FIG Bulletin

Recent developments

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UK-EU trade and cooperation agreement

After extensive negotiations, and within a week of the Brexit transition period ending on 31 December 2020, the UK and the EU finally announced on 24 December 2020 that they had agreed an EU-UK Trade and Cooperation Agreement (TCA). The UK ratified the TCA on 30 December and the TCA now applies provisionally until 28 February 2021, by which time it is hoped that the necessary EU ratification steps are completed, including the consent of the European Parliament and adoption by Council Decision. The TCA was brought into effect in UK law by the swift passing of the European Union (Future Relationship) Act 2020. The UK government has published a summary explainer.

In relation to financial services, the TCA confirms that UK and EU firms may benefit from third country access to each other's markets and non-discriminatory treatment. However, there are some carve-outs and "reservations". These include a typical "prudential carve-out" which allows both parties to take any measure it deems necessary for prudential reasons, such as protecting investors, depositors or policyholders, or ensuring the integrity and stability of their financial systems, so long as it is not used to avoid commitments under the TCA.

In addition, both the UK and the EU have exempted financial services from the most favoured nation (MFN) provision, which means that preferential terms granted to another party in the future need not be extended to the UK or the EU. They have also retained the right to impose a specific legal form on a financial services subsidiary (on a non-discriminatory basis).

The UK has some specific reservations in the TCA, for example, only firms having their registered office in the UK can act as depositaries of the assets of investment funds. This reservation also states that the establishment of a specialised management company, having its head office and registered office in the UK, is required to perform the management of common funds, including unit trusts, and where allowed under national law, investment companies.

The TCA includes provision confirming that it covers any new service that could be supplied under existing regulation. It also guarantees access by foreign firms to any self-regulatory bodies required for the conduct of their business, and to public clearing and payments systems.

In the TCA, the UK and EU also agree to make best endeavours to ensure that internationally agreed standards in the financial services sector for regulation and supervision, for the fight against money laundering and terrorist financing, and for the fight against tax evasion and avoidance, are implemented and applied in their territory. These include standards adopted by the G20, the FSB, the BCBS, the IAIS, IOSCO and the FATF.

Accompanying the TCA is a Joint Declaration on financial services regulatory cooperation in which the UK and the EU agree to enter into a memorandum of understanding by March 2021 establishing a framework for regulatory cooperation on financial services. This framework will be based on a shared commitment to preserve financial stability, market integrity, and the protection of investors and consumers. It will facilitate:

- bilateral exchanges of views and analysis relating to regulatory initiatives and other issues of interest;
- transparency and appropriate dialogue in the process of adoption, suspension and withdrawal of equivalence decisions; and
- enhanced cooperation and coordination including in international bodies as appropriate.

In addition, the UK and EU commit to "discuss" how to move forward with equivalence decisions.

The TCA does not include any provision for equivalence in financial services. In its Q&A on the TCA, the Commission explains that these are unilateral decisions for each party and are not subject to negotiation. The Commission notes that it has assessed the UK's replies to the Commission's equivalence questionnaires in 28 areas. However, the Commission requires further clarifications from the UK, particularly in relation to how the UK will diverge from EU frameworks, how it will use its supervisory discretion regarding EU firms, and how the UK's temporary regimes will affect EU firms. The Commission reiterates that it will consider granting equivalence when it is in the EU's interest.

Key dates to watch are the 28 February 2021 deadline for the end of the provisional application of the TCA and March 2021 for the deadline for the regulatory cooperation MoU.

If you would like to discuss the impact of the TCA on your business, please get in touch with your usual Hogan Lovells contact or a member of our Brexit Taskforce. For an overview of the impact of the TCA on data protection, read our separate briefing here.

Cryptoassets and stablecoins: HM Treasury consultation and call for evidence

HM Treasury has published a consultation and call for evidence on the UK regulatory approach to stablecoins and cryptoassets. The consultation paper represents the first stage in HM Treasury's consultative process on the broader regulatory approach to cryptoassets and stablecoins. It wants to ensure the UK regulatory framework is equipped to harness the benefits of new technologies, supporting innovation and competition, while mitigating risks to consumers and financial stability.

HM Treasury proposes an incremental, phased approach to regulatory adjustments, and a proportionate approach to regulation that is sensitive to risks posed and responsive to new market developments. The approach would be rooted in the principle of "same risk, same regulatory outcome". The objectives and principles would be set by the government and HM Treasury, with detailed rules set by the regulators. HM Treasury plans to maintain the current division of UK regulator responsibilities as far as possible.

The consultation paper focuses on establishing a sound regulatory environment for stablecoins, where HM Treasury judges that risks and opportunities are most urgent. If appropriate standards and regulation can be met, HM Treasury considers that certain stablecoins have the potential to play an important role in retail and cross-border payments, including in settlement. It proposes to introduce a regulatory regime for "stable tokens" used as a means of payment, covering firms issuing stable tokens and firms providing services relating to them, either directly or indirectly, to consumers.

The use of currently unregulated tokens and associated activities primarily for speculative investment purposes, such as Bitcoin, could initially remain outside the regulatory perimeter for conduct and prudential purposes. Utility tokens (those used to access a service) could also remain outside the perimeter. To a longer timetable, HM Treasury will consider the case for bringing a broader set of cryptoasset market actors or tokens within the scope of regulation.

The paper also includes a call for evidence on cryptoassets used for investment and the broader use of distributed ledger technology in financial markets.

The deadline for comments on the paper is 21 March 2021.

If the proposals are adopted, further consultations and guidance will be issued by HM Treasury and relevant regulators on implementation, including specific firm requirements.

Separately, the House of Commons European Scrutiny Committee considered, in section 4 of its 33rd report of the 2019-21 session, the EU's proposed Regulation on markets in cryptoassets (MiCA), proposed Regulation on a pilot regime for market infrastructures based on distributed ledger technology (DLT) and proposed Directive amending MiFID to clarify the legal position of certain cryptoassets under existing EU financial services legislation. The Committee explains that the new EU rules will not apply directly to or in the UK under the post-Brexit transition period. Nevertheless, it is concerned that the EU proposals raise several concerns which it discusses in its report.

The Committee will continue to scrutinise developments in the EU legislative process.

Expanding dormant assets scheme: HM Treasury response to consultation

HM Treasury has published a response to its joint consultation paper with the Department for Digital, Culture, Media and Sport (DCMS) on expanding the dormant assets scheme established under the Dormant Bank and Building Society Accounts Act 2008.

The UK dormant accounts scheme is currently narrower in scope than other international schemes, with only bank and building society accounts included. HM Treasury and DCMS consulted on expanding the scheme between February and July 2020.

Having considered all responses, which showed widespread support, the government intends to legislate to include additional assets from the insurance and pensions, investment and wealth management, and securities sectors in the scheme. Assets proposed to be within the scope of the expansion include:

- proceeds of dormant life insurance and retirement income policies;
- proceeds of dormant shares or units in collective investments;
- dormant investment asset distributions and proceeds;
- proceeds of, or distributions from, dormant shares; and
- unclaimed proceeds from corporate actions.

Once the scheme is expanded, participants must continue to first make efforts, based on industry best practice, to reunite assets with their owners. Where that is not possible, more businesses will be allowed to participate in voluntarily transferring dormant assets into the scheme. People will still be able to reclaim their assets in full at any time.

Funding raised through expanding the scheme will enable continued support of good causes, social investments and environmental initiatives.

The government intends to legislate to expand the scheme when parliamentary time allows. It recognises and welcomes the strong interest in how future dormant assets funding could be spent and is considering whether this is an area that should be reviewed.

Post-Brexit Gibraltar passporting arrangements: FCA and PRA statements

The Financial Conduct Authority (FCA) has published a new webpage on passporting in and out of Gibraltar and the Prudential Regulation Authority (PRA) has published a new webpage on Gibraltar passporting arrangements.

The PRA explains that the transitional arrangements preserving deemed passporting for Gibraltarian firms after the end of the transition period have been extended until 31 December 2021 and can be further extended until such time as the permanent arrangements of the Gibraltar Authorisation Regime are in place. The PRA provides an overview of outward passporting to Gibraltar and inward passporting from Gibraltar. It also covers how the PRA assesses outward passporting firms and changes to the original passport notification. Until further notice, the PRA requests that all passport notifications in accordance with the Capital Requirements Directive (CRD) and Solvency II Directive are submitted by email only, not sent by post.

The FCA webpage covers how to apply for, change or cancel a passport, the passporting fees payable and the time it takes for the FCA to process passport notifications. It also includes information on passporting rights for UK appointed representatives, UK tied agents in Gibraltar, and UK-authorised payment institutions and registered account information service providers with several agents.

PRA changes required before end of Brexit transition period: PS30/20 & PS27/20

The PRA has published a policy statement, PS30/20, on changes to its rules and onshored binding technical standards, as well as the use of temporary transitional directions, required before the end of the Brexit transition period. In particular, PS30/20 contains the final versions of the PRA Rulebook: (EU Exit) Instrument 2020 (PRA 2020/29) (set out in Appendix 1), the PRA transitional direction (set out in Appendix 2) and related guidance (set out in Appendices 4 to 7).

The PRA published these initially as near-final drafts as part of a joint Bank of England (BoE) and PRA policy statement, PS27/20, on 18 December 2020. However, following the making of the PRA's rules implementing CRD V, the PRA Rulebook: (EU Exit) Instrument 2020 and the PRA transitional direction have now been made and published as final versions, together with related guidance. The PRA has not made any changes to these materials from the near-final versions previously published.

Most provisions of the Instrument commenced at 11pm on 31 December 2020 (IP completion day). However, a small number of provisions will take effect at different times. The transitional direction came into force on IP completion day. In general terms, it delays onshoring changes that fall within the PRA's remit. It will apply until 31 March 2022, unless otherwise stated in the direction or if it is varied or revoked before then.

End of Brexit transition period: FCA cooperation and information-exchange MoUs

The FCA has published a webpage linking to memoranda of understanding (MoUs) it has entered into with European authorities in the areas of securities, insurance and pensions, and banking:

- a multilateral MoU with EU and EEA National Competent Authorities (NCAs) covering supervisory cooperation, enforcement and information sharing relating to, among others, market surveillance, investment services and asset management activities;
- an MoU with the European Securities and Markets Authority (ESMA) covering supervision of credit rating agencies and trade repositories;
- a multilateral MoU with EU and EEA NCAs covering supervisory cooperation, enforcement and information exchange between UK and EU/EEA national supervisors in the field of insurance regulation and supervision;

- an [MoU with the European Insurance and Occupational Pensions Authority (EIOPA)]() covering information exchange and mutual assistance between the UK authorities and EIOPA in the field of insurance regulation and supervision;
- an [MoU with the European Banking Authority (EBA)]() covering information exchange and mutual assistance between the UK authorities and the EBA in the field of banking; and
- individual MoUs with EU and EEA NCAs covering supervisory cooperation and information-sharing arrangements in the field of banking. These can be found on the [PRA website]().

End of Brexit transition period: FCA update on regulatory change

The FCA has published a [press release]() about regulatory changes for firms as the Brexit transition period ends. The press release refers to several changes to existing systems and services, including:

- **temporary permissions regime (TPR):** the TPR has now come into effect for the firms and funds that notified the FCA that they wanted to enter the regime. Passporting between the UK and EEA states has ended;
- **financial services contracts regime (FSCR):** the FSCR allows, for a limited period, EEA passporting firms not in the TPR to continue to service UK contracts entered into prior to the end of the transition period (or prior to when they enter FSCR) to conduct an orderly exit from the UK market now that the transition period has ended. The extent to which UK firms can continue to provide services to customers in the EEA depends on local law and local regulators' expectations. The FCA expects UK firms to take the steps available to them to make sure they act consistently with these local laws and expectations. The FCA states firms' decisions need to be guided by obtaining appropriate outcomes for their customers, wherever they are based;
- **temporary transitional power (TTP):** while the TTP has been applied on a broad basis, there are some key exceptions where firms need to comply with the changed requirements now. Firms should check the implications of these for their business; and
- **credit rating agencies (CRAs) and trade repositories (TRs):** the FCA is the UK regulator of UK-registered and certified CRAs. This means that any UK legal entity that wishes to issue credit ratings publicly or by subscription will now need to be registered or certified as a CRA with the FCA. Any TR wishing to offer its services in the UK after 31 December 2020 will need to be registered with or recognised by the FCA. UK reporting counterparties and UK TRs should use the validation rules contained in the retained EU law version of the European Market Infrastructure Regulation (UK EMIR) when submitting derivative transactions entered into from 11pm on 31 December 2020 onwards.

Final FCA Brexit instruments and TTP directions

To prepare for the end of the transition period, the FCA made further EU exit-related changes to its Handbook and Binding Technical Standards for which, in some cases, it shares responsibility with the PRA or the BofE. These changes ensure that a functioning regulatory and legal framework for financial services continues to be in place after the transition period.

The updates follow the publication in September of the FCA's [CP20/18]() containing draft onshoring-related instruments. The final instruments are largely unchanged from the versions consulted on in CP20/18, and these changes are outlined in the FCA's [Handbook Notice 83]().

The FCA's Temporary Transition Power (TTP) [directions]() have also been made and published. The TTP applies transitional provisions to financial services legislation for a temporary period.

The TTP will be applied on a broad basis from the end of the transition period until 31 March 2022, although there are some areas where the TTP will not apply which are detailed on an FCA webpage.

Post-Brexit UK regulatory regime: FCA directions, notifications and forms

The FCA has published a series of new directions, notifications and forms, which it and firms will need to use now the Brexit transition period has ended.

Forms relating to benchmarks

- Benchmarks administrator notification form: this equivalence notification form can be used to give the FCA the information it requires to publish the relevant firm's details and benchmarks on the UK benchmarks register; and
- Benchmarks schedule form equivalence: this equivalence form requires details on those benchmarks or families of benchmarks that the relevant benchmark administrator already administers or intends to administer. This includes all benchmarks administered in the UK or the EU (or both).

Forms relating to credit rating agencies (CRAs)

- CRAs' application for certification form and notes: this application for certification form relates to an application for certification under article 5 of the UK CRA Regulation. Applicants must submit the information required by the onshored version of Commission Delegated Regulation (EU) 449/2012, which sets out the information to be provided by a CRA applying for certification; and
- CRAs' application for registration form and notes: this application for registration form relates to an application for registration under the UK CRA Regulation. Applicants must comply with articles 2 to 6 of the UK CRA Regulation regarding the format of the application, the attestation of its accuracy, the class of credit ratings, the number of employees, and the policies and procedures provided to the FCA. They must submit the information required by the onshored version of Commission Delegated Regulation (EU) 449/2012.

Notification forms

- Supervised run-off (SRO) notification form: this notification form is for EEA-authorised payment institutions (PIs), EEA-registered account information service providers (RAISPs) and EEA-authorised electronic money institutions (EMIs), to notify the FCA of entry into SRO, which forms part of the UK's financial services contracts regime (FSCR). Under SRO, these firms can provide the payment and e-money services they were providing in the UK in the exercise of a passport right to the extent necessary to continue to service pre-existing contracts with UK customers;
- Contractual run-off (CRO) notification form: this notification form is for passporting firms under schedule 3 of the Financial Services and Markets Act 2000 (FSMA) (that is, credit institutions, Solvency II insurers, investment firms, alternative investment fund (AIF) managers, UCITS management companies, insurance distribution firms and mortgage intermediaries). CRO forms part of the FSCR. It allows EEA or Treaty firms that, immediately before the end of the Brexit transition period, qualified for authorisation to undertake regulated activities in the UK in line with Schedule 3 or 4 of FSMA on a freedom to provide services basis, to continue to perform regulated activities within the scope of their previous passport in the UK mainly to the extent necessary to continue to perform pre-existing contracts with UK customers; and

- Notification form: EEA E-Commerce Directive (ECD) firms: this form relates to notifications under regulation 13 of the Electronic Commerce and Solvency 2 (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/1361) (ECD EU Exit Regulations). It allows an EEA ECD firm to notify the FCA that it is using the ECD run-off, which is set out in Part 4 of the ECD EU Exit Regulations, to run-off its existing contracts that it entered into under the ECD exclusion in article 72 of the FSMA (Regulated Activities) Order 2001 (SI 2001/544) (RAO).

Directions

- Direction: ECD run-off: this direction is given by the FCA under regulation 13 of the ECD EU Exit Regulations. It applies to notifications under that regulation;
- Direction: FSMA applications: this direction is given by the FCA under section 55U(4) and (4A) of FSMA, as modified by regulation 6(6) of the EEA Passport Rights (Amendment etc. and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1149) (Passport Rights Regulations). It is addressed to temporary permission (TP) firms and directs them not to apply for authorisation or variation in the UK until specifically directed to do so by the FCA;
- Direction: no section 272 applications: this direction is given by the FCA under regulation 68(2) of the Collective Investment Schemes (Amendment etc.) (EU Exit) Regulations 2019 (SI 2019/325). It directs that fund managers should not submit an application for the full recognition of a fund in the UK's temporary marketing permission regime (TMPR) under section 272 of FSMA until specifically directed by the FCA to do so;
- Direction: notification following entry into CRO (FSMA): this direction is given by the FCA under regulation 53(2) of the Passport Rights Regulations. It directs that a notification made under regulation 53(1) of the Passport Rights Regulations must be made by submitting the CRO notification form;
- Direction: notification following entry into CRO (EEA authorised EMIs): the FCA has given this direction under paragraph 12C(3) of Part 1A of Schedule 3 to the Electronic Money, Payment Services and Payment Systems (Amendment and Transitional Provisions) (EU Exit) Regulations 2018 (SI 2018/1201) (as amended) (E-Money and Payments EU Exit Regulations). It directs that a notification made under paragraph 12C(1) of Part 1A of Schedule 3 to those Regulations must be made by submitting the CRO notification form, contain the information required in that form, and be made as soon as practicable after entry into CRO;
- Direction: notification following entry into SRO (EEA authorised EMIs): the FCA has given this direction under paragraph 12C(3) of Part 1A of Schedule 3 to the E-Money and Payments EU Exit Regulations. It directs that a notification made under paragraph 12C(3) of Part 1A of Schedule 3 to those Regulations must be made by submitting the SRO notification form, contain the information required in that form, and be made as soon as practicable after entry into SRO;
- Direction: notification following entry into CRO (payments): the FCA has given this direction under paragraph 27(3) of Part 3 of Schedule 3 to the E-Money and Payments EU Exit Regulations. It directs that a notification made under paragraph 27(1) of Part 3 of Schedule 3 to those Regulations must be made by submitting the CRO notification form, contain the information required in that form, and be made as soon as practicable after entry into CRO; and
- Direction: notification following entry into SRO (payments): the FCA has given this direction under paragraph 27(3) of Part 3 of Schedule 3 to the E-Money and Payments EU Exit Regulations. It directs that a notification made under paragraph 27(3) of Part 3 of Schedule 3 to those Regulations must be made by submitting the SRO notification

form, contain the information required in that form, and be made as soon as practicable after entry into SRO.

Sterling LIBOR transition: FCA, BoE and RFRWG updates

The FCA and the BoE have published press releases highlighting the need for firms to complete the transition from sterling LIBOR by the end of 2021, alongside an updated version of the priorities and roadmap document produced by the Working Group on Sterling Risk-Free Reference Rates.

Financial services sector competition investigation: CMA update

The Competition and Markets Authority (CMA) has published an update on the progress of its ongoing investigation, launched in November 2018, into alleged anti-competitive arrangements in the financial services sector. The CMA confirms that, following the end of the UK-EU transition period, the CMA's investigation will continue into suspected anti-competitive arrangements which may infringe the Chapter I prohibition of the Competition Act.

The CMA had stated that its initial investigation would continue until December 2020. It now states that the investigation will continue from January 2021 to September 2021, including further information gathering and analysis.

COVID-19: PRA and FCA statement for dual-regulated firms on SMCR

The PRA and FCA have jointly published an updated statement on the impact of COVID-19 on the Senior Managers and Certification Regime (SMCR), setting out their expectations of dual-regulated firms. The statement provides an update to the flexibility they previously offered in their April 2020 statement.

The regulators state that, as firms have adapted to the impact of the pandemic over the past months, their current expectation is that firms' application of the SMCR rules returns to normal. They have therefore ended the provisions that were previously available. Their explanation of what this means for firms includes:

- the relaxation of the requirement for a firm that needed to make temporary arrangements in direct response to the pandemic to submit updated Statements of Responsibilities (SoRs) ended on 7 January 2021. The regulators now expect firms to submit revised SoRs as normal. They should use Form J for this;
- the regulators' rules allow individuals to perform senior management functions (SMFs) without approval for up to 12 weeks in a consecutive one-year period if their firm experiences an SMF vacancy that is temporary and/or reasonably unforeseen (the 12-week rule). The regulators' statement said that if the FCA and PRA conclude that the 12-week rule is insufficient to allow firms to respond to temporary SMF absences linked to coronavirus, they will consider additional measures. The regulators have found no evidence that the 12-week rule does not provide enough flexibility for dual-regulated firms due to coronavirus, and therefore do not intend to introduce measures; and
- in normal circumstances, if an SMF becomes temporarily vacant, firms should reallocate those SMFs' prescribed responsibilities (PRs) among their remaining SMFs until a permanent replacement is approved. However, if this is not possible due to coronavirus, the regulators previously allowed firms to temporarily allocate the SMFs to the individual who is acting as interim SMF under the 12-week rule, even if they are, at the time, unapproved as an SMF. This provision ended on 7 January 2021, and firms should now

apply these rules as normal. If a PR has been allocated to someone who is not approved as an SMF, the firm should reallocate it to an SMF before that date.

COVID-19: FCA statement for solo-regulated firms on SMCR

The FCA has published an updated statement on the impact of COVID-19 on the SMCR, setting out its expectations of solo-regulated firms. The statement provides an update to the additional flexibility the FCA communicated in its April 2020 statement.

In this latest statement, the FCA also explains that, as firms have adapted to the impact of the pandemic over the past few months, it expects that firms' application of the SMCR rules will return to normal. Some of the previously available provisions ended on 7 January 2021 and the relevant modifications by consent will end after 30 April 2021. The FCA provides more detail below on what this means, which includes:

- the relaxation of the requirement for a firm that needed to make temporary arrangements in direct response to the pandemic to submit updated Statements of Responsibilities (SoRs) (provided certain conditions were met) ended on 7 January 2021. The FCA now expects firms to apply the notification requirements as normal and submit a Form J when significant changes are made to SoRs. However, it does not expect firms to submit updated SoRs relating to changes made before 7 January 2021; and
- the FCA previously issued a modification by consent to the 12-week rule to support firms using temporary arrangements during the crisis. If temporary arrangements made as a result of the pandemic lasted longer than 12 weeks, firms could notify it that they consented to an extension of the 12-week rule. The modification by consent is still available. However, a firm cannot consent to the modification after 30 April 2021 and all modifications consented to before then will come to an end on that date. The end date means that the maximum period of extension available to firms reduces closer to 30 April 2021.

The FCA has made little change from its previous statement relating to furloughed staff.

COVID-19: FCA updated expectations for approved persons regime

The FCA has published an updated statement setting out its expectations to help firms using appointed representative arrangements apply the approved persons regime during the COVID-19 pandemic. The statement provides an update to its June 2020 statement.

The FCA explains that, as firms have adapted to the impact of the pandemic over the past few months, it expects that firms' application of the SMCR rules will return to normal. Some of the previously available provisions ended on 7 January 2021 and the relevant modifications by consent will end after 30 April 2021. The FCA provides more detail below on what this means, which includes:

- the FCA previously issued a modification by consent to the 12-week rule to support firms using temporary arrangements during the crisis. If temporary arrangements made as a result of the pandemic lasted longer than 12 weeks, firms could notify the FCA that they consented to an extension of the 12-week rule. The FCA explains that the modification by consent is still available. However, a firm cannot consent to the modification after 30 April 2021 and all modifications consented to before then will come to an end on that date. This means that the maximum period of extension available to firms reduces closer to 30 April 2021; and

- from 7 January 2021, firms are again be expected to notify the FCA under Form D of the temporary arrangements set out in the FCA's statement. However, the FCA does not expect firms to submit their Form D relating to changes made before 7 January 2021.

COVID-19: FCA statement on financial crime systems and controls

On 8 January 2021, the FCA updated its webpage on firms' financial crime systems and controls during the COVID-19 pandemic which allowed some flexibility, on a risk-assessed basis, to firms' financial crime systems and controls. The FCA's update informs firms that its statement will expire on 7 February 2021.

COVID-19: FCA financial resilience survey

On 7 January 2021, the FCA published a new webpage setting out the data it has obtained as a result of carrying out its COVID-19 financial resilience survey during 2020. It also announced, on 8 January 2021, that it will carry out a further survey of firms to help it understand the change in their financial resilience as a result of COVID-19. The FCA intends to email the survey to the relevant firms during the period of 13 January to 19 January 2021. Completion of the survey is mandatory.

COVID-19: ESRB revises recommendation on restrictions of distributions

On 18 December 2020, the European Systemic Risk Board (ESRB) published a press release summarising discussions at the 40th regular meeting of its General Board, which was held on 15 December 2020. Among other things, it decided to revise and extend its initial recommendation on restrictions of distributions during the COVID-19 pandemic by way of a further recommendation (dated 15 December 2020).

The revised Recommendation aims to ensure that firms maintain a sufficiently high level of capital to mitigate systemic risk and contribute to economic recovery in case of further economic disruptions. It recommends that relevant authorities ask banks, investment firms, insurers and reinsurers to refrain from distributions that have the effect of reducing the quantity or quality of own funds, unless firms apply extreme caution in carrying out distributions and the resulting reduction does not exceed the conservative threshold set by their competent authority.

Previously the General Board included central counterparties (CCPs) within the scope of its recommendation. However, ESMA's CCP stress test exercise confirmed the overall operational resilience of EU CCPs to common shocks and multiple defaults for credit, liquidity and concentration stress risks. Considering the effectiveness of the measures deployed by CCPs to mitigate operational risk, the General Board decided that it is no longer necessary to include CCPs within the scope of the recommendation.

The revised recommendation will apply until 30 September 2021. The ESRB will continue to monitor the recommendation's implications on firms and will decide if it needs to be further amended.

COVID-19: EBA requests extension for submission of technical standards

On 17 December 2020, the EBA published a letter (dated 9 December 2020) asking the European Commission to revise the deadlines for the submission of certain draft RTS and implementing technical standards (ITS) required under the Capital Requirements Regulation, the Capital Requirements Directive and the Investment Firms Regulation that were due to be delivered by the end of December 2020 or 1 January 2021.

The EBA requests new time limits for the submission of these RTS and ITS because of the lengthened consultation periods due to COVID-19 and needing to put on hold data collections normally used for ad-hoc impact or cost-benefit analyses.

The EBA is also requesting a delay to a report required under Article 44 of the Securitisation Regulation which it now expects to complete by the end of March 2021.

Outsourcing to cloud service providers: ESMA guidelines

ESMA has published a final report containing guidelines on outsourcing to cloud service providers (CSPs). The guidelines aim to help firms and competent authorities identify, address and monitor the risks and challenges arising from cloud outsourcing arrangements, from making the decision to outsource, selecting a cloud service provider, monitoring outsourced activities to providing for exit strategies.

ESMA consulted on the guidelines in June 2020. In general, respondents agreed with ESMA's approach towards outsourcing to CSPs. The final report provides an overview of the feedback it received and explains how ESMA took this feedback into account.

The guidelines apply from 31 July 2021 to all cloud outsourcing arrangements entered, renewed or amended on or after that date. ESMA states that firms should review and amend accordingly existing cloud outsourcing arrangements with a view to ensuring that they take into account the guidelines by 31 December 2022. Where the review of cloud outsourcing arrangements of critical or important functions is not finalised by 31 December 2022, firms should inform their competent authority, including the measures they plan to take to complete the review or their possible exit strategy.

The guidelines will be translated into the official EU languages and published on ESMA's website. The publication of the translations in all official languages of the EU will trigger a two-month period during which competent authorities must notify ESMA whether they comply or intend to comply with the guidelines.

PEPP Regulation: European Commission adopts Delegated Regulation

The European Commission has adopted a Delegated Regulation supplementing the Pan-European Personal Pension Product (PEPP) Regulation with regard to regulatory technical standards (RTS) specifying the requirements on information documents, on the costs and fees included in the cost cap, and on risk mitigation techniques for the PEPP.

The Council of the EU and the European Parliament will now consider the Delegated Regulation. If neither object, the Delegated Regulation will be published in the Official Journal of the EU (OJ) and enter into force on the twentieth day following its publication in the OJ.

Cryptoassets: IOSCO report on investor education

The International Organization of Securities Commissions (IOSCO) has published a report to help regulators and retail investors address the risks associated with cryptoassets. As well as identifying the specific risks of cryptoassets to investors, the report describes methods that regulators can use to provide educational material to retail investors on the risks of investing in cryptoassets.

IOSCO recommends that members adopt the material and educational approaches in the report best suited to their respective jurisdictions. It acknowledges that not all the report's material or educational approaches may be appropriate for all member jurisdictions or consistent with all members' legal and regulatory frameworks.

Banking and Finance

Ring-fencing and proprietary trading activities reviews: HM Treasury update

On 22 December 2020, the House of Commons Treasury Committee published a letter (dated 16 November 2020) it received from John Glen, Economic Secretary to the Treasury, on the upcoming statutory reviews of the ring-fencing regime legislation and banks' proprietary trading activities.

The ring-fencing regime came into effect on 1 January 2019 and was implemented following recommendations of the 2011 Independent Commission on Banking, chaired by Sir John Vickers. HM Treasury is required, by 1 January 2021, to appoint a panel to review the operation of the ring-fencing regime, including Part 9B of the Financial Services and Markets Act 2000 (FSMA) and the ring-fencing rules made by the Prudential Regulation Authority (PRA) or the Financial Conduct Authority (FCA).

The same implementing legislation that requires HM Treasury to appoint an independent panel to review the ring-fencing regime also requires an independent review of firms' proprietary trading activities. The independent review will consider whether it agrees with the conclusions of the PRA's September 2020 report on proprietary trading.

Given the close connection between the ring-fencing objectives and proprietary trading activity, Mr Glen explains that he intends to appoint one panel of six members to conduct both reviews. Mr Glen sets out his intention to appoint Keith Skeoch, outgoing CEO of Standard Life Aberdeen, as chair of the independent panel.

End of Brexit transition period: BoE and SRB cooperation arrangement

The Single Resolution Board (SRB) has announced that the cooperation arrangement between it and the Bank of England (BoE) came into force on 1 January 2021. The SRB explains that the arrangement will help to facilitate bank resolution while maintaining financial stability in the EU and the UK. It sets out the framework for consulting, cooperating and exchanging information when preparing for and implementing bank resolution in the UK and the Banking Union, in line with the rules in both jurisdictions. The arrangement is based on reciprocity and proportionality, and recognises the complex nature of cross-border bank operations.

The SRB and the BoE will continue to work closely together to ensure appropriate arrangements are in place for effective cooperation on the management of the failure of cross-border banks, in the event this is necessary.

The BoE has updated its resolution webpage to refer and link to the arrangement.

The SRB notes that its Brexit expectations position paper covers topics including the minimum requirement for own funds and eligible liabilities (MREL) eligibility, internal loss absorbency, operational continuity and access to financial market infrastructures. In addition, the SRB has communicated its expectations on an individual basis to banks. It has placed an emphasis on issuances under UK law, raising awareness that they may become ineligible for MREL.

The SRB also notes that its Expectations for Banks document and the MREL policy under the Banking Package also set out measures applying to third countries, which now apply to the UK. These include relevant clauses to contracts governed by third country law to ensure eligibility for MREL, enhance cross-border recognition of resolution actions or support operational continuity in resolution.

MREL and resolvability for mid-tier banks: BoE extends deadline

The BoE has published a statement announcing an extension for mid-tier banks to comply with deadlines relating to the MREL and the resolvability assessment framework (RAF).

For these purposes, "mid-tier banks" are UK resolution entities that are not global systemically important banks (G-SIBs) or domestic systemically important banks (D-SIBs) (or their subsidiaries) for which the BoE has set (or has indicated it will set) an MREL in excess of minimum capital requirements. The term also covers UK material subsidiaries of such institutions and certain UK subsidiaries of overseas groups for which the BoE has set internal MREL in excess of minimum capital requirements.

MREL

The BoE has extended the deadline for mid-tier banks to comply with their end-state MRELs to 1 January 2023, unless they are already subject to a later deadline. This replaces indicative end-state MREL compliance dates falling before that date that the BoE had previously communicated.

Before 1 January 2023, mid-tier banks are expected to continue to comply with their interim external and internal MRELs, as set in accordance with point b. of para. 9.4(b) of the Statement of Policy on "The BoE's approach to setting a MREL" (the MREL SoP), or as otherwise communicated to them by the BoE. The MREL SoP should be read as amended accordingly.

All other MREL deadlines remain unchanged.

MRELs applicable to all other institutions are unaffected by this announcement. The BoE notes that, as announced in May 2020, it intends to exercise its discretion with respect to the transition time firms are given to meet higher MRELs. Firms that are not currently subject to a leverage-based capital requirement, but which subsequently become subject to one, will be given at least 36 months after that requirement takes effect to meet any higher MREL resulting from it.

RAF

The deadline for mid-tier banks to implement the Statement of Policy on "The BoE's Approach to Assessing Resolvability" and to achieve the three resolvability outcomes has been extended from 1 January 2022 to 1 January 2023.

The BoE emphasises that it remains important for boards and senior management of mid-tier banks to take responsibility for their firm's resolvability and to continue to take steps to assure themselves that they have the necessary arrangements in place to achieve, and continue to achieve, the three resolvability outcomes by 1 January 2023. The BoE intends to continue to engage with those firms on the implementation of the RAF ahead of the revised deadline.

The extension of MREL and RAF deadlines will enable the BoE to engage with interested parties on the issues set out in its MREL discussion paper published on the same day (see below) and to complete its review of the MREL framework in 2021 considering that engagement.

MREL: BoE discussion paper

The BoE has published a discussion paper as part of its review of the UK's framework for the MREL The discussion paper is the first part of the BoE's review, which will consider, among other things, resolution strategy thresholds, the calibration of MREL, instrument eligibility and the application of MRELs within banking groups.

The deadline for responses is 18 March 2021. The BoE intends to publish a consultation paper in summer 2021, setting out any proposed changes to its MREL framework, and to make any policy changes by the end of 2021.

CRR prudential treatment of software assets: PRA statement

The PRA has published a statement on the requirement on the prudential treatment of software assets under Article 36(1)(b) of the Capital Requirements Regulation (CRR). Article 36(1)(b) of the CRR became effective on 23 December 2020 (including in the UK) and exempts software assets from the deduction requirement for intangible assets from common equity tier 1 (CET1). This revised regulatory treatment of software assets does not derive from the Basel Standards and is specific to the CRR.

Concerned that this could undermine the safety and soundness of UK firms, the PRA plans to consult to maintain the earlier position whereby all software assets continue to be fully deducted from CET1 capital. Firms should take this into account when making capital management and other decisions, which may be impacted by this change.

While the revised EU requirement applies to PRA-regulated firms, the PRA recommends firms do not base their distribution or lending decisions on any capital increase arising from this requirement. They should also consider any significant software assets included in their regulatory capital in making capital management decisions.

CRD V implementation and designation of firms within certain consolidation groups: PRA PS29/20

The PRA has published a policy statement, PS29/20, setting out its final policy on the implementation of the Capital Requirements Directive V (CRD V) and its final policy on the designation of firms within certain consolidation groups. The policy statement is relevant to UK banks, building societies and PRA-designated investment firms, as well as UK financial holding companies and UK mixed financial holding companies.

PS29/20 follows the PRA's consultation in CP22/20, on its proposed approach to designating entities within certain banking UK consolidation groups as responsible for ensuring that consolidated prudential requirements are met during a transitional period, and policy statement, PS26/20, setting out near-final versions of rules instruments, statements of policy, supervisory statements, model requirements and templates relating to the proposals consulted on in CP12/20 and CP17/20. The PRA did not make the final versions of these documents at that time because its power under the CRD V EU Exit Regulations to make rules imposing consolidated or sub-consolidated requirements on holding companies could not be exercised before 28 December 2020.

The PRA also published additional rulebook instruments and supervisory statements where it considers that certain policies would need to be amended under the European Union (Withdrawal) Act 2018 (EUWA) to make the legislation operable following the end of the Brexit transition period.

There are 33 appendices to PS29/20, including links to the rulebook instruments, updated Supervisory Statements, Statements of Policy, etc.

International banks: PRA CP2/21 on approach to branch and subsidiary supervision

The PRA has published a consultation paper, CP2/21, setting out its proposed approach to supervising the UK activities of PRA-authorised banks and designated investment firms that are headquartered outside of the UK, or are part of a group based outside of the UK (referred to as "international banks"). The term includes those firms operating in the UK through a branch. It also proposes expectations for receiving information concerning risks in the wider group, and for cooperation from regulated entities and their supervisors, in order that it can be satisfied that firms are meeting threshold conditions.

The purpose of the proposals in CP2/21 is to provide clarity to international banks on the implications for them of the different ways they may choose to structure their operations. The proposals also aim to explain how the PRA would assess these firms against its threshold conditions, particularly the condition relating to the effective supervision of firms, when a firm belongs to a group based outside the UK.

The proposals would result in a new Supervisory Statement (SS) "International banks: The PRA's approach to branch and subsidiary supervision", which will supersede SS1/18 "International banks: the Prudential Regulation Authority's approach to branch authorisation and supervision".

The PRA states that the proposed expectations on subsidiaries and systemic wholesale branches in the proposed SS are consistent with the PRA's existing supervisory approach and are intended to provide clarity to firms on what they need to do to meet the PRA threshold conditions. It notes that this clarification is particularly timely given the changes in the population of firms that the PRA supervises and the associated changes in firms' operating structures.

The consultation period ends on 11 April 2021. The PRA intends to implement the final policy in Q2 2021.

The PRA has also published a speech by David Bailey, BoE Executive Director Financial Market Infrastructure, in which he further sets out the PRA's approach to supervising international banks. Among other things, he covers what is meant by "responsible openness", cooperation with home state supervisors, information sharing and governance. He also discusses booking arrangements for trading activity and having robust and proportionate requirements in place for international firms.

End of Brexit transition period: FCA guidance on approach to interpreting reporting and disclosure requirements under CRD and CRR BTS

The FCA has published guidance setting out the approach it expects firms to take when interpreting EU-based references found in reporting and disclosure templates and associated instructions in binding technical standards (BTS) relating to the CRD and CRR. The guidance is necessary following the expiry of the implementation period under the UK-EU Withdrawal Agreement.

The FCA has not made line-by-line changes to reporting or disclosure templates or instructions as a result of Brexit. Instead, it expects firms to interpret EU references in those requirements in accordance with this guidance.

Transposing BRRD II: PRA PS28/20

The PRA has published a policy statement, PS28/20, on transposing the Bank Recovery and Resolution Directive (BRRD) II (BRRD II) which amends the BRRD. The UK was required to transpose the BRRD II Directive by 28 December 2020. HM Treasury's statutory instrument (SI) transposing the BRRD II Directive was made on 3 December 2020 and amends primary legislation that will affect the Contractual Recognition of Bail-in and Stay in Resolution Parts of the PRA Rulebook. In PS28/20, the PRA sets out its final rules concerning the impact of BRRD II on these Parts.

To comply with the PRA's obligation to transpose BRRD II, most of the elements of the SI that are relevant to these Parts came into force on 28 December 2020, but subsequently ceased to have effect at the end of the transition period. The PRA rulebook instruments followed a similar approach.

LIBOR transition: Working Group paper on credit adjustment spread methods for active transition GBP LIBOR referencing loans

The Working Group on Sterling Risk-Free Reference Rates has published a paper highlighting the key methodologies emerging in the loan market on credit adjustment spreads for active transition from LIBOR to SONIA, and how these compare to the approaches taken in the bond and derivatives markets.

The Working Group encourages loan market participants to consider which methodology is appropriate to calculate the credit adjustment spreads for active transition. Based on historic loan transactions and approaches taken in the bond and derivatives markets, two key methodologies have emerged and are considered by the paper:

- five-year historical median approach; and
- forward approach (based on the forward-looking swap market).

The Working Group also published a set of slides outlining an indicative path towards its recommended milestone to cease issuance (by the end of March 2021) of sterling LIBOR-based loan products maturing beyond the end of 2021.

SSM banks: ECB guide on supervisory approach to consolidation

The European Central Bank (ECB) has published a guide on its supervisory approach to consolidation for banks in the single supervisory mechanism (SSM). The aim of the guide is to clarify the principles underpinning the prudential supervisory approach the ECB follows when determining whether the arrangements implemented by a credit institution resulting from a consolidation ensure the sound management and coverage of its risks.

The ECB has also published a feedback statement, which provides an overview of the comments received to its preceding consultation, together with the ECB's response and explanation of any subsequent amendments made to the guide.

SRB permission regime for reduction of eligible assets: SRB communication

The Single Resolution Board (SRB) has published a communication on the SRB permission regime on the reduction of eligible assets.

Article 78a of the CRR, which was introduced by CRR II, requires institutions to obtain permission from their resolution authorities to call, redeem, repay or repurchase eligible liabilities instruments before these instruments reach their contractual maturity. The effect of the Single Resolution Mechanism (SRM) II Regulation, which applies from 28 December 2020, is to expand the scope of liabilities subject to the permission regime to all liabilities eligible for the MREL (including senior unsecured liabilities and internal MREL eligible liabilities).

The purpose of the communication is to inform institutions of the impact on the SRB's current permission regime procedure of the application of the SRM II Regulation and the regulatory technical standards (RTS) on the procedure applicable to early redemptions under Article 78a(3) of the CRR currently under development by the EBA.

The SRB sets out how it will transition from its current procedure for assessing prior permission applications to 1 January 2022, which is the deadline for institutions to comply with the intermediate MREL targets set under the SRM II Regulation. The SRB emphasises the importance of building up and maintaining an adequate MREL stock, warning of the potential consequences of having a MREL shortfall on 1 January 2022.

BRRD: EBA second report on simplified obligations and waivers

The European Banking Authority (EBA) has published its [second report] on the application of simplified obligations and waivers in recovery and resolution planning in accordance with Article 4 of the Bank Recovery and Resolution Directive (BRRD). The report presents an overview of how competent and resolution authorities have applied the principle of proportionality in recovery and resolution planning, based on data collected in December 2019. The EBA published its first report in December 2017.

BRRD: EBA final report on RTS on estimating Pillar 2 and combined buffer requirements for setting MREL

Following its July 2020 consultation, the EBA has published a final report on its draft RTS specifying the methodology to be used by resolution authorities to estimate the Pillar 2 and combined buffer requirements at resolution group level. This is for the purpose of setting the MREL under the BRRD.

BRRD: EBA final report on ITS on reporting by resolution authorities of MREL decisions

Following a consultation launched in July 2020, the EBA has published a final report on draft implementing technical standards (ITS) specifying uniform reporting templates, instructions and methodology for the identification and transmission by resolution authorities to the EBA of information on MREL. The purpose of the ITS is to replace the existing ITS on MREL reporting by resolution authorities that are set out in Commission Implementing Regulation (EU) 2018/308, which supplements the BRRD. Article 45j(2) of the BRRD, as amended by BRRD II, gave the EBA a mandate to produce new ITS on MREL reporting by resolution authorities to reflect the new framework introduced by BRRD II.

The ITS set out minimum procedural obligations covering reporting periods and submission dates, as well as templates to be used by resolution authorities when informing the EBA of the MREL requirements they have set. Annex I to the ITS set out the templates that should be used by resolution authorities and Annex II contains the instructions for completing the templates. The ITS will also repeal Commission Implementing Regulation (EU) 2018/308.

BRRD: EBA final report on RTS and ITS on impracticability of contractual recognition of bail-in

Following its July 2020 consultation, the EBA has published a final report on draft RTS and draft ITS on the impracticability of contractual recognition of write-down and conversion powers and related notifications under Articles 55(4) and 55(8) of the BRRD.

BRRD II amends Article 55 to address the scenario where it is impracticable for institutions and entities subject to the BRRD to include bail-in contractual recognition clauses in liability contracts. The new Articles 55(6) and 55(8) give the EBA a mandate to draft RTS specifying conditions under which it would be legally, contractually or economically impracticable to include contractual recognition clauses and ITS to specify uniform formats and templates for notifying resolution authorities concerning impracticable clauses.

The draft ITS specify uniform formats and templates for the notification to resolution authorities of contracts meeting the conditions of impracticability defined in the draft RTS. The EBA has published Annex I (templates) and Annex II (instructions) to the draft ITS separately.

COVID-19: EBA report on implementation of selected COVID-19 policies: December 2020

On 21 December 2020, the EBA published an updated version of its report on the implementation of selected COVID-19 policies. The aim of the report is to provide a follow-up on the implementation issues around COVID-19 credit risk policy relief measures, particularly the EBA's guidelines on moratoria, and to monitor how such measures are implemented. The report also contains FAQs on the implementation of the requirements set out in the EBA's guidelines on COVID-19 reporting and disclosure.

The EBA may update the report in the future to reflect further issues that may arise in the context of its monitoring of the implementation of COVID-19 policies.

CRR: European Commission adopts Implementing Regulation on ITS on supervisory reporting

The European Commission has adopted an Implementing Regulation containing ITS on supervisory reporting requirements for institutions under the CRR that repeals and replaces Commission Implementing Regulation (EU) 680/2014. It has published the Annexes to the Implementing Regulation separately.

The purpose of the Implementing Regulation is to set out all the ITS on supervisory reporting under the CRR in a single place. It reflects additional reporting requirements introduced by CRR II, including new requirements on counterparty credit risk and the net stable funding ratio, and changes to existing areas of reporting, including own funds, credit risk, large exposures, the leverage ratio and global systemically important institution (G-SII) indicators. It also reflects amendments to the CRR made by Regulation (EU) 2019/630, which established a prudential backstop for non-performing loans.

The Implementing Regulation will enter into force on the day following that of its publication in the Official Journal of the European Union (OJ). It will apply from 28 June 2021, except for the requirements for reporting on the leverage ratio buffer requirement for institutions identified as G-SIIs, which will apply from 1 January 2023. Articles 9 and 10, which contain reporting requirements for groups that consist only of investment firms, will cease to apply on 26 June 2026.

CRR: Delegated Regulation on prudential treatment of software assets

Delegated Regulation (EU) 2020/2176, which amends Delegated Regulation (EU) 241/2014 as regards the deduction of software assets from CET 1 items, has been published in the OJ. The Delegated Regulation sets out RTS specifying the application of the deductions of software assets that are classified as intangible assets for accounting purposes under Article 36(1)(b) of the CRR.

The Delegated Regulation entered into force on 23 December 2020.

CRD: EBA consults on amendments to ITS on benchmarking of internal models

The EBA has published a consultation paper on draft ITS amending Commission Implementing Regulation (EU) 2016/2070 with regard to benchmarking of internal models.

Commission Implementing Regulation (EU) 2016/207016, which reflects a mandate under Article 78(8) of the CRD, contains ITS specifying the information that institutions have to report to the EBA and to competent authorities to monitor the range of risk weighted exposure amounts or own funds requirements for the exposures or transactions in the benchmark portfolio resulting from the internal approaches of those institutions and to assess those approaches.

For the 2022 benchmarking exercise, the EBA is proposing to amend Commission Implementing Regulation (EU) 2016/207016 to make changes to the reporting templates and instructions relating to market risk, credit risk and IFRS 9. The proposed revisions to the Annexes have been published separately in a zip file on the webpage for the draft ITS.

The deadline for responses is 15 February 2021.

CRD: EBA report on methodology for calibrating O-SII buffer rates

The EBA has published a report on the appropriate methodology to calibrate other systemically important institution (O-SII) buffer rates.

CRD V makes extensive amendments to the framework for capital buffers for firms identified as O-SIIs as set out in the CRD. Competent authorities will have the discretion to subject each O-SII to a buffer of up to 3% of their total risk exposure amount (TREA). It also mandated the EBA to produce a report on the appropriate methodology for the design and calibration of O-SII buffer rates, as there is currently is no harmonised methodology at EU level for calibrating these rates.

In the report, the EBA recommends that a floor methodology should apply for the calibration of O-SII buffer rates ideally by the year 2022. The methodology should be based on the O-SII scores that result from the first stage of the process for identifying O-SIIs. Competent authorities will still retain the ability to set higher O-SII buffer rates than the prescribed floor and are encouraged to do so where appropriate.

The EBA suggests that it should be given a legal mandate in future revisions to the CRD to prescribe the floor methodology for calibrating O-SII buffer rates in the form of technical standards. This mandate might also extend to the process for identifying O-SIIs, which is currently set out in EBA guidelines published in December 2014.

Eurosystem plans for digital euro: ECB letter

The European Central Bank (ECB) has published a letter it has sent, responding to a letter from the European Parliament, on plans for a digital euro. Among other things, the ECB explains that the Eurosystem is currently conducting conceptual analysis and practical experimentation on the technical solutions that might support the issuance of a digital euro in the future. It also outlines the role of commercial banks in a digital euro system, and the possible impact on their provision of credit.

Consumer Finance

Debt Respite Scheme (Breathing Space): Insolvency Service guidance

The Insolvency Service (IS) has published guidance for creditors and money advisors about the debt respite scheme (Breathing Space), which comes into effect on 4 May 2021. This follows the publication of the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311).

The IS guidance comprises two documents to help navigate the regulations:

- Debt Respite Scheme (Breathing Space) guidance for creditors; and
- Debt Respite Scheme (Breathing Space) guidance for money advisers.

The IS guidance is also designed for debtors who may be considering entering a Breathing Space with their debt adviser.

The IS will provide and maintain the electronic service used by debt advisers.

COVID-19: FCA proposes update to mortgage and consumer credit repossessions guidance

On 13 January 2021, the FCA published draft guidance for mortgage firms and consumer credit firms setting out the FCA's proposed approach to repossessions from 31 January 2021 to update its coronavirus tailored support guidance.

The FCA's current guidance on mortgage repossessions means firms should not enforce repossessions before 31 January 2021 except in exceptional circumstances, such as a customer requesting that proceedings continue. The FCA proposes extending this guidance so that firms should not enforce repossessions before 1 April 2021.

The FCA's approach takes account of the worsening COVID-19 situation and the government's tighter COVID-19-related restrictions, which mean that consumers could experience significant harm if forced to move home at this time due to repossession proceedings. The FCA recognises that there are also government bans on evictions in some nations, which could prevent firms from enforcing home repossessions.

The FCA's current consumer credit guidance means that firms should not terminate a regulated agreement or repossess goods or vehicles under the agreement that the customer needs, before 31 January 2021, except in exceptional circumstances. The FCA proposes changing this so that consumer credit firms can repossess goods and vehicles from 31 January 2021. However, this should only be as a last resort, and is subject to complying with relevant government public health guidelines and regulations (for example on social distancing and shielding).

The FCA's proposed approach reflects the different risks and harms that customers with goods or vehicles on credit are likely to face compared to those who are at risk of losing their home. The FCA reiterates that it expects firms to exercise particular care when dealing with vulnerable customers and when deciding whether repossession of goods or vehicles is appropriate.

Comments can be made on the draft guidance until 10am on 18 January 2021.

Payments

COVID-19: Pay.UK report on current account switching behaviours

On 6 January 2021, Pay.UK published a report on how COVID-19 has affected current account switching attitudes and behaviours in the UK.

The report finds that current account switching in 2020 was 30% lower compared to previous years. It explores the mechanisms that have driven these changes, including the pandemic and wider changes to the financial services market.

Proposed new special administration regime for PIs and EMIs: summary of draft rules

HM Treasury has published a summary of proposed draft rules to accompany the new special administration regime for payment institutions (PIs) and electronic money institutions (EMIs). The summary is published as a new annex to the consultation on this proposed special administration regime that was issued on 3 December 2020.

As with the draft regulations, the draft rules are closely modelled on the equivalent provisions in the existing special administration regime for investment banks. Key points of difference with the related investment bank provisions include:

- omissions to reflect that payment institutions (PIs) and electronic money institutions (EMIs) do not undertake deposit-taking activities. This includes the omission of any role for the Financial Services Compensation Scheme as creditor;
- different contents for a special administrator's statement of affairs, including details of the individuals that use or hold funds through the institution, security interests and relevant safeguarding measures used;
- new provisions that approved costs incurred by the administrator due to a breach of the institution's safeguarding regime will be paid out of the institution's own assets, with any shortfall being met out of the asset pool;
- provisions setting out reasonable measures that the administrator needs to take before a hard bar takes effect; and
- omission of provisions allowing a claimant or the Financial Conduct Authority to submit a claim following the bar date.

As with the investment bank rules, the draft rules will set out the specific procedural requirements in relation to court proceedings for commencing a special administration procedure. The Insolvency Rules Committee will be consulted in due course in finalising the detail of the draft rules.

The principal consultation closes at midnight on 14 January 2021. Responses specifically on the proposals for the draft rules can be submitted until midnight on 28 January 2021.

Securities and Markets

UK SSR: Short Selling (Notification Thresholds) Regulations 2021

The Short Selling (Notification Thresholds) Regulations 2021 (SI 2021/5) have been published, together with an explanatory memorandum. The Regulations were made on 6 January 2021 under Article 5(4) of the retained EU law version of the Short Selling Regulation (UK SSR). They amend Article 5(2) of the UK SSR by lowering the initial notification threshold for the reporting of net short positions to the Financial Conduct Authority (FCA) relating to the issued share capital of a company that has shares admitted to trading on a trading venue, from 0.2% to 0.1%. This change will ensure that the FCA has the necessary data to effectively monitor short selling activity at a time of increased market volatility and act earlier against any disruptive short selling activity.

The explanatory memorandum notes that the amended threshold will result in the UK requirements differing from the EU requirements. In the UK, the 0.1% threshold will apply in respect of shares admitted to trading on UK regulated markets and UK multilateral trading facilities (MTFs), whereas in the EU the 0.1% threshold applies only in respect of shares admitted to trading on EU regulated markets. The government has taken this approach following engagement with reporting persons by the FCA. This demonstrated that applying the 0.1% threshold to regulated markets and MTFs would result in a simpler, less burdensome regime.

The lower threshold takes effect from 1 February 2021, when the Regulations come into force, and will apply indefinitely. In the interim period, between the end of the transition period and 1 February 2021, notifications can be made to the FCA at the 0.1% threshold if reporting persons wish to do so.

HM Treasury and the FCA will continue to monitor whether the notification threshold remains appropriate given market conditions.

UK MiFIR: Markets in Financial Instruments (Switzerland Equivalence) Regulations 2021

The Markets in Financial Instruments (Switzerland Equivalence) Regulations 2021 (SI 2021/28) have been published, together with an explanatory memorandum.

The Regulations have been made to specify that the legal and supervisory framework for stock exchanges in Switzerland meet at least equivalent outcomes to the UK's corresponding regime. The Regulations will allow all investment firms, which are subject to the trading obligation set out in Article 23(1) of the retained EU law version of the Markets in Financial Instruments Regulation (UK MiFIR), to trade shares that fall within scope of the share trading obligation on Swiss trading venues that have been recognised as equivalent (that is, BX Swiss AG and SIX Swiss Exchange AG).

The Regulations were laid before Parliament on 13 January 2021 and will come into force on 3 February 2021.

UK MiFIR: FCA uses TTP for derivatives trading obligation to mitigate disruption

The FCA has published a statement on the use of its temporary transitional power (TTP) to modify the UK's derivatives trading obligation (DTO).

In its statement, the FCA notes that the UK has onshored the Markets in Financial Instruments Regulation (MiFIR) DTO under the EU Withdrawal Act 2020 (EUWA) and that the UK DTO applies to the same classes of derivatives as the EU DTO. The FCA welcomes the UK and EU agreeing a Trade and Cooperation Agreement and the associated Joint Declaration on financial services regulatory cooperation.

The FCA continues to believe that the agreement of mutual equivalence between the UK and EU is the best way of avoiding disruption for market participants and fragmentation of liquidity in DTO products, reducing costs for investors. Without mutual equivalence, some firms, in particular the branches of EU firms in London, will be caught by a conflict of law between the EU and UK DTOs. Therefore, in the absence of a coordinated solution, the FCA is using its TTP to modify the application of the UK DTO and has published the relevant transitional direction and explanatory note.

Under the FCA's modification, where firms subject to the UK DTO trade with, or on behalf of, EU clients that are subject to the EU DTO, they will be able to transact or execute those trades on EU venues provided that:

- firms take reasonable steps to be satisfied the client does not have arrangements in place to execute the trade on a trading venue to which both the UK and EU have granted equivalence; and
- the EU venue has the necessary regulatory status to do business in the UK – such venues include Recognised Overseas Investment Exchanges and those that have been granted the relevant temporary permission or are certain they benefit from the overseas person exclusion.

The modification applies to UK firms, EU firms using the UK's temporary permissions regime, and branches of overseas firms in the UK. Transactions concluded by an EEA UCITS fund or an EEA alternative investment fund are currently outside the scope of the UK DTO.

The modification does not apply to trades with non-EU clients, proprietary trading conducted, for example, to hedge a firm's own risk exposure, and trades between UK branches of EU firms. These trades remain subject to the UK DTO.

The FCA expects firms to be able to demonstrate they are taking all reasonable steps during Q1 2021 to ensure compliance with the UK DTO.

The transitional direction came into force at the end of the transition period on 31 December 2020. The FCA states that it will consider by 31 March 2021 whether market or regulatory developments warrant a review of its approach. The FCA remains open to cooperation with EU authorities on ways of avoiding conflicting obligations.

COVID-19: FCA update for revised expectations on market trading and reporting

On 8 January 2021, the FCA published an updated version of its webpage providing information for firms on COVID-19. The FCA has updated its section on market trading and reporting in the light of the extensive duration of working from home arrangements in response to COVID-19.

The FCA states that it now expects firms to ensure that all relevant communications (including voice calls) are recorded when working outside the office. The FCA previously accepted that it might on some occasions not be possible to record calls, and instructed firms to inform it if they were unable to meet its requirements.

Firms are required to continue to take all steps to prevent market abuse risks and to submit regulatory data without undue delay. The FCA previously accepted that firms may experience difficulties in submitting their regulatory data, in which case they should maintain appropriate records and submit the data as soon as possible.

The FCA advises any firms that have further concerns about their ability to meet its obligations due to the pandemic to contact it via their regular supervisory channels as soon as possible. It will provide any further updates on its expectations of market participants, including listed issuers, through its usual communication channels, including supervisory communications, Market Watch and Primary Market Bulletin publications.

FCA Market Watch issue 66

The FCA has published issue 66 of Market Watch, its newsletter on market conduct and transaction reporting issues. Issue 66 sets out the FCA's expectations for firms on recording telephone conversations and electronic communications when alternative working arrangements are in place, including increased homeworking.

UK Listing Rules climate-related disclosures: FCA PS20/17 and technical note

Following its consultation in CP20/3, the FCA has published a policy statement, PS20/17, which contains the feedback to its consultation and final rules and guidance which requires commercial companies with a UK premium listing to include a compliance statement in their annual financial report on whether they have made disclosures consistent with the recommendations of the Taskforce on Climate-related Financial Disclosures (TCFD) or providing an explanation if they have not done so.

The amendments to the Handbook came into force on 21 December and apply for accounting periods beginning on or after 1 January 2021, meaning the first annual financial reports subject to the rule would then be published in spring 2022.

PS20/17 includes a technical note which clarifies existing disclosure obligations in EU legislation and the FCA Handbook. The technical note applies with immediate effect.

Premium listed companies directly impacted by the new rule should familiarise themselves with the details of the rule and associated guidance, and consider the arrangements they need to put in place to ensure they can meet the requirements of the rule.

Relevant issuers should familiarise themselves with the content of the Technical Note and consider where they may already be required to disclose information on climate-related and other ESG matters under the relevant rules and legislative provisions.

The FCA plans to issue a follow up consultation paper in Q1 2021 on proposals to extend the application of its rule to a wider scope of listed issuers. It will also consider consulting on strengthening the compliance basis.

BEIS plans to consult early in 2021 on TCFD-aligned disclosure obligations in the Companies Act 2006 for certain UK-registered companies. This may include some commercial companies with a UK premium listing or standard listing and the FCA will continue to engage with this work to ensure that the regimes operate in a coherent and complementary way.

The FCA states that it will set out further information on its supervisory approach to the new listing rule in a Primary Market Bulletin in late 2021. Also, in the first half of 2021, it plans to consult on potential client-focused TCFD-aligned disclosures by UK-authorised asset managers, life insurers and FCA-regulated pension providers.

The FCA intends to continue to work with the government and other UK regulators, international partners, the IFRS Foundation and industry to drive progress towards an international standard for sustainability reporting.

EMIR 2.2: HM Treasury letter

HM Treasury has published a letter (dated 11 January 2021) from John Glen, Economic Secretary to HM Treasury, sent to Lord Kinnoull, House of Lords European Union Committee Chair clarifying certain aspects of EMIR 2.2. The letter is in response to questions raised in a letter (dated 10 December 2020) from the Committee to HM Treasury. The response includes information relating to:

- changes to delegated acts on central counterparty (CCP) recognition;
- impact on comparable compliance; and
- supervisory cooperation between the Bank of England and the European Securities and Markets Authority (ESMA).

EMIR: BoE and ESMA MoUs on recognition of UK CCPs and CSDs

ESMA has published the following memoranda of understanding (MoU) that it and the Bank of England (BoE) have agreed on the recognition of UK CCPs and central securities depositories (CSDs):

- arrangements for cooperation on the monitoring and supervision of CCPs established in the UK; and
- monitoring the ongoing compliance with recognition conditions by CSDs established in the UK.

The CCP MoU provides for the cooperation arrangements required as a condition of recognition by ESMA for a third-country CCP under Article 25(7) of EMIR and to provide the BoE and ESMA with tools to monitor the regulatory and supervisory developments in the EU and UK, and the ongoing compliance of CCPs established in the UK with recognition conditions.

The CSD MoU aims to meet the condition contained in Article 25(4)(c) of the CSD Regulation (CSDR), that is, that cooperation arrangements have been established about covered CSDs. It also provides ESMA with tools to monitor the ongoing compliance by covered CSDs with recognition conditions.

Both MoUs entered effect following the end of the Brexit transition period.

EMIR: Delegated Regulation amending RTS on CCP colleges

Commission Delegated Regulation (EU) 2020/2145, amending Commission Delegated Regulation (EU) 876/2013, which contains regulatory technical standards (RTS) supplementing EMIR on CCP colleges, has been published in the Official Journal of the EU (OJ). The revisions to the RTS reflect changes to Article 18(6) of EMIR introduced by EMIR 2.2, which came into force on 1 January 2020.

The Delegated Regulation will enter into force and apply on 7 January 2021.

EMIR: Corrigendum to Delegated Regulation supplementing EMIR on rules of procedure for penalties imposed on trade repositories by ESMA

A corrigendum to Commission Delegated Regulation (EU) No 667/2014 supplementing EMIR with regard to rules of procedure for penalties imposed on trade repositories by ESMA has been published in the OJ. The corrigendum amends Articles 6(5) and 7(5) of the Delegated Regulation to replace references to Article 58 of the ESMA Regulation (Regulation 1095/2020) with references to Article 60 of the ESMA Regulation.

EMIR: European Commission adopts Delegated Regulations on clearing obligation and risk mitigation

The European Commission has adopted the following two Delegated Regulations made under EMIR:

- a Delegated Regulation amending RTS laid down in Commission Delegated Regulation (EU) 2016/2251 as regards to the timing of when certain risk management procedures will start to apply for the purpose of the exchange of collateral; and
- a Delegated Regulation amending RTS laid down in Commission Delegated Regulations (EU) 2015/2205, (EU) 2016/592 and (EU) 2016/1178 as regards the date at which the clearing obligation takes effect for certain types of contracts.

The next step is for the Council of the EU and the European Parliament to consider the Delegated Regulations. If neither the Council or the Parliament object, the Delegated Regulations will be published in the OJ and enter into force the following day.

End of Brexit transition period: ESMA reminder to firms on MiFID reverse solicitations

ESMA has published a statement reminding firms of the requirements under the Markets in Financial Instruments Directive (MiFID) concerning the provision of investments services to retail or professional clients by firms not established or situated in the EU.

Under Article 42 of MiFID II, where a retail client or professional client established or situated in the EU initiates, at its own exclusive initiative, the provision of an investment service or activity by a third-country firm, the third-country firm is not subject to the requirements relating to establishing a branch under Article 39 of MiFID.

ESMA reminds firms that it has already provided guidance to firms (in its Q&A on MiFID and MiFIR investor protection and intermediaries topics) on the application of the MiFID requirements for the provision of investment services and activities by third country firms, including how the notion of a client initiating "at its own exclusive initiative the provision of an investment service or activity by a third-country firm" should be understood and applied.

However, following the end of the Brexit transition period on 31 December 2020, ESMA notes that some questionable practices by firms around reverse solicitation have emerged. For example, some firms appear to be trying to circumvent MiFID requirements by including general clauses in their terms of business, or using online pop-up "I agree" boxes, where clients state that any transaction is executed on the exclusive initiative of the client.

Among other things, ESMA reminds firms of recital 111 of MiFID, which provides guidance on what "own exclusive initiative of the client" means. In addition, it reminds firms that every communication means used, such as press releases, advertising on the internet or phone calls, should be considered in determining if the client, or potential client, has been subject to any solicitation, promotion or advertising in the EU on the firm's investment services or activities or on financial instruments.

ESMA highlights that:

- the provision of investment services in the EU, without proper authorisation in accordance with the EU and the national law applicable in member states, exposes service providers to the risk of administrative or criminal proceedings for the application of relevant sanctions; and
- when using the services of investment service providers that are not properly authorised in accordance with EU and member states' law, investors may lose protections granted to them under EU relevant rules. This includes coverage under the investor compensation schemes in accordance with the Investor Compensation Schemes Directive.

End of Brexit transition period: ESMA statement about UK-based CRAs and TRs

ESMA has published a press release explaining that it has withdrawn the registrations of six UK-based credit rating agencies (CRAs) and four trade repositories (TRs) as a result of the end of the Brexit transition period. The registrations have been withdrawn as the firms no longer meet the conditions under which they were registered, that is, being a legal person established in the EU.

Consequentially, ESMA explains:

- the ratings issued by the affected CRAs cannot be used for regulatory purposes in the EU unless endorsed by an EU CRA (under the Credit Rating Agencies Regulation). ESMA confirmed in an October 2020 statement that all UK-based CRAs except the Economist Intelligence Unit Ltd took steps to ensure that an EU CRA is willing and able to endorse its credit ratings; and
- as a result of these withdrawal decisions, EU derivatives and securities financing transactions subject to the reporting obligation under the Regulation on OTC derivative transactions, central counterparties and trade repositories (EMIR) and the Regulation on reporting and transparency of securities financing transactions (SFTR) can no longer be reported to any of the TRs, but need to be reported to an EU-established TR. An updated list of available TRs is available on an ESMA webpage.

EMIR REFIT: ESMA final report on technical standards on reporting, data quality, data access and registration of TRs

ESMA has published a final report on regulatory technical standards (RTS) and implementing technical standards (ITS) on reporting requirements, procedures to reconcile and validate the data, and amendments to the technical standards on registration of and access to TRs by the relevant authorities under the EMIR Refit Regulation (EMIR REFIT).

ESMA sets out the following RTS and ITS in annexes to the final report:

- draft RTS on details of the reports to be reported to TRs under EMIR;
- draft ITS own standards, formats, frequency and methods and arrangements for reporting to TRs under EMIR;
- RTS on registration and extension of registration of TRs under EMIR;
- ITS on registration and extension of registration of TRs under EMIR;
- RTS on procedures for ensuring data quality; and

- RTS on operational standards for aggregation and comparison of data and on terms and conditions for granting access to data.

ESMA has submitted the draft technical standards to the European Commission for endorsement. The Commission must decide whether to endorse the draft technical standards within three months or inform the European Parliament and the Council of the EU where the adoption cannot take place within the three-month period. Following the entry into force of the technical standards, ESMA proposes an 18-month implementation period.

EMIR: ESMA second report on clearing solutions for pension scheme arrangements

ESMA has submitted its second report on clearing solutions for pension scheme arrangements (PSAs) under EMIR to the European Commission.

One of the amendments to EMIR under EMIR REFIT was a further extension of the exemption from the clearing obligation for PSAs until June 2021, potentially to be extended by another year or two. The extension was introduced because of the challenges that PSAs would face to provide cash for the variation margin calls related to their cleared derivative contracts. To monitor the progress made by the different parties involved towards possible clearing solutions for PSAs by June 2021, ESMA was mandated, if the exemption still applies, to draft an annual report as input to the European Commission's report on the clearing solutions for PSAs.

ESMA states that, as detailed in its second report, it seems very unlikely that after the efforts from all stakeholders and regulators since the start of the exemption, a new and never thought of "silver bullet" solution will emerge. This also means that the solution towards which ESMA is moving seems to be the optimisation by different parties (regulators, CCPs, clearing members and their clients) of already existing solutions. Although some of these existing solutions need to be further developed, or might need regulatory consideration, their addition should provide the conditions for PSAs to be able to clear and meet variation margin calls in all states of the market that have been considered.

ESMA is of the view that more time is needed to make enough progress with the implementation of a mixture of solutions. Therefore, it states that an extension of one year by the Commission of the temporary exemption, as provided for in the EMIR REFIT, would be beneficial.

EMIR: ESMA updates Q&As

ESMA has published an updated version of its Q&As on the implementation of EMIR. Part I (OTC derivatives) has been updated to clarify the status, after the Brexit transition period, of legacy derivative transactions executed on UK markets. This is relevant for EU CCPs to determine applicable EMIR requirements, and for position calculations against clearing thresholds.

In addition, Part IV (reporting to trade repositories (TRs): transaction scenarios) and Part V (reporting to TRs: exchange-traded derivative (ETD) contracts reporting) have been amended to clarify the reporting technique for derivatives executed on a third-country venue and cleared on the same day.

EMIR: ESMA and CFTC enter enhanced MoU relating to certain CCPs

ESMA and the US Commodity Futures Trading Commission (CFTC) have entered into an enhanced memorandum of understanding (MoU) regarding cooperation and the exchange of information with respect to certain registered derivatives clearing organisations established in the US that are CCPs recognised by ESMA under EMIR.

MiFIR: European Commission adopts Delegated Regulation on liquidity thresholds and trade percentiles used to determine SSTI applicable to non-equity instruments

The European Commission has adopted a Delegated Regulation establishing RTS amending Delegated Regulation (EU) 2017/583 (RTS 2) as regards adjustment of liquidity thresholds and trade percentiles used to determine the size specific to the instrument (SSTI) applicable to certain non-equity instruments.

RTS 2 imposes transparency requirements for trading venues and investment firms in respect of bonds, and other non-equity products. In particular, it provides the methodology to assess the liquidity and the SSTI of bonds. Both liquidity and SSTI are relevant for the application of transparency waivers and deferrals under the Markets in Financial Instruments Regulation (MiFIR).

The next step is for the Council of the EU and the European Parliament to consider the Delegated Regulation. If neither the Council nor the Parliament object, the Delegated Regulation will be published in the Official Journal of the EU (OJ) and enter into force on the twentieth day following its publication in the OJ.

MiFID: ESMA updates Q&As on investor protection and intermediaries

ESMA has updated its Q&As on investor protection and intermediaries under MiFID and MiFIR. The updated version includes a new Q&A on information on costs and charges that aim to give guidance on how firms can present ex-post costs and charges information to clients in a fair, clear and not misleading manner.

MiFIR: ESMA updates opinion on assessment of pre-trade transparency waivers

ESMA has published an updated version of its opinion on the assessment of pre-trade transparency waivers for equity and non-equity instruments under the MiFIR. It covers guidance related to request for quote systems, guidance on how trading venues should apply for a waiver to their national competent authority, and updates on frequently encountered issues when assessing waiver notifications.

MiFID: ESMA consults on impact of algorithmic trading

ESMA has published a consultation paper on algorithmic trading to assist the European Commission in producing a report on the impact of requirements relating to algorithmic trading, including high-frequency trading. The Commission is required to present the report to the European Parliament and Council of the EU (after consulting ESMA) under Article 90(1)(c) of MiFID.

The consultation closes on 12 March 2021. Based on responses it receives, ESMA will prepare its final review report for submission to the Commission by July 2021.

MiFIR: ESMA consults on technical advice on penalties imposed on DRSPs

ESMA has published a consultation paper on technical advice on penalties imposed on data reporting services providers (DRSPs).

Regulation (EU) 2019/2175 amended MiFIR to transfer authorisation and supervisory powers relating to most DRSPs from national competent authorities to ESMA from 1 January 2022. Article 38k (10) of MiFIR gives the European Commission the power to adopt a delegated regulation specifying the rules of procedure for the exercise of the power to impose fines or periodic penalty payments and the limitation periods for the imposition and enforcement of fines and periodic penalty payments. In June 2020, the Commission made a call for advice from ESMA, set out in Annex II of the consultation paper, on the drafting of the delegated regulation. In the consultation, ESMA sets out its preferred options for the procedural rules on penalties imposed on DRSPs under its direct supervision.

The deadline for responses is 23 January 2021. ESMA intends to publish a final report and to submit the technical advice to the Commission in Q1 2021.

CSDR: ECSDA updates settlement fail penalties framework

The European Central Securities Depositories Association (ECSDA) has published an updated version of its settlement fail penalties framework. The framework applies to all central securities depositaries (CSDs) subject to the Regulation on improving securities settlement and regulating CSDs (CSDR) or equivalent legislation. It aims to create a harmonised set of rules for the creation and operation of settlement discipline cash penalties mechanisms and constitutes a market practice for CSDs and their participants.

The ECSDA has also published responses to practical questions it has previously asked CSD participants on CSDR cash penalties implementation.

SFTR: ESMA updated guidelines on reporting

ESMA has published an updated version of its guidelines on reporting under Articles 4 and 12 of the Securities Financing Transactions Regulation (SFTR). The corrections that have been made appear to be shown in tracked changes.

FX settlement risk: BCBS and CPMI letter

The Basel Committee on Banking Supervision (BCBS) and the Committee on Payments and Market Infrastructures (CPMI) have published a joint letter to supervisors, banks and other participants on managing foreign exchange (FX) settlement risk.

In the letter, the BCBS and CPMI (the committees) state that they encourage supervisors and participants in the FX market to follow the expectations set out in the BCBS's February 2013 Supervisory Guidance on managing FX settlement risk (BCBS214) and the Global FX Code. They state that where supervisors determine that a bank's management of FX settlement related risks is not adequate, they should take appropriate action to correct the situation.

The committees warn that the 2019 BIS Triennial FX survey indicates that FX settlement risk remains significant and that the proportion of trades with payment-versus-payment (P2P) protection has fallen in recent years. They note that the BCBS guidance recommends eliminating principal risk by using PvP settlement where practicable and, for FX transactions that do not settle via PvP, banks should be encouraged to minimise the size and duration of their principal risk and to conduct timely reconciliation of payments received. To fully address FX settlement-related risks, banks' incentives, business practices and infrastructures must be properly aligned.

The committees have agreed an action plan in response to the Triennial results, involving concerted supervisory action, supplemented with education and improved data and analysis. They also welcome the Global FX Committee's plans to strengthen the guidance on FX settlement risk in its Global FX Code and support plans to collect data to monitor FX settlement risk on a regular basis.

MAR: ESMA annual report on sanctions and measures

ESMA has published its annual report on the administrative and criminal sanctions and other administrative measures issued under the Market Abuse Regulation (MAR). ESMA is required to publish the report under Article 33 of MAR. The report contains:

- aggregated information on the administrative and criminal sanctions and other administrative measures imposed by national competent authorities in accordance with Article 30 of MAR from 1 January 2019 to 31 December 2019; and
- an overview of the applicable legal framework, including the penalties and measures foreseen.

The report also includes, for the last time, information provided by the FCA relating to MAR administrative and criminal sanctions and measures in the UK.

MAR: ESMA annual report on application of accepted market practices

ESMA has published its annual report on the application of accepted market practices (AMPs) under MAR. In the report, produced under Article 13(10) of MAR, ESMA provides an overview of the legislative framework concerning the adoption of AMPs in the EU under MAR, as well as an overview of its opinion on points for convergence relating to MAR AMPs on liquidity contracts. The report also contains information on the legal status of AMPs and provides data on their application in practice, covering the second half of 2019 and the first half of 2020.

BMR: ESMA consults on procedural rules for penalties imposed on benchmark administrators

ESMA has published a consultation paper on procedural rules for penalties imposed on benchmark administrators under the Benchmarks Regulation (BMR). This follows a formal request from the European Commission to ESMA for technical advice to help the Commission formulate a delegated act on procedural rules for benchmark administrators, which will come under ESMA's direct supervision from 1 January 2022.

The consultation paper sets out ESMA's preferred options and invites comments to help with the production of the technical advice. The consultation closes on 23 January 2021. ESMA expects to publish a final report and submit the advice to the Commission in Q1 2021.

Exchange traded funds: IOSCO industry survey

The International Organization of Securities Commissions (IOSCO) published a questionnaire for industry participants on exchange traded funds (ETFs). The voluntary survey is directed specifically at asset managers (Part A), and liquidity providers and market makers (Part B). Its purpose is to support IOSCO's ongoing ETF project by enhancing its understanding of certain aspects of ETFs, including during the market volatility in March/April 2020 due to the COVID-19 pandemic and issues related to fixed-income ETFs.

IOSCO will consider the survey responses when formulating any potential guidance regarding ETFs in the future. The results of the survey will also help inform IOSCO's findings and policy analysis to date for a future report on ETFs to the IOSCO board.

The deadline for responses is 1 March 2021.

COVID-19 impact on retail market conduct: IOSCO report

On 22 December 2020, IOSCO published a report, prepared by its Retail Market Conduct Task Force (RMCTF), on the impact of COVID-19 on retail market conduct.

The RMCTF analysed a number of case studies received from IOSCO members to form the basis of the report, focusing on market environment, key drivers of firm and investor behaviour in periods of stress that provide increased opportunities for retail misconduct, and regulatory measures and tools used to address retail losses or mitigate misconduct risks. It has distilled these into practical findings and observations relating to the vulnerabilities demonstrated by retail investors, the changes exhibited in firms' behaviour and the responses by regulators.

The report also contains a suggested toolkit for regulators facing shifting priorities during stressed conditions, such as the pandemic. It states that regulators may tailor the toolkit to the specific circumstances of their respective markets and jurisdictions.

The RMCTF will continue to monitor trends arising from its members' experiences and will continue its work to support regulators in their efforts to address retail market conduct issues and to protect investors during and beyond the COVID-19 pandemic.

COVID-19 and CCP risk management frameworks: ISDA paper

The International Swaps and Derivatives Association (ISDA) has published a paper setting out the results of an analysis conducted by its Clearing Member Committee regarding how CCP risk management frameworks reacted to the COVID-19 pandemic, based on feedback from CCPs.

In brief, ISDA states that the results show CCPs dealt with the crisis well, managing record volumes while most of their staff worked from home. In total, there were three member defaults or close-outs, none of which threatened financial stability. This reflects a more stable financial system overall: clearing members are much better capitalised and hold more liquidity compared to the last crisis.

However, some issues did emerge. Procyclical initial margin requirements exacerbated market stress at certain points. Clearing members also lacked timely information about back testing breaches and procyclicality in margin models.

The paper makes recommendations to address both of those points.

Insurance

Solvency II: PRA CP1/21 on deep, liquid and transparent assessments, and GBP transition to SONIA

The UK Prudential Regulation Authority (PRA) has published a consultation paper, CP1/21, on deep, liquid and transparent (DLT) assessments and GBP transition to the Sterling Overnight Index Average (SONIA) under the Solvency II regime. CP1/21 is relevant to all UK Solvency II firms, including in respect of the Solvency II groups provisions, and to the Society of Lloyd's and its managing agents.

In CP1/21, the PRA sets out its proposed approach to DLT assessments and the transition of Solvency II technical information (TI) from the London Interbank Offered Rate (LIBOR) to SONIA in 2021. The proposals would result in changes to the PRA's Statement of Policy (SoP), "The PRA's approach to the publication of Solvency II technical information". Draft amendments to the SoP are set out in an Appendix to CP1/21.

From 11 pm on 31 December 2020, the PRA has been required to publish TI for each relevant currency. The TI includes the basic risk-free rates and fundamental spreads used in the calculation of the matching adjustment and volatility adjustment. The onshored Solvency II Delegated Regulation provides that RFRs must be based on financial instruments traded in a DLT financial market. From 31 December 2020 and throughout 2021, the PRA's relevant currencies are: GBP, USD, EUR, CAD, SEK, AUD, JPY, NOK and DKK.

The Solvency II TI for GBP, USD and JPY currently reference LIBOR rates. In December 2020, the administrator of LIBOR, ICE Benchmark Administration, published a consultation on its intention for the GBP, JPY and some USD LIBOR panels to cease at the end of 2021, and for the remainder of USD panels to cease at the end of June 2023. The Working Group on Sterling Risk-Free Reference Rates recommended that SONIA is used as the preferred replacement for LIBOR for sterling markets. Therefore, the PRA will transition the GBP Solvency II TI to reference SONIA swap rates before end-2021.

The PRA will also transition the JPY and USD TI references from LIBOR to an Overnight Indexed Swap rate, although the date and approach to these transitions will depend on the liquidity of swaps referencing the Tokyo Overnight Average Rate and the Secured Overnight Financing Rate.

The GBP LIBOR-based rates are currently higher than the equivalent SONIA-based rates. Should this continue to be the case at the time of the proposed transition, the PRA explains that this would generally result in an increase in technical provisions. However, this is, in part, mitigated by several proposals included in CP1/21, notably the proposals on transitional relief and the calculation of the long-term average spread.

The PRA proposes to implement the transition for GBP TI to SONIA from and including 31 July 2021.

The consultation closes on 31 March 2021.

General insurance pricing practices: FCA Q&A

The Financial Conduct Authority (FCA) has published a Q&A document on general insurance pricing practices. The document responds to questions raised during a series of webinars held in November 2020 on the FCA's proposed package of remedies following publication of the FCA's final report on its market study into the pricing of home and motor insurance.

COVID-19: FCA information on flood and storm claims

The FCA has updated its webpage on insurance and COVID-19 to include a section on claims relating to floods and storms. Following the severe flooding in parts of the UK in December 2020, the FCA reminds insurers that it is essential they have plans in place to manage the operational impact of COVID-19. This includes having sufficiently robust plans to continue to operate effectively when there is pressure on services. The FCA outlines some of the different steps insurers have taken to prepare for the impact of COVID-19 on the seasonal increase in flood and storm-related claims. These include:

- reviewing and adjusting their operational contingency plans to address the additional operational challenges they have identified from the pandemic;
- conducting reviews of capacity and resources of the supply chain, and of third parties who handle claims for the insurer; and
- assessing the impact of COVID-19 on the claims process and adjusting it as necessary. This includes factors such as the impact of lockdowns and other restrictions on service providers' ability to access and carry out work in affected areas, and the availability of alternative accommodation where needed.

The FCA states that where customers require immediate assistance, it is critical they can contact their insurer quickly and speak to staff who can deal with their claim. The FCA has seen some insurers address the challenge of staff shortages by cross-training staff so that they can be deployed quickly and flexibly to respond to affected customers as claim volumes increase.

Firms should ensure that they can respond to customers appropriately, including customers they have identified, or who identify themselves, as vulnerable. In doing so, firms should also recognise that some customers may be facing financial difficulty because of COVID-19. This may affect their ability to pay for any immediate costs while their insurance claim is being processed. The FCA reminds insurers to consider if emergency and interim payments are appropriate in the light of the customer's circumstances, and to ensure they make payments in a timely way.

Regardless of the challenges from COVID-19, the FCA expects firms to handle storm and flood claims promptly and fairly, ensuring that customers do not face barriers or delays when making a claim. Firms should provide customers with clear communications about the information they need to support their claim and keep customers informed on progress, including timeframes for any work to be carried out and settlement payments made.

The FCA reminds insurers that they hold regulatory responsibility for the claims process and outcomes, including when they delegate the handling of claims to a third party. They must maintain appropriate oversight of these arrangements to ensure that their outsourcing relationships are meeting the insurer's regulatory obligations.

COVID-19: EIOPA consults on ORSA supervisory statement

The European Insurance and Occupational Pensions Authority (EIOPA) has published a consultation on the Supervisory Statement on Own Risk Solvency Assessment (ORSA) in the context of COVID-19.

In its press release, ESMA states that the statement promotes convergence by guiding undertakings through common supervisory expectations on the ORSA in the current situation triggered by the pandemic, taking into account that the impact on each individual undertaking can differ depending on its specific risk profile. A proper balance between flexibility and acknowledgment of the ORSA as an undertaking's own exercise, and clarification of supervisory expectations in specific circumstances, should be kept.

EIOPA believes that the current situation calls for an ad-hoc/non-regular ORSA in the cases where the pandemic impacts the risk profile of the undertaking materially, in particular in those cases where the performance of the regular ORSA has not allowed the undertaking to assess and to take into account the impact of the pandemic.

Undertakings are expected to consider the uncertainty in the duration and (macroeconomic) impact of the pandemic in its ORSA and, if relevant for its risk profile, consider multiple scenarios to capture this uncertainty in an appropriate manner. In this case the scenarios are expected to include several degrees of severity for the pandemic's impact on the undertaking's solvency and capital needs considering its individual situation.

EIOPA invites responses to its survey by 15 March 2021. After considering the feedback received, EIOPA will develop impact assessment and publish a final report on the consultation, as well as submit the supervisory statement for adoption by its Board of Supervisors.

End of Brexit transition period: Lloyd's underwriters' trading rights

Lloyd's has published market bulletin Y5321, which summarises and clarifies Lloyd's underwriters' trading rights in the EEA after the end of the Brexit transition period. Points of interest include the following:

- Lloyd's underwriters will cease to have trading rights in the EEA for insurance business from 1 January 2021. As a result, Lloyd’s underwriters' EEA Crystal reports will be updated to reflect the new regulatory position and the impact on Lloyd's underwriters' trading rights;
- Lloyd's underwriters will continue to be able to write cross-border EEA reinsurance business post-transition period, except with respect to German cedants. For some territories, cross-border reinsurance business can only be written on a reverse solicitation basis;
- intermediaries and entities carrying on distribution activities to EEA policyholders seeking cover for EEA risks are required to be established and registered in the EEA following the end of the transition period. This applies to both insurance and reinsurance business;
- from 30 December 2020, when the Lloyd's insurance business transfer scheme took effect, all transferring EEA policies caught by the scheme and related assets and liabilities transferred to Lloyd's Europe. Any claims or proceedings against the members in connection with these EEA policies will be continued by or against Lloyd's Europe. The transfer will not change the terms and conditions of any policy, except that Lloyd's Europe will become the insurer and data controller for EEA policies; and
- after the end of the transition period, Lloyd's will be deemed a third-country reinsurer for the purposes of the Solvency II Directive. Under the Directive, if the country in which the reinsurer is established is deemed equivalent, that reinsurer should be treated the same as EEA reinsurers. The EU has not confirmed whether and, if so, when it will assess the UK's equivalence for reinsurance purposes. However, if the EU does not designate the UK as being equivalent for these purposes under Solvency II, Lloyd's underwriters will be able to continue to write EEA cross-border reinsurance (except for Germany).

Cyber risk underwriting: IAIS report on challenges and supervisory considerations for sustainable market development

The International Association of Insurance Supervisors (IAIS) has published a report on the identified challenges and supervisory considerations for sustainable cyber risk underwriting. The report sets out the findings of the IAIS' cyber underwriting small group which it appointed in 2019 to prepare a report with findings and recommendations for a strategic approach to how supervisory practices can foster sustainable cyber risk underwriting. The report also sets out the findings from the IAIS' 2019 stock-take of supervisory practices regarding cyber risk underwriting.

Funds and Asset Management

TMPR: FCA update on adding new sub-fund to umbrella scheme

The UK Financial Conduct Authority (FCA) has updated its webpage on adding a new sub-fund to an umbrella scheme in the temporary marketing permissions regime (TMPR) to add a link to the final version of the direction made under the Collective Investment Schemes (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/325), which sets out the information required to make a valid notification of a new sub-fund. The FCA has also added a link to the final version of the notification letter that must be sent by the operator of the new sub-fund to notify the FCA that they wish the new sub-fund to enter the TMPR.

Amending a recognised EEA UCITS: FCA notification form

The FCA has updated its webpage on amending a recognised fund, adding a link to a new Form TMPR CH. This form is to be used to notify the FCA of certain changes to an EEA UCITS scheme and any sub-funds that are in the TMPR, as required by regulations 65 and 66 of the Collective Investment Schemes (Amendment etc) (EU Exit) Regulations 2019 (SI 2019/325).

The link to Form TMPR CH replaces the link to Form 264 CH (notification of certain changes to UCITS recognised under section 264 of the Financial Services and Markets Act 2000 (FSMA)) which was previously on the webpage. The FCA has also replaced references on the webpage to "recognised UCITS" with references to "previously recognised UCITS".

Connaught Income Fund Series 1: Report of the independent review into FCA and FCA response

The FCA has published the report of the independent review, led by Raj Parker, into the Financial Services Authority (FSA) and FCA's (the Regulator) handling of the Connaught Income Fund Series 1 (the Fund) and connected companies. The FCA has also published its response to the report.

In brief, the review found (among other things) that the Regulator's regulation of the relevant entities and individuals connected to the Fund was not appropriate or effective. The reviewer reached this conclusion against the background of known risks to investors posed by unregulated collective investment schemes (UCIS) in general as well as the specific information the regulator was presented with as to the risks posed to investors in the Fund.

In its response to the report, the FCA apologises for the errors it has made. It accepts and will implement all the review's recommendations.

London Capital & Finance: Report on independent investigation and FCA response

HM Treasury has published a report on Dame Elizabeth Gloster's investigation into the FCA's regulation of London Capital & Finance plc (LC&F). The FCA has published its response to the report along with a series of key actions that it will take in the next six months to address the issues raised.

The investigation considered whether the FCA discharged its functions in respect of LC&F in a manner which enabled it to effectively fulfil its statutory objectives. It concluded that the FCA did not. The review found that the root causes of the FCA's failure to regulate LC&F

appropriately were significant gaps and weaknesses in the policies and practices implemented by the FCA to analyse the business activities of regulated firms.

The FCA has published a response to the report and accepted all its recommendations. It will fully incorporate the recommendations into its assessment of how effectively its current actions are delivering, as well as its action plan and ongoing transformation programme.

Nikhil Rathi, FCA Chief Executive, has outlined a series of key actions that the FCA will take in the next six months. These include:

- restructuring the FCA to join up its policy, supervision and competition functions under two new Executive Directors so it has a better approach to translating insights into risks and warnings before taking action to tackle them;
- undertaking a "use it or lose it" exercise, with firms that have not used their regulatory permissions to earn any regulated income for the last 12 months at risk of having their authorisation revoked. This is to reduce the risk of firms having a permission to carry out regulated activity purely to add credibility to their unregulated activities; and
- recruiting additional prudential specialists to act as quality assurance and assess firms with complex business models, including where they combine regulated and unregulated activity, within the FCA's Authorisation Division.

EU UCITS: ESMA launches common supervisory action with NCAs on supervision of costs and fees

The European Securities and Markets Authority (ESMA) has announced the launch of its common supervisory action (CSA) with national competent authorities (NCAs) on the supervision of costs and fees of UCITS. The CSA will be conducted during 2021.

The CSAs aim is to assess the compliance of supervised entities with the relevant cost-related provisions in the UCITS framework, and the obligation to not charge investors undue costs. For this purpose, the NCAs will take into account ESMA's June 2020 supervisory briefing on the supervision of costs.

The CSA will also cover entities employing Efficient Portfolio Management (EPM) techniques to assess whether they adhere to the requirements set out in the UCITS framework and ESMA's guidelines on exchange traded funds (ETFs) and other UCITS issues.

Throughout 2021, NCAs will share their knowledge and experiences through ESMA to ensure supervisory convergence in how they supervise cost-related issues and ultimately enhance the protection of investors across the EU.

Ensuring greater convergence in the supervision of costs is an integral part of ESMA's broader efforts on the cost of retail investment products and is key to improving investors' confidence in financial markets and reducing costs associated with obtaining financial products.

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