

ALLEN & OVERY



Key Regulatory Topics: Weekly Update

29 November 2019 – 5 December 2019

CONDUCT

GFXC announce priorities for updating the FX Global Code

On 4 December, the Global Foreign Exchange Committee (GFXC) announced its areas of focus for updating the FX Global Code. The GFXC discussed the feedback on the code and agreed to focus its work on the following areas: (i) Buy-Side Outreach; (ii) Anonymous trading; (iii) Disclosures; (iv) Algorithmic trading and Transaction Cost Analysis; and (v) Execution principles. GFXC Chair, Guy Debelle noted that "the strong consensus from the feedback is the Code remains fit-for-purpose, however, a few key areas warrant close review to ensure the Code is providing appropriate guidance and contributing to an effectively functioning market. The next meeting of the GFXC will be held in Zurich in June 2020 and be hosted by the Swiss National Bank.

[Read more](#)

FMSB releases draft statement of good practice for participation in sovereign and supranational auctions

On 2 December, the FICC Markets Standards Board (FMSB) published for consultation a draft statement of good practice for participation in sovereign and supranational auctions in fixed income markets. The statement identifies some of the key conflicts of interest that can arise in the issuance of government and supranational bonds in these markets, due to conflicting roles, price formation mechanisms and transaction types. The FMSB have therefore developed 8 Good Practice Statements for firms to take into consideration. These include: identifying, preventing or mitigating conflicts of interest; ensuring bidding strategies are not designed to improperly manipulate auction levels or statistics; disclosing relevant information to clients, whilst ensuring that the client's information is kept secure and ensuring that policies, procedures and training is developed to encourage compliance. The deadline for comments is 27 January 2020.

[Read more.](#)

New form for MIFID firms to notify FCA of management body changes for non-SMF directors

On 2 December, the FCA published an update reminding MiFID investment firms and MiFID optional exempt firms (except credit institutions) that from 9 December 2019, they must use a new form to submit information to the FCA when appointing non-SMF directors to, or withdrawing them from, their management body. Firms will be able to submit the form from Q1 2020 via Connect, but a preview is currently available on the FCA website.

[Read more.](#)

FCA consultation paper on extending SMR to benchmark administrators

On 29 November, the FCA published a consultation paper on extending the Senior Managers Regime (SMR) to benchmark administrators, those firms with only the administering benchmarks permission. The SMR will come into force for these firms on 7 December 2020; however the Certification regime will not be implemented at any point. Benchmark administrators, the FCA proposes, should generally be considered as core firms under the regime. The paper also includes the FCA's amendments reflecting that the existing approved persons regime will apply solely to Appointed Representatives from the 9 December 2019. The deadline for comments is 28 February 2020.

[Read More.](#)

CONSUMER/RETAIL

FCA clarifies use of legal mortgage term following request from Complaints Commissioner

On 3 December, the Complaints Commissioner published its report regarding a complaint about the FCA's handling of an inquiry about the definition of "legal mortgage", contained in PERG 4.4.16G. The FCA had initially declined as it does not have a definition, suggesting that the complainant seek legal advice. They then explained that use of the term was a piece of legacy drafting, once used by Parliament, on which the Commissioner requested clarification. The FCA explains that a 'legal mortgage' in the current legislative definition has been subsumed within the broader term 'regulated mortgage contract' and is thus no longer referred to. Retaining the term 'legal mortgage' shows where the original definition of a regulated mortgage contract was restricted to a legal mortgage. The Commissioner found the explanation to be reasonable, reflecting the complexity of the legislative framework.

[Read More.](#)

CMA final decision removes Part 6 of Retail Banking Market Investigation Order 2017

On 4 December, the Competition and Markets Authority (CMA) completed its review of Part 6 of the Retail Banking Market Investigation Order 2017. It has confirmed its provisional conclusion earlier this year that the new FCA rules on consumer overdraft alerts from 18 December 2019 would result in firms facing duplication in the regulatory requirements on them. This could potentially result in confusion among providers and unnecessary costs of compliance and also confusion amongst consumers. The CMA has therefore decided to entirely remove Part 6 of the Order. One final compliance report must be issued to the CMA in 2020, as most breaches are uncovered ex-post, to ensure no regulatory gaps are created. Part 12 will also be modified to ensure that the CMA can continue to monitor compliance during the transition to the FCA and therefore providers must continue to report any breaches of Part 6 that come to light subsequent to its removal.

[Read More.](#)

FCA updates regarding delayed consultation papers

On 2 December, the FCA updated a couple of its webpages in relation to delays on upcoming consultation papers. In January, the FCA plans to publish a paper outlining the feedback received in relation to its discussion paper on price discrimination in the cash savings market. In early 2020 it plans to publish a consultation paper on a potential new duty of care in response to feedback it published in April this year. The FCA had previously indicated that it planned to publish both papers in 2019.

[Price discrimination webpage](#)

[New duty of care webpage](#)

FINANCIAL CRIME

IT Failures in the FS industry

Please see our digest on the HoC Treasury Committee's recent report on IT failures in the financial services industry, highlighting a number of potential enforcement risks for FS firms.

[Read more.](#)

EU Council conclusions on strategic AML and CTF priorities

On 5 December, the Council of the EU published its conclusions on strategic AML and CTF priorities. The Council highlight that the fight against ML/TF remains a high priority, recognising the continued legal developments such as 5MLD. However it also notes that further work is required to determine where further harmonisation would enable more effective cooperation throughout the Union and urges all MSs to swiftly complete the transposition of all relevant legislation. Finally the Council calls on the EC to take a number of steps that include: to thoroughly assess any restrictions stemming from existing legislation or lack thereof; to further consider the possibility of creating a coordination and support mechanism; and to explore the advantages and disadvantages of conferring certain AML responsibilities and powers on an independent EU body.

[Read More.](#)

FMLC outlines concerns on ESMA review of the MAR

On 29 November, the FMLC published its concerns in relation to ESMA's proposals contained in its recent review on certain aspects of the MAR. Firstly, they urge ESMA not to expand the definition of inside information so soon after the amendments brought in by MAR. Secondly, the FMLC lists the issues raised by a possible inclusion of Spot FX contracts within the MAR scope. Spot FX is used primarily for commercial purposes, not investment, as required by the insider information definition. In practice, there is also no issuer of Spot FX contracts, so structural changes or broad exemptions would also be required.

[Read More.](#)

FINTECH

Council of EU and EC adopt joint statement on stablecoins

On 5 December, the Council of the EU announced that it and the EC have adopted a joint statement on stablecoins. The statement details both the benefits and multifaceted challenges posed by stable coins reaffirming the G7 commitment that no global stablecoin projects come into operation until the legal, regulatory and oversight challenges and risks have been properly addressed. Tackling this challenge requires a co-ordinated global response, but the Council and the EC are committed to putting a framework in place to harness the potential opportunities crypto-assets offer.

[Read more.](#)

FUND REGULATION

Please see the Prudential Regulation Section for an update on the IFR and IFD publication in OJ.

ABI updates good practice guide for unit-linked funds

On 4 December, the Association of British Insurers (ABI) published an updated version of its guide to good practice for unit-linked funds. The guide establishes guidelines that they believe all firms operating unit-linked funds should aspire to follow, taking into account both financial and other circumstances. The FCA supports this initiative, but the guide does not constitute FCA guidance. One of the main principals throughout the guide is that firms must act in accordance with the FCA's Principles for Businesses, including the need to comply with the Principle 6 and the FCA's treating customers fairly requirements. Firms that deviate from the principals and measures contained in the guide, must be able to justify this decision.

[Read More.](#)

ESMA updates Q&As on application of AIFMD

On 4 December, ESMA has updated its Q&As on the application of AIFMD. ESMA has updated Section III, which covers reporting to national competent authorities to explain how AIFMs should report the results of liquidity stress tests for the closed-ended unleveraged funds that they manage.

[Read More.](#)

MARKETS AND MARKETS INFRASTRUCTURE

Please see the Conduct Section for an update on GXFC priorities for updating the FX Global Code; and FMSB draft statement of good practice for participation in sovereign and supranational auctions.

Please see the Financial Crime Section for FMCL concerns on ESMA review of MAR

Joint Committee of ESAs final report on EMIR RTS on bilateral margining and joint statement on introduction of fall-backs

On 5 December, the Joint Committee of the ESAs published its final report on RTS amending the Regulation on bilateral margining in view of the international framework agreed by BCBS and IOSCO. Given the progress made globally towards the implementation of the international framework, stakeholders asked for adjustments in the EU legislative rulebook to better facilitate international consistency. These relate to the treatment of physically settled FX forward and swap contracts, intragroup contracts, equity option contracts and the implementation of the initial margin requirements. The proposed amendments adapt the timelines and all amendments are limited in scope. The ESAs have submitted the draft RTS to the European Commission for endorsement. Due to fast approaching deadlines concerning the bilateral margining and the treatment of physically settled FX forward and swap contracts, intragroup contracts and equity option contracts the ESAs expect competent authorities to apply the EU framework in a risk-based and proportionate manner until the amended RTS are in force. Alongside the report, the ESAs published a joint statement on the introduction of fallbacks in OTC derivative contracts and the requirement to exchange collateral.

[Report on Bilateral margin amendments](#)

[Fallbacks introduction- joint statement](#)

ESMA updates MiFID II Q&As on market structures and transparency

On 5 December, ESMA published an updated version of its Q&As on market structures topics and an updated version of its Q&As on transparency topics under MiFID II and MiFIR. The Q&A on market structures covers data disaggregation issues; the definitions/scope of Direct Electronic Access and algorithmic trading; the tick size regime; multilateral and bilateral systems; and access to CCPs and trading

venues. The updated Q&A on transparency issues clarifies the process to be followed by trading venues when converting large in scale (LIS) and size specific to the instrument (SSTI) thresholds into lots.

[Markets Structures Q&A](#)

[Transparency Q&A](#)

ESMA report on development in prices for pre-and post-trade data and on the consolidated tape for equity instruments

On 5 December, ESMA published its first review report regarding the development in prices for pre- and post-trade data and on the consolidated tape (CT) for equity instruments contained in MiFID II and MIFIR. Based on the feedback received to its consultation in July, ESMA considers that, currently, the reasonable commercial basis (RCB) information provided by trading venues, approved publication arrangements (APAs) and SIs does not enable users to understand market data policies and how the price for market data is set. ESMA believes the most appropriate way forward is to improve the current RCB approach. It intends to develop supervisory guidance in 2020. ESMA also considers that MiFID II has not delivered reducing the cost of market data charged by trading venues and APAs. It recommends the establishment of an EU-wide real-time CT for equity instruments, assessing Brexit's potential impact on this. The report has been submitted to the EC.

[Read more.](#)

ESMA begins consultation on guidelines on internal controls for CRAs

On 5 December, ESMA published a consultation paper on its draft guidelines on internal controls for CRAs. The purpose of the paper is to clarify what ESMA considers to be the characteristics and components of an effective internal control system to prevent or mitigate any possible conflicts of interest that may impact the independence of a firm's credit rating activities. It divides this between the requirements of an effective internal control framework and the effectiveness of controls within such a framework. The deadline for comments on the draft guidelines is 16 March 2020. ESMA intends to publish the final guidelines in Q2 2020.

[Read more.](#)

Council of the EU sets out conclusions on further integration of EU Capital Markets

On 5 December, the Council of the EU set out the conclusions it has adopted on the need for further deepening of the CMU, as EU capital markets are not yet fully integrated. It therefore sets out 6 principles, a roadmap, underpinning this objective. These include: increased access to finance, especially for SMEs; identification and removal of structural and legal barriers for increased cross border capital flows; incentives to enable well informed investors to invest in capital markets, particularly long term products, active support of a transition to sustainable economies, embracing technological progress and digitalisation, and the strengthening of global competitiveness of EU capital markets. The Council therefore calls on the EC to develop a set of clearly defined key performance indicators (KPIs) by the end of 2020 and report on the progress of the CMU on the basis of the KPIs; to identify any potential gaps for further measures; and to consult closely and facilitate discussion with MSs and report every year on the progress made in deepening of the CMU.

[Read more.](#)

ISDA publish response to OSSG regarding pre-cessation triggers

On 4 December ISDA published a letter responding to the letter from the FSB Operational Sector Steering Group (OSSG) regarding pre-cessation triggers for derivatives fallbacks. ISDA recognises the high priority OSSG places on the development and implementation of fallbacks for derivative contracts. ISDA aims to remain fully focused on the timely delivery of a fallback solution to prevent the systemic disruption that could occur if LIBOR or another key IBOR ceases. In order to further increase market understanding ISDA believes market participants should receive further clarity on: (i) Whether the "reasonable period" during which a "non-representative" LIBOR would be published would be minimal (i.e., a number of months not years) after the FCA announces that LIBOR is no longer representative; and (ii) Upon announcement of the FCA that LIBOR is "non-representative", whether CCPs will implement rule changes or use discretionary powers to amend their entire portfolio of cleared LIBOR derivatives, making sure these derivatives reference the relevant adjusted RFR instead. ISDA also agrees on the potential impact that a 'non-representative' LIBOR could have on existing derivative contracts and market fragmentation. ISDA is therefore prepared to re-consult with the market on a single documentation approach once the market has clarity on the issues outlined above.

[Read more](#)

ESMA publish Q&A on the new Prospectus Regulation

On 4 December 2019, ESMA published the third version of its questions and answers on the new Prospectus Regulation. It includes 2 new questions relating to the inclusion of pro-forma summaries in base prospectuses and the application of prospectus disclosure annexes where securities do not fall neatly within a specific disclosure regime. The Q&A includes a summary table which outlines the subject and topic of each question, also outlining which set of provisions each question aims to clarify.

[Read more](#)

ESMA publish final report on draft RTS amending Prospectus RTS Regulation

On 4 December 2019, ESMA published its final report on the draft RTS amending Delegated Regulation (EU) 2019/979 (Prospectus RTS Regulation) containing regulatory technical standards under the new Prospectus Regulation. The draft RTS contained in Annex I comprises of minor updates which have been made primarily to correct clerical errors observed in the Delegated Regulation and do not constitute new policy.

[Read more](#)

ESMA updates Q&As on investor protection and intermediaries under MiFID II

On 4 December, ESMA updated its Q&As on investor protection and intermediaries topics under MiFID II and MiFIR. The updated Q&As relate to: (i) information on costs and charges; and (ii) national product intervention measures that firms should apply for cross-border provision of investment services.

[Read more](#)

ECON further draft report on proposed Directive on credit servicers, credit purchasers and recovery of collateral

On 3 December, the EP's Economic and Monetary Affairs Committee (ECON) published a draft report on the proposed Directive on credit servicers, credit purchasers and the recovery of collateral. The draft report, which was prepared by Rapporteurs Esther de Lange and Irene Tinagli, contains a European Parliament legislative resolution, the text of which sets out suggested amendments to the proposed Directive. The report does not contain an explanatory statement on the Rapporteurs' reasons for the amendments.

[Read more.](#)

ESMA updates Q&As on BMR

On 3 December, ESMA published updated Q&As on the BMR. The updated Q&As relate to: (i) IOSCO Principles for Oil Pricing Reporting Agencies under Annex II; and (ii) the role and responsibilities of legal representatives under Article 32(3).

[Read more](#)

ESMA updates Q&As on CSDR

On 3 December, ESMA published updated Q&As on the CSDR. The updated Q&As relate to matching settlement instructions under Article 7 of the CSDR.

[Read more](#)

ESMA publishes guidance on registering securitisation repositories

On 2 December, ESMA published guidance for companies that intend to register to become securitisation repositories (SRs) under the Securitisation Regulation. Where an applicant is already registered under EMIR or SFTR, it needs to apply for an extension of registration. The guidance focuses only on the registration process, not how to actually meet the conditions. The process follows the commonly used process, pre-application correspondence with ESMA; then an assessment for completeness of the submitted documentation, followed, once deemed complete, by an assessment for compliance with the requirements in the Regulation. No applications will be acknowledged until the draft RTS adopted on 29 November come into force, (as to which, see further below.)

[Read More.](#)

EC adopts two Delegated Regulations on RTS for securitisation repositories

On 29 November, the EC adopted two Delegated Regulations containing RTS for securitisation repositories relating to ESMA's mandates under the Securitisation Regulation. The first RTS sets out a framework for securitisation repositories to collect, process and provide access to relevant disclosures on securitisations that the originator, sponsor or securitisation special purpose entities are required to make available by means of a securitisation repository. Its key features cover the quality of submitted data, the standardisation and security of data transfers and providing access to data requests. The second RTS specify the content

required in a securitisation repository's application for registration, with a simplified application for those depositories already registered under previous regulations.

[RTS on securitisation repository operational standards](#)

[RTS specifying the details of the application for registration](#)

ESMA's annual report on Market Share Calculations for CRAs

On 29 November, ESMA published its annual market share calculations for credit rating agencies (CRAs), as required by the CRA Regulation. Issuers or related third parties must consider when appointing more than one CRA those with 10% or less total market share. To assist, the report contains a list of registered CRAs and their market share, the types of credit rating they issue and the proportion of EU debt issuances by asset class rated by individual CRAs.

[Read More.](#)

PENSIONS

EIOPA consultation on proposed technical advice and standards for PEPP Regulation

On 29 November, EIOPA published a consultation paper on proposed approaches and considerations for its technical advice, ITS and RTS under the pan-European personal pension product regulation (PEPP Regulation). The paper covers a number of features, suggesting possible text, including the PEPP key information document and benefit statement, the format for supervisory reporting, the cost cap for the Basic PEPP, risk mitigation techniques and EIOPA's powers regarding product intervention. The deadline for comments is 2 March 2020.

[Read More.](#)

PRUDENTIAL REGULATION

IFR and IFD published in OJ

On 5 December, Regulation 2019/2033 on the prudential requirements of investment firms; and Directive 2019/2034 on the prudential supervision of investment firms were published in the OJ. They will enter into force on 25 December. The IFR will apply from 26 June 2021, except for Articles 63(2) and (3) which will apply from 26 March 2020, and Article 62(30) which will apply from 25 December 2019.

[IFR](#)

[IFD](#)

EBA publishes Impact Study and Key Recommendations for Basel III reforms

On 4 December, the EBA published two sets of advice containing a detailed impact assessment and key policy recommendations regarding credit valuation adjustment (CVA) risk and market risk reforms and represents the second part of the EBA's advice on the implementation of the final Basel III framework. Among other things, the EBA recommends that: (i) as the CVA risk generated by the CVA exemptions can be substantial, it should be captured prudentially; (ii) CVA exemptions should be fully removed, subject to phasing-in measures that are commensurate with the expected impact of the revisions to the CVA risk framework, when the impact of such revisions can be more accurately assessed; and (iii) if the simplified treatment for CVA risk envisaged in Basel III reforms were included in the CRR, the thresholds for its usage should be based on the market value of the on- and off-balance sheet derivative business, while the level for the thresholds should be set so that it is consistent with that established for the use of the simplified standardised approach to counterparty credit risk.

[Implementation of Basel III in the EU](#)

[Basel III reforms on CVA and market risk](#)

ITS on mapping credit assessments of ECAIs under CRR amended

On 4 December, Commission Implementing Regulation (EU) 2019/2028 was published in the OJ of the EU. The Amending Regulation, adopted on 29 November, amends Commission Implementing Regulation (EU) 2016/1799, containing ITS on the mapping of external credit assessment institutions' (ECAIs) credit assessments under CRR. The ITS specify the correspondence of the relevant credit assessments issued by an ECAI to the credit quality steps defined in the CRR. The new regulation updates the mappings of ECAIs to reflect changes to the factors underpinning existing credit assessments and the extension by some ECAIs of their credit assessments to new market segments. It also provides a mapping for a credit rating agency that has recently been registered under the Credit Rating Agencies Regulation. It will enter into force on 24 December 2019.

[Read More.](#)

RECOVERY AND RESOLUTION

FCA, PRA and BoE consult on new requirements to strengthen operational resilience in FS sector

On 5 December, the FCA, PRA and BoE published a shared policy summary and three co-ordinated consultation papers on new requirements to strengthen operational resilience in the FS sector. The summary addresses the feedback received to the July 2018 joint discussion paper and sets out the outcomes associated with an operational resilience framework. The consultation proposals set requirements and expectations for firms and financial market infrastructures to identify their important business services, mapping the people, processes, technology, facilities and information that support them and considering how disruption to the business services they provide can have impacts beyond their own commercial interests. The deadline for comments to all three consultation papers is 3 April 2020.

[Read more.](#)

Council adopts position on recovery and resolution of CCPs and HMT update

On 4 December, the Council announced that COREPER has approved its negotiating mandate on the proposed Regulation regarding the recovery and resolution of CCPs. The proposed rules will provide national authorities with adequate tools to manage crises and to handle situations involving failures of CCPs. COREPER has invited the Presidency of the Council to start triologue negotiations with the EP on the Regulation as soon as possible. The regulation will apply 2 years from the date it enters into force. The text of the legislation was not included, but some details have been made public in a letter published by HM Treasury from John Glen, HMT Economic Secretary, to the HoC European Scrutiny Committee Chair, providing an update on the proposed Regulation. MSs have agreed to include a new requirement for CCPs to use its own resources in recovery, which doesn't need to be prefunded, prior to financial contributions from clearing members. Further FSB guidance is anticipated in 2020. Agreement was reached also on delaying the enforcement of contractual obligations on CCPs in resolution, when there is a risk of adverse effects for financial stability or critical functions. An article has also been added to an amendment in the draft regulation to implement the FSB's recommendations for interest rate benchmark reform. It clarifies that contracts entered into before the application of clearing and margin requirements to OTC derivative transactions will not become subject to these requirements when they are amended for the purpose of implementing interest rate benchmark reforms.

[Council of EU press release](#)

[HMT Letter.](#)

OTHER DEVELOPMENTS

New PRA consultation paper on outsourcing and third party risk management

On 5 December, the PRA published a consultation paper on outsourcing and third party risk management. The proposals, included in the Appendix, pursue the following objectives of the PRA: (i) complement the policy proposals on its recent paper on operational resilience, (ii) facilitate greater resilience and adoption of new technologies, specifically the cloud; (iii) implement the EBA's guidelines on outsourcing arrangements; and (iv) take into account the draft EIOPA cloud-outsourcing and EBA ICT and security risk managements guidelines. The deadline for comments is 3 April 2020.

[Read More.](#)

Corporate governance: principles-based guidance for board risk committees in the financial services sector

On 4 December 2019, the Risk Coalition (RC) published its final guidance for board risk committees and risk functions in UK financial services. The final guidance is very similar to that proposed in its consultation draft. It focuses on accountability explaining that that it is intended to be used by organisations on an "apply or explain" basis. It also clarifies that while the RC assumes that organisations operate a "three lines of defence" model for risk management, this is not required. In relation to board risk committees, the guidance maintains the proposed eight board risk committee principles but there have been some changes and additions that underlie how committees should meet each principle. Committees should seek regular board engagement and direction on the organisation's principal and emerging risks; confirm that delegated risk-related responsibilities are clearly defined; and support the committee chair in engaging with investors and key stakeholders on risk-related topics. In relation to the risk function, guidance maintains the nine proposed risk function principles but emphasises that independent risk oversight and challenge sits at the centre of the risk function principles.

[Read More.](#)

Council of EU adopts ESFS reforms

On 2 December, the EU Council announced that it has adopted the first fundamental review reforming the functioning of the European System of Financial Supervision. The adopted texts review the tasks, powers, governance and funding of the European Supervisory Authorities and the European Systemic Risk Board. They also include provisions reinforcing the role of the EBA as regards the risks posed by money laundering. They contain amendments to MiFID II, the Solvency II Directive and the ESRB Regulation. They will be formally signed on 18 December.

[Read More.](#)