engage with RegTech and the benefits it can bring. We expect this trend to continue into 2017 - with financial institutions under pressure to manage their costs and find ways to improve their risk mitigation, RegTech has the potential to be an answer to many of their concerns. We expect this to be a major growth area.

Greater democratisation of financial services

By automating processes in new tech-driven systems, FinTechs are potentially able to improve aspects of the customer journey while driving costs down. This, combined with other efficiencies, means that it will be increasingly attractive, commercially, to offer what were traditionally labour intensive (and therefore costly) products to the mass market.

We have already seen this with the emergence of robo-advice in the investment space – by automating advice which would traditionally be provided by individual, trained advisers, robo-advisers have been able to unlock the door to investing for those trapped in the "financial advice gap" – those who have cash to invest but are reluctant to pay for adviser charges at their current

level. This is particularly relevant for younger customers who prefer the use of technology to making an appointment to see an adviser and for whom existing costs would be unattractive.

Pulling power

The cost of customer acquisition will continue to be an issue for FinTechs. To succeed, as a standalone venture, they need to offer products that are so appealing, useful and easy to use that they will have sufficient pulling power to win a loyal and highly networked customer base to gain a critical mass of customers. All FinTechs (and all technology companies) are recruiting their UX (user experience) leads to give them the edge and drawing on experience of computer games to attract younger customers.

FinTechs may turn personal financial management from a chore (think cheque reconciliation) to fun.

Regulatory tensions

Finally, it seems to us that there are a number of tensions developing at the heart of regulation that have not yet been resolved. These include:

- **Competition v resilience**

  How to open up systems and processes to new entrants while maintaining the resilience and integrity of the underlying infrastructure on which the economy relies. Settlement systems have traditionally required deep pockets from those who participate as they may be required to bail out others in the event of insolvency or significant loss. By opening up greater access, will this resilience be undermined?

- **New entrants v cyber-risk**

  The emergence of Blockchain, new FinTech entrants and services and dis-intermediation of value chains all potentially add points of vulnerability. PSD2 seeks to balance these requirements by leaving liability for unauthorised transactions with the banks and requiring them to seek reimbursement from the responsible FinTech (or its insurer). How will this work in practice?

- **Globalisation v data privacy**

  In an increasingly global world, data privacy concerns can still cause significant issues for new technology. For example, data held on a blockchain or distributed ledger can be transferred and processed anywhere in the world. Although pseudonymised, this is not sufficient for GDPR purposes. How innovators and regulators deal with this tension will be key to the viability of a number of FinTech projects.

We expect regulators to have to continue to grapple with these inherent tensions during the course of 2017, influenced by what they witness in practice and as new entrants start to be the victims of cyber-risk or other compliance failures.

PSD2: getting ahead of the competition?

Jonathan Chertkow, Partner

Quick read

- Implementing PSD2 requires a significant regulatory change programme
- The new competitive landscape provides opportunities in some markets to win a competitive advantage over rivals, however, doing the minimum necessary to comply risks being the victim of increased competition that PSD2 seeks to bring

When the PSD1 was introduced in 2009 it had an unprecedented impact on the banking and payments sector, requiring wholesale changes to customer documentation, processes and income streams. The changes being introduced from early 2018 under PSD2 threaten to have equally profound impacts on the industry and require banks and payment service providers to thoroughly evaluate their processes and business models. A key decision for payment service providers will be whether to set up their projects simply to comply – by introducing the minimum required standards – or to embrace the opportunities that PSD2 offers and make a virtue out of a necessity.

What does PSD2 do?

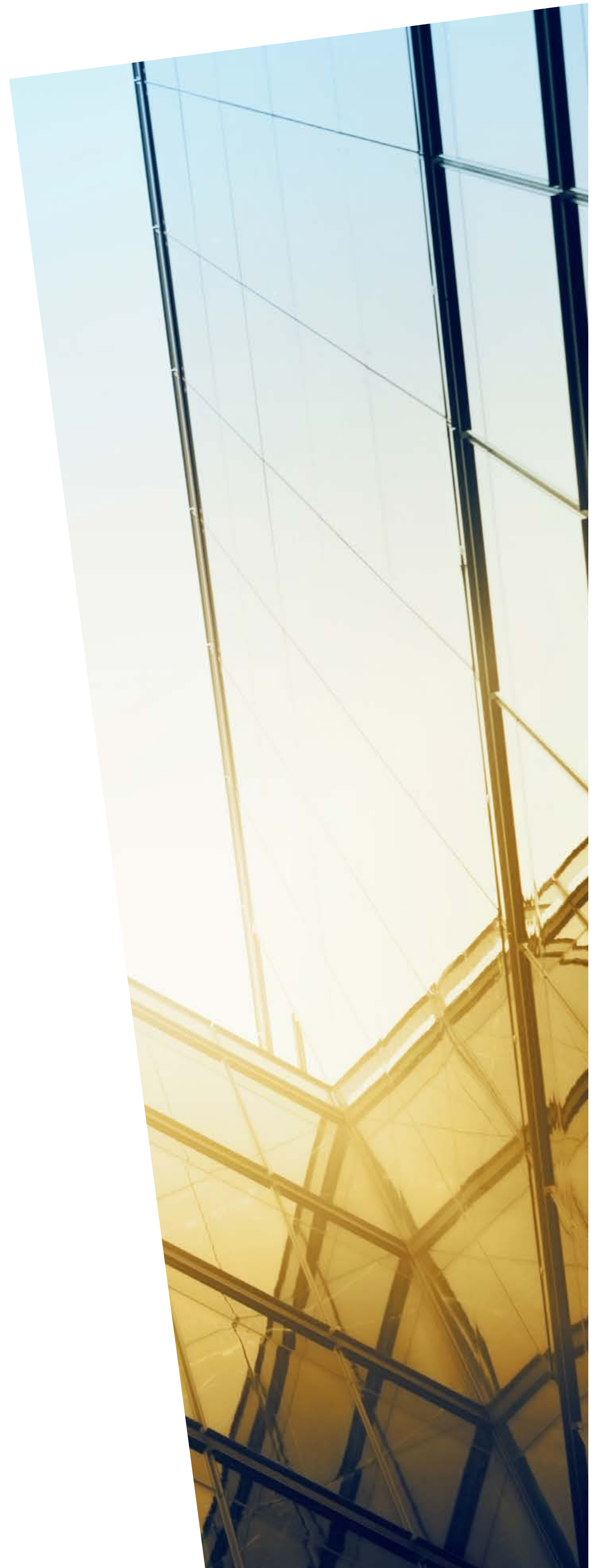
From 13 January 2018, PSD2 will:

- Extend the scope of regulation to all international payments
- Limit some existing exemptions
- Introduce new third party payment services and require account providers to permit access
- Require new strong customer authentication procedures
- Impose new data protection, security incident and complaints requirements.

Changes to scope: International payments

PSD1 only applies to:

- Payment transactions within the EEA: it does not cover so-called ‘one leg out’ transactions where the payment services provider for the payer or the payee is outside the EEA
- European currencies: it covers payments in euro or another EEA currency of a member state outside the Eurozone (e.g. Sterling or Swedish Krona).



PSD2, however, extends the scope so that (with limited exceptions), it applies "in respect to those parts of the payment transaction which are carried out in the Union" to payments in all currencies and to one leg out transactions.

This will mean that any products and services (e.g. US$ accounts) that would have been excluded from the scope of PSD1 implementation projects will need to be reviewed and brought into line for PSD2. It also has a potential impact on correspondent banking relationships because of the need for arrangements that ensure compliance for a greater range of international payments.

Changes to exemptions

Concerned that exemptions were being applied differently in different jurisdictions, PSD2 introduces restrictions on a number of exemptions that are commonly used, including the limited network exemption (used for store cards and other closed network products), the digital download exemption (used for pay by phone providers) and the commercial agent exemption (used by a variety of intermediary platforms).

Any business that relies on those exemptions today will need to revisit its business models and ensure they still fit within the exemption or apply to become authorised payment institutions.

New payment services

PSD2 introduces two new categories of payment services:

– Account information services - an account aggregation service, allowing customers to see account information from a number of providers in a single place

– Payment initiation services – allowing Third Party Payment Providers (TPPs) to initiate payments from accounts held by a third party PSP at the request of their customer.

As well as regulating these services, PSD2 imposes requirements on PSPs to provide TPPs with access to their payment accounts. In the UK this will principally be achieved through Open Banking which is dealt with in more detail on page 54. The introduction of these new payment services is intended to increase competition. For banks there is a risk that TPPs will dis-intermediate their customer relationships, potentially relegating them to the role of utility provider. But at the same time banks can also offer these new services, increasing their ability to strengthen and reinvigorate their customer relationships.

Strong Customer Authentication

PSD2, introduces a new requirement for two factor authentication, known as strong customer authentication (SCA) for online access and payments. This will require changes to security processes and procedures and, because it will add a step to the process, is likely to be seen as a backward step by users.

SCA requires two or more of the following:

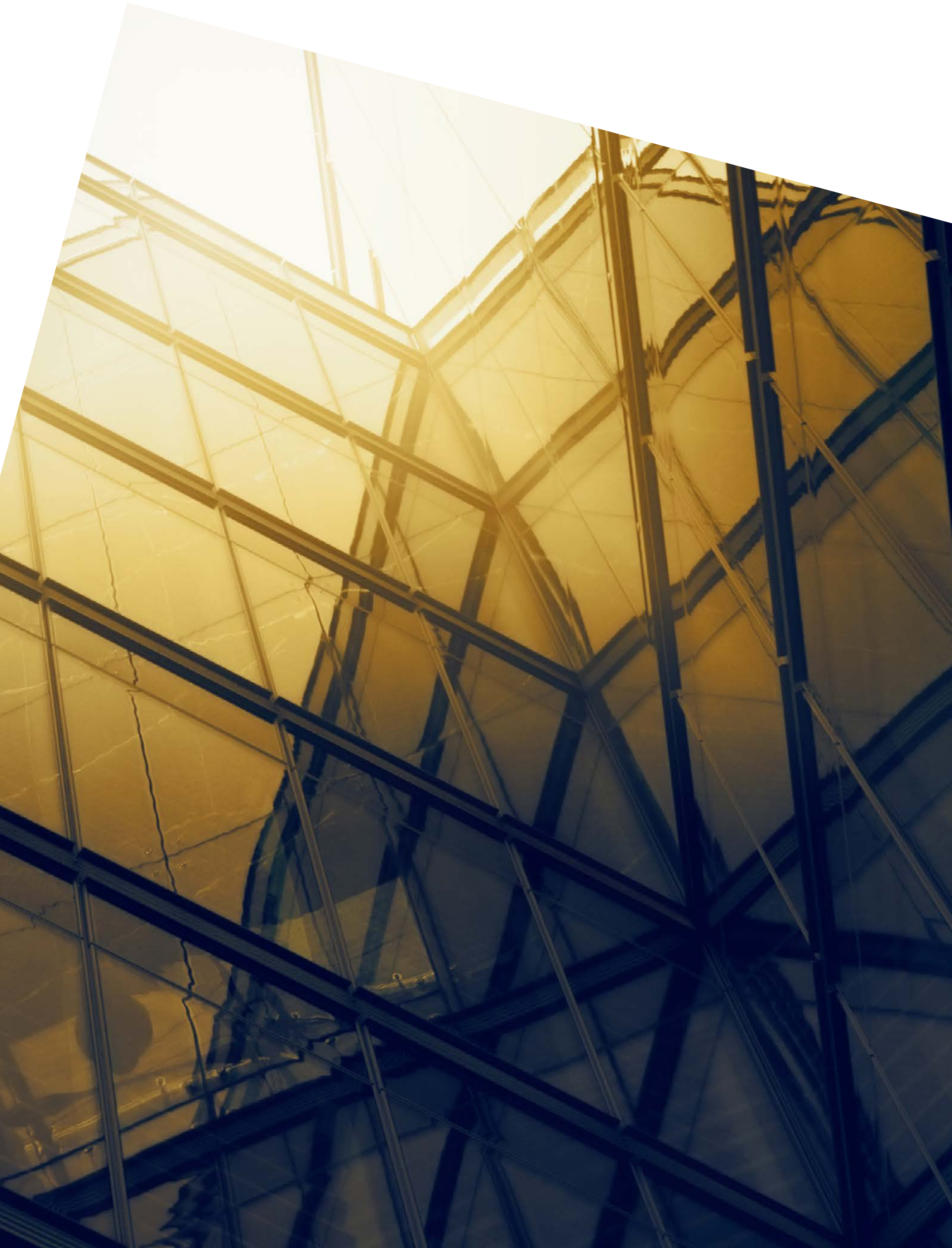
- Knowledge: something only the user knows (e.g. static password, code, personal identification number)
- Possession: something only the user possesses (e.g. token, smart card, mobile)
- Inherence: something the user is (e.g. biometric characteristic, such as a fingerprint).

The selected elements must be mutually independent such that breach of one does not compromise the other. In addition, for remote payments, the SCA must include elements which dynamically link the transaction to a specific amount and a specific payee.

This will have a significant impact on users who are accustomed to accessing their accounts via thumbprints or iris scans and who are used to making purchases through Amazon "one click" and similar services. Although the EBA's draft guidelines for SCA indicated little or no flexibility in this area, recent indications suggest the approach may have softened and SCA will not have to be used where a limited number of exemptions apply. However, the reality is likely to be a backward step for user experiences for a large number of payments and accounts. Developing approaches that minimise the impact on that user experience is likely to become a key competitive differentiator in the years ahead.

Data protection, security incident and complaints

Finally, PSD2 will introduce new requirements for dealing with data and security incidents, including reporting to the FCA and notifying customers. It also introduces new, shorter, time periods within which complaints must be dealt with. Both will have an impact on existing processes.



MiFID II: Only 12 months to go...

Michael Thomas, Partner and James Roslington, Associate

Quick read

- MiFID II will change how financial institutions and markets operate in the EU
- The legislation will go live on 3 January 2018
- Final FCA rules are expected in the first half of 2017

From 3 January 2018, the financial sector will be expected to adhere to the bulk of the MiFID II package. The EU has already delayed the legislation by 12 months, so no further respite is likely. Firms will have to keep up the momentum in their implementation plans as even the revised timetable is ambitious.

What is MIFID II?

MiFID II will change the way that financial institutions and markets operate in Europe. Originally intended as an updated version of the existing Markets in Financial Instruments Directive, MiFID II has become the vehicle for legislative change intended to reform financial services in Europe, especially following the political and economic fall-out from the financial crisis of 2008.

Its impact will include:

- Tougher rules to protect retail investors
- New requirements to make public trades in equities and, for the first time, non-equities
- New governance requirements for firms and trading venues
- New requirements for some derivatives to be traded on-exchange
- The creation of a new category of trading venue, the organised trading facility
- New levels of monitoring and mandatory restrictions on trading in commodity derivatives
- Requirements to submit more transaction data to regulators than ever before
- Strict caps on trading volumes in dark pools
- New rules for firms using algorithms in trading.

The broad reach of MiFID II means that most firms in the financial sector will be affected. The volume and scope of the legislation means that project planning and implementation is complex and often requires significant resourcing and management time. Combined with other legislative change running in parallel – notably the Packaged Retail and Insurance-based Investment Products Regulation and the IDD – this will be a major undertaking for the industry in 2017.

Is the end in sight?

The overwhelming majority of the legislative text is in final or near-final form. The primary text of the MiFID II Directive and the Markets in Financial Instruments Regulation were delivered nearly three years ago. However much of the detailed rules, including some of MiFID II's most controversial issues, are contained in secondary legislation, known as the "Level 2" rules. Throughout 2014-2015, the EU's securities regulator, ESMA, engaged in a complex round of discussion, consultation, and feedback which culminated with the delivery of 42 draft technical standards, as well as a volume of technical advice, which together contained much of the detail for MiFID II. In 2016, the focus shifted to the European Commission. From the spring of last year onwards, the Commission adopted texts for a delegated Directive and two delegated Regulations, followed by a succession of revised technical standards.

Now that the Level 2 text is nearly complete, focus has begun to shift from rule-making to implementation. ESMA's role will be particularly important as it will continue to publish so-called "Level 3" guidance and Q&A. Just as the MiFID Q&A were crucial to interpretation of the existing MiFID in its early days, so the ESMA Q&A and guidance have already begun to provide vital guidance to firms seeking to overcome gaps or ambiguities in the legislation. For example, recent publications have included draft or final guidelines on the volume caps on dark trading, board governance, product governance, together with Q&A on investor protection. It will be important for firms to monitor ESMA's output because this will provide a critical steer in relation to rules that are not always clear or comprehensive.

The rules in the MiFID II Directive and the MiFID II Delegated Directive will have to be transposed into national law by 3 July 2017. The FCA expects to publish a policy statement containing final rules and guidance during the first half of 2017.

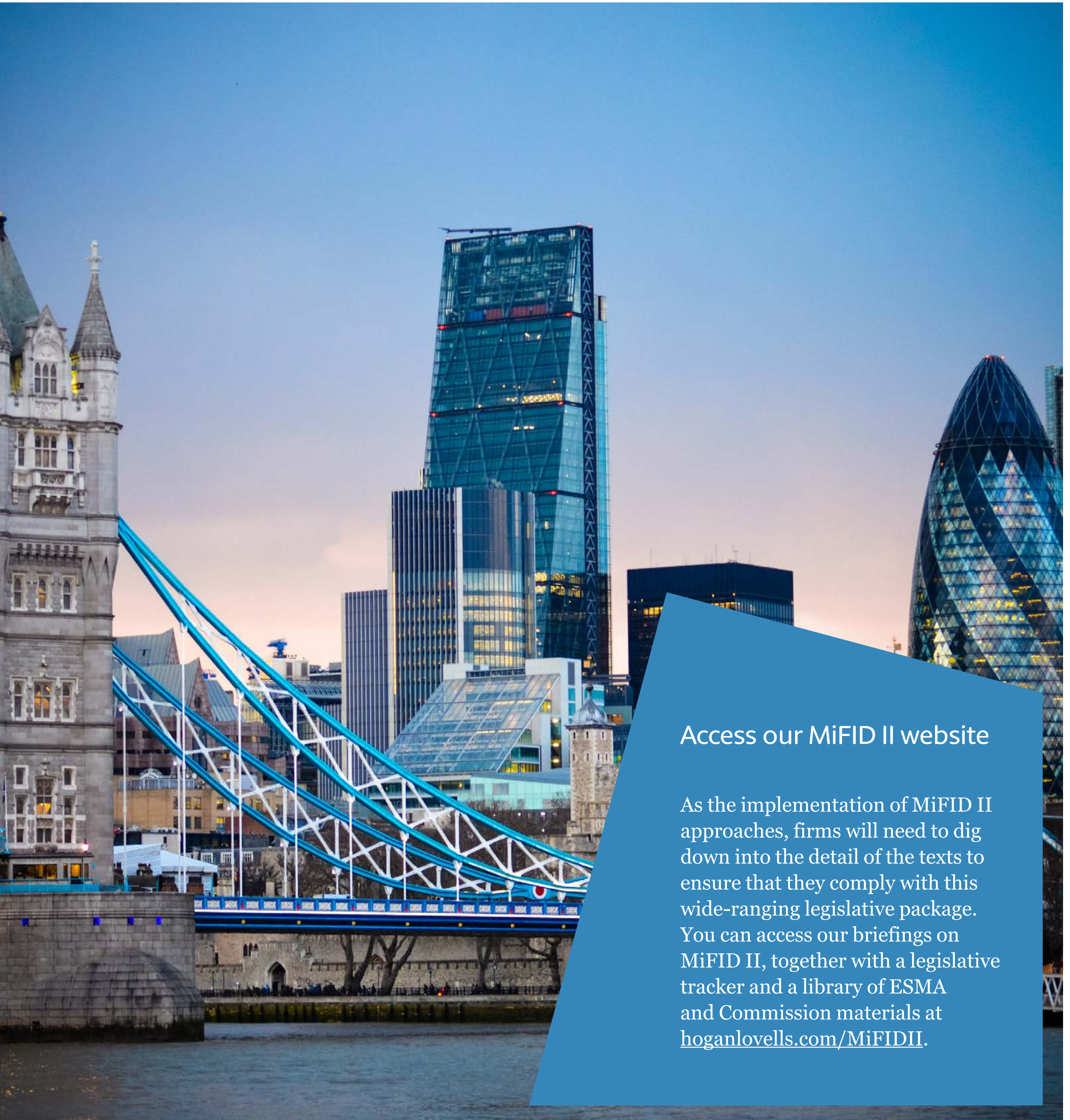
Will everything happen on 3 January 2018?

The bulk of the MiFID II rules will come into effect on the 'big bang' date of 3 January 2018. However, firms should be aware that MiFID II requires a phased-in approach to implementation in specific areas:

- Following concerns from market participants, transparency requirements for non-equities will be phased in over time. It was feared that over-ambitious transparency requirements could damage liquidity, especially in the fixed-income markets. As Verena Ross, ESMA Executive Director, has explained by way of an admirable metaphor, MiFID II is intended to switch on the lights without turning off the taps. Consequently, the Level 2 text provides for a phasing-in of the thresholds and waivers for pre-trade transparency.
- ESMA has pushed back the date investment firms must perform their first systematic internaliser (SI) assessment to 1 September 2018. This will be a tight timeline given that firms will have to rely on trading data published in August in order to work out whether or not they must comply with the SI regime. As a result, it is expected that firms that are likely to fall into the SI category will have to put contingencies in place to adopt SI status if required.
- ESMA's recent discussion paper on the trading obligation provides its proposals for a staggered approach to the requirement for standardised OTC derivatives to be traded on-exchange.
- Requirements applying to providers of a consolidated tape for equity trades will come into effect from September 2019.

Finally, regulators as well as firms will be working to a tight timetable. One of the reasons for the 12-month delay to MiFID II was the sheer complexity of the IT systems that must be put in place by ESMA in particular. ESMA is expected to centralise data collection for more than 100 trading venues and calculate transparency parameters for several million instruments.

Timeline of key events



Access our MiFID II website

As the implementation of MiFID II approaches, firms will need to dig down into the detail of the texts to ensure that they comply with this wide-ranging legislative package. You can access our briefings on MiFID II, together with a legislative tracker and a library of ESMA and Commission materials at hoganlovells.com/MiFIDII.

General Data Protection Regulation: Apparently similar, fundamentally different

Mac Macmillan, Counsel

Quick read

- Firms that currently comply with the Directive will be in a reasonably good position to implement the changes required by the GDPR but the extent of those changes cannot be underestimated
- The GDPR will impact both what you tell your customers (in terms of greater transparency, consents and new rights) and how you operate your business (contracts with processors, accountability and dealing with breaches)
- Implementation programmes will need to be wide-ranging and require considerable forward planning
- Financial penalties for non-compliance will be material

The new EU General Data Protection Regulation (GDPR) will apply from 25 May 2018 and its impact on the financial services sector will be significant. Although the overarching principles applying to use of individuals' data remain the same as under the Data Protection Directive (the "Directive"), GDPR's emphasis on a proactive approach to privacy will require significant process changes for most companies in respect of how they collect, share and use personal data. When one takes into account that most of the innovations contemplated in the sector are based around use of personal data (not to mention the potential for sizable fines for non-compliance of up to 4% of global turnover), the importance of this becomes evident. Companies need to be considering now the changes they need to make as the 18 months' remaining until GDPR becomes enforceable is not really that long when one takes into account the number of potential stakeholders in large organisations and the lead times on IT projects that will be affected by GDPR.

This article looks at some key changes which will affect the sector.

Wider scope of application

The GDPR will continue to apply to data controllers based within the EU, as the Directive does now. However for the first time certain obligations will be imposed directly on data processors, including obligations to have appropriate security in place and keep records of the data they process.

In terms of the application of the GDPR outside the EU, the legislators decided to do away with the Directive's somewhat old-fashion references to EU-based data processing equipment. Instead whether the Regulation applies to organisations without an establishment in the EU will be determined by the location of the data subjects.

To this end, the GDPR will apply whenever the use of personal data by an organisation relates to:

- The offering of goods or services to individuals in the EU, irrespective of whether a payment is required
- The monitoring of those individuals' behaviour in the EU.

The combined result of these changes is that companies which have centralised processing operations in off-shore subsidiaries are likely to find that those subsidiaries are directly subject to EU data protection law for the first time.

Greater transparency requirements

Under the Directive, the data controller must provide the data subject with certain prescribed information at the point at which his information is collected, including the intended purposes of the processing. The GDPR is more prescriptive about the information which must be provided, and almost all organisations will find they need to update their privacy/data collection notices to meet this requirement. Drafting these notices is likely to require a more detailed review of processing practices than at present, as, for example, data controllers will have to explain the legal grounds on which they rely when processing personal data.

New consent rules

The GDPR imposes stringent new conditions for obtaining valid consent from data subjects for processing of their data. Controllers must be able to demonstrate that the individual has consented to the processing, pre-ticked boxes are expressly stated not to constitute consent, and where consent is included in a written document with other matters, the request for consent must be presented in a form that is distinguishable from the rest of the document. As a consequence of these new rules, it is likely that many companies will need to review and update existing contracts and terms and conditions to ensure that any consent they collect meet the new rules. In some cases it may be advisable to consider whether a different legal basis can be used to legitimise the processing, both because of the difficulties in obtaining valid consent, and because certain data subject rights will apply if the processing is based on consent, but not if it is based on certain other grounds. In addition, companies will need to consider the state of their existing databases as existing consents must meet the standards of the GDPR for consent if they are to remain valid.

New requirements for processor contracts

Companies will be familiar with the need to include certain provisions in contracts with service providers which are processing personal data for them. GDPR is more prescriptive about what these requirements are, such that all companies are likely to need to amend their processing contracts, even where their existing clauses are quite detailed. For some organisations, this could mean reviewing hundreds, or even thousands, of contracts.

Data portability

Another innovation of the GDPR is the right for individuals to have a copy of certain of their personal data in a commonly used electronic and structured format that allows for further use, including by other data controllers. This is not dissimilar to the requirements for data sharing under PSD2 and Open Banking (explained further in our articles on those topics), but has a much wider application and any company with a significant individual customer base will need to start considering which of their data is in-scope and how it will implement the right.

Profiling

Profiling of customers is vital across financial services, for credit scoring, insurance risk calculation, and targeted marketing, to give only a few examples. Under the GDPR, profiling is a discrete data processing activity that will be strictly regulated. Profiling is defined as any form of automated processing of personal data used to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict behaviour, performance at work, personal preferences, interests, reliability, location or movements.

The GDPR includes strict information obligations in relation to profiling and an obligation to honour an individual's right to object. Prior consent to profiling is likely to be required in many cases. Organisations are advised to conduct an assessment of all data activities that may qualify as "profiling" and determine what steps they need to take to meet the requirements of the new law.

Accountability

For UK businesses one of the biggest novelties may be the concept of accountability: the introduction of the idea that data controllers are not only responsible for compliance with the general principles of the GDPR, but must also be able to demonstrate this.

In practice this means that data controllers must implement appropriate technical and organisational measures to ensure that their processing of personal data is performed in compliance with the GDPR and also to demonstrate this, for example by implementing an internal or external audit process. Other specific obligations include:

- a requirement to implement appropriate data protection policies and measures to ensure that an organisation's processing of personal data complies with the GDPR, in particular introducing data protection by design and by default; and
- carrying out data protection impact assessments for operations that present specific risks to individuals due to the nature or scope of the processing operation and consulting data protection authorities where there is a high risk.

Essentially this will require a much more proactive approach to data protection than UK companies have taken so far. Under the current regime it is not uncommon to be asked to give an opinion on data protection issues in respect of a project which is due to launch in two days. Under GDPR the mere fact that data protection issues are not being considered until late in the process would arguably be a breach of the accountability or data protection by design obligations. Companies are going to need to review their project development methodology.

Mandatory breach notification

Some organisations are already gearing up for breach notification under PSD2. GDPR introduces a further set of breach notification obligations, but applying to a different set of data, and applying a different threshold for reporting. Companies will need to update existing data breach handling processes to ensure they meet the new requirements.

What to do now?

- Review agreements with data processors
- Consider customer consents. Are they adequate? Would it be sensible to change the legal basis for processing data?
- Investigate the systems and operational requirements for complying with data portability
- Work out where data profiling is used in the business and how consent can be captured in the future
- Prepare for increased accountability, reporting and the potential for significant fines.

Financial services and insurance

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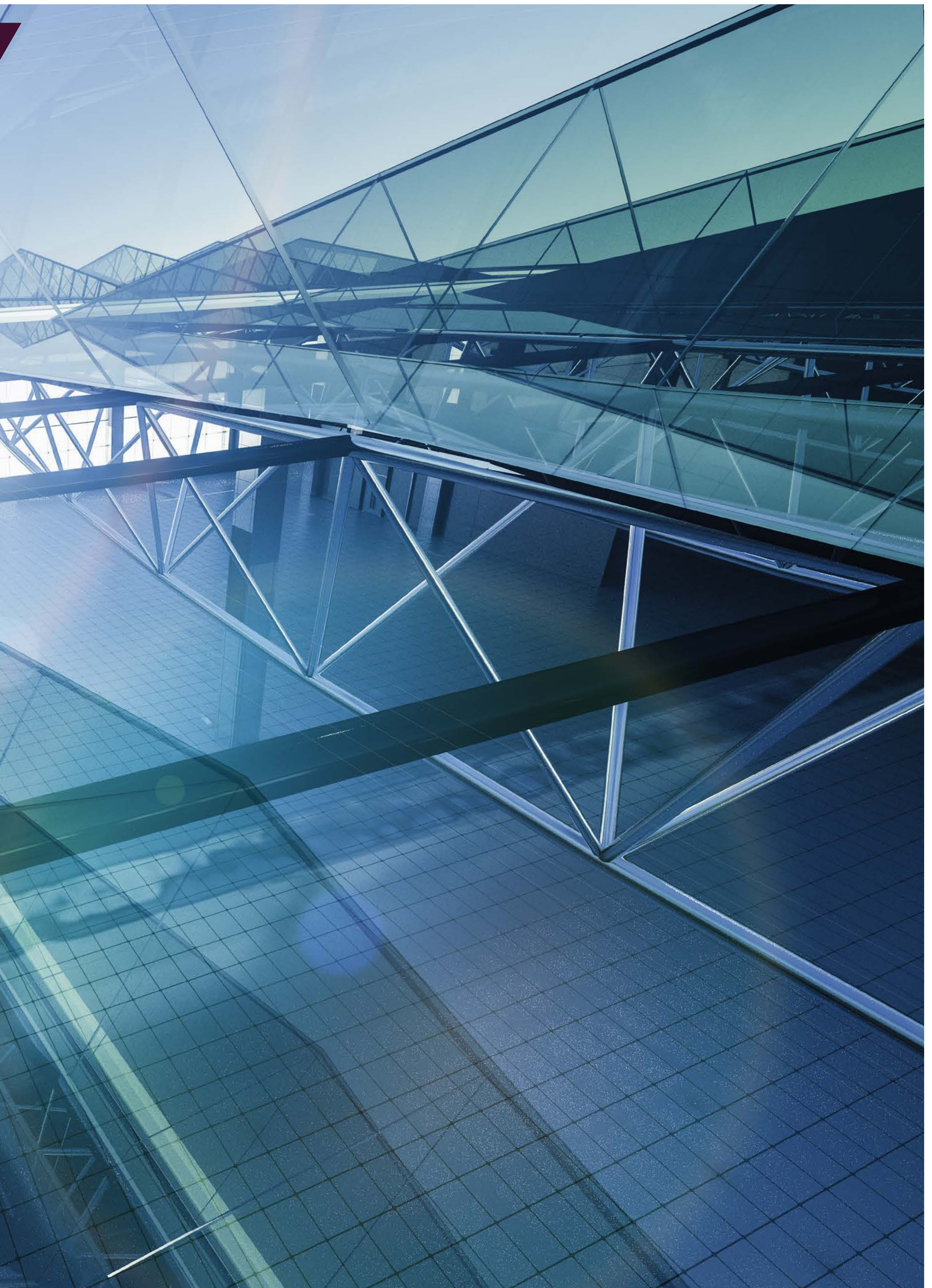


InsurTech: UK regulators ahead of the game

Helen Chapman, Partner, James Richardson, Associate and John Salmon, Partner

Quick read

- Insurance products and selling platforms are evolving swiftly to keep pace with new technology and consumers' demands
- The use of Big Data and modern technology is enabling insurers to change the service they provide and also change how they manage their business
- In the UK, the FCA is working hard to match the pace set by the insurance industry and to create a progressive regulatory environment conducive to innovation without compromising standards

A number of factors are driving disruption in the insurance industry, posing a major challenge for the regulators – a challenge the UK regulators are rising to with gusto.

So what are the factors driving the disruption?

Major societal changes

In the retail insurance space, consumers are more connected than ever, via a multitude of devices and through multiple platforms. This has two consequences: first, consumers increasingly expect a much better, smarter service.

Second, a larger proportion of consumers fall into Generation Y or the millennial generation: these individuals are less likely to own property or cars, are less attracted by life assurance and are looking for more tailored cover they can buy easily and quickly. They are attracted by the sharing economy. At Hogan Lovells, we are seeing an increase in demand for insurance products to be designed on a modular basis, allowing customers to purchase just the cover they need at a price which is calculated on the basis of actual customer data. Customers are no longer interested in annual policies which might cover them for risks they do not run.

Big data

As the FCA (Financial Conduct Authority), the UK's conduct regulator, has said, big data "can be used by firms to transform how consumers deal with insurance firms, allowing firms to develop new products as well as reducing form-filling, streamlining sales and claims processes". It also allows insurers to price risk more accurately. This is a major opportunity for insurers, which they are seeking to capitalise on through the use of technology: telematics in motor insurance; wearable tech in life and illness insurance; intelligent home technologies for property insurance.

New technology

The new technology available to insurers and intermediaries is revolutionising the way they run their businesses. Artificial intelligence technology, such as robo-advisers and chatbots, can increase efficiency and improve customer experience. Drones have the potential to cut costs involved in inspections for claims purposes. As insurers amass more and more data, in particular from connected devices, data analytics tools allow insurers to use their data in a smart way and gain valuable insights into customer behaviour and trends. Often, cloud computing underpins the use of these other technologies. And not forgetting blockchain technology, which has the potential to transform the insurance industry, but which insurers and reinsurers are just beginning to consider seriously.

Availability of capital

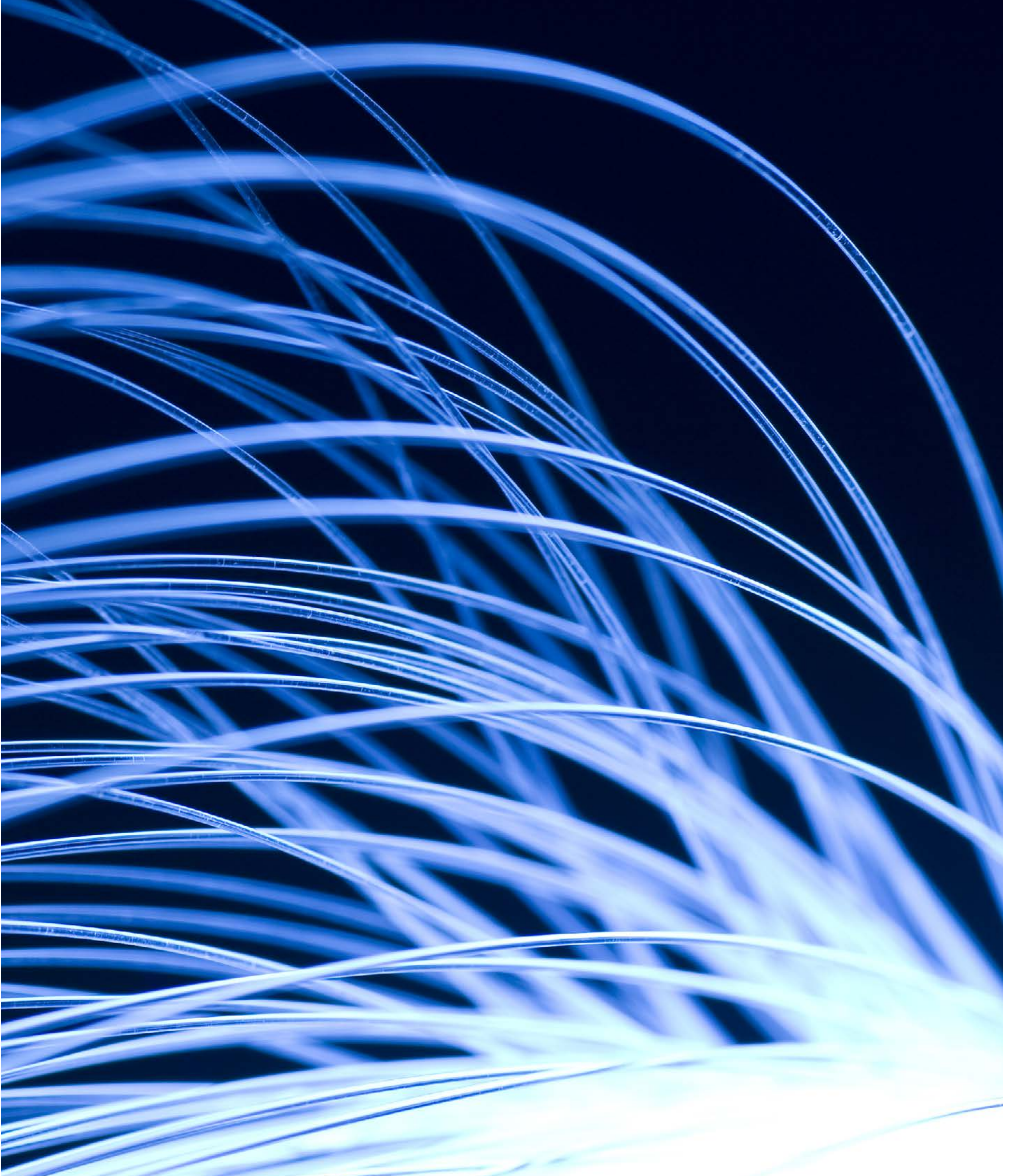
A feature of the InsurTech phenomenon is the mountain of capital available from interested venture capital and private equity firms as well as established insurance market players. This is fuelling a boom in innovative start-ups.

Who are the disruptors?

Not who you might think. While there are many start-ups vying for a piece of the pie, much of the innovation is being driven by incumbents: large, often global players in the insurance markets. All the major insurer groups have their own accelerators or incubators, mentoring and investing in innovative ideas either for products or means of distribution. Many reinsurers are investing heavily in these sorts of ventures because they see the mining of the data that they have access to over broad market segments as key to their future success. One of the challenges, however, is the cultural shift that is needed for a traditionally risk-averse organisation to truly embrace innovation and creativity.

Alongside the might of the incumbent insurance and reinsurance groups are the innovative start-ups, often funded by venture capitalists. What they might be lacking in experience, they make up for in agility.

The ability for technology to shake up the insurance distribution chain has attracted non-insurance brands into parts of the market too. Insurers and intermediaries are facing off to major players from other areas, including technology providers, and manufacturers of cars and consumer electronics. While some incumbents view this advancement as a threat, others have been welcoming the opportunities this could bring and otherwise unlikely partnerships have been forming.



Regulators: running scared or embracing the future

The scale and pace of change in the industry presents a significant challenge for the regulators. The FCA has commented that it sees change as the new normal and is embracing it. The FCA has actively sought ways of ensuring it meets its objectives, which include ensuring the relevant markets function well and protecting consumers.

In order to do this and ensure that regulation remains relevant to the new normal, it initiated Project Innovate in 2014, including an Innovation Hub, enabling innovative insurance businesses to take part in assessments of how they meet regulation, without fear of penalty. It promises to provide fast, frank feedback on the regulatory implications of financial firms' technological development. Working closely with firms in this way gives the regulator the information it needs to tailor its regulations to the new business models.

Alongside the Innovation Hub, the FCA is actively considering issues such as big data to understand the use of data by firms better, and how this affects consumer outcomes and competition.

Even more noteworthy is the FCA's international engagement. It has co-operation agreements with a number of overseas regulators (Australia, Singapore and South Korea), with the aim of promoting the UK as a centre for innovation in financial services.

These activities are in stark contrast to other regulators around the world. Lawyers in Hogan Lovells' international insurance practice have remarked on the progressive steps being taken by the FCA compared with those in their jurisdictions. There are few local regulators that are taking as pro-active an approach as the UK regulators. However, as already mentioned, some other jurisdictions are co-operating with the FCA and positive steps are also being taken in Hong Kong. In the United States, a House Bill was introduced in September 2016 with the expressly stated aim of keeping the US from losing financial innovators to the UK's regulatory sandbox.

It is clear that we are witnessing a watershed in both the insurance industry and the relevant regulation.

This is an abridged version of an article which was originally published in The Times Raconteur report on the Future of Insurance on 12 October 2016.

The full article also appears in our publication: Insurance Industry Perspectives 2016 Review.

Blockchain, DLT and the regulatory landscape: At a point of convergence?

Michael Thomas, Partner and Pamela Buxton, Consultant

Quick read

- Blockchain/DLT is at a point of convergence between the technology, commercial and legal worlds
- Developers, investors and users need to understand the legal and regulatory context to create viable and valuable solutions
- Financial services are highly regulated and current regulatory frameworks were not designed for blockchain so may conflict with proposed use cases
- Dialogue with regulators will be key to ensuring that regulation and policy evolve to fit with blockchain solutions
- Industry collaboration will be key to ensuring that interoperable platforms emerge
- Contextual legal issues, e.g. governance, data, competition, insolvency, security, need to be factored in

Blockchain and other forms of distributed ledger technology (DLT) have generated considerable interest within the FinTech community, as FinTech start-ups, market infrastructure providers, global banks and global payment and tech providers evaluate technology and potential use cases. But there remain many unanswered questions as to how DLT solutions will evolve to fit into the current regulatory and legal infrastructure. For the technology to progress towards productivity in 2017, broad industry collaboration and emerging regulatory certainty will be critical. DLT is at a point of convergence where the technology, commercial and legal worlds need to evolve to work together to deliver practical solutions.

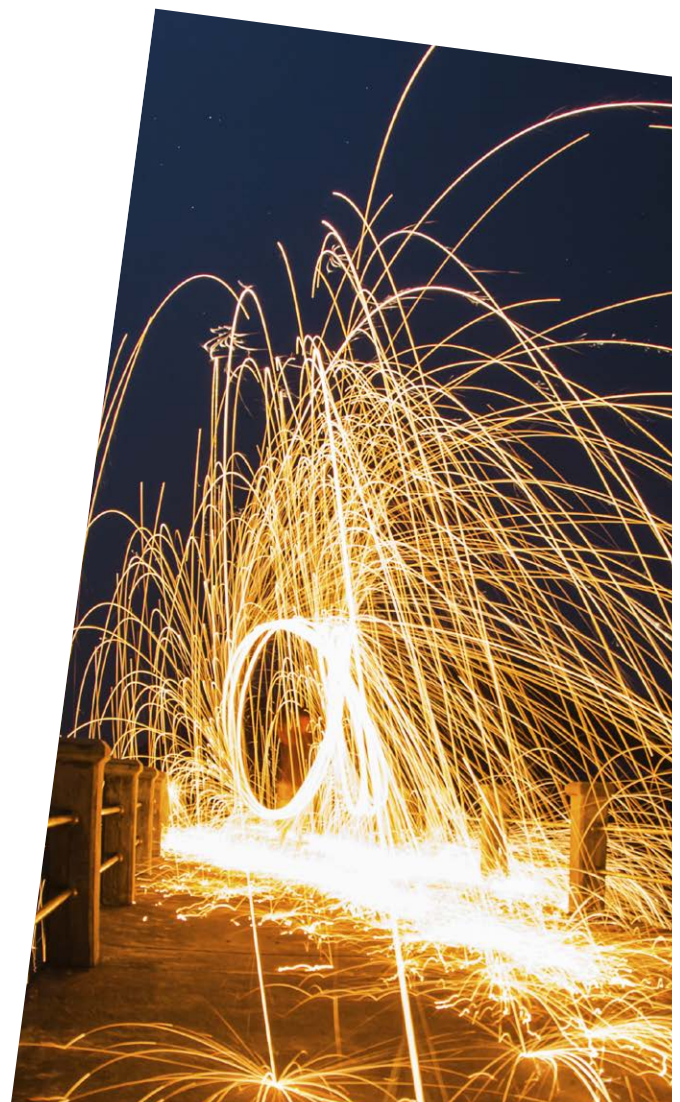
In October 2016, Hogan Lovells, Innovate Finance and EY published a white paper, Blockchain, DLT and the Capital Markets Journey: Navigating the regulatory and legal landscape, to help progress the understanding of the key legal and regulatory issues which will need to be addressed if blockchain, or other forms of DLT, are to deliver viable and valuable solutions in the complex and highly-regulated environment of capital markets. Achieving success in this area will either require developing solutions which conform to the regulatory framework or engaging with policymakers to reshape its contours. Although the report focuses on the UK's regulatory and legal environment (including, where applicable, by reference to EU law) it acts as a stepping-stone to understanding the analysis to be applied in other markets as the issues and concepts identified in it tend to give rise to similar concerns in other jurisdictions. Given the need for international co-operation in responding to a global technology, the analysis should also help progress the thinking on the regulatory and legal issues to be navigated in other jurisdictions. The report identifies key themes to consider in this area and uses them to frame the analysis and recommendations for regulators and policy-makers.

Although the report focusses on use cases for Capital Markets, similar issues arise for use cases in other areas of financial services, including payments where Blockchain and DLT technology was first developed.

As with any FinTech solution, DLT will need to comply with the regulatory and legal framework which applies to the activity which it supports. This is a particular challenge for a "distributed" technology which, in most financial services use cases (particularly for capital markets and payments), would need to operate across national boundaries to be meaningfully useful. Whilst the regulatory agenda in financial services is increasingly co-ordinated at an international level, there is not yet one framework that serves all jurisdictions nor is there one form of DLT.

Significant elements of the regulatory landscape in the UK are defined by EU law, such as MiFID, EMIR and the Central Securities Depositories Regulation for capital markets and PSD for payments, as well as non-sector specific legislations such as the GDPR, none of which were drafted with DLT in mind. The regulatory framework needs to be re-examined in light of DLT developments. Regulators also need to understand where and how DLT can deliver benefit without introducing additional risk.

Brexit will add another layer of complexity, given its uncertain impact on existing EU and UK regulatory infrastructures. Much will depend on whether the UK mirrors existing EU law and regulation, as is intended initially under the proposed Great Repeal Bill, or diverges to form an independent regulatory perspective. Brexit may even present opportunities to launch DLT solutions in the UK if it enables legislation to be updated to reflect the emergence of DLT solutions and remove legal technicalities that obstruct implementation. It may be possible that this could be achieved even if the ultimate outcome of Brexit is that the UK needs to maintain an "equivalent" legal, regulatory and supervisory framework as that commitment would be based on "equivalence" of outcomes rather than being obliged to mirror the legislation. However, even if the UK Government could draft new laws and regulations to support and enable the use of DLT technology the cross-border nature of the use cases for capital markets and payments mean that this alone would not be sufficient. Indeed, if Brexit were to result in a significantly divergent approach to regulating use of DLT in the UK and the EU, it may not be possible to realise potential cross-border efficiencies. More recognition of this technology in other jurisdictions would still be needed but, with regulatory support, the UK could be the fulcrum for its emergence on to a wider stage with its regulatory characteristics better understood.



DLT will have many impacts, at operational and strategic levels. Key themes to be considered when analysing the use of DLT in financial services include:

- Scope for disintermediation of market players
- Certainty and immutability
- Flexibility of smart contracts and redress – the “code is law” proposition (spoiler alert: code is not law...)
- Regulatory uncertainty and potential compliance benefits
- How competition law applies to permissioned DLT systems
- Transparency and data privacy
- Security and system resilience.

Understanding this complex matrix of legal issues supports the development of recommendations for industry and regulators covering legal, market impact, operational and regulatory matters. More detail of those, as they apply to capital markets, can be found in the report.

2017 looks set to be a pivotal year for DLT in capital markets, payments and wider financial services with the key to unlocking its potential dependent on navigating the regulatory and legal landscape whilst building on industry collaboration to deliver interoperability and robust governance structures.

What to do now

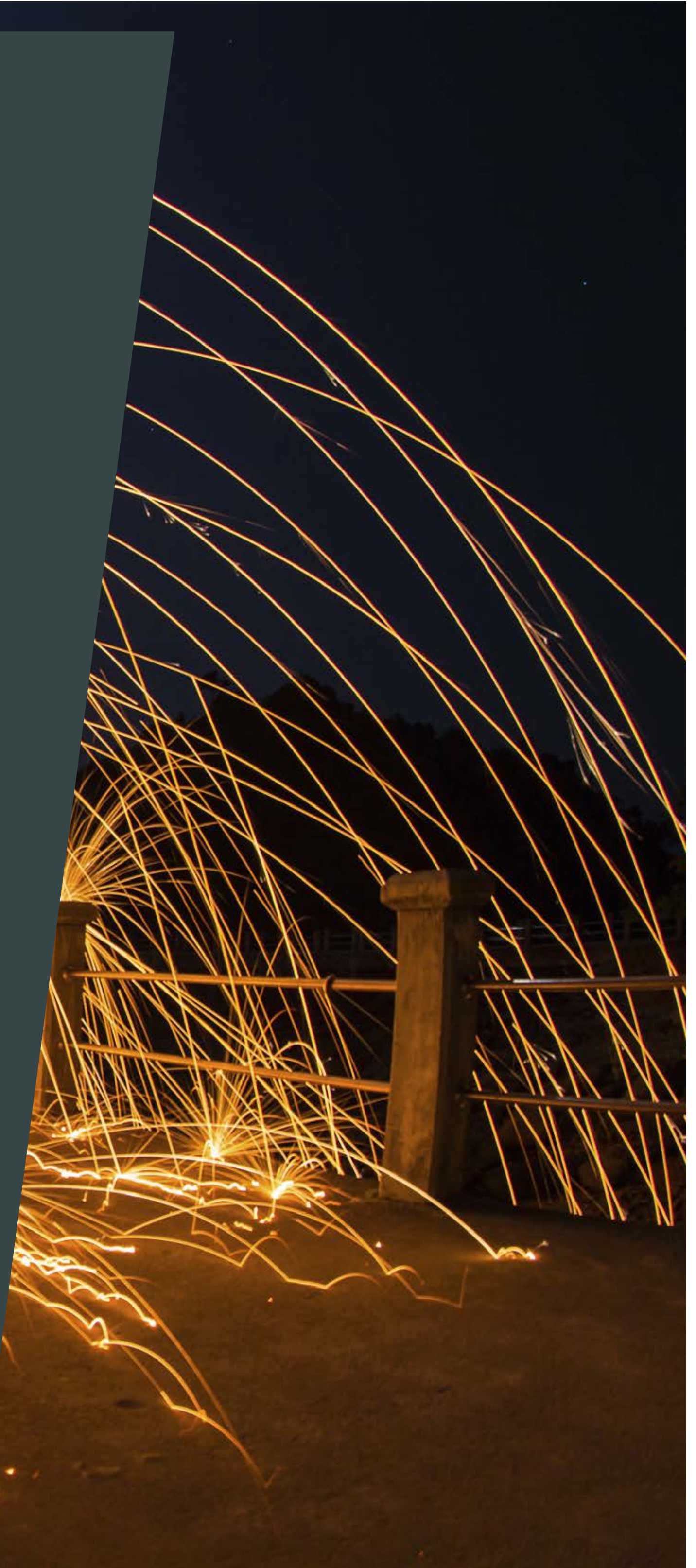
- Monitor how developments in blockchain/DLT may impact on your area of financial services, as use cases are emerging across financial services: capital markets, payments, market infrastructure, trade finance, syndicated loans, insurance, AML verification
- Understand how proposed blockchain/DLT solutions in your area will fit with the legal and regulatory framework
- Build engagement with regulators, domestic and international, to ensure that solutions being developed are coherent with policy objectives
- Identify any areas where the proposed use cases fit with policy objectives but not the technical framework and engage with policy-makers to evolve the legislation
- Engage with the Brexit process to ensure priorities are heard, e.g. on maintaining influence on developing common international standards
- Collaborate on industry-level design decisions, including through relevant industry associations such as Innovate Finance, to help develop interoperable solutions and common standards
- Ensure that the wider legal context is complied with, e.g. on competition law and data privacy
- Develop robust governance structures appropriate to the use case.

Core characteristics of blockchain and other DLT systems

1. Blockchain in simple terms is a technology that enables a shared ledger to be maintained by multiple parties and updated simultaneously so that each party can be confident that the record it holds matches the record which each other participant holds. It has the potential to create significant efficiencies in capital markets and payments.

2. New transactions are entered in blocks into the shared ledger once validated in accordance with agreed protocols, known as consensus, and are protected by encryption. These entries generate a time-stamped record of history and audit trail, with the possibility of automatic identity verification.

3. Blockchains can be permissioned, i.e. where only participants who are authorised in accordance with the relevant consensus protocols have access (which is most likely in capital markets use cases) or public blockchains i.e. where it is accessible to anyone who wishes to participate (as has been the case for payments use cases to date).



Change starts at the top: The Senior Managers and Certification Regime

Michael Thomas, Partner and James Roslington, Associate

Quick read

- The SMCR came into force in March 2016
- The SMCR currently imposes governance requirements on individuals in banks and PRA-authorised investment firms
- From 2018 the SMCR will be rolled out to the entire financial sector, requiring substantial work by authorised firms to ensure that their governance arrangements comply with the new requirements
- The FCA has identified shortcomings in the way that firms have implemented the SMCR, and further regulatory activity is expected in this area

The Senior Managers and Certification Regime (SMCR) is intended to make senior managers and other key staff take more responsibility for their actions. The current SMCR rules impose governance requirements on individuals in banks and PRA-authorised investment firms. During 2017, we expect to see more regulatory activity in this area, especially following the FCA's recent criticism of firms' failure to implement the regime properly. Proposals to extend the SMCR to the entire sector will also be finalised ahead of the roll-out of the regime to all regulated firms in 2018.

What is the SMCR?

The SMCR was created following the financial crisis of 2008 in order to address the perceived failure of the Approved Persons regime. The Parliamentary Commission on Banking Standards found that the regulatory framework had failed to ensure that senior bankers took individual responsibility for their actions. Andrew Tyrie MP, the Chairman of the Parliamentary Commission, complained that senior managers at banks had "continued to shelter behind an accountability firewall".

The SMCR is intended to ensure that senior managers in banks and PRA-authorised investment firms are properly held to account and that their responsibilities are clearly identified. It also imposes requirements on staff who are not senior managers but who hold significant positions of responsibility.

> "Getting the culture right means that the senior management of firms needs to set the right tone from the top – they need to take responsibility for the culture in their firms."
>
> *Andrew Bailey*
> *Chief Executive of the FCA*

The SMCR contains two distinct components:

The Senior Managers Regime

- Individuals appointed to perform designated "Senior Management Functions" must have regulatory approval
- Senior Managers are required to have individual Statements of Responsibility setting out their personal responsibilities
- The regulators prescribe a number of core responsibilities that must be allocated among the Senior Managers of the firm
- Firms must maintain Responsibility Maps outlining the governance structure of the firm, including reporting lines and the responsibilities of the Senior Managers.

The Certification Regime

- The Certification Regime covers staff who do not perform Senior Management Functions, but who could cause "significant harm" to the firm or its customers
- They must be certified by their firm as fit and proper at least annually.

Which firms are affected?

The SMCR currently applies to individuals operating in banks and PRA-authorised investment firms. A parallel regime, the Senior Insurance Managers Regime currently applies in the insurance sector.

The UK Government plans to extend the SMCR to all sectors of the financial services industry, including insurers, investment firms, asset managers, insurance and mortgage brokers and consumer credit firms. According to the UK Government's proposals: "Many firms beyond the banking sector – such as large investment firms, insurers and those involved in shadow banking – can pose a threat to financial stability. Misconduct by firms of any size can have serious impact on the welfare of consumers or on market integrity, which will in turn harm consumers, investors and the businesses that depend on fair and effective markets. Such misconduct can be caused by similar failings to those identified in banks."

Instead of the approximately 935 banking and PRA-authorised investment firms covered by the existing SMCR, from 2018 the SMCR will bring within its scope an additional 60,000 firms (including 580 insurers, over 17,000 investment firms and 42,000 consumer credit firms). Currently, over 40,000 individuals are within the scope of the SMCR; the planned extension of the regime is expected to bring nearly 160,000 additional individuals within its ambit for the first time.

This is a major extension of individual accountability, and firms in the financial sector that are not currently within the scope of the SMCR will need to take steps during 2017 to prepare for the extension of the regime.

What are the FCA's concerns?

Firms currently within the scope of the SMCR, or which are likely to be caught by the extension of the regime, should take note of the FCA's recent criticism of the way that some firms have implemented the SMCR.

In a recent review of the regime, the FCA found that not all firms had properly carried out the requirements of the SMCR:

- Some firms had allocated Senior Management Functions or particular responsibilities to staff who were too junior to hold such positions. Some firms had failed to allocate all of the business functions and activities of the firm to responsible Senior Managers, resulting in gaps in the coverage of responsibilities
- Statements of Responsibilites for individuals and firm-wide responsibility maps did not always set out clearly how responsibilities were allocated, or how reporting lines worked within firms
- A number of responsibility maps did not give enough information about governance arrangements.

It is inevitable that firms will have differing approaches to applying the SMCR rules, given the scale and complexity of the changes introduced by the SMCR and the fact that different firms have differing governance structures. Nevertheless, firms should take note of the FCA's comments and ensure that they comply properly with the regime. The SMCR is likely to be an area of regulatory focus in 2017, especially as the regulator gears up in preparation for the roll-out to the entire sector in the following year. Although there has been a comparative lull in enforcement activity against individuals during the last six months, this trend may be reversed if the FCA continues to find shortcomings in the implementation of the SMCR.

What to do now

Firms currently within the scope of the SMCR must ensure that they comply fully with its requirements, especially taking into account the FCA's recent feedback statements on shortcomings in the sector.

Firms that will come within the scope of the SMCR from 2018 must look at the detail of the proposals to extend the regime. Once the rules have been finalised, they will have to:

- identify staff who will fall within the SMCR categories;
- assess current reporting lines and allocated responsibilities; and
- review the impact of the SMCR on internal controls and procedures.

The Benchmarks Regulation: What will it mean for you?

Bianca Smith-Moir, Associate

Quick read

- The Benchmarks Regulation will affect you if you use, administer or contribute to any benchmarks
- The impact may also depend on the type of benchmark, and whether or not it is deemed "critical" or "significant"
- A "benchmark" is now more broadly defined than before and includes any published figure that is regularly determined by a calculation, formula or assessment on the basis of underlying assets or prices

A new Benchmarks Regulation will apply from January 2018 and the scope of what is regulated will be broader than ever before. While the most onerous requirements are on benchmark administrators, businesses that use or contribute to benchmarks will also be caught. Now is the time for banks, asset managers, product providers and non-bank lenders to consider whether they use, administer or contribute to benchmarks and develop an action plan for compliance.

What is the Benchmarks Regulation about?

The Benchmarks Regulation came about following revelations of 'rate-rigging' scandals after the 2008 financial crisis. It aims to ensure that benchmarks produced and used in the EU are not manipulated, and to improve their functioning and governance more generally so they will be robust, reliable, representative and fit for purpose.

What is a benchmark?

The definition of a benchmark is complicated. A benchmark is any "index" that is used for any of the following purposes:

- to determine the value of, or the amount payable under, a "financial instrument" (broadly, any traded financial instrument within the scope of MiFID II);
- to determine the amount payable under certain credit agreements (as defined in the Consumer Credit Directive and the Mortgage Credit Directive); or
- to measure the performance of an investment fund with the purpose of tracking the index, defining the asset allocation of a portfolio, or computing performance fees.

An "index" is any figure that is:

- published or made available to the public; and
- regularly determined (either wholly or in part) by the application of a formula, an assessment, or any other method of calculation, on the basis of one or more underlying assets or prices (including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys).

What will firms be required to do?

- Supervised entities (broadly, regulated firms) may only use benchmarks if the benchmark or its administrator appears on a register maintained by ESMA
- Supervised benchmark users must have "robust written plans" for what they would do if a benchmark materially changes or ceases being provided, which must be reflected in client-facing terms and provided to the firm's regulator upon request
- Prospectuses regarding investment products that reference a benchmark must state whether the benchmark is provided by an administrator included on the ESMA register
- Certain credit agreements that reference a benchmark must identify the benchmark and its administrator and the potential implications for the customer. For consumer credit agreements, this must be in a separate document, which may be attached to the Standard European Consumer Credit Information Form. The Benchmarks Regulation amends the Consumer Credit Directive and the Mortgage Credit Directive to insert these requirements where the relevant agreements reference a benchmark
- Benchmark administrators must meet a comprehensive set of governance, oversight and control requirements across a range of areas including conflict of interests, methodology, input data, record-keeping and reporting. They must also implement and monitor a code of conduct for contributors
- Supervised entities that contribute to benchmarks must meet specific governance and control requirements regarding their contributions, including managing conflicts, and proper oversight and record-keeping. They must also give notice if they intend to cease contributing to a "critical" benchmark, and can be compelled to continue contributing for up to two years.

Are there any exclusions or exemptions?

Yes. The Benchmarks Regulation does not apply to:

- Central banks
- Central counterparties (CCPs) providing reference prices or settlement prices used for CCP risk-management purposes and settlement
- The provision of a single reference price for financial instruments
- Public authorities in respect of benchmarks for public policy purposes
- Press, media or journalists who merely publish or refer to benchmarks
- Persons offering credit in the course of a trade, business or profession publishing their own borrowing rates applicable only to their own Group's financial contracts
- Certain submission-based commodity benchmarks used as a reference for instruments traded on a single venue with a total value of no more than €100m
- Index providers who are unaware and could not reasonably have been aware that their index is being used as a benchmark.

Are all benchmarks treated in the same way?

No. The detailed rules that apply to benchmark administrators and contributors depend on:

– The type of benchmark that it is – e.g. certain rules do not apply in relation to regulated data benchmarks (broadly, benchmarks based on input data from regulated sources), and specific rules that apply to interest rate benchmarks and most commodity benchmarks

– The importance of the benchmark to the broader financial system – e.g. "critical" benchmarks are subject to more onerous requirements than those that are merely "significant", and administrators can opt out of some rules for benchmarks that are "non-significant". Significance criteria include the value of the financial instruments using the benchmark as a reference, availability of appropriate market-led substitutes, and likely impacts if a benchmark became unavailable or unreliable.

Am I a benchmark user?

You are "using" a benchmark if you:

– provide a borrowing rate that is a mark-up over an index

– measure the performance of an AIF or a UCITS against an index for the purpose of tracking the return of the index, setting portfolio asset allocations, or calculating performance fees

– determine the amount payable under a financial instrument or credit agreement by reference to an index

– issue or are party to a financial instrument that references an index.

The following firms are therefore likely to be "users" of benchmarks:

– Managers of AIFs or UCITS (including delegated portfolio managers) where asset allocation, returns or fees are linked to an index

– Banks or lenders offering mortgages or consumer credit at an index-based rate (e.g. "LIBOR + 1%")

– Issuers of financial instruments that reference an index (e.g. a structured product or derivative based on FTSE performance)

– Any party to a financial contract that references an index.

However, merely holding a financial instrument that references a benchmark does not amount to "use" of a benchmark.

Am I a benchmark contributor?

Contributing to a benchmark essentially means voluntarily providing input data to a benchmark administrator for the purposes of determining a benchmark. Where the data is "readily available" this will not amount to contributing to a benchmark.

Am I a benchmark administrator?

The benchmark administrator is the person that has control over the "provision of a benchmark", which means:

– administering the arrangements for determining a benchmark;

– collecting, analysing or processing input data for the purpose of determining a benchmark; and

– determining a benchmark through the application of a formula or other method of calculation or by an assessment of input data provided for that purpose.

What to do now

First, establish whether your business is a benchmark user, contributor or administrator.

If you are a benchmark user that is a regulated firm then you need to:

- only use benchmarks where the benchmark or its administrator appears on the ESMA register;
- plan what you would do if the benchmark materially changes or becomes unavailable, and reflect those plans in your client-facing terms; and
- where relevant, include certain details in the customer information package. This only applies to credit agreements within the scope of the Consumer Credit Directive or Mortgage Credit Directive where the agreement references a benchmark.

Also, where a prospectus to be published under the Prospectus Directive or UCITS Directive references a benchmark, the issuer, offeror, or person requesting admission to trade on a regulated market must ensure that the prospectus also includes clear and prominent information stating whether the benchmark is provided by an administrator included on the ESMA register.

If you are a benchmark contributor, most impacts of the Benchmarks Regulation are likely to be indirect. You must comply with the code of conduct that the benchmark administrator must enforce. If you are a regulated firm then certain governance and control requirements will also apply to you directly.

If you are a benchmark administrator, then you need to:

- classify your benchmarks;
- identify which rules will apply;
- review your control and governance arrangements against the detailed rules and be ready to comply with the substantive requirements by 1 January 2018;
- determine whether they need to obtain authorisation as a benchmark administrator or merely register; and
- apply for authorisation/registration by 1 January 2020 (provided you were already providing a benchmark as at 30 June 2016).

The Insurance Distribution Directive: What can we expect?

Victor Fornasier, Partner

Quick read

- The IDD must be transposed by Member States by 23 February 2018, replacing the IMD
- Its aim is to harmonise insurance selling practices across Europe and enhance customer protection across all distribution channels
- The Directive expands the scope of the existing insurance mediation regime to cover all sales of insurance products, including insurance- based investment products
- It introduces a number of new concepts and requirements including professional training, product oversight and governance, information disclosure and management responsibilities
- For some Member States the IDD will mean significant changes to existing practices, but for others, like the UK, who had gold-plated the IMD requirements, the changes will be less significant

Will the IDD bring about significant change in the regulatory landscape for insurance intermediaries? If we look at a couple of features of the IDD in a selection of the larger European countries (France, Germany, Italy, Poland, Spain and the UK) it is relatively clear that it may bring about significant change in some Member States but not in others.

The IMD introduced the basic regulatory framework for insurance mediation across the EU in 2005. The IMD was a minimum harmonisation directive and when, in 2012, EIOPA reviewed how effective IMD was at creating standardised insurance mediation practices across Europe it found that it had been implemented across the 27 Member States in substantially different ways. The UK, for example applied the IMD selling requirements to direct sales by insurers (which was not implemented in most other EU Member States) and each Member State implemented the detailed IMD selling requirements in a multitude of ways.

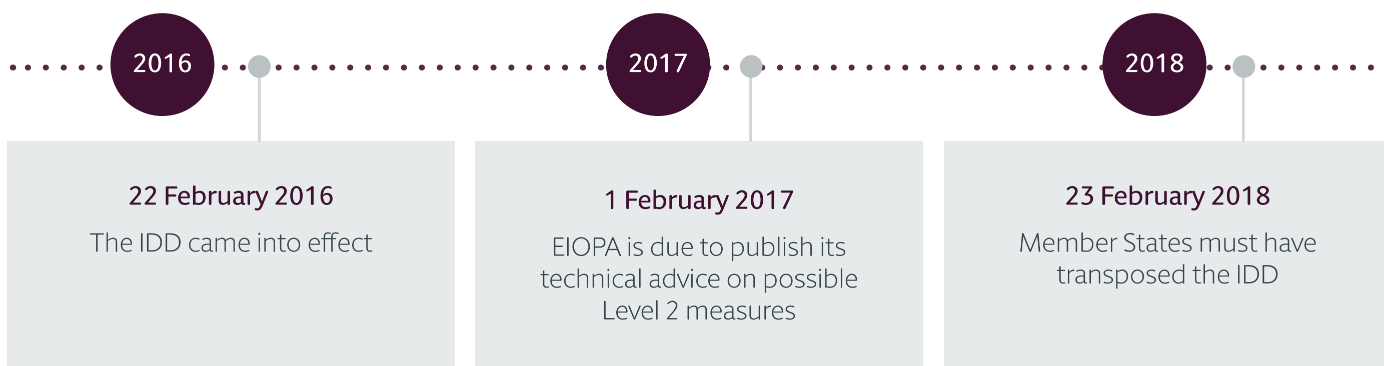
So, the IDD is being implemented with a view to harmonising insurance sales practices across Europe. Its main objective is to harmonise national provisions concerning insurance and reinsurance distribution; it is also aimed at ensuring consumer protection across all distribution channels (like insurance brokers, direct sales by insurers and more "non-core" insurance distributors like banks, travel agents and car manufacturers).

What can we expect from IDD – will it standardise practices across Member States? Here are some general thoughts on two material changes introduced by IDD: the requirement for ancillary intermediaries to become authorised and the more prescriptive information sales disclosure requirements.

One preliminary point to note is that the IDD is, itself, a minimum harmonisation directive. Member States will be freely able to enhance or gold-plate its requirements provided that the specified requirements are met as a minimum. So, for example, while the IDD selling requirements are considerably more detailed than IMD (thus making gold-plating more difficult) there is still scope for local state regulators to introduce more stringent requirements.

One significant change introduced by IDD is for local state regulators to require regulatory authorisation for "ancillary intermediaries" (loosely, those businesses or individuals that sell insurance but whose principal business is other than insurance mediation – for example, travel agents and car hire companies). Some countries like France, Spain and the UK already have (detailed) authorisation regimes for these types of ancillary intermediaries (including lighter touch conduct requirements) so the IDD will introduce little change, whereas other countries like Italy and Poland do not, while Germany only has light regulatory requirements. For these countries the IDD will considerably impact the regulatory landscape. But, the extent of the regulatory impact is not entirely clear because market practice differs in each Member State and it is not clear how certain practices unique to local markets will fit into the IDD requirements for ancillary intermediaries.

Timeline of key events



Another of the more detailed changes introduced by IDD is the prescriptive and detailed list of selling requirements. Again, there are currently markedly differing practices across Europe. In France and in Italy there are currently detailed information disclosure requirements for life insurance distribution but not for general insurance; there are detailed information requirements for both life insurance and general insurance distribution in the UK (applicable to intermediated and direct sales); similarly there already exist detailed information requirements for insurance distribution in Germany, but the implementation of IDD will expand them to direct or online distribution (which is welcomed by German insurance broker associations); in Poland there are detailed selling requirements but they are not mandatory in every case. While introducing a standardised minimum list of selling requirements is to be welcomed and can certainly provide the underpinnings of harmonised sales practices across Europe there is a question over whether the requirements are prescriptive enough to meet that aim. While the IDD selling requirements are certainly more prescriptive than IMD, they only focus for example on nine specific information disclosures in terms of insurance product detail. There is significant scope for variation in terms of local practice and local regulatory requirements – we will have to wait for the detail of the local implementing legislation in each state to see how standardised requirements will become.

Brexit

When the UK implemented its local IMD regime in 2005 it heavily gold-plated the IMD requirements, such that the IDD is not introducing too many material changes to the current UK insurance distribution regulatory regime. It is too early to tell what impact the Brexit vote will have for the UK – will the FCA reverse or modify its current regime in light of the IDD? All we have for now is a statement from Andrew Bailey, head of the FCA, on 19 July 2016 in which he appears to have confirmed that Directive requirements will continue to be met/ implemented until such time as the UK has effected an exit from the EU. If that is right, given the current timing of the Brexit negotiations, they will likely not be completed before 23 February 2018 so the UK should expect to see IDD requirements transposed into the UK regulatory regime.

This is an abridged version of an article which first appeared in Post, and can be found here.

The full article also appears in our publication: Insurance Industry Perspectives 2016 Review

Payments and banking

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CMA forces banks to cap overdraft fees and hopes technology will shake-up retail banking

Mark Jones, Partner and Richard Brown, Associate

Quick read

- After a two-year investigation, the CMA has published its final report and package of remedies on how to improve competition in UK retail banking
- When they come into force early next year, the measures will mandate that banks make a number of changes to the way they deal with each other, other financial services companies and customers
- The main reform is to require the UK's largest banking to develop an "Open Banking" framework by early 2018 – technology which the CMA hopes will give customers with more control over their accounts and financial services, and greater ability to switch provider
- Other reforms include capping unarranged overdrafts costs, auto-enrolling customers in overdraft text alerts, and requiring banks to publish service quality rankings in branch and online

After a two-year investigation into retail banking, the time for action has arrived. In 2017, the CMA will implement remedies to address the competition concerns identified which the CMA hopes will force larger banks to compete harder for customers, allow smaller and newer banks to grow, and make it easier for customers to take control over their finances and switch their accounts between providers. The package of remedies is wide-ranging. Banks and building societies will not only have to change the technology they use to interact with their customers and each other, but will also have to cap their monthly unarranged overdraft charges and inform customers when they are at risk of going overdrawn.

Over the coming months, banks will need to assess the costs and resource implications of implementing the changes (e.g. whether legacy systems can cope with the new technology) and may wish to engage with the relevant industry and governmental bodies as the finer details underpinning these remedies are finalised.

More information, easier to access

In August this year, the CMA published its final report following its lengthy investigation into retail banking. It concluded that competition for personal customers and SMEs is not working as well as it should be, with so-called 'challenger' banks struggling to win market share off the UK's more established players. The CMA does not believe the banks' size and limited number to be the problem. Rather, it considers that the low level of switching between banks is caused by customers' inability to easily access, assess and act on information regarding the cost of their banking.

In response, the CMA has proposed a wide-ranging package of remedies which aim to better inform and engage customers, prompting and giving them more confidence to switch. By focussing on transparency and customer engagement, the CMA has not pursued certain other remedies which it considered earlier in the investigation. In particular, it has decided not to break-up the UK's largest banks nor has it tried to end the 'free-if-in-credit' banking model.

In December, the CMA took the next step towards implementing these remedies by publishing a draft order and undertakings (to be given by Bacs) for public consultation, affording stakeholders the opportunity to raise issues with the detailed mechanics of the remedies. During the course of January/February 2017, the CMA will formally make the order and accept the undertakings, making the remedies binding and starting the timetable for implementation.

Banking on a technological revolution

The CMA's central reform is to mandate that the UK's eight largest banks develop 'open application program interfaces', enabling banks to share customer data with each other and FinTech businesses. It is hoped that this Open Banking revolution will remove information asymmetries, encourage innovation and boost competition. The CMA believes that Open Banking will also allow banks to fulfil their information-sharing obligations required under PSD2. The CMA is currently working with the banks to establish an entity, including in it representatives from across the industry, which will facilitate and oversee the implementation of this remedy in stages. The implementation timetable proposed by the CMA in its final report is ambitious. The banks concerned must develop and share customer transaction data via this technology by early 2018 – in time for the transposition deadline of PSD2.*

*For more detail, please see our articles on PSD2 at page 14 and Open Banking on page 54.

Other transparency and customer engagement measures include mandating banks to:

– publish information on service quality on their websites and in branch, ranking themselves against the market leaders (by Q3 2018);

– cooperate with the FCA to test event-based and periodic prompts aimed at providing customers with timely reminders to reconsider their choice of bank (starting Q1 2017); and

– in relation to SMEs, standardise account opening procedures, and help develop and promote online comparison tools (both by Q1 2018).

Engaging overdraft users

The CMA concluded that customer inertia particularly harms overdraft users who pay the most for their banking and have the most to gain from switching. A number of the CMA's remedies are targeted at giving customers more control over overdraft charges. For example, the banks will be required to:

– auto-enrol customers into an unarranged overdraft alert which gives them a 'grace period' within which they can act to avoid charges (by Q1 2018);

Timeline of key events

– work with Bacs to review the account switching process in order to see what improvements can be made to it, such as giving a firm overdraft decision prior to switching (by Q3 2017); and

– impose a maximum monthly charge on unarranged overdrafts, set by each bank, which will include all unarranged overdraft charges including debit interest and returned item fees (by Q3 2017).

For more detail, please see our article on overdrafts at page 68.

Opening the door to further regulation?

This is not the end of the road. The CMA has relied on other regulatory bodies to test and implement many of the remedies mentioned above. For example, the CMA has recommended that the FCA conduct further research to assess how banks can better engage and inform customers, such as regarding service quality, changes to their services or fees, and their overdraft use. The CMA wants to remind customers to review whether their bank account offers the best value and to switch banks if not. The FCA has responded, noting that it will carry out this research not only from a competition perspective, but also bearing in mind its consumer protection powers. Banks will therefore need to work with other regulators and governmental bodies even after the CMA's final order comes into force.

2018

January/February 2018

Banks must auto-enrol customers for text alerts which will allow customers to take action before incurring fees related to the use of an unarranged overdraft

13 January 2018

The UK's largest banks must carry out the next stage of the Open Banking framework, making customer transaction data sets available to authorised third parties

Q3 2018

Banks must start publishing service quality rankings in branch and online

The Open Banking Standard: Will one size fit all?

Charles Elliott, Senior Associate and Virginia Montgomery, Senior Professional Support Lawyer

Quick read

- The largest banks in the UK must create and publish open standards for APIs allowing third parties to initiate payments for customers by 13 January 2018
- There is a clear overlap with work to implement the access and communication requirements under PSD2 at the national level
- Questions remain over whether the UK open banking standards, once developed, will tie in with EU requirements

The Open Banking Standard in the UK is intended to establish a framework within which customer banking data can be used and accessed more easily by both financial service providers and customers. The intention is to drive greater levels of transparency to provide customers with more control over their accounts and use of financial services, and in turn to encourage financial service providers to develop better banking services and products.

As set out in our article on the CMA remedies (see page 50), the nine largest banks in the UK have been tasked by the CMA to deliver this. They are required to:

- Publish and maintain "read only data" standards by 31 March 2017: these are open standards for product, reference and performance datasets, including all prices, charges, terms and conditions together with customer eligibility criteria, in the case of loans, for sterling personal current account (PCA) and business current account (BCA) products (including overdrafts) and all SME lending products within the CMA's existing remit (including unsecured loans), and any other reference data designated by the CMA
- Create and publish "read/write data" standards by 13 January 2018: open standards for APIs which allow a third party to initiate a payment on behalf of the customer (subject to the customer's explicit consent) which will include personal current account and business current account transaction data sets.

Linking PSD2 account access and the common banking API

As noted by the CMA, there is overlap with PSD2 which, amongst other things, requires account providers to use “common and secure open standards of communication for the purpose of identification, authentication, notification, and information, as well as for the implementation of security measures, between account servicing payment service providers, payment initiation service providers, account information service providers, payers, payees and other payment service providers”.

Acknowledging the overlap, the CMA-imposed deadline for the read/write data standards is 13 January 2018, the transposition deadline for PSD2 – although notably the regulatory technical standard (RTS) covering this area will come into force at least six months later.

This overlap has also been highlighted by the FCA, which has made it clear that work on access and communication requirements under PSD2 and open banking standards should not be taken forward separately, underscoring the fact that there are benefits (to consumers and to firms) if the access required through PSD2 is made available via a common API for all accounts.

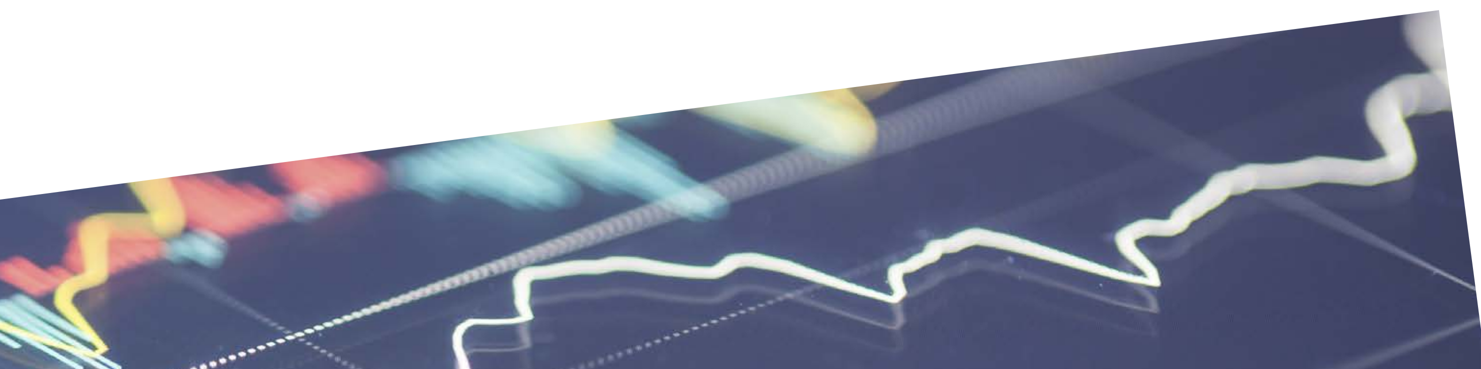
Not necessarily a common approach?

Whilst conceptually it makes sense to deal with the two together, this does create issues.

In reality, the full read/write access standards for APIs will be needed well in advance of the transposition date for PSD2. The Directive requires third party service providers (TPPs) engaged in initiating payments on behalf of customers and aggregating payment account information to be authorised or registered by 13 January 2018. These entities will expect to be able to access customer data from day one, so the APIs will need to be in place in advance if a seamless interface between account providers and third parties is to be achieved.

PSD2 applies to a wider range of currency accounts than just sterling, with the scope of payment regulation requirements now applying to transactions initiated or received in the EEA, regardless of currency. The Open Banking Standard will need to be adapted to cater for the wider range of payment account types that PSD2 will capture.

In particular, getting the UK standards ready in advance of the transposition date may require the UK to commit itself to a path that might not actually provide its banks with an approach that works throughout Europe.



PSD2 does not prescribe APIs as the channel through which access and secure communication is achieved. Whilst the first draft of the EBA's regulatory technical standards on strong customer authentication (SCA) and common and secure communication (SC) under PSD2 confirmed that this will be the likely mechanism for giving access, the EBA did not make an API the mandatory channel through which communications must be routed. Instead, the RTS merely set out requirements with which every communication solution used for secure communication between account servicing payment service providers and TPPs must comply. As such, the RTS included APIs: they did not prescribe APIs. This leaves scope for divergence.

Whilst the UK might lament the lack of clear direction laid down by the EBA, in contrast the European Parliament felt the EBA went too far in what it did say, recently voicing its concerns in a letter to the EBA around the requirement for account servicing payment service providers to offer at least one 'communication interface' for secure communication between them and third party payment services. Despite the fact that the

Open Banking and PSD2 timeline

2017

Mid-February 2017 (approx)

EBA to submit final draft RTS on SCA and SC under PSD2 to the European Commission (i.e. later than 13 January 2017 deadline)

31 March 2017

Largest UK banks to publish and maintain "read only data" standards, ie open standards for product, reference and performance datasets for PCAs, BCAs and all SME lending products within CMA's existing remit

PSD2

CMA open banking remedy

UK Open Banking Initiative

RTS do not prescribe the use of a specific industry standard of internet communication, such as open APIs, the European Parliament believes that the proposals would go against the EBA's mandate to develop RTS to secure and maintain fair competition between all PSPs and to ensure technology and business model neutrality. This was picked up in a letter from 39 European and national organisations to the European Commission which highlighted the importance of the EBA adopting a technology neutral approach and expressed concern at the prospect of the EBA prescribing any approach that was too specific.

In the absence of something more prescriptive from the EBA, and in the light of the concern voiced by the Parliament and other organisations, the question is not just whether a common approach can be achieved across the EU as originally hoped for, but whether UK banks may be required to use standards other than those created by the UK Open Banking initiative.

2018

13 January 2018
Deadline for transposition of PSD2 into national law

13 January 2018
Largest UK banks to create and publish "read/write data" standards, ie open standards for APIs including PCA and BCA current account transaction data sets

Mid-August 2018
Earliest possible effective date for EBA's RTS on SCA and SC under PSD2

2019

By 2019
UK Open Banking Working Group's target for full scope of Open Banking Standard to be reached

Unlocking competition and innovation in payments: The PSF's Strategy for the 21st century

Roger Tym, Partner and Oli Irons, Senior Associate

Quick read

- In November 2016, the PSF published its new Strategy for the future of retail interbank payment systems
- The Strategy is based on collaboration and innovation to stimulate competition in UK payments and ensure that end-users' future needs can be met
- Core deliverables include a new payments architecture in the form of a simplified payments platform and open access APIs
- The PSF has set out a roadmap and timetable, with the aim of completing the new payments architecture within the next five to ten years

The aim of the Payments Strategy Forum's (PSF) new Strategy, published in November 2016, is to simplify the current payment environment to deliver a new payments architecture within the next 5 to 10 years. This will be achieved by leveraging industry knowledge and experience and modernising the assessment and deployment of the latest technology.

The PSF was established in October 2015 by the Payment Systems Regulator (PSR) to create a strategy for payments in the UK which would facilitate innovation and encourage competition through collaboration. It is made up of a group of experts from across the payments industry with the intention of ensuring that all of the relevant stakeholders contribute to the future shape of the UK's payments systems.

A constantly changing landscape

UK payments are currently among the best and most advanced in the world. It is, however, a sector that is continuously evolving in response to changes driven by innovation and customer needs.

One of the recurring themes that we hear from clients is that payments remains at the forefront of the innovation in the broader financial services industry, with advances in mobile commerce, compliance and the use of blockchain and distributed ledger technology to the fore. It is clear that new entrants in the payments sector are continuing to challenge the established players for market share. There is increasing awareness across the sector of the need to adopt technology and innovation and to react flexibly to deliver new payment solutions. The pace at which banks can adapt to changes will always be hampered by their legacy systems, so while competition is still a key driver behind innovation it is clear that collaboration

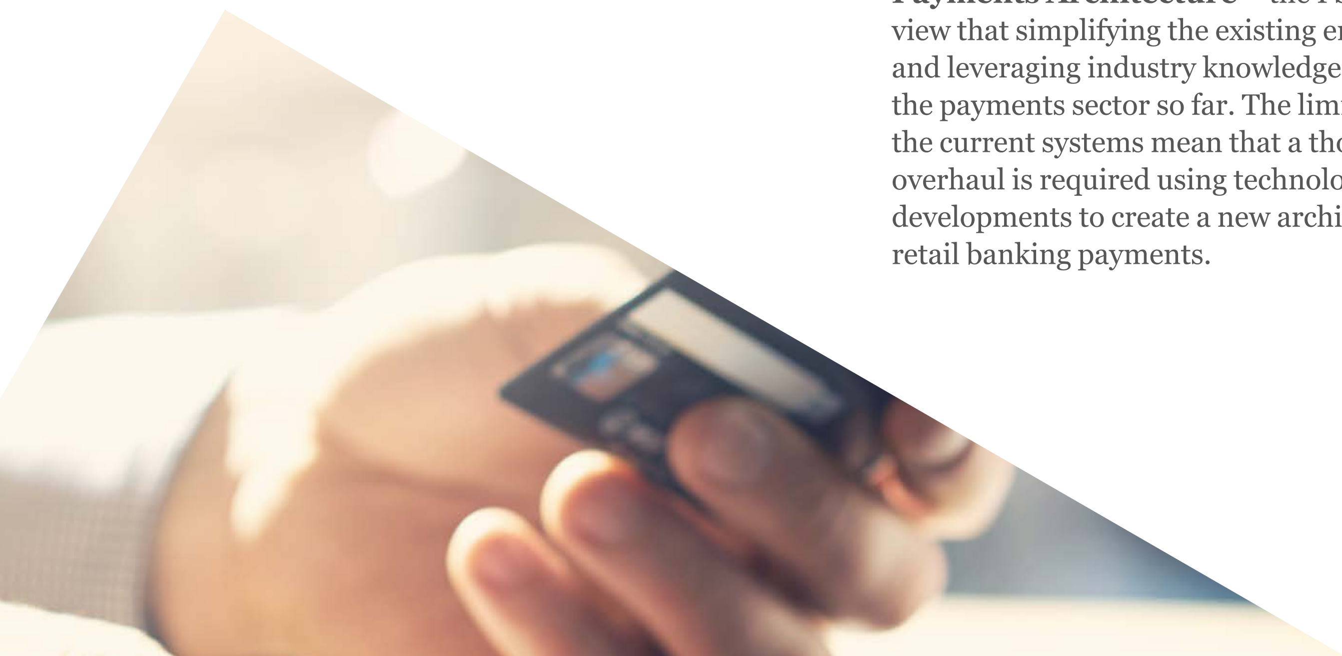
will be just as important, as already demonstrated by the introduction of Chip and Pin, Faster Payments and Paym.

The way in which regulation shapes technology and the payments market is also at the forefront of peoples' mind as the EU works to implement PSD2 and this is likely to take on increasing significance as the uncertainty caused by the Brexit vote plays out over the coming years.

Collaboration and innovation as keys to healthy competition

The Strategy will be guided by a "Vision" of the future of retail interbank payment systems that will provide simpler access, ensure stability and resilience, encourage innovation and competition and enhance adaptability and security to overcome key challenges that have been identified.

The emphasis of the Strategy remains on industry collaboration and the swift adoption of innovation to stimulate competition in UK payments and ensure that end-user needs continue to be met in the future.



The core elements of the Strategy

The Strategy aims to address the challenges facing payments and meet end user needs by:

– **simplifying the current environment** – at present, there are a significant number of payment systems operating in the UK through a variety of technologies and relying on different rules and standards. The Strategy will seek to streamline this environment by simplifying access, governance and infrastructure as well as standardising rules and developing common standards

– **leveraging industry knowledge and experience** – collaboration within the payments industry will be essential to the success of the Strategy. There are already a number of collaborative initiatives underway (Open Banking APIs and Paym on Faster Payments) and the Strategy will aim to leverage the existing capabilities and experience to bring market participants closer together

– **modernising through the deployment of the latest developments to deliver the New Payments Architecture** – the PSF is of the view that simplifying the existing environment and leveraging industry knowledge can only take the payments sector so far. The limitations with the current systems mean that a thorough overhaul is required using technological developments to create a new architecture for retail banking payments.

What are the proposed solutions?

The solutions cover four areas:

- Responding to end user needs
- Improving trust in payments
- Simplifying access to promote competition
- New payments architecture in the form of a simplified payments platform and open access APIs.

The payments roadmap – starting 2017

The PSF is continuing with its design of the simplified payments platform and has set out a roadmap and timetable for delivery of its solutions which should provide much needed guidance for industry players on the timing of implementation and consequently on their investment and participation in the current payments architecture:

- 0-3 months – delivery model, governance and funding in place
- 6-18 months – building confidence in enabling technology and opening up access to information
- 1-2 years – simplified access and engagement within the industry
- 2-3 years – building on current state
- 5+ years – future platform in place.

By the end of 2017, the intention is to have a new consolidated payment systems operator in place to continue the work of the PSF and drive the Strategy forward towards adoption of new payments architecture and the simplified payments platform. For now, collaboration with other industry initiatives such as PSD2 and Open Banking should enable solutions like Request to Pay and Assurance Data to be provided using the current systems.

The PSF Strategy is a timely intervention which will hopefully lead to the faster development and adoption of payment systems that will allow the UK to maintain its leading role in the global payments market.

PSF strategy implementation roadmap

2017-2019
Building on current state

2017-2018
Simplified access and engagement within the industry

Jan 2017-July 2018
Building confidence in enabling technology and opening up access to information

2017 · 2018 · 2019 · 2020 · 2021

January-March 2017
Strategy delivery model, governance and funding in place

End 2017
New consolidated payment systems operator in place to (i) continue PSF's work (ii) drive Strategy towards adoption of New Payments Architecture/Simplified Payments Platform

2021+
Future platform in place

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Peer to peer lending in 2017: A crowded market?

James Black, Senior Associate and Aine McEleney, Associate

Quick read

- 2017 will be an important and potentially challenging year as the P2P industry starts to come of age
- Key challenges in the year ahead include:
  - rising base rates restoring competition from banks and increasing default risk;
  - market saturation; and
  - the possibility of increased regulation.
- New FCA rules to increase lender and borrower protection, including increased disclosure and caps on investment, are likely

2016 has been an 'interesting' year for the financial services sector generally. The result of the Brexit referendum caused an immediate slump in the value of sterling and created uncertainty for providers with cross-border operations whilst the Bank of England base rate dropped to new lows. With these rock-bottom interest rates looking set to continue into 2017, the short-term outlook remains fairly bleak for traditional savers, whether individual or commercial. Against this backdrop, these savers will look for alternative investment models to secure higher returns, with the P2P industry hoping to lead the charge.

The P2P lending market has already seen dramatic growth in recent years, with the FCA estimating that the £500m invested on crowdfunding platforms in 2013, had risen to an estimated £2.7bn over the course of 2015. As the sector continues to grow and evolve at a rapid pace, what do the next 12 months hold for the P2P lending industry?

The watchful eye of the regulator

The P2P lending market has been subject to FCA regulation since only 2014. As investment continues to rise, and the scale of possible customer harm rises with it, the FCA has inevitably started to turn its attention to the adequacy of the current regulatory framework.

In July 2016, the FCA launched a Call for Input to consider whether its rules on crowdfunding need to change. Its response was published in December 2016. Some of the FCA's key focusses include:

- whether borrower protections and disclosures are sufficient as the FCA is concerned that platforms will face commercial pressures to consider higher risk borrowers and may relax their creditworthiness assessments as a result;
- the adequacy of systems and controls as markets continue to grow;
- the contagion risk of a platform failure, and adequacy of wind-down arrangements; and
- regulatory arbitrage where more complex products are wrapped up as P2P lending to benefit from lighter regulation.

It is clear that the FCA has concerns about the long-term sustainability of a model that may by its nature encourage higher risk investments by lenders who don't fully understand the risks. One particular risk to both lenders and platforms identified by the FCA is that of loan 'mis-match', where short-term lenders are matched by platforms to longer-term borrowers, creating a reliance on future market liquidity. At this stage, we cannot say with certainty what action the FCA might take but we know that action is almost certain and we know the broad areas of concern. The FCA plans to consult in the New Year on initial rule changes, and is also considering consulting on a further round of changes later in 2017.

One change it might consider to redress the balance between platforms and lenders is to mandate participation in investments by platforms i.e. to ensure that when making assessments of risk, platforms do so objectively because they have "skin in the game". That would, however, take those agreements outside the regulated activity in article 36H of the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001, which stipulates that an agreement under which the platform itself provides credit, or assumes the rights of the lender, is not an "article 36H agreement". It would also generally require platforms to apply for permission to enter into regulated agreements since such loans would be regulated if made to individuals. This is likely to meet with strong opposition from the industry.

Rule changes that are more likely to be introduced next year include the introduction of additional rules for ‘more complex’ business models (although it remains to be seen how the FCA will define that), limits on the amount that individuals can invest in P2P lending and possible FSCS protection. Additionally, the FCA is likely to consult on changes that would eliminate the differences between CCA regulated loans and non-commercial loans and which would introduce or extend regulated mortgage contract type protections to secured P2P loans.

What if interest rates do go up?

As relative newcomers to the lending market, P2P lenders have largely operated in a low interest environment. If interest rates did go up, what would this mean for the industry?

An obvious concern for platforms would be the return of increased competition from high street banks, as borrowers start to access lower risk investments (protected by statutory guarantees) for increased returns. However, the risk of rising defaults is likely to be of more immediate concern. Where borrowers hold P2P loans as well as other forms of credit, the likelihood is that as loan repayments increase across all their borrowing, borrowers will prioritise secured loan repayments where their homes are potentially at risk. This could see a steady increase in default risk on P2P loans, although platforms will generally have confidence in their sophisticated credit assessments and underwriting criteria.

New entrants are emerging

Competition in the marketplace is at an all-time high. In its Call for Input, the FCA noted that there are now over 100 platforms in the market seeking authorisation. There has been some talk of the market ‘overheating’ but it remains to be seen whether that is the case or whether, based on the rapid growth of investment, there is plenty of room for everyone. That may depend on the wider economic situation and any movements in base rate.

The industry continues to evolve and expand; whereas the lender ‘peers’ used to be individuals, we have seen a steady increase in institutional lending with ‘P2P’ now sometimes referred to as ‘I2P’. This raises concerns that institutional lenders with large reserves to invest will have first pick of borrowers, forcing individual lenders to lend to higher risk borrowers.

Whatever happens, the next year is likely to be an important and potentially challenging one for the P2P industry as it adapts to potentially greater regulation and increased compliance costs and deals with the influx of competition.

Change is coming for overdrafts

Stephen Timbrell, Associate

Quick read

- Changes are coming for overdrafts in 2017 from both the CMA and FCA but the detail and extent remain unclear
- The FCA may adopt a different approach to the CMA
- FCA proposals on alerts may only be formed once banks have already implemented the CMA's requirements
- Despite the CMA's introduction of the maximum monthly charge for unarranged overdrafts, an additional cap set by the FCA remains a possibility
- The FCA will be reviewing account opening procedures and forming proposals on how to highlight overdraft features to customers. Banks will be keen to ensure these are sensitive to different customer application channels

Since publication in August 2016 of the CMA's long-awaited report into competition in the banking industry (see note on page 50), it has been clear that 2017 will be a year of change for overdrafts.

However, the full extent of that change remains uncertain and the FCA is also looking at similar issues and may take a different approach to the CMA.

What is happening and what are the challenges?

CMA recommendations

In its report, the CMA proposed that:

- banks must provide and automatically enrol all customers in an unarranged overdraft alert
- banks must provide and alert customers to grace periods from unarranged overdraft charges
- the FCA undertake research and implement measures to increase customer engagement with their overdraft usage and charges
- the FCA looks at the current account opening process to increase customer engagement with overdraft features and their relevance to the customer
- banks must introduce a maximum monthly charge (covering all interest and charges) for use of an unarranged overdraft
- following the introduction of open APIs, the FCA considers requiring banks to offer online tools to indicate whether a customer is likely to be eligible for an overdraft

At the end of last year, the CMA consulted on a draft order implementing, amongst other things, its recommendations on overdraft alerts and charges. The CMA has until 8 February 2017 to make this order. Once made, according to the draft timetable, banks will then have 6 months (until July/August 2017) to implement a maximum monthly charge and 12 months (until January/February 2018) to implement and enrol customers in an alert programme.

Be alert and watch this space

While many banks already offer customers alerts on a voluntary basis, these will need to be adapted to comply with the CMA's requirements. As well as identifying whether they have accurate account holder information to provide the alerts, banks will need to review and consider changes to their product terms and data consents to enable alerts to be made.

In its response to the CMA's report, the FCA agreed to conduct research and testing to design effective overdraft alerts. The FCA will do this during the course of 2017 but does not expect to make proposals before 2018.

As banks will be making arrangements to implement the CMA's requirements in time for early 2018, they will be concerned to ensure that any proposals made by the FCA do not cut across those already made by the CMA.

The Maximum Monthly Charge – a cap set by banks or the FCA?

Since publication of the CMA's report, there has been criticism in the press and from the Treasury Select Committee that the CMA's recommendations do not go far enough in regulating overdraft charges and that the FCA should impose a cap on these charges.

It is not clear whether the FCA will seek to do this, but it is clear from its separate Call for Input on high-cost credit (which invites views on key issues relating to arranged and unarranged overdrafts) that it is considering overdrafts as, and comparing them to other forms of, high-cost credit, such as payday loans where a price cap already exists.

While the FCA has committed to reviewing the cap once it has been in place long enough to measure its impact (around late 2018), it has stated that the CMA's recommendations will take time to change behaviour and appears prepared, given its broader remit compared to the CMA, to take action sooner depending on the responses to its Call for Input.

Whether the FCA takes a different approach to the CMA on overdraft charges remains to be seen. Despite this uncertainty, banks will still need to review their existing charging models to implement the cap and will be keen to engage with the FCA on the impact that further changes to overdrafts could have on customers.

Account opening

In its response to the CMA's report, the FCA also agreed to look at current account opening procedures during 2017 to identify improvements in how overdraft features are highlighted to customers.

Different information requirements currently apply at the contracting stage depending on the channel by which a customer applies for an overdraft. Banks will therefore be keen to work with the FCA to ensure that, while proposals address any issues regarding customer awareness of overdraft features, they also reflect the different legal and operational requirements of different channels.

Eligibility tools

The FCA will consider whether to introduce overdraft eligibility checkers. However, it will not do this until the Open Banking Standard has been implemented in January 2018.

With all of the above initiatives in the pipeline, it looks like overdrafts will be in the regulatory spotlight for the foreseeable future.

Timeline of key events

FCA initiatives

CMA retail banking remedies

2018
January / February 2018
Banks to introduce alerts under CMA Order
At some point in 2018
FCA to make proposals on alerts
2018
FCA to consider the introduction of online eligibility checkers
Late 2018
FCA review of maximum monthly charge

Consumer credit: Is 2017 the year of the consumer?

Elizabeth Greaves, Associate and Peter Finch, Associate

Quick read

- Focus on vulnerable customers and those with large outstanding balances
- Competition for traditional lenders from the FinTech sector with the potential for greater access to low cost credit
- Brexit and the review of the CCA retained provisions provide scope for a fresh approach to communicating with borrowers

2016 was a busy and challenging year for the FCA in supervising consumer credit. The number of firms in the sector significantly outstrips all other areas regulated by the FCA and there is still work to do to bring all former OFT regulated firms through the FCA authorisation gateway. Alongside this there have been a significant number of new authorisation applications with firms seeking to enter the market. The supervision burden is significant.

The FCA is also concerned to ensure that the credit regime works effectively with the right consumer outcomes. It published its much awaited credit card market study, as well as recently publishing a Call for Input on a cap for high-cost short-term credit. Although the FCA has always aimed to protect consumers, this seems to be of increasing importance in a world where average outstanding debt balances are at an all-time high, and there is a large range of expensive credit options easily available.

With the publication of a number of consumer-focussed consultation papers expected in early 2017, it seems the FCA is more eager than ever to place the onus on lenders to ensure consumers understand their agreements and are not adversely impacted by spiralling debts.

Focus on vulnerable customers

The Money Charity's most recent statistics suggest that each UK household has an average of £6,991 of outstanding unsecured debt. That's a total of £188.7bn of outstanding unsecured debt in the UK, including £65.7bn of credit card debt alone.

With ever-increasing balances, the FCA is becoming more focussed on consumer outcomes and protecting those who are less financially savvy or could be considered vulnerable. This is a trend which is looking certain to continue throughout 2017, with the imminent publication of various consultation papers focussed on consumer protection. Most notably, this includes a consultation on creditworthiness and affordability, and another on long-term persistent debt. Together, these will outline rules requiring firms to take action to intervene on an escalating basis when a consumer has been persistently indebted for a period (for example, to offer them a more structured repayment plan) and rules requiring firms to identify early signs of debt problems and to step in accordingly.

The FCA appears eager to shift the burden of financial responsibility onto lenders and to ensure that financial institutions play a bigger part in minimising consumer detriment. This may well result in increased resources and costs from financial institutions as a consequence of more pre-emptive monitoring of consumer behaviour and proactive intervention being required.

The challenges of FinTech

Those consumers who are most at risk may soon be able to take advantage of the increased availability of alternative finance solutions. New FinTech products including P2P lending and employee loans repayable via payroll have low overheads and more automated processes – including in some instances sophisticated credit scoring techniques. The aim of lenders in this sector is to make the cost of credit lower than traditional sources of credit as well as help borrowers build their credit history. This new wave of lenders may reduce reliance on more expensive existing sources of credit.

It will be a challenge for small FinTech providers to break into mainstream markets and gain the confidence of consumers who would otherwise use recognised high street banks and lenders. Entry of these new players to the market also brings fresh regulatory issues for the FCA. With the increased availability of innovative lending solutions, the FCA will need to consider the scope and application of the existing consumer credit regime. Although specific rules have already been put in place for P2P lending platforms, the FCA may need to expand its rules to ensure that all appropriate consumer protection measures are in place for non-traditional credit providers which currently may be falling in between legislative gaps. The FCA continually stresses that it wishes to encourage, rather than stifle, innovation, and it will be interesting to see how a balance is struck between protecting consumers and championing small FinTech start-ups.

Brexit – will the CCA be retained?

Another item that will no doubt be high on the FCA's agenda in 2017 will be the implications of the Brexit vote. Little is known as yet about the exact approach which will be taken by the UK Government, but it will be interesting to see how this impacts the FCA's work on CCA retained provisions. The FCA must report to HMT on its review of the retained provisions by April 2019. With potentially increased scope to leave the restrictions imposed by the EU Consumer Credit Directive behind, the FCA may be able to take a broader approach to reform than previously anticipated. Whilst it is unlikely that the FCA will make wholesale changes the greater flexibility may allow it to give lenders more freedom in how they communicate with borrowers allowing lenders to use the flexibility of smarter communications to ensure borrowers properly understand the agreements they are entering into.

Silver service: Don't forget about your ageing customers

Eimear O'Brien, Associate

Quick read

- Don't just design products and services for the 'typical' consumer - be flexible enough to capture individual situations
- Older consumers are diverse and one size does not fit all for our ageing population
- Consider whether there are alternative channels for people who cannot get online

The terms 'disruption', 'transformation', 'automation' and 'innovation' have become synonymous with the financial services industry.

Technology is transforming financial services and there is an enormous drive on firms to increase their digital offerings. Digital-only providers are targeting the increasing number of customers who use mobile and online banking to manage their finances.

There is no doubt that digital drives efficiency, cuts overheads, increases revenue and enhances (for most) the customer journey. But what about vulnerable customers and, in particular, the ageing population who sometimes struggle to use mainstream banking channels?

The Office for National Statistics' annual survey of internet users in the UK has found that just four in every 10 adults aged 75 and over have used the internet in the last three months. Since the survey began in 2011, adults aged 75 years and over have consistently shown the lowest rates of internet use.

FCA Discussion Paper on Ageing Population and Financial Services

The FCA has recognised this issue and in its February 2016 FCA Discussion Paper on Ageing Population and Financial Services (DP 16/1), it notes that the ONS forecasts an increase of over 1 million in the number of people over 65 by 2020 and that the over 85s are the UK's fastest growing age group.

The FCA has around five staff working on a full-time basis on its ageing population strategy. The project looks specifically at whether the financial services industry meets the needs of older consumers.

DP 16/1 encourages firms to do more to support the UK's ageing population and ensure that consumers can access the financial products and services they need at every stage of their life. Among other things, DP16/1 examines how older consumers assess their own needs, how well financial products and services meet the needs of older consumers and the kind of borrowing challenges that older consumers face.

One message comes through loud and clear: older consumers are diverse and one size does not fit all for our ageing population.

In September 2016, the FCA published an update on its ageing population work stating that it has decided to undertake focused work in six key areas to supplement work already ongoing across the FCA (such as work on access and vulnerability).

The ageing population work plan will look at a number of areas including: (i) what happens as the mind ages, and what this mean in terms of products, services and distribution; (ii) how firms can help consumers to better engage with products and services in retail banking; and (iii) how the FCA can build on existing industry initiatives to facilitate mortgage lending to older consumers.

The FCA will look in more detail at markets that restrict access based on age, and explore whether voluntary initiatives on transparency and signposting may help consumers to understand the options open to them at every age. The ageing population work will consider how best to protect older people in vulnerable circumstances, including those who require assistance from a third party when managing their finances.

An FCA Strategy on the Ageing Population will launch in summer 2017. This strategy will make recommendations about how the industry can improve outcomes for older people, including whether regulatory settings need further review. It is about practical experience and consumer research around what people encounter with the FCA using its softer convening powers.

What other regulatory or legislative initiatives are there to include the ageing population?

The Payment Accounts Directive (PAD) – right to a basic bank account

In the area of financial inclusion, PAD seeks to improve access to basic bank accounts to ensure that all consumers legally resident in the EU have access to basic banking services, whatever their financial situation, to reduce financial and social exclusion. Article 14 of PAD enshrines the principle that banks must not discriminate against consumers legally resident in the EU when they apply for or access a payment account in the EU for reasons connected with their nationality, place of residence, race, age, sexual orientation and disability, amongst others.

BBA Industry Protocol on Branch Closures

The BBA Industry Protocol on Branch Closures was launched in May 2015 to help minimise the impact of bank branch closures on customers and local communities. The protocol outlines how banks should ensure that customers have suitable alternative ways to bank before a branch is closed.

The protocol requires that after a bank has decided to close a branch it should engage with key local stakeholders in considering issues including the age profile of branch users and the number of vulnerable and other branch users who are more dependent on their branch than others (e.g. because they are disabled, older, digitally excluded and/ or lower income customers).

Banks are required to take into account the local availability of broadband and access to alternative ways to bank for vulnerable customers.

On 10 November 2016, the BBA published a review of its access to banking protocol conducted by Professor Griggs. In his review, Professor Griggs recommends changes to the protocol's contents on pre-closure assessments and on community engagement.

Treasury Select Committee: Financial Exclusion

The House of Lords appointed a Select Committee on Financial Exclusion in May 2016 to consider financial exclusion and access to mainstream services. The Committee was appointed with a reporting deadline of 31 March 2017 to examine the following issues:

- Who is affected by financial exclusion?
- Do different sectors of society experience financial exclusion in different ways?
- To what extent, and how, does financial exclusion affect those living in isolated or remote communities?

The Committee has heard evidence from a number of banks as well as other government and industry bodies such as the Department for Work and Pensions, The Money Advice Service and the FCA.

In an oral hearing, Lucy Malenczuk, Senior Policy Manager of Age UK stated that firms need to consider not only whether services work for older customers but also whether they know how to use them. She believes for older customers, the focus should be on accessing cash and making it easier to register powers of attorney.

What does all this mean for product design going forward?

Products should be designed inclusively with the vulnerable and the ageing population in mind. They should also encourage people to get online, by taking an inclusive approach and design. With the increased focus on digital offerings, don't leave your older customers behind!

Mortgages: A fresh look?

Roger Tym, Partner, Neelam Hundal, Associate and Michael Oxlade, Associate

Quick read

- Firms should continue to assess the effectiveness of MCD implementation projects
- The FCA market study represents an opportunity to engage with the FCA to improve consumer outcomes and competition in this sector
- Firms will need to consider the impact of the FCA rule changes and remediation initiatives

2017 promises to be an interesting year in the mortgages market. The Mortgage Credit Directive (MCD) was transposed into national law on 21 March 2016, but its implementation was challenging, requiring firms to overhaul existing documentation as well as internal practices and procedures. Now that the dust has finally settled, in 2017 we expect the challenges created by the new regime will begin to surface more clearly, especially in terms of how the mortgages and consumer credit regimes fit together, and the operational complexities of the new regime on lenders' operations.

This year will also bring a number of new challenges and opportunities. The FCA's terms of reference for its market study are focussing on the consumers' ability to make effective choices and the impact of commercial arrangements in the supply chain on competition in the mortgage sector. The FCA has also implemented its rule change on how to treat customers in payment shortfall. This will require firms to investigate and assess how their current systems work as well as consider whether remediation is needed for historic conduct.

An examination of the mortgage

In May 2016, the FCA published FS 16/3, its Feedback Statement to the "Call for Inputs on competition in the mortgage sector" where it announced its intention to undertake a targeted market study focused on customers' ability to make effective choices.

The FCA has been carrying out more detailed scoping work and recently published its proposed Terms of Reference. The review will focus on first charge residential mortgages although the FCA may consider whether information or findings are also applicable to other markets. As part of the study, the FCA will also look at the impact its current rules have had on the level of intermediation (and whether this is in customers' interest) and whether there are opportunities for technological solutions to any identified problems.

Should lenders be treating borrowers more fairly?

In 2010, the FSA introduced an MCOB rule preventing firms from automatically capitalising a payment shortfall where the impact on the customer would be material. The purpose of the rule was to stop firms automatically capitalising customers' payment shortfalls without considering their individual circumstances (known as 'automatic capitalisation'). This rule built on existing established principles such as the duty to treat customers in arrears with forbearance and treating customers fairly.

In October 2016, following a market study, the FCA found that some firms have still been automatically including customers' payment shortfall balances within contractual monthly instalment calculations, following a calculation trigger such as an interest rate change. The payment shortfalls have been treated as outstanding with firms continuing to pursue the payment shortfall balance separately through their collections processes, treating the balances as immediately due and payable. The FCA considered that these practices were driven by a combination of systems which had not been set up to calculate in line with the FCA's rules, together with underlying customer terms and conditions – perhaps reflecting how difficult it is to change legacy systems and older product terms.

The FCA is now keen to stamp out this approach and firms will be expected to remedy this historically and moving forwards. The FCA's guidance consultation sets out a "remediation framework" for historic cases. This applies to those with current or past payment shortfalls on a regulated mortgage or home purchase plan to which the relevant MCOB rule applies (since 25 June 2010), where firms have automatically included the payment shortfall balance in calculating the contractual monthly instalment. Closed mortgage accounts and second charge mortgages where the automatic calculation occurred after 21 March 2016 are in scope, but buy-to-let mortgages fall outside of scope. Firms will therefore need to actively consider whether their historic treatment of customers in arrears will require any remediation action. The guidance consultation closes on 18 January 2017. Firms should watch out for the FCA's final guidance, which will be published in the first part of the New Year.

The FCA is also reminding firms that their current practices should be aligned with the FCA's rules. In June 2016, the FCA consulted on changes to the wording of the rule in MCOB 12.4.1BR on the allocation of payments received from customers with a payment shortfall and an amendment to the Glossary definition of 'payment shortfall'. Although these changes were published in a consultation paper titled 'Minor Handbook changes related to mortgage borrowers with a payment shortfall', they could have potentially significant systems implications for firms, depending on how systems are currently configured to deal with payment shortfalls. The final rules are not in place and the FCA's aim is to ensure all firms allocate payments in such a way as to minimise the payment shortfall going forward. Firms will need to look at how they allocate payments where there is a shortfall to ensure this is being achieved.

Firms operating in this sector will be keen to understand how they will compete in the future to attract new borrowers as well as looking back at past practices to ensure the continued fair treatment of their existing borrowers.

Funds

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Investment funds: What are the key trends and developments in 2017?

Nicholas Holman, Partner and Nora Bullock, Senior Professional Support Lawyer

Quick read

- As well as getting ready for Brexit, funds and managers should be prepared for increased regulatory scrutiny in 2017, such as in the areas of:
  - investor transparency (e.g. PRIIPs and on-going SEC enforcement activity were centred around lack of transparency);
  - conduct of business rules, including inducement rules (MiFID II may be gold-plated in the UK so that it applies to AIFMs and UCITS ManCo's even where they don't do MiFID business); and
  - requirements in relation to beneficial ownership registers (MLD4 implementation will require changes to the entities covered by the PSC regime).
- On the positive side:
  - the CMU and related measures are helpful as they are intended to remove regulatory barriers to cross-border investment
  - the expected introduction of the new UK Private Fund Limited Partnership is also welcome, in particular the introduction of a 'whitelist' of activities that limited partners can safely engage in whilst still retaining limited liability
  - the AIFMD will be subject to review and we hope to receive more clarity around the scope and timing of the third country AIFMD passport (although this is likely to be further delayed as a result of Brexit)

As well as getting ready for Brexit, funds and managers should be prepared for increased regulatory scrutiny in 2017, such as in the areas of investor transparency, conduct of business requirements and beneficial ownership registers. But there are also positive developments, such as the introduction of the Private Fund Limited Partnership and CMU-driven changes, intended to improve cross-border investment.

Brexit

With the Government stating that Article 50 will be triggered by the end of March 2017, the clock will start ticking for fund managers to complete their assessment of the likely impact of Brexit and implement plans to protect against a 'hard' Brexit as much as is reasonably possible. It will be necessary to think about building in flexibility in fund structures and fund documentation to accommodate Brexit, for example the ability to move UK domiciled funds to Ireland or Luxembourg. It is helpful that the AIFMD contains a third country passport which, on paper, should be useful in the event of a 'hard' Brexit. However, the introduction and timing of the third country AIFMD passport is uncertain and will require UK equivalence. For those managers who wish to access EU investors through a passport (or use fund vehicles that require EU domiciles, such as European Long Term Investment Funds (ELTIFs), European Venture Capital Funds (EuVECAs) and European Social Entrepreneurship Funds (EuSEFs)), it will be necessary to set up a presence in the EU and make arrangements for delegation back to the UK business. For more information, see our Brexit reports on the Potential Impact on Funds and Practical Steps, and Impacts and Actions for Listed Funds.

AIFMD Review, Third Country Passport and Delegation

In 2017, the AIFMD will be subject to review. This was due to happen under the watchful (and fund manager-friendly) eye of the UK's presidency of the EU, but of course Brexit changed that. Some positive developments are in motion, for example removal of national barriers (e.g. material fee payments) to passporting by EU managers of EU domiciled alternative funds. However, the positive progress that was being made towards a passport for non-EU funds and managers seems to have come to an abrupt halt, no doubt because it has material implications in the context of the upcoming Brexit negotiations about the degree to which the UK will have access to the single market. It will be interesting to see how this develops during the upcoming year, in particular for managers based in places like the Channel Islands who currently feel that positive momentum has evaporated, to their future detriment.

Another AIFMD-related item to watch concerns rules relating to delegation: ESMA recently (and controversially) suggested that all AIFMD activities in Annex 1 that are not performed by the AIFM, such as administration and marketing, must be treated as having been delegated by the AIFM. Current practice is often that the AIF will appoint third parties directly. It remains to be seen what approach the FCA and other national regulators will take, as the view expressed by ESMA is contrary to the approach advocated by the FCA and others. For now, managers should sit tight and just observe how the debate unfolds, but the worst case scenario involves managers having to spend time in 2017 making changes to whole swathes of fund documentation and supporting contracts.

CMU

Many ongoing and recently introduced EU measures form part of the CMU and are meant to improve cross-border investment and reduce barriers. CMU measures we expect to see developed in 2017 include:

- Some relaxation of the rules in the EuSEF regime (for social entrepreneurship funds) and the EuVECA regime (for venture capital funds) to try to improve the popularity of these funds
- The new Prospectus Regulation, which has many benefits for listed funds, including simplified secondary issuance and higher limits to the prospectus requirement. It is also possible that AIFs, including closed ended investment companies, will end up entirely outside the scope of the Prospectus Regulation, which has been suggested by the Parliament (but might be resisted by the Commission or the Council). It remains to be seen what the position will be in the final text, but this is definitely something to watch.

Other EU measures such as early stage proposals for an EU framework for loan originating funds appear to be a double-edged sword – positive in that it seeks to harmonise the regime across the EU, but negative as it will potentially impose additional requirements over and above the AIFMD and also risks negating the very helpful deregulation that has happened in the past 18 months in many EU countries in this area. On the one hand, the EU economy needs non-bank lenders to finance growth-generating activities, on the other hand some regulatory bodies are suspicious of non-bank lending and are keen to regulate it in the same way that banks are regulated. The latter approach could be bad news for many different types of direct lending funds.

Investor disclosure

2017 will see the (delayed) introduction of measures (known under the title of "PRIIPs") that are designed to protect retail investors through improved pre-investment transparency, notably via the three page KID. This will be a completely new regime for AIFs when it comes into force and will present some challenges in describing inherently complex products in a simple way (see our PRIIPs and KIDs article on page 86). Also funds and managers may need to comply with MiFID II requirements (such as rules on inducements) even where they do not do MiFID business as the FCA has indicated that it will 'gold-plate' the MiFID II conduct of business rules.

Other changes

In 2017, it will also be necessary to watch the implementation of the Fourth Money Laundering Directive (MLD4) which requires beneficial ownership registers. MLD4 potentially extends the PSC ('persons with significant control') regime to further entities, such as Scottish limited partnerships and AIM listed entitles.

From a domestic UK perspective a new Private Fund Limited Partnership will be introduced, which is welcome as it should reduce some of the administrative burden associated with operating these types of funds. Helpfully, the changes include a "white list" of activities that limited partners are permitted to do without losing their limited liability (see our Limited Partnership Reforms article on page 90).

PRIIPs and KIDs: How are they relevant to funds?

Erik Jamieson, Partner, Nora Bullock, Senior Professional Support Lawyer and Ollie Phillips, Trainee

Quick read

- The European Parliament voted to delay the Regulation on KIDs for packaged retail and insurance-based investment products by one year to 1 January 2018
- All self-managed funds, fund managers and distributors of interests in funds that could have retail investors should consider what steps they need to take to comply in good time before 1 January 2018

The aim of the PRIIPs Regulation is to help retail investors to better understand and compare the key features, risks, rewards and costs of different retail products, by requiring that retail investors are provided with information in a short, consumer-friendly document.

PRIIPs include all (new and existing) AIFs, regardless of domicile, that are available to retail investors in the EEA. From 1 January 2018, for each such PRIIP, retail investors must be provided with a standardised KID pre-investment.

While the primary obligation to prepare a KID falls on 'manufacturers' of PRIIPs, such as AIFMs and self-managed AIFs, any person selling or advising on a PRIIP to retail investors will be under an obligation to provide a copy of the KID. A PRIIP manufacturer is any entity that (a) manufactures PRIIPs or (b) makes changes to an existing PRIIP including, but not limited to, altering its risk and reward profile or the costs associated with an investment in a PRIIP. Neither the PRIIP manufacturer nor the PRIIP need to be EEA entities to be caught by the PRIIPs Regulation. All self-managed funds, fund managers and distributors of interests in funds that could have retail investors in the EEA should consider what steps they need to take to comply in good time for 1 January 2018. Note that retail investors include sophisticated investors and high net-worth individuals as well as local and public authorities. However, it is possible to opt up retail investors to professional investor status, but, in order to do so, these investors must comply with onerous quantitative and qualitative tests.

Although the PRIIPs Regulation does not itself distinguish between listed and private funds, because of the way listed funds are marketed and freely traded the PRIIPs Regulation should be of particular interest to listed funds, their managers/advisers and book runners.

The PRIIPs Regulation sets out the format and content of a KID that must be provided to retail investors who are considering whether to buy a PRIIP. The KID is intended to be a simple, clear standalone document, which will be no more than three A4 pages long. Content-wise, the PRIIPs KID is similar to the UCITS Key Investor Information Document, but the PRIIPs KID will contain questions, such as: What is this product? What are the risks and what could I get in return? What happens if the manufacturer is unable to pay out? What are the costs? How long should I hold it and can I get my money out early? How can I complain? The cost disclosures are very detailed (and potentially different from MiFID II cost disclosures). More detailed rules on preparing KIDs are due to be contained in a Delegated Regulation setting out regulatory technical standards (RTS).

Where are we now and when do we have a final PRIIPs framework in place?

After the European Parliament's rejection of the RTS on the format and content of the KID, both the Parliament and a large majority of member states also called for a postponement in the entry into application of the PRIIPs Regulation. The Commission is now working with the ESAs (that is, the European Banking Authority, the European Insurance and Occupational Pensions Authority and ESMA) to resubmit the revised RTS. In particular, the Commission has now asked the ESAs to make targeted changes in certain areas (including multi-option products and performance scenarios).

The Commission's expectation is that the revised PRIIPs framework should be in place during the first half of 2017 and apply as of 1 January 2018.

Liability and penalties

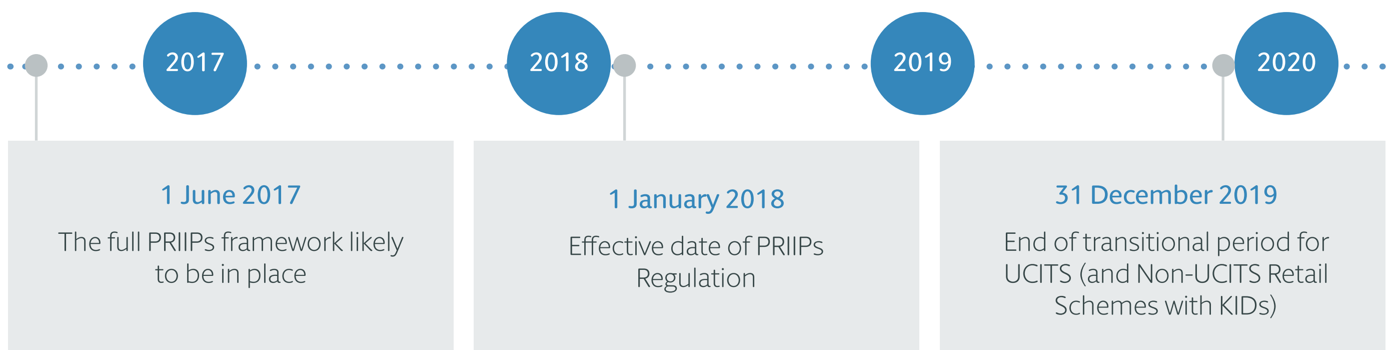
If a retail investor can demonstrate loss resulting from reliance on a KID (including a translation) that was misleading, inaccurate or inconsistent with relevant parts of legally binding pre-contractual or contractual documents or with the content requirements, they can claim damages from the PRIIP manufacturer in accordance with the relevant national law (e.g., usually English law for a typical London listed fund). The right to claim damages cannot be waived in the investment contract.

Otherwise, each member state must set its own administrative sanctions that are "effective, proportionate and dissuasive". The Regulation allows these to include orders prohibiting the marketing of a fund. Administrative fines can be up to €5m, 3% of the total annual turnover or twice the profits gained or losses avoided because of the infringement, or even higher if required by a member state.

The impact of Brexit

Since the UK would not leave the European Union until two years after an Article 50 notification has been made, those affected will need to comply by 1 January 2018 even if their only EEA nexus is the UK. Even if the UK did not remain an EEA state after leaving the EU, funds with other EEA retail investors would still need to comply. For equivalence purposes, the UK could also implement rules similar to the PRIIPs Regulation into its national legislation.

Timeline of key events



What to do now

Manufacturers of PRIIPs

- Start soon to prepare the KID so that it is ready for 1 January 2018 (especially if it needs to be translated into other languages by then too)
- Before commencing any marketing on or after 1 January 2018, obtain advice from EEA member states on whether the KID needs to be filed with the local regulatory authority first

Persons advising on or selling PRIIPS

- Contact the relevant PRIIP manufacturer to ensure that a KID will be available from 1 January 2018
- Consider amending sales procedures to take account of the PRIIPs Regulation requirements

Limited Partnership reforms: The Private Fund Limited Partnership

Erik Jamieson, Partner, Nora Bullock, Senior Professional Support Lawyer and Christopher Morris, Trainee

Quick read

- The UK Government are poised to implement a significant reform to limited partnership law with the introduction of a new vehicle, the Private Fund Limited Partnership
- This new model aims to modernise the limited partnership with a particular focus on the private equity and investment funds market
- The forthcoming legislation will introduce a non-exhaustive 'white list' of permitted activities providing limited partners with greater certainty in preserving their limited liability status
- The requirements for limited partners to make capital contributions and repay capital contributions that have been withdrawn will be removed
- Further, the legislation will remove administrative and disclosure requirements for the vehicle itself and for Companies House

Next year, the UK Government is expected to overhaul limited partnership legislation for private funds, through the proposed introduction of 'Private Fund Limited Partnerships' (PFLPs). The move follows a consultation launched in July 2015 by HM Treasury to modernise the limited partnership model which is predominantly used in the private equity and alternative investment funds space.

The Government is expected to amend the Limited Partnership Act 1907 via a Legislative Reform Order to incorporate the new PFLP vehicle. Any limited partnership that qualifies as a "collective investment scheme" under the FSMA (or would do but for statutory exceptions to the definition) will benefit from the new regime.

Modernising limited partnership law

Reforms have been welcomed by practitioners seeking the removal of uncertainties and inconveniences in existing UK limited partnership law. The Government has reacted to other competitor jurisdictions that have recently adopted legislation to improve their own offering. Examples include Jersey and Luxembourg who have implemented legislation allowing partnership vehicles with separate legal personality (akin to the Scottish model), although the PFLP will not adopt this characteristic.

The main reforms to be enacted under the LRO are as follows.

The "white list" of permitted activities

One of the fundamental principles of the current limited partnership regime in the UK is that limited partners will lose their limited liability status if they take part in the day to day management of the partnership. However, this principle is not supported by a comprehensive or legally certain definition of 'management'. This causes problems for limited partners and their advisers when advising on the permitted scope of activity for limited partners.

The draft reforms incorporate a non-exhaustive 'white list' of activities that PFLP limited partners are permitted to engage in without risking their limited liability status. White lists have been introduced in some other jurisdictions and the introduction to the UK system should provide welcome clarity to limited partners and their advisers. On the other hand, fund managers may not be so welcoming of increased limited partner engagement with management activities, and are likely to be keen to emphasise that the list is permissive rather than a set of mandatory investor rights.

There have also been calls for a 'black list' of prohibited activities to provide further clarity as a helpful counterpart to the 'white list'; however this is not in the Government's current proposals.

Capital contributions

In addition to reduced disclosure requirements relating to capital contributions, the requirement for limited partners in PFLPs to make capital contributions will be removed altogether. Similarly, limited partners who withdraw capital contributions from PFLPs will no longer be liable to repay withdrawn capital contributions. However the current law will apply to capital contributions that were made to existing limited partnerships before they opted in to the PFLP rules.

Administration and eligibility

With a view to modernising limited partnerships, the reforms tackle systemic administrative burdens with measures including:

- the removal of some of the details that must be specified when a private fund established as a limited partnership is registered (including the amount of capital contributed - reducing disclosure burdens and protecting investor confidentiality) and when such details change;
- the removal of the requirement for the advertisement in the Gazette of transfers of limited partnership interests; and
- the removal of partners' duties to render accounts and information and to account for profits made in competing businesses.

Whilst some administrative hurdles have been removed, new rules introduced with the PFLP must be followed closely to ensure the partnership is correctly registered. The application for registration must be accompanied by a confirmation from the general partner that the eligibility criteria have been satisfied.

Particular care will be important when setting up the limited partnership given the need to satisfy the conditions from the date of application for registration. Limited partnerships that have been registered before the effective date of the new rules, but which meet the conditions for PFLPs, will be able to benefit from the new regime and may apply to Companies House to convert to PFLP status at any time from the date of the LRO. There is however no ability to return to limited partnership status, so fund managers and advisers will need to give due consideration to the merits of the PFLP before moving to that model.

Conclusions

These reforms go some way to address concerns regarding imperfections with the existing limited partnership model for private equity and investment fund practitioners. The LRO is expected to be laid before Parliament in due course and the change will be operational within a year.

What to do now

- The introduction of the PFLP will have a practical effect on the drafting of our Limited Partnership Agreements. For example, the inclusion of a clause to make future rights to review or amend the LPA and to elect to covert limited partnerships meeting the eligibility criteria into PFLPs
- Firms have yet to notice a substantial rise in requests by clients to convert existing limited partnerships, however it is perceived that there will be interest in PFLPs when the legislation becomes effective
- The LRO's implementation may present opportunities to engage with clients to discuss their options in respect of both existing and prospective fund structures

Disputes

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When sorrows come: The UK sanctions and anti-money laundering regime gets tough

Louise Lamb, Partner and Catherine Robert, Senior Professional Support Lawyer

Quick read

- Stiff new civil monetary penalties for breaching sanctions are being introduced
- The government will consult on introducing an offence of failing to prevent economic crime
- MLD4 and new UK money laundering regulations will come into force on 26 June 2017
- Amendments to MLD4 are being negotiated at EU level and may come into force on 26 June 2017, bringing digital currencies into the regulated sector for the first time

The year ahead in financial sanctions

At present, the only penalties for breaching financial sanctions are criminal: fines and prison sentences; some regulators can also impose penalties for systems and controls failings. There have been very few convictions for breaches of sanctions, so the Government wants to take a tougher approach. From April 2017, the enforcement toolkit will be expanded through the introduction of civil monetary penalties and deferred prosecution agreements. The introduction of civil penalties is a significant development because the test for imposing a penalty is the 'balance of probabilities' test, which is a much lower bar than the criminal 'beyond reasonable doubt' test. We should therefore see more enforcement action for sanctions breaches. The Office of Financial Sanctions Implementation is consulting on its proposed approach to issuing civil penalties and the consultation closes on 26 January 2017.

The sectoral sanctions imposed by the EU against Russia are due to expire on 31 January 2017 and the asset-freezing sanctions are due to expire on 15 March 2017. Although the Russian counter-measures have damaged trade between the EU and Russia, Russia and Ukraine have yet to implement the Minsk peace accord, so we expect the sanctions to be renewed.

Changes to the anti-money laundering regime

The UK anti-money laundering (AML) regime will change significantly in 2017.

First, MLD4 is due to be implemented by 26 June 2017. HM Treasury is currently consulting on the implementation of MLD4 and will publish the draft Money Laundering and Transfer of Funds (Information on the Payer) Regulations in early 2017, before carrying out a short four week consultation. The Regulations are expected to come into force on 26 June 2017 and will replace the Money Laundering Regulations 2007. The UK has already implemented many of the measures in MLD4, including the key new requirement for a publicly accessible register of beneficial ownership.

However, there is a proposal to amend MLD4 before it has even been implemented. The proposed new directive (known as MLD5) would amend MLD4 and bring digital currency exchange platforms and custodian wallet providers into the regulated sector. Other proposals include allowing the use of digital IDs for CDD purposes, prescribing the minimum CDD measures which need to be applied when dealing with business relationships or transactions involving certain high risk countries and lowering the threshold for CDD for pre-paid instruments. The trilogue negotiations between the European Parliament, Commission and Council on the final text of MLD5 will begin in early 2017 and at present the implementation date for MLD5 is also 26 June 2017.

Secondly, the Criminal Finances Bill, which is currently going through Parliament, will extend the period which the National Crime Agency (NCA) has to consider consent requests made under the Proceeds of Crime Act 2002. At present, the NCA has seven working days to consider a consent request, but can extend this period for another 31 days. Under the Criminal Finances Bill, the NCA could apply for further extensions of up to 186 days in total. The Bill also includes important provisions to make it easier for regulated firms to share information without running the risk of committing a 'tipping off' offence. In parallel, the NCA will also take practical steps to improve the AML reporting and consent regimes, including through issuing guidance and improving IT.

Thirdly, the FCA's Financial Crime Annual Data Return is being rolled out from 31 December 2016; the results will be used to focus supervision on the highest risk firms. Reports are to be submitted on a 'best endeavours' basis for the first year. In terms of supervision, alongside its existing Systematic Anti-Money Laundering Programme and other work focussed on higher-risk firms, the FCA also intends to inspect a random sample of 100 firms of different types.

The FCA's other financial crime initiatives include discussing potential reforms to the AML regime with the government (e.g. whether transaction reporting should be reformed) and a plan to update the Financial Crime Guide to reflect MLD4 (although the FCA has promised that this does not mean reams of new material).

Finally, as part of its Our Future Mission paper, the FCA has said that it will look at using data science for anti-money laundering purposes. Firms should look at how they are using data science tools to ensure that they are ahead of the game.

A new offence of failing to prevent economic crime?

The idea of a new corporate offence of failing to prevent economic crime was originally floated by the Attorney General in September 2014. The idea was shelved, but has now been dusted off. Under the Bribery Act 2010, a company will be guilty of an offence if an associated person pays a bribe for the company's benefit, but the company will have a defence if it had adequate procedures in place to prevent bribery. A separate corporate offence of failing to prevent tax evasion is being brought in through the Criminal Finances Bill 2016.

The new wider offence of failing to prevent economic crime would be modelled on the Bribery Act offence, but would cover fraud and money laundering. The government intends to consult on the introduction of the proposed offence in May 2017. The risk is that the proposed offence will increase the compliance burden for businesses, without reducing the level of economic crime, so businesses should make their views heard in the consultation.

2017: Light at the end of the PPI tunnel?

Victor Fornasier, Partner, Charlie Shute, Associate and Harry Harvey, Trainee

Quick read

- 2017 is likely to be a significant year for those involved in the PPI mis-selling scandal
- The FCA is set to fire the starting gun on a two-year deadline for submission of consumer PPI complaints, with a publicity campaign to run simultaneously
- The FCA is due to introduce a new two-step complaints handling process in response to the Supreme Court's decision in *Plevin v Paragon Personal Finance*

Many years after the PPI mis-selling scandal first surfaced, consumer complaints of mis-selling show little sign of abating. Consumers submitted around 930,000 PPI complaints between January and June 2016 (complaints data for the latter half of the year is not yet available), accounting for 45% of all complaints to regulated firms and making PPI the most complained-about financial product.

Looking to the year ahead, we can expect two notable developments in 2017: first, the FCA's PPI publicity campaign is likely to begin in earnest, signalling the beginning of a two-year countdown to a deadline for submission of complaints; and second, the implementation of new rules in light of the 2014 Supreme Court decision in *Plevin v Paragon Personal Finance*.

At the time of writing, no firm timetable had been established for either of these developments, although the FCA has issued Consultation Papers on the subject which give an insight into its intention. The FCA last released an update on 9 December 2016 to the effect that we can expect "a further announcement" on implementation in the first quarter of 2017.

FCA's PPI publicity campaign and deadline

The FCA first announced its intention to implement a deadline for consumers to submit PPI complaints in 2015. In its view, a two-year publicity campaign leading up to a deadline will:

- prompt consumers who want to complain or investigate if they had PPI into action, encouraging them to seek redress sooner
- persuade consumers to submit their own PPI complaints rather than rely on claims management companies
- increase the efficiency of PPI complaints handling
- end the uncertainty for firms relating to long-term exposure to PPI, and bring finality to the issue.

Following the release last year of Consultation Paper 16/20, it now appears that this two-year deadline will start to run in mid-2017, signalling an end to PPI claims by the middle of 2019.

According to the FCA, its intention in running the publicity campaign will be to reach "all adults in the United Kingdom", through a variety of TV and digital advertising; billboards and communications targeted at "harder to reach" consumers; and the launch of an online hub and telephone helpline dedicated to providing information and advice. The overall cost of a two-year campaign is expected to be £42.2m, to be funded by the 18 highest recipients of mis-selling complaints.

If the FCA fires the starting gun on its two-year deadline in 2017, it will be a positive development for firms involved in the PPI scandal to have certainty on when the issue will come to a close. The corresponding FCA publicity campaign may, however, lead to an increase in PPI claims, with consumers encouraged to investigate their PPI status and to submit their claims before time is up.

Overall, the effect of the FCA's publicity campaign is uncertain, but firms should ensure that they are prepared for a spike in complaints in the year ahead. The FCA has made clear that it expects firms to continue to comply with their regulatory obligations, whatever the result of the publicity campaign in terms of complaint volumes.

The new Plevin rules

The second development in the PPI world in 2017 is expected to be the implementation of new rules in the FCA Handbook (DISP) arising from the Plevin decision. To recap, the Supreme Court ruled in Plevin that a lender's failure to disclose its large commissions from the sale of PPI made its relationship with the consumer "unfair" under the terms of the CCA, and able to be unwound.

In response to this decision, the FCA undertook consultations in 2015 and 2016 on the introduction of new rules which (amongst other things) introduced a new two-step process for firms' handling of PPI complaints:

– the first step is to assess whether the firm's conduct of the sale of PPI generally breached the applicable rules; and

– the second step looks at whether, if the policy in question has not been mis-sold for another reason, there was a failure by the firm to disclose an unfair level of commission.

The two step process outlined above will only apply to complaints about PPI policies which would fall within the scope of the provisions of the CCA dealing with unfair relationships (i.e. those policies attached to credit agreements entered into after 6 April 2007, or entered into before that date but still in effect on 6 April 2008).

The FCA has indicated that a "commission" level of 50% will be deemed unfair (save in exceptional circumstances), with commission being defined widely to cover both upfront sales commission and other types of revenue such as profit share. Calculation of redress for mis-sales identified under the "step two" process will be based on the difference between the actual commission charged, and a "fair" commission of 50%.

At the time of writing, the FCA had not published final versions of these rules; however it indicated in Consultation Paper 16/20 that the above aspects are unlikely to change before introduction. The new rules are expected to come into force in March 2017, allowing firms some time (albeit not a great deal) to prepare for the changes.

Ultimately, the new rules will mean changes to firms' complaints handling processes in the year ahead to ensure that Plevin-based complaints are dealt with properly, and that "step two" redress is properly calculated. Consumers who previously had their complaints rejected will also have the right for their complaints to be re-assessed in light of Plevin, although the FCA has confirmed that firms will not be expected to proactively contact previously rejected complainants.

The way ahead

2017 is likely to be a landmark year for PPI, signalling what appears to be the beginning of the end of firms' handling of mis-selling complaints. Firms should ensure that they are adequately prepared for the introduction of the regulatory changes we are expecting, as well as increased complaint volumes as a result of the FCA's publicity campaign.

Regulatory enforcement: The year ahead

Elaine Penrose, Partner and Daniela Vella, Senior Professional Support Lawyer

Quick read

- The FCA levied just over £22m worth of fines in 2016, down on previous years, but is not indicative of regulator complacency
- Areas of FCA focus in 2017 are financial crime (money laundering and market abuse), individual accountability, competition and culture
- We will continue to see an assertive and interventionist approach by the FCA, and are likely to see it diversifying its strategy of "credible deterrence" by using powers to restrict a firm's business as opposed to, or in addition to, imposing financial penalties

Whether or not the FCA has had a 'good year' has historically been judged by the sum total of fines levied during the previous 12 months. This year (at the time of writing) the total stands at just over £22m, comprising 23 financial penalties. This is no inconsiderable sum. However, when viewed in the context of previous years (£905m in 2015, £1.47bn in 2014, £474m in 2013, £312m in 2012, and so on) it suddenly looks like small fry. Indeed it is the lowest since 2008.

The reason for this is far from indicative of regulator complacency, however. In reality, we are seeing the end of the big ticket fines for benchmark manipulation and post 'financial crisis' investigations, which inflated the year-end totals of previous years.

Also, the FCA is changing its focus, increasingly concentrating on individuals. Over half of the fines levied in 2016 were against individuals. In January 2016 a long-running criminal insider dealing case brought jointly by the FCA and the National Crime Agency (NCA) went to trial, resulting in an investment banker being convicted and sentenced to four and a half years' imprisonment - the longest sentence ever handed down for insider dealing in a case brought by the FCA.

The FCA is also diversifying its methods of enforcement, using more of the powers available to it to make firms who have fallen foul of its rules feel the pain, slowly increasing its use of suspensions, restrictions and prohibitions.

So, where will the FCA be flexing its enforcement muscle in 2017? The answer is less a matter of crystal ball gazing and more an exercise of piecing together hints from various publications and speeches made by the FCA about its priorities and focus in 2017.

Financial crime

Next year the FCA will roll out its Financial Crime Annual Data Return, which will allow it to gather statistics from firms about their financial crime risks, such as money laundering. The return will assist it to detect emerging financial crime risks and to target its supervisory work more accurately. Where it finds firms with material weaknesses in their financial crime controls, the FCA will use its enforcement powers to send a deterrent message to industry and/or impose business restrictions to limit the level of risk.

We should also expect to see the FCA taking a more collaborative approach to enforcement in this area, working with other law enforcement agencies, such as the NCA, the Serious Fraud Office, City of London Police and others - including overseas authorities. The FCA might support enforcement agencies in taking action, or vice versa. In April 2016 a director of three debt management firms was sentenced to 15 months in prison for fraud for abuse of his position. The case was brought by South Wales Police with FCA assistance and support.

This year the FCA finished implementing, and started applying, the new EU Market Abuse Regulation which strengthens the existing UK market abuse framework by extending its scope to new markets, new platforms and new behaviours. This is likely to be an area of FCA focus in 2017. Firms must ensure their systems and controls are robust enough to cover all situations, including the unintentional receipt of inside information in unexpected situations, such as during pre-market soundings, informal meetings or when conducting market research.

Accountability and governance

In March 2017 the Senior Managers and Certification Regime (SMCR) will have been in force for a year. The key aim of SMCR is to enhance accountability of senior managers and, consequently, improve their standards of conduct. A feedback statement published by the FCA in September 2016 (FS16/6) into the implementation of SMCR across a sample of banks showed deficiencies. Firms had not identified sufficiently senior individuals to hold Senior Management Functions, and Statements of Responsibilities (SORs) and Responsibility Maps (RMs) were not clear enough to enable the FCA to understand how responsibilities were allocated - nor was there enough clarity or detail. Firms must get these right, as SORs and RMs will be key to the FCA when considering enforcement against individuals. The FCA is yet to test SMCR in enforcement terms and it is just a matter of time.

The FCA is intending to consult during 2017, with the aim that the SMCR will be extended to the private equity industry from 2018. The basics (as they currently apply to banks) will not change. As such, relevant firms should begin their internal dialogue on the allocation of responsibilities now in order to address any changes that need to be made to comply with the new regime.

Competition

In April 2015 the FCA was given power to take enforcement action against anti-competitive agreements and abuse of dominance under the Competition Act 1998 and in July 2015 it published finalised guidance on concurrent competition enforcement powers. In 2016 the FCA put theory into practice: it opened its first Competition Act investigation and, as reported in its Annual Report in July 2016, it had at that date issued two ‘on notice’ letters and three advisory letters to firms. Expect to see more activity in this space in 2017 but firms should be aware that they are obliged to bring their own competition law contraventions to the FCA’s attention under Principle 11 of the FCA’s Principles of Business.

Culture

Culture, and getting it right, continues to be a priority. The FCA believes that employee conduct is the best yardstick of culture and has developed ‘five key conduct questions’ as a tool to probe this area. The questions explore what steps firms are taking to identify conduct risks, how employees are encouraged to be responsible for conduct, what support the firm provides to those seeking to improve conduct, how senior individuals consider the conduct implications of strategic decisions they make and whether the firm has assessed whether any activities it undertakes could undermine its strategies to improve conduct. The FCA is particularly interested in a firm’s attitude to incentives, remuneration and transparency and how these factors influence the mindset of its employees.

Approach

The FCA has said that it will continue to pursue a strategy of credible deterrence and “will take tough and significant action” against firms and individuals who break its rules, reinforcing proper standards of market conduct, ensuring firms put customers at the centre of their business and securing redress for those affected. In terms of approach, expect to see a continuation of the FCA’s assertive and interventionist style, with the debate over legal privilege in investigations continuing to be a theme. Increasingly the FCA is employing its credible deterrence strategy by impacting the commercial side of a firm’s business, imposing recruitment bans and restrictions on acquiring new clients. Arguably these make a greater dent on smaller institutions, and not so much of an impact on larger firms, but we could start to see the FCA getting more creative and increasingly employing a combination of its powers to sanction unruly firms in a way which hurts them most.

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Access the roadmap at
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110 “Rescue Me”: Mandatory restructuring proceedings in the pipeline for EU Member States

“Rescue Me”: Mandatory restructuring proceedings in the pipeline for EU Member States

Margaret Kemp, PSL Counsel

Quick read

- The European Commission has issued a draft Directive which seeks to impose minimum standards for restructuring frameworks, “second chances” for honest entrepreneurs and for improving the efficiency of restructuring, insolvency and discharge procedures across EU Member States
- This is the first time an attempt has been made to harmonise certain aspects of restructuring and insolvency law across EU Member States
- Member States will have two years to implement the measures once the Directive has become effective

Following the European Commission’s recommendations in 2014 and its consultation earlier in 2016, on 22 November 2016 the Commission issued a proposal for an EU directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures across EU Member States. The proposal is part of the EU’s CMU Action Plan.

Why is a Directive needed?

The explanatory memorandum to the draft Directive states that a good insolvency framework is necessary to ensure a good business environment, supporting trade and investment and helping create and preserve jobs. A good insolvency framework is also essential for the efficient management of defaulting loans and for the reduction in the accumulation of non-performing loans (NPLs) on bank balance sheets. The flip side is that a bad insolvency framework is a deterrent to cross-border expansion and investment, whether that be an investment in cross-border companies, an investment in a new business in another jurisdiction or an investment in NPLs. The need to deal with the high level of NPLs being carried on the balance sheets of a number of financial institutions across Europe is also reflected in the consultation published by the European Central Bank on 12 September 2016 on draft guidance to banks in the single supervisory mechanism on how they should tackle NPLs.

What does the Directive do?

The proposed Directive will set minimum standards for EU Member States concerning:

- preventative restructuring proceedings;
- second chances for honest entrepreneurs, including a requirement that Member States provide that such a debtor should be discharged after no more than three years; and
- measures generally to increase the efficiency of restructuring, insolvency and discharge proceedings.

Under the proposed Directive, the key requirements for the preventive restructuring proceedings are as follows:

- proceedings must be made available to a debtor where there is a "likelihood of insolvency";
- there will be no mandatory viability test before the debtor can enter restructuring proceedings (although a valuation will be required if any creditor challenges a subsequent restructuring plan);
- the debtor remains in possession and in control of day-to-day business;
- an insolvency administrator or supervisor does not have to be appointed to supervise the restructuring (and save in certain circumstances Member States cannot make it a requirement, which will be a big change for some jurisdictions);
- the debtor can apply to court for a stay of individual creditor enforcement action (except for claims of workers). The stay can be for up to four months although the court will have the power to extend the stay (for a total of up to 12 months) in certain circumstances. The stay is subject to certain provisions designed to address creditor concerns; creditors must still perform contracts during the stay (provided the debtor also performs its obligations) and they cannot terminate contracts as a consequence of the stay;
- insolvency proceedings cannot be started against the debtor while the debtor is under preventive restructurings proceedings (including no mandatory filing requirement – again, this is a big change for some jurisdictions);
- protection will be given to:
  - new financing necessary to implement a restructuring plan, for interim financing incurred to ensure a business's continuity during restructuring negotiations, and for other transactions concluded in close connection with a restructuring plan;
  - reasonable advisory costs; and
  - worker's claims for work carried out;
- creditors voting on the adoption of a restructuring plan will be split into classes; as a minimum, secured and unsecured creditors must be treated separately. If the plan is approved by the court, the court will have the power to cram down dissenting creditors, subject to certain safeguards; and

– equity holders may not unreasonably prevent the adoption of a restructuring plan; dissenting equity holders may be subject to a cram-down. Member states may need to modify company law provisions to ensure this is possible.

If the proposal is adopted it will have a significant impact on national insolvency regimes. A number of EU Member States have already spent considerable time and resources on amending their restructuring and insolvency regimes over the last five years and they may not be delighted at the prospect of further changes. Investors, on the other hand, may welcome a move to make restructuring processes more transparent, more coherent and quicker than they are at the moment.

Two points to end on:

– Member States will have to implement the Directive within 2 years after it becomes effective. Assuming the Directive takes at least 6 months to agree, and possibly longer if it follows in the steps of Directives such as the BRRD, it is possible that the UK will have left the EU before the implementation requirement kicks in. However, the UK may well want to ensure that it continues to be a go-to jurisdiction for restructuring; that may only be achievable if the UK also adopts similar standards as those that apply to the rest of the EU.
– A number of the proposals are similar to those contained in the UK's own consultation on reforms to corporate insolvency. A further consultation is expected at some point in the spring or summer of 2017, but the feeling is that a number of the original proposals will be taken forward. It will be interesting to see whether any of the UK's own proposals change to reflect the EU Directive.

Global perspectives

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OCEAN
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OCÉAN PACIFIQUE

The King is dead! Long live the King! Is London's reign as the FinTech capital over?

Richard Diffenthal, Partner

Quick read

- Prior to the Brexit vote, London was regarded as the undisputed capital of the world for FinTech
- Following the vote to leave, the future is less certain
- However, there remains a confluence of access to capital, talent, customers and policymakers
- We anticipate further significant investment in UK FinTech during 2017 and beyond

The UK, and London in particular, has long been held up as the blueprint to create a vibrant and dynamic FinTech hub. The confluence of access to talent, capital, customers and the support of a progressive and innovative regulator came together in a manner not seen elsewhere in the world. And then the world changed. Does Brexit mean that London has lost its crown?

In November 2016, Innovate Finance released The Q3 FinTech Investment Landscape, a report examining the health of FinTech investment. Globally investment in FinTech continues to go from strength to strength. The aggregate value of global FinTech investment surged, up 27% year on year to US$15.2bn in the nine month period up to Q3. The picture in the UK is less rosy. Innovate Finance reported that over that same period, the aggregate value of investment in UK FinTech companies dropped 26% to US$532m, with a pronounced downturn in the run up to the EU referendum and in the second half of the year.

Given the broader macro-economic/political events that have shaped 2016, it is no surprise that investors are thinking twice before committing capital to UK FinTech. Whilst full year data is not yet available, it is likely that on a like-for-like basis investment in UK FinTech will be stuck in second gear whilst the rest of the world will be seen to be powering ahead.

Where once London (or possibly New York) was seen as the natural destination for ambitious FinTech entrepreneurs, other cities and countries are now pushing as hard as they can to attract the very best and brightest to them. In Europe, both Berlin and Frankfurt are making strong

cases to be regarded as the FinTech capital of Germany – Berlin with its thriving creative and digital scene is home to many B2C start-ups; Frankfurt as the home of German banking and the BaFin, the German Federal Supervisory Authority, leans more towards B2B start-ups.

Similarly a big push is being made by Amsterdam to take the European FinTech crown. Further afield, Hong Kong and Singapore are vying to be the FinTech capital of Asia, and quite possibly the world, and unlike the BaFin, both the Monetary Authority of Singapore (MAS) and the Hong Kong Monetary Authority (HKMA) are adopting the more progressive, innovative approach long championed by the FCA. In the last two months, the HKMA released their white paper on the use of blockchain (or distributed ledger technology) and how it has the potential to reshape aspects of the financial services industry and MAS has recently launched a regulatory sandbox based on the successful model championed by the Project Innovate team at the FCA.

So what does 2017 hold for UK FinTech? The factors that made London such a vibrant place to launch a new FinTech business remain just as cogent today, despite the changes in the broader political landscape and those that are still to come. No other country in Europe, or indeed the world, offers the same combination of attributes that make the UK such a vibrant place for FinTech or indeed the broader tech ecosystem.

On 5 December 2016, Balderton Capital released their European talent survey (based on feedback from more than 1,000 VC-backed companies) – the results showed that the pool of UK talent is as deep if not deeper than in other European countries. They found that there are more developers based in London than in Paris and Berlin combined. In the last few months of 2016 both Google and Facebook announced that they will significantly increase the size of their respective London-based workforces, underlining their belief in the depth of the talent pool in London.

The importance of tech, life sciences and FinTech in particular is not lost on Government. In the Autumn Statement, Philip Hammond announced a number of FinTech friendly measures ranging from a FinTech census to an additional £400m being made available to the British Business Bank, which in and of itself is not going to reshape the landscape but is at least a step in the right direction. And irrespective of whether Brexit turns out to be ‘hard’ or ‘soft’ (or somewhere in-between), the fact that the FCA continues to lead the way in terms of its approach to regulation in this sector means that UK-based FinTech companies will be able to adapt their business model to meet the local regulatory requirements to serve customers across the globe (not just those in the EU).

So in our view reports of London’s demise are premature. UK FinTech remains very much alive and we don’t see anyone taking the UK’s crown any time soon.

Asia's FinTech tigers: Set for a roaring 2017

Mark Parsons, Partner

Quick read

- Asia will be a region to watch for FinTech developments in 2017
- As the business and regulatory environments mature and lessons are learned, the region's future in financial services will start to take shape
- We can expect some ambitious moves to come in the next 12 months
- However, if nationalist overtones continue to come to the fore in 2017, the region's patchwork of national financial services and data protection laws could dampen FinTech's natural spirit of internationalism, with the objective turning to the support of national champions rather than regional ones

Looking ahead to 2017 and its many uncertainties, one sure thing is that FinTech will continue to drive change in financial services globally. Much attention has been paid to how the FinTech revolution is running its course in Asia, noting the enormous potential scale in larger markets such as China, India and Indonesia, and the state of technological advancement in markets such as Hong Kong, Singapore, Japan and South Korea.

Above all else, Asia is a region of diversity, with its 50 countries and four billion plus people living in tremendously varied stages of economic development and regulatory maturity. The touchpoints for FinTech success often lie in reactions to market gaps and specific market needs, and these differ from jurisdiction to jurisdiction. Likewise, the permissiveness or, in some cases, the supportiveness of the regulatory environment to technological innovation can be critical to FinTech success, and this too is increasingly varied across the region.

Turning to 2017, it is clear that the absence of a dominant Asia region FinTech champion means that there is still much to play for. It also means that there is much in the way of nuance to understand how such a champion might emerge.

China

We have grown used to China being a producer of astonishing statistics, and China FinTech does not disappoint. KPMG reports that the market for online alternative finance grew in China from just US$5.6bn in 2013 to over 100 billion in 2015, with trading taking place, at its peak, on as many as 2,595 platforms. McKinsey has reported that with 30 per cent of the population now using online payments, the total volume of internet finance in China has ballooned to US$1.8tn in 2015.

Given the scale of China's population, any market gap in financial services can quickly translate to an opportunity for an outsized FinTech success. The surge in marketplace lending, for example, has been attributed to a state run banking system that offers limited credit opportunities to consumers and SMEs and at the same time provides little in the way of return to savers and small investors. The collision of unfulfilled market needs, on a scale possible only in China, led to explosive growth in P2P lending.

But some sharp growing pains have followed the run-away success. News broke in December 2015 that popular P2P lender Ezubao was a Ponzi scheme, allegedly defrauding lenders of over US$7bn. China's banking regulators had by this time already started to step back from what may be described as a permissive approach to regulating FinTech, with the principal financial regulators and telecommunications regulator jointly issuing the Guiding Opinions on the Promotion of the Healthy Development of Internet Finance, an omnibus regulation covering a wide range of FinTech businesses. More detailed regulations have since been issued on topics such as P2P lending and 'know your customer' requirements. An April 2016 crackdown on the registration by unlicensed businesses of company names incorporating banking and finance-related terminology was a further signal of a regulatory sea-change.

China's move towards a more tightly regulated FinTech environment may come just as the timing is right for consolidation and rationalisation. We would note that the status quo has remained challenging for direct foreign participation in the Chinese market through all phases of China's FinTech surge to date. The sector has remained largely closed to businesses without strong Chinese links and so partnering arrangements are commonplace.

Hong Kong

Although late to the FinTech party, Hong Kong has recently taken strides to catch up, with a HK$2bn budget allocation supporting co-investment in start-ups. The three principal financial services regulators have now established FinTech liaison offices tasked with engaging with Hong Kong's growing FinTech community and the scale of FinTech investment in the city continues to grow.

While Hong Kong's seven million population clearly lacks for scale in the market for consumer financial services, its reputation for a trusted legal and regulatory environment and home to the region's third largest stock exchange means that it has heft in areas such as asset management, securities trading and commercial paper. The Hong Kong Monetary Authority recently commissioned Hong Kong's leading research organisation to publish a paper on the use of blockchain in the banking system and there is optimism that strategic focus is coming to the fore.

India

India's November 2016 demonitisation of its 500 and 1,000 rupee notes has led to a sudden flood of new FinTech investment. India has long lagged in terms of FinTech development, with critics noting that there are less than 25 million credit cards in a nation of over a billion people. Demonitisation may change this. The sudden scarcity of paper notes has meant that digital payments businesses are reporting massive surges in interest from merchants desperate to enable a reliable means of getting paid. If the Indian government is strong-arming its economy into digital payments, India's FinTechs will benefit by finally having the scale that the nation's population promises. Whether or not the regulatory apparatus is prepared remains to be seen.

ASEAN

It is clear that law-makers and regulators across the ASEAN region have come to a consensus that FinTech is a critical part of future prosperity, both in terms of creating opportunities to bring financial inclusion to the 'unbanked' and under-serviced consumer sectors, and as a means of encouraging technological innovation and entrepreneurship.

Singapore, Malaysia, Indonesia and Thailand have all now announced the creation of 'regulatory sandboxes' for FinTech. The sandbox concept, pioneered by the FCA, grants FinTech start-ups temporary relief from the full burden of financial services licensing requirements so as to allow experimentation in a supervised pilot programme.

Singapore has emerged as the ASEAN FinTech leader, being well ahead of the curve in terms of public funding and with a knack for fine-tuning its laws to support fresh-thinking about managing risks in financial services. Like Hong Kong, Singapore's small but advanced population means that leveraging a wider region will be key to success. It is notable that telecommunications service providers are doing well with mobile payments in a number of jurisdictions across the region, driven in many cases by the reality that consumers are more likely to have a smartphone than a bank account. ASEAN, then, brings yet another set of possibilities to Asia's FinTech future.

Financial services regulation under President Trump: An examination of the potential changes in financial services policy and regulation under the incoming Trump administration

Richard Schaberg, Partner and Aaron Cutler, Partner

Quick read

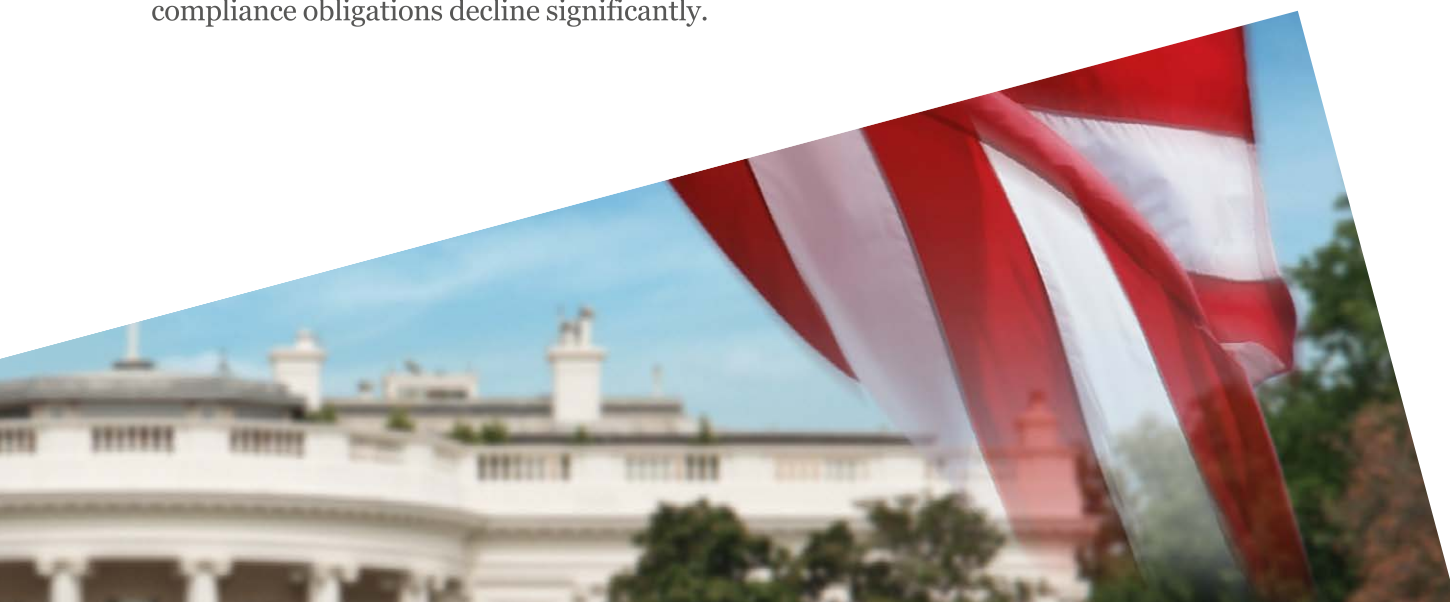
- President-elect Trump has an anti-regulation, pro-growth platform and has said he will not allow any new federal regulation until a thorough review of its utility and the current relevant regulation(s) have been reviewed
- President-elect Trump and Republicans in Congress have been vocally opposed to the CFPB, both its structure and the scope of its authority, and will likely implement changes quickly
- The largest banks are unlikely to see much regulatory relief
- Community financial institutions will likely be exempted from many regulatory requirements
- The classification of systemically important financial institutions will likely be changed to encompass only the very largest institutions, either those above US$250bn or US$500bn in consolidated assets
- Very little is certain and President-elect Trump's nominee for Secretary of the Treasury is a virtual unknown in the financial regulation space

Donald Trump's victory in the U.S. presidential election came as a surprise to almost everyone and has left much of the world scrambling to understand the implications of his presidency on American policy. President-elect Trump has not provided concrete plans or proposals regarding financial regulatory policy, but the statements he has made, as well as his generally anti-regulation rhetoric, points toward a new era in financial services policy. Further, with the House and Senate under Republican control, the Republican vision for financial services policy can likely come to fruition.

The Dodd-Frank Act, passed in the wake of the financial crisis, almost completely revamped the financial system: it created the Consumer Financial Protection Bureau (the CFPB); it mandated more robust compliance and supervision, including 'stress tests' for larger institutions; it mandated increased disclosures and evaluations in mortgage origination and servicing; and it provided increased limitations on banks' trading and hedging activities, to name just a few changes. Because many of these changes required significant rulemakings, including joint-rulemakings between various federal financial regulators, the process has been long and arduous and even six years later, it is not complete. The chief complaint in the industry is that these increased compliance requirements adversely affect community banks and financial institutions because they are not able to keep up with the growing compliance costs.

Congressional Republicans and the Trump administration will likely focus their energy on the small to mid-size banking sector and providing regulatory relief to those institutions. One of the first changes likely to happen is an increase in the asset threshold for designation as a systemically important financial institution (SIFI), which subjects an organization to increased regulation, including stress testing. Currently, any institution with consolidated assets of US$50bn or more is automatically a SIFI. In December, the House passed the Systemic Risk Designation Improvement Act, which would require a case-by-case determination of systemic risk, rather than automatic designation, for all financial institutions; except those designated as Global Systemically Important Banks by the Financial Stability Board, which will not be subject to further review. This step will effectively separate the largest financial institutions (e.g. JP Morgan Chase, Citigroup, Wells Fargo, Bank of America, Goldman Sachs, and Morgan Stanley) from the rest of the financial service providers. The top banks are unlikely to see material compliance relief. The now much-enlarged second tier of financial service providers, on the other hand, is poised to see their compliance obligations decline significantly.

Perhaps the most obvious and largest proposed change is the proposed reorganisation of the CFPB. Congressional Republicans have been attacking the CFPB from inception and their attacks have not diminished throughout the years. The main target is the CFPB's structure: it has a single director and is not subject to Congressional appropriations because its budget comes from the Federal Reserve. In a recent decision, the D.C. Court of Appeals determined the current structure is unconstitutional but can be easily fixed simply by making the director removable at will rather than only for good cause. With that decision in hand, President-elect Trump is likely to remove Director Cordray very soon after his inauguration. There is currently a bill before Congress, the Financial Choice Act, which proposes the creation of a bi-partisan commission to run the CFPB. While a commission like the one proposed is likely in the longer term; in the near term, a Trump appointee will likely slow down or cease CFPB rulemakings and may review the current CFPB regulations and guidance to determine if any should be rolled back.



The CFPB is not the only agency likely to see immediate material change: Mary Jo White, the Chair of the Securities and Exchange Commission (the SEC) has said she will step down at the end of President Obama's term. Upon her resignation, there will be three open seats at the SEC. The Comptroller of the Currency, Thomas Curry's, term ends in March 2017 and President Trump will likely appoint a less aggressively pro-regulation person to that post. Martin Gruenberg, the Chairman of the Financial Insurance Deposit Corporation, may step down before his term ends in November 2017. Janet Yellen, the Chairman of the Board of Governors of the Federal Reserve, has stated she does not intend to step down before her term expires in February 2018, but there may be several changes to the Board in that time. Finally, President-elect Trump's nominee for Treasury Secretary, Steven Mnuchin, does not have financial regulatory experience and has spent the last several years working as a movie producer. He is a virtual unknown in this space; he worked for Goldman Sachs, founded OneWest Bank Group and Dune Capital Management, and worked with and for George Soros who is generally considered a "liberal bogeyman" by much of the Republican Party. It remains to be seen what his general attitude toward financial regulation is and what changes he may wish to make.

In a rare point of agreement, both parties' platforms called for the creation of a "modern Glass-Stegall Act", which was repealed in 1999 with bipartisan support. While President-elect Trump has made statements in favor of reinstating the Glass-Steagall Act, the Republican vision for a modern Glass-Steagall likely does not match the Democratic vision, which could hinder efforts to pass a bill. Congressional Republicans have been vocal in their derision for the Volcker Rule, which prohibits banks from making certain speculative investments with their own accounts, but most banks are already subject to its requirements and have spent millions of dollars ensuring their compliance, so it may not be repealed; though its application to 'smaller' banks may be rolled back.

Overall, very little is known about what financial regulation under President Trump will look like. However, Congressional Republicans will finally have the votes and a like-minded president to begin to roll back and revise large portions of the Dodd-Frank Act, though any material change will require support from some Democrats, which may happen early in the president's term.

A golden year for Germany's financial services regulatory regime?

Dr Richard Reimer, Partner, Dr Verena Ritter-Döring, Senior Associate and Andreas Doser, Associate

Quick read

- 2017 will be another busy year on the regulatory front in Germany
- In particular, implementation acts relating to MiFIR and MiFID II will change the regulatory environment
- Although the German legislator usually takes a 'gold-plating' approach to the implementation of EU legislation, it remains to be seen exactly how the German financial market will be positioned within Europe by the end of another eventful year

2017 will bring new national regulatory laws based on European Directives which either enter into force in 2017 or are on the way to being passed. As Germany is usually a gold-plating country, it remains to be seen how the German legislator will position the German financial market within Europe. In particular, implementing acts based on MiFIR and MiFID II will change the regulatory environment.

MiFIR / MiFID II

MiFID II will be implemented into the German legal system via an implementing act (Zweites Finanzmarktmodernisierungsgesetz or 2. FiMaNoG) that also includes clarifications regarding MiFIR. The German legislator has already published a draft of the implementing act for consultation among market participants. The implementing act aims at closing loopholes in the current supervisory requirements. Investor protection is strengthened by the release of new regulations adjusting procedural and organisational obligations of investment services enterprises. These regulations contain wider supervisory competences for the supervisory authority and even product bans. We expect the German Federal Supervisory Authority, BaFin, to adjust to its new role as consumer protection authority, including by providing new guidelines.

MLD4

MLD4 will be implemented across the European Union in 2017. Since MLD4 only provides for a minimum harmonization of rules in the European Union, Member States may introduce stricter standards which exceed the anti-money laundering rules under MLD4.

The German Federal Ministry of Finance published a draft act implementing MLD4 in November 2016. The draft act not only provides for the necessary amendments required by MLD4 (e.g. the legal requirement to submit data regarding beneficial owners to the new electronic transparency register) but also contains rules that may have a considerable impact on the payment industry and in particular e-money issuers, agents and distributors. For instance, the draft implementing act provides for stricter standards for anonymous e-money products.

PSD2

Even though the transposition period for EU Member States does not end until 13 January 2018, Germany is expected to pass its PSD2 implementation act before the German federal election in September 2017.

Unlike the European AML legislation, PSD2 provides for a maximum harmonisation, i.e. there is no room for additional national rules and requirements. However, PSD2 is still open to interpretation at the national level and it is expected that the implementing act and the accompanying grounds of the law, i.e. the explanatory note published by the German legislator, will provide clarification and guidance on how to interpret some of the PSD2 provisions (e.g. regarding payment initiation services).

The use of cash in Spain: The beginning of a new era

Joaquín Ruiz Echauri, Partner and Pablo de la Fuente, Associate

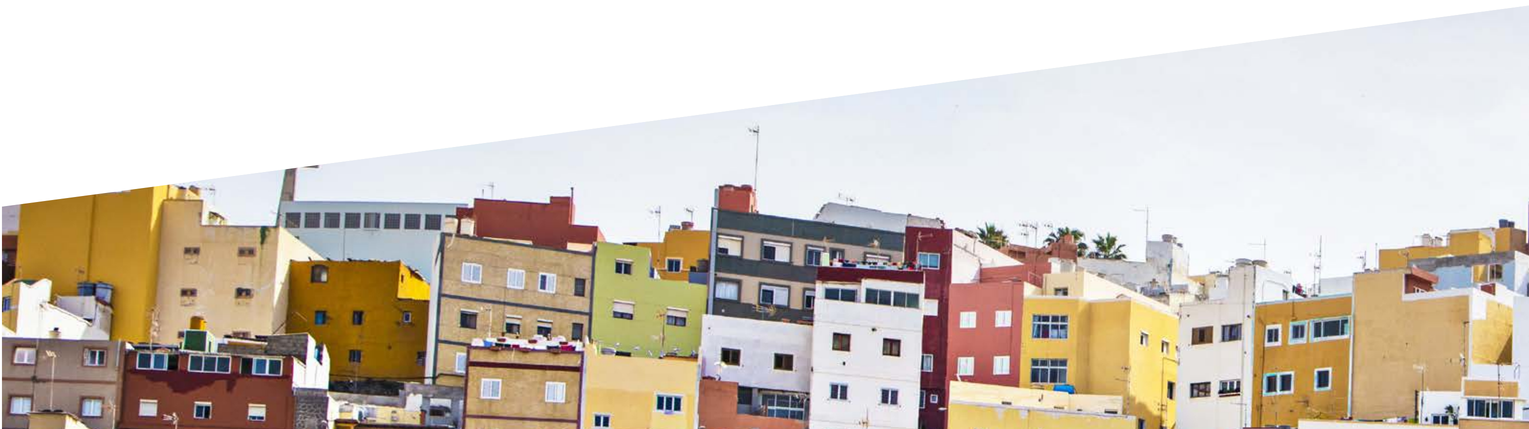
Quick read

- Spain has historically been a cash society but recent changes are indicating that both providers and consumers are adopting new payment methods
- During 2016 the use of credit and debit cards increased significantly
- Consumers are changing their payment habits with a new banking environment likely to follow on the implementation of PSD2

For many decades cash payments have dominated the Spanish market due to a number of cultural and historical factors. Following a number of recent developments Spain now has the legal, technical and political environment to embrace new payment methods.

To understand why cash dominated, it is important to understand some key cultural issues. There has been public mistrust due to the lack of information about the security of other payment methods. In addition the existence of a huge undeclared economy in Spain (18.2% of the Spanish GDP at the end of 2015) has been fuelled by cash payments. These factors are arguably common across a number of countries in southern Europe. For example, the level of the undeclared economies in Italy and Greece is similar to that of Spain.

However, things are beginning to change. For the first time since 2008, there has been a significant growth in the number of payment cards in circulation, with debit cards up by 2.8% and credit cards 3.8% during 2016. Overall there are 2.2 million new cards issued in Spain matching the pre-financial crisis level. The Spanish payment industry is adopting new payment methods. Samsung Pay launched last summer and Apple Pay entered the market back in December. Mobile payments and faster payments are now being widely adopted. FinTech companies are working together to draft a comprehensive



document setting out the challenges they face and using this to create an "industry sandbox". Even the traditional banks believe that they now face more competition in an "open banking environment".

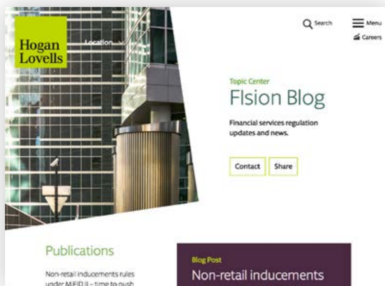
Spain, like all other EU members, will very soon implement PSD2 with the challenges that will bring. The extension to payment initiation and account information services is likely to increase competition. Although no official guidance or draft has been made public to date, the final version of the Spanish implementation legislation will be shared with the main players in the market in order to ensure acceptable standards are achieved both for providers and customers. Where in the past political instability has proved to be an obstacle to implementation and innovation, the stable political environment is expected to make the implementation process more straightforward.

There have also been other regulatory developments which have impacted the use of cash. In 2016 a regulation relating to fees for cash withdrawals led to a slight decrease in the use of cash. In addition, in the near future cash payments will be subject to a cap of €1,000. The cap is being introduced to fight against money laundering and also the undeclared economy. A by-product of the cap on cash payments will be an increase in the use of other payment methods.

Spain now appears to be prepared to face the challenges of payment innovation.

Resources

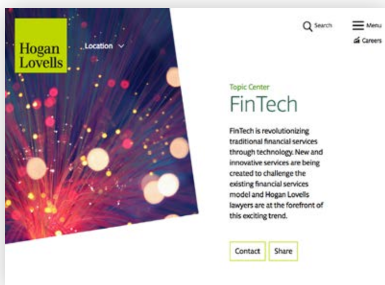
The Financial Institutions sector group at Hogan Lovells has produced a range of resources to help you navigate the market developments and legal and regulatory issues which may impact your business in 2017. Access them via hoganlovells.com and subscribe to receive your regular updates straight into your inbox.



FIsion Blog

As the remit and reach of regulators continue to expand and change continues on a daily basis, Financial Institutions need to stay on top of developments. Our new FIsion blog will provide you with regular content from our market-leading regulatory team across financial services, commercial & retail banking and payments.

To get a feed of useful financial services regulation updates and news in your inbox you can subscribe at hoganlovells.com/fision.



FinTech Topic Center and Blog

FinTech is revolutionising traditional financial services through technology. New and innovative services are being created to challenge the existing financial services model and Hogan Lovells lawyers are at the forefront of this exciting trend.

Whether you are a FinTech company or a Financial Institution exploring new FinTech products you can hear all about market developments, industry events and regulatory implications for the sector at hoganlovells.com/FinTech and subscribe to the blog to receive regular alerts.

Blockchain: Linked Ledgers Blog

As the potential for blockchain and other distributed ledger technology continues to be explored in a wide range of use cases both across the Financial Institutions sector and beyond, the rumours of its transformational scope abound - and operational examples are emerging.

Keep on top of the developments and our view of the legal and regulatory implications by signing up to receive our blog updates at hoganlovells.com/blockchain.

Brexit Hub

The impact of Brexit on Financial Institutions is significant. The likely loss of passporting gives rise to serious implications for the sector. We are providing a range of guidance to the market on whether the existing alternatives to passporting, such as the third country regime, provide a solution.

You can access our latest thinking on potential solutions which could be established by financial institutions, the merits of various jurisdictions if relocation is required and applying the potential impacts to different business lines via our Brexit Hub at hoganlovells.com/brexit

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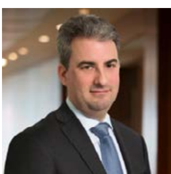

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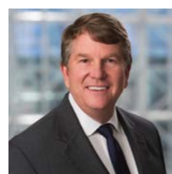

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