

# ALLEN & OVERY

## *Key Regulatory Topics: Weekly Update*

4 October 2019 – 10 October 2019



### **BREXIT**

Please see the Financial Crime section for an update on the Joint Opinion of the ESAs on the risks of money laundering and terrorist financing arising from Brexit.

Please see the Brexit section for the BoE's financial policy summary and record of FPC meeting on 2 October.

Please see the Structural Reform section for an update on the ECB Banking Supervision: SSM supervisory priorities 2020 publication.

### **FCA's instructions on use of its Financial Instruments Transparency System**

On 10 October, the FCA published instructions on its Financial Instruments Transparency System (FITRS). The system has been built to replace ESMA's equivalent system as part of the FCA's Brexit planning. The instructions provide: (i) details on the files containing UK-only transparency calculation results that the FCA will publish; and (ii) instructions on how to access these files. The instructions will be relevant to market participants that need to make use of the UK transparency calculation results in compliance with UK MiFIR.

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### **Financial Services (Implementation of Legislation) Bill 2017-19 failed to complete**

On 9 October, Parliament updated its webpage for the Financial Services (Implementation of Legislation) Bill 2017-19 to confirm that the Bill failed to complete through Parliament before the end of the 2017-19 Parliamentary session, meaning that the Bill will make no further progress. This follows the prorogation of Parliament on 8 October.

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### **Government no-deal readiness report**

On 8 October, the government published a no-deal readiness report, which sets out how the government has taken steps to ensure that the UK is fully prepared for a no-deal Brexit on 31 October. The report states that while the government would prefer the UK to leave the EU with a deal, it is prepared to leave without one. The report covers no-deal preparations for various sectors, including, among other things: (i) data protection – the government has taken steps to allow the free flow of personal data from the UK to the EU but notes that action is required by organisations in the EU and the UK to enable the continued flow of personal data from the EEA to the UK; and (ii) services – the report outlines changes in regulations that would apply to the services sector, and summarises the actions that businesses should take to prepare for a no-deal exit, which

includes checking regulations in the EU or EEA states in which they operate and familiarising themselves with the immigration rules of relevant countries.

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### **FCA Market Watch Newsletter No. 61**

On 7 October, the FCA published Issue 61 of its Market Watch Newsletter, which provides information to help firms prepare for a possible no-deal Brexit on 31 October. The newsletter states that the FCA continues to update its Brexit webpages, but firms should also consider the issues outlined in Andrew Bailey's September speech on Brexit preparations. Firms and connected persons, such as approved reporting mechanisms, should take reasonable steps to comply with changes to transaction reporting obligations under the FCA's temporary transitional power. The newsletter confirms that firms that are not able to comply fully with the transaction reporting regime at the time of the UK's withdrawal from the EU will need to be able to back-report missing, incomplete, or inaccurate transaction reports as soon as possible. The FCA has also provided an update to explain how the transparency regime under UK MiFIR will operate if there is a no-deal Brexit.

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### **ESMA's statement on preparations for a possible no-deal Brexit**

On 7 October, ESMA published a statement with an update on the UK's withdrawal from the EU and preparations for a possible no-deal Brexit scenario on 31 October. The statement confirms that the reference date for Brexit in all of ESMA's previously published measures, actions and statements about the possibility of a no-deal Brexit scenario should be read as 31 October. ESMA has also issued the following updated statements: (i) use of UK data in ESMA databases and performance of transparency calculations relating to MiFID II - from 1 November, no new UK-related data will be received and processed by ESMA or published on the ESMA website; (ii) impact on the application of MiFID II and the Benchmark Regulation (BMR) - the statement covers the trading obligation for derivatives, the MiFID II "C(6) carve-out", ESMA opinions on third-country trading venues for the purpose of post-trade transparency and the position limits regime, and post-trade transparency for OTC transactions between EU investment firms and UK counterparties; and (iii) ESMA's data operational plan in the event of a no-deal Brexit - the statement provides information and instructions about the Financial Instruments Reference Data System, the Financial Instrument Transparency System, the Double Volume Cap System, and transaction reporting systems.

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### **EBA's communication on UK withdrawal from the EU**

On 4 October, the EBA published a communication that outlines the remaining issues that firms and competent authorities (CAs) need to address in their preparations for the UK's withdrawal from the EU. Despite the progress made to date, the EBA urges continued progress on contingency planning and warns financial entities and CAs to guard against complacency. It explains that CAs have identified specific areas that merit heightened attention, including the need to: (i) operationalise relocation plans - the EBA reminds credit institutions of the detailed principles set out in the October 2017 opinion on the need to avoid creating and operating "empty shell" companies, and warns firms that it is imperative they have the capability to manage the risks they generate from the first day after the withdrawal of the UK; and (ii) ensure effective communication to customers - firms must ensure that they have engaged with all their relevant customers and have provided clear and adequate information on the risks and mitigating measures being taken.

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## **CONDUCT**

### **PRA's letter to Treasury Committee on senior management accountability in context of IT failures and current investigations**

On 8 October, the House of Commons Treasury Committee published a letter (dated 16 September) from Lyndon Nelson, PRA Deputy CEO, following up on his appearance before the committee in July as part of its inquiry into IT failures in the financial services sector. At the hearing, Mr Nelson promised to provide the committee with further details concerning examples of where the senior managers regime or accountability structures have "bitten" firms that have not upheld their responsibilities, particularly in the context of IT incidents and failures. Mr Nelson states that the PRA's current investigative portfolio includes examples of it looking for both firms and senior individuals to account for their actions regarding matters falling broadly under the banner of "operational resilience", which includes, but is not limited to, IT outages. These PRA investigations are focused on exploring potential weakness in the role and responsibilities of senior individuals in the decision-making and oversight of the potentially affected area.

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## **FINANCIAL CRIME**

Please see the Markets and Markets Infrastructure section for ESMA's final report on draft RTS on co-operation arrangements in the context of market abuse.

### **UK Office of Financial Sanctions Implementation (OFSI) sees a drop in reported sanctions violations**

On 10 October, the OFSI published its annual report. The report found that the value of sanctions breaches self-reported to HMT fell by more than a billion pounds in the last financial year.

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### **HMT approves LMA revisions to JMLSG guidance on syndicated lending**

On 10 October, the LMA announced that HMT has formally approved the Joint Money Laundering Steering Group's (JMLSG) revised guidance on syndicated lending. The guidance contains revisions to chapter 17 of Part II of the JMLSG's AML and CTF guidance. The guidance is intended to provide a clear description of the primary and secondary syndicated loan markets, an assessment of where money laundering and terrorist financing risks are most likely to arise, and the different types of relationship that exist between the parties to a syndicated loan transaction.

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### **EC "non-paper" key elements of refined methodology for identifying high-risk third countries under the Fourth Money Laundering Directive (MLD4)**

On 10 October, the Council of the EU published a note (dated 1 October) from COREPER relating to the identification of high-risk third countries under Article 9 of MLD4. The note includes an EC "non-paper" on key elements of a refined methodology for identifying high-risk third countries, namely: (i) interaction between the EU and the FATF listing processes - countries listed by the FATF will, in principle, also be listed by the EC. Countries de-listed by the FATF will be assessed by the EC for possible de-listing; (ii) engagement with the third countries - a staged approach should be adopted. Third countries should be consulted on preliminary findings, country-specific "EU benchmarks" should be drafted to address each country's concerns, and their commitment should be sought to implement specific corrective measures before an EU listing is considered; and (iii) consultation with EU Member States' experts at every stage of the process - this includes consulting with law enforcement agencies, intelligence services and financial intelligence units.

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### **Joint Opinion of the ESAs on the risks of money laundering and terrorist financing**

On 4 October, the ESAs published an opinion on the risks of money laundering and terrorist financing affecting the EU's financial sector. The ESAs have identified that the main cross-sectoral risks arise from Brexit, new technologies, virtual currencies, legislative divergence and divergent supervisory practices, weaknesses in internal controls, terrorist financing, and de-risking. The uncertainty generated by Brexit is a key challenge, and there are concerns about the ability of competent authorities (CAs) to adequately supervise the changing population of firms relocating to their EU Member States from the UK following the UK's withdrawal from the EU. The ESAs are concerned about weaknesses in the control frameworks put in place by financial institutions, especially for transaction monitoring and suspicious transactions reporting, in sectors with high volumes of transactions. It also appears that the development of adequate business-wide and customer risk assessments is still a challenge for financial institutions across different sectors and is an area that would benefit from more guidance.

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## **FINTECH**

Please see the Financial Crime section for an update on the Joint Opinion of the ESAs on the risks of money laundering and terrorist financing in the context of Fintech and virtual currencies.

## **INSURANCE**

### **EIOPA launches field test on revised and new templates under Solvency II reporting and disclosure review 2020**

On 9 October, EIOPA announced the launch of a field test on revised and newly proposed templates, which forms part of its work on the Solvency II reporting and disclosure review. There is no intention that the field

test will involve NCAs collecting real data. The field test is open to all solo insurers and reinsurers and service providers. They can test one, some or all of the templates. The deadline for comments is 31 January 2020.

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### **FCA's evaluation paper on general insurance renewal transparency intervention**

On 4 October, the FCA published an evaluation paper on its general insurance renewal transparency intervention (EP19/1). The FCA's intervention appears to have had a positive impact on consumers, and estimates consumer savings of between £39 million and £330 million a year (with an average estimate of £185 million a year). EP19/1 also outlines insights that can be used for the FCA's future work, including that the FCA may need to be more prescriptive with its interventions when the presentation of information is important to the intervention's effectiveness.

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## **MARKETS AND MARKETS INFRASTRUCTURE**

Please see the Brexit section for an update on the FCA's Market Watch Newsletter No. 61 and ESMA's statement on preparations for a possible no-deal Brexit.

### **ESMA's annual report on the application of waivers and deferrals**

On 9 October, ESMA published its annual report on the application of waivers and deferrals under MiFIR. ESMA is required to monitor the application of pre-trade transparency waivers and deferred trade-publication under Articles 4(4), 7(1), 9(2) and 11(1) of MiFIR. The report considers waiver applications received in the course of 2017 and 2018 for which ESMA issued an opinion to the relevant NCA before 31 December 2018. In particular, ESMA analyses the application of equity waivers, the deferral regime to equity instruments, non-equity waivers and the deferral regime to non-equity instruments.

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### **ESMA's guidelines on standardised procedures and messaging protocols under CSDR**

On 8 October, ESMA published a final report with guidelines on standardised procedures and messaging protocols under Article 6(2) of the CSDR. Section 2 of the report contains feedback to the responses received to ESMA's December 2018 consultation paper and highlights where ESMA has changed the proposed guidelines following the consultation. Annex IV to the report contains the guidelines, which apply to investment firms and to competent authorities (CAs). The objectives of these guidelines are to establish consistent, efficient and effective supervisory practices within the European System of Financial Supervision and to ensure the common, uniform and consistent application of the second subparagraph of Article 6(2) of the CSDR, as supplemented by Article 2 of Commission Delegated Regulation (EU) 2018/1229 (RTS on settlement discipline). The guidelines will be translated into the official languages of the EU, which will trigger a two-month period during which CAs must notify ESMA whether they comply or intend to comply with the guidelines. The guidelines will apply from the date of entry into force of Commission Delegated Regulation (EU) 2018/1229 (13 September 2020).

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### **ESMA's final report on draft RTS on co-operation arrangements on market abuse**

On 8 October, ESMA issued its final report on draft regulatory technical standards (RTS) on co-operation arrangements under the Market Abuse Regulation (MAR). Article 26 of MAR mandates ESMA to develop draft RTS containing a template document for cooperation arrangements that are to be used by competent authorities of EU Member States where possible for the cooperation with the supervisory authorities of third countries. There was a delay in the delivery of the draft RTS to take into account the impact that GDPR has had on the transfer of personal data. Annex I recalls the legislative mandate to develop draft RTS, and Annex II sets out the full text of the draft RTS and its annexes.

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### **ECB Regulation regarding money markets statistics published in OJ**

On 8 October, Regulation (EU) 2019/1677 of the ECB amending Regulation (EU) 1333/2014 concerning statistics on the money markets (MMSR Regulation) was published in the OJ. The Regulation amends the minimum standards to be applied by reporting agents under the MMSR Regulation. The Amending Regulation will enter into force on 28 October, 20 days after publication in the OJ.

[Read more](#)

### **ESMA's updated Q&As on MiFIR data reporting**

On 7 October, ESMA published updated Q&As on MiFIR data reporting. A new question about the reporting of FX forward financial instruments under Articles 26 and 27 of MiFIR has been added, and the Q&A on national client identifiers for natural persons has been updated.

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### **FCA's update to its supervisory statement on the operation of the MiFID Transparency Regime**

On 7 October, the FCA updated its March supervisory statement on the operation of the transparency regime under UK MiFIR. The FCA explains that much of the March statement remains relevant; however, the update covers changes mainly to dates, and takes into account ESMA's October statements relating to a no-deal Brexit scenario. The update covers: (i) the financial instruments transparency reference system; (ii) double volume cap; (iii) equity and non-equity transparency; (iv) systemic internalisers; and (v) tick sizes.

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### **ESMA's consultation paper on alignment of MiFIR with the changes introduced by EMIR Refit**

On 4 October, ESMA issued a consultation paper on the alignment of MiFIR with the changes introduced by the EMIR Refit Regulation (EMIR Refit). Under EMIR Refit, the EC shall prepare a report assessing the necessity and appropriateness of aligning the trading obligation for derivatives under MiFIR with changes made under EMIR Refit to the clearing obligation for derivatives. EMIR Refit has not made direct amendments to MiFIR, which means there is a misalignment between the scope of counterparties subject to the clearing obligation under EMIR and the derivatives trading obligation (DTO) under MiFIR. ESMA's initial proposal is to recommend to the EC an alignment of the scope of counterparties subject to the clearing obligation and the DTO. The deadline for comments is 22 November.

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### **ESMA's opinion on frequent batch auctions (FBAs) and the double volume cap mechanism (DVCM)**

On 4 October, ESMA published an opinion on FBAs and the DVCM. The opinion aims to provide clarification regarding the application of the pre-trade transparency requirements by FBA systems and the price determination process of FBA systems, ensuring consistent application throughout the EU. Trading venues operating FBA systems initiating auction calls based on the first incoming order pending a potential match should inform market participants that an auction has started, thereby making market participants aware that there might be a trading opportunity and enabling them to participate in the auction. The opinion also sets out several practices which may undermine the price formation process and the following functionalities that result in non-price forming FPA systems: (i) systems that allow only for the submission of pegged orders and/or adjusted limit orders; (ii) the use of price band limitations; and (iii) systems that lock in the prices at the beginning of an auction.

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## **PRUDENTIAL REGULATION**

### **BoE's financial policy summary and record of FPC meeting on 2 October published**

On 9 October, the BoE published the financial policy summary and record of the FPC meeting held on 2 October. Points of interest include, inter alia: (i) the FPC is maintaining the UK countercyclical buffer (CCyB) rate at 1%; (ii) the core of the UK banking system remains resilient to severe global and market stress; (iii) most risks to UK financial stability that could arise from disruption to cross-border financial services in a no-deal Brexit have been mitigated; and (iv) the FPC remains committed to the implementation of robust prudential standards in the UK. This will require maintaining a level of resilience that is at least as robust as that currently planned, which itself exceeds that required by international baseline standards, as well as maintaining UK authorities' ability to manage UK financial stability risks. The FPC's next policy meeting will be on 3 December.

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### **ECB publishes final results of sensitivity analysis of liquidity risk stress test**

On 7 October, the ECB published the final results from its 2019 supervisory stress test, a sensitivity analysis of liquidity risk. Key takeaways of the exercise include, among other things: (i) banks reported an overall comfortable liquidity position; (ii) incentives provided to banks by the Liquidity Coverage Ratio make them sounder; (iii) collateral management practices could be improved in some banks; and (iv) banks underestimate the negative impact on liquidity that could result from a credit rating downgrade. Supervisors will discuss the conclusions individually with the banks as part of the annual supervisory review and evaluation process.

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## **STRUCTURAL REFORM**

### **ECB Banking Supervision: SSM supervisory priorities 2020 publication**

On 7 October, the ECB published its SSM supervisory priorities for 2020, which are, inter alia: (i) continuing balance sheet repair - the ECB will engage with affected institutions in relation to the stock of non-performing loans in the euro area and will continue to ensure the adequacy of internal models used by banks in calculating their regulatory capital requirements and there will be a follow-up on the targeted review of internal models findings; (ii) strengthening future resilience - supervisory activities will include assessing credit underwriting criteria, capital and liquidity management, business model sustainability and IT and cyber risk; and (iii) Brexit preparation - the ECB expects banks to prepare for all possible outcomes and finalise the implementation of contingency measures for a no-deal Brexit.

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## **SUSTAINABLE FINANCE**

### **BoE's speech to the Task Force on Climate-related Financial Disclosures (TCFD) summit on strengthening the foundations of sustainable finance**

On 8 October, Mark Carney, Governor of the BoE, gave a speech at the TCFD summit in Tokyo on strengthening the foundations of sustainable finance. Mr Carney sets out key next steps for the TCFD, including, inter alia: (i) sharing best practices to increase the quantity and quality of disclosures; (ii) refining disclosure recommendations to those that investors consider most useful for decision making - he considers that the TCFD needs to reach a definitive view of what counts as a high quality disclosure before they become mandatory; and (iii) spreading knowledge on how to measure and use information on strategic resilience to manage risks and realise opportunities.

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## **OTHER DEVELOPMENTS**

### **Government responds to House of Commons Treasury Committee report on work of FCA and regulatory perimeter**

On 10 October, the House of Commons Treasury Committee published its fifteenth special report of session 2017-19 outlining the government's response to the Committee's report on the work of the FCA and the perimeter of regulation. In response to the Committee's recommendations, the government states that, among other things: (i) it is working with the FCA to consider what further steps may need to be taken to ensure consumers understand what regulatory protections they may or may not be entitled to when engaging with unregulated products; and (ii) it rejects the recommendation that the FCA be given formal power to request changes to the regulatory perimeter.

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### **FSB, CPMI and IOSCO reports on governance arrangements for the unique product identifier (UPI) and the unique transaction identifier (UTI)**

On 9 October, the FSB published a report on governance arrangements for the globally harmonised UPI and the UTI. In addition, the CPMI and IOSCO also published a report on governance arrangements for critical OTC derivatives data elements other than UPI and UTI (CDE). The FSB, CPMI and IOSCO consider that the Legal Entity Identifier Regulatory Oversight Committee (LEI ROC) is best positioned to become the single international governance body for the UPI, the UTI and the CDE. However, this is provided that the LEI ROC makes appropriate adjustments to its existing governance arrangements to make it fit for purpose for these identifiers. Among other things, the FSB, the CPMI and IOSCO recommend that jurisdictions take the necessary steps to implement the UPI technical guidance and the governance arrangements across jurisdictions by the third quarter of 2022 (that is, three years from publication of the reports).

[FSB Report](#)

[CPMI and IOSCO Report](#)

### **PRA's October 2019 occasional consultation paper**

On 7 October, the PRA published an occasional consultation paper (CP25/19) proposing minor amendments to its Rulebook, supervisory statements, statements of policy and relevant templates. The proposals relate to: (i) removing references to LIBOR; (ii) updating references and corrections in relation to the SMCR; (iii)

reporting updates for Capital+ and ring-fenced bodies; and (iv) retirement interest-only mortgages. The deadline for comments is 18 November.

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**PRA's policy statement on changes to the PRA's settlement policy**

On 4 October, the PRA published a policy statement (PS23/19) along with a final version of its enforcement statement of policy. PS23/19 states that the PRA is making changes as consulted on its April consultation paper on the settlement of enforcement action policy (CP10/19). The PRA has amended the enforcement statement of policy to: (i) simplify the PRA's settlement discount scheme by retaining a 30% discount or early settlement and removing the 20% and 10% discounts available for settlement in later stages of an enforcement action; and (ii) clarify and make more transparent the PRA's procedures for settlement. It will take effect from 4 October, with one exception relating to cases where the PRA has already concluded stage 1 settlement discussions with the subject, without reaching a settlement, prior to 4 October.

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