

# ALLEN & OVERY

## *Key Regulatory Topics: Weekly Update*

24 May 2019 – 30 May 2019



### **BREXIT**

Please see the Markets and Markets Infrastructure section for ESMA's statement on impact of no-deal Brexit on trading obligation for shares under MiFIR and the FCA's response to that statement.

#### **FCA confirms extension of temporary permissions regime (TPR)**

On 24 May, the FCA confirmed that the deadline for notifications for entering into the TPR will be extended to 30 October. The TPR will allow EEA-based firms which notify the regulator and which passport into the UK to continue to operate in the UK within the scope of their current permissions for a limited period in the event of a hard Brexit. The FCA also states that any fund managers who wish to update their notification before the notification window closes on 30 October, should do so by 16 October. The deadline for CRAs and TRs applying to register a UK legal entity has also been extended to 30 October.

[FCA press release](#)

[Revised direction for EEA firms with passports and Treaty firms](#)

[Revised direction for EEA UCITS](#)

[Revised direction for EEA alternative investment funds](#)

### **CONDUCT**

#### **FCA publishes industry feedback to "five conduct questions"**

On 28 May, the FCA published its "five conduct questions" report which outlines wholesale banking industry feedback for 2018/19. The FCA introduced the five conduct question programme for wholesale banks in 2015 in order to help firms improve their conduct risk management and to drive cultural change. The report is divided into three sections, comprising (i) a new section which looks at strategic factors that "may help firms reframe, extend or energise their efforts"; (ii) an update on industry progress against each of the five questions, and a catalogue of "good practice ideas"; and (iii) a brief assessment of 'speak up' and whistleblowing initiatives in wholesale banking. Points of interest include: (a) firms' conduct training initially focused on raising awareness of conduct risk, although this has now been replaced with training to raise alertness and ability in spotting potential conduct risk. The majority of firms now consider conduct risk a major risk, alongside credit, market and operational risk; and (b) non-financial misconduct has emerged as a significant concern, and requires much more attention from staff of all levels. The FCA will increasingly include some degree of testing and challenge to management and staff below board and top management level. The report covers supervisory activity and discussions with a sample of around 50 firms, although the FCA states that the content is relevant for all firms in the financial sector, wholesale or otherwise.

[Read more](#)

## CONSUMER/RETAIL

### **EC letter regarding treatment of bonds under the PRIIPs Regulation**

On 28 May, the EC published a letter (dated 14 May) sent to the ESAs, regarding the treatment of bonds under the PRIIPs Regulation. The letter was sent in response to a letter from the ESAs dated 19 July 2018. The EC considers that: (i) the transparency of bonds made available to retail investors is an important investor protection measure and a precondition for boosting the confidence of retail investors in the financial market. Owing to the state of harmonisation of bond law at EU level, the assessment whether a particular bond is a PRIIP or not must be determined on a case-by-case basis; and (ii) by virtue of Article 4(1) of the PRIIPs Regulation, a bond made available to retail investors qualifies as a PRIIP solely where potential or compulsory payment in terms of either interest, principal or both, in accordance with the applicable terms and conditions, may vary due to its exposure to reference values or the performance of one or more assets that are not directly purchased by the retail investors. The actual amount to be repaid is not certain at the outset of the contract. As a result, the actual amount to be repaid cannot be certain at the outset of the contract.

[Read more](#)

## FINANCIAL CRIME

### **FSB cyber incident response and recovery progress report**

On 28 May, the FSB published a progress report summarising its work to date and outlining its workplan for developing effective practices for cyber incident response and recovery. The report states that enhancing cyber resilience is often characterised by a set of functions. The toolkit of effective practices will focus on the 'respond' and 'recover' functions. The respond function involves the development and implementation of the appropriate activities following a detected cyber event. The recover function involves the development and implementation of the appropriate activities to restore and maintain any capabilities or services that were impaired due to a cyber incident. The development of the toolkit of effective practices relating to a financial institution's response to, and recovery from, a cyber incident will be taken forward in two phases. The first phase of work will continue until October and focus on identifying and developing effective practices, including: (i) literature review, (ii) a stocktake of work carried out by international bodies since 2017; (iii) a stocktake of publically released guidance issued by national authorities; and (iv) engagement with external stakeholders by an online survey. The second phase of work will most likely commence during the last quarter of this year and will focus on drafting of the toolkit. It will then involve a public consultation which is to be conducted early next year. Following FSB plenary approval, the final toolkit will be published in September 2020.

[Read more](#)

## FINTECH

### **FCA publishes call for input on cross-sector sandbox**

On 29 May, the FCA published a call for input on a cross-sector sandbox. The FCA refers to a six month study it conducted in October 2018 into how a cross-sector sandbox involving multiple regulatory agencies could be established. The call for input gives an overview of why the FCA conducted this work, highlights what a sandbox is and explains the opportunities and challenges a cross-sectoral sandbox could pose for firms and regulators, by looking at case studies. There are multiple challenges that a prospective cross-sector sandbox could face, including: (i) lack of demand; (ii) misunderstanding surrounding the purpose of a sandbox; (iii) differing regulatory remits; and (iv) firms' lack of own in-house knowledge. However, the FCA believes there are ways to mitigate these challenges such as creating eligibility criteria which require firms to show a need for testing to ensure that only those innovative ideas that would benefit from a sandbox test would be accepted and ensuring that firms do due diligence before any test by showing that they understand the regulatory framework where they operate. The deadline for comments is 30 August.

[Read more](#)

### **IOSCO consultation report on issues, risks and regulatory considerations relating to crypto-asset trading platforms**

On 28 May, IOSCO published a consultation report on the issues, risks and regulatory considerations in relation to crypto-asset trading platforms (CTPs). In relation to the issues and risks identified, it describes key considerations and provides related toolkits that are useful for each key consideration. The key considerations relate to: (i) access to CTPs; (ii) safeguarding participant assets; (iii) conflicts of interest; (iv) operations of CTPs; (v) market integrity; (vi) price discovery; and (vii) technology. The key

considerations represent specific areas that IOSCO believes jurisdictions could consider in the context of the regulation of CTPs; they are not intended to suggest any particular regulatory action or requirement. The deadline for comments is 29 July.

[Read more](#)

## **FUND REGULATION**

Please see the Brexit section for the FCA's directions extending the temporary permissions regime (TPR) notification window to 30 October for EEA UCITS and Alternative Investment Funds.

## **MARKETS AND MARKETS INFRASTRUCTURE**

### **Commission Delegated Regulation on the specification of a single electronic reporting format published in OJ**

On 29 May, Commission Delegated Regulation (EU) 2018/815 supplementing the Transparency Directive 2004/109/EC with regard to regulatory technical standards on the specification of a single electronic reporting format was published in the OJ. The regulation will enter into force on 18 June and will apply to annual financial reports containing financial statements for financial years beginning on or after 1 January 2020.

[Read more](#)

### **ESMA updates statement on impact of Brexit on the trading obligation for shares**

On 29 May, ESMA published a statement outlining its approach, in the event of a hard Brexit, to the application of the trading obligation for shares (STO) under Article 23 of MiFIR in the absence of an equivalence decision relating to the UK. ESMA initially published a statement on 19 March, and has now updated the statement to further mitigate potential adverse effects of the application of the STO, within the constraints of the circumstances of a no-deal Brexit. ESMA has given additional attention to the risks of disruption that conflicting EU27 and UK STOs may potentially create. ESMA concludes that an approach to the STO based only on the ISIN of the share would be more likely to minimise any such risk of disruption in the interest of sustaining orderly markets. As a result, the EU27 STO would not be applied to the 14 GB ISINs included in its previous guidance. All EEA shares i.e ISINs starting with a country code corresponding to an EEA member state are within the EU27 STO. GB ISINs are outside the scope of the EU27 STO. ESMA states that its approach will avoid overlapping STOs if the UK adopts an approach that does not include EEA ISINs under the UK STO.

[Read more](#)

### **FCA response to ESMA update on share trading obligations (STOs)**

On 29 May, the FCA published a statement responding to ESMA's updated statement on STOs under MiFID II. The FCA is encouraged that ESMA has taken steps to reduce the disruption that would be caused by the previously announced scope of the EU STO. However, the FCA's view is that ISINs should not determine the scope of the STO. The FCA believes in open markets and competition between trading venues and that reciprocal equivalence, which reflects the reality, is the best way of dealing with overlapping STOs. The FCA will continue to consider its approach to the implementation of any STO that is needed in the event of a no-deal Brexit.

[Read more](#)

### **ESMA Q&As on MiFID II and MiFIR investor protection and intermediaries topics updated**

On 29 May, ESMA published an updated version of its Q&As on investor protection and intermediaries topics under MiFID II and MiFIR. New Q&As on best execution and information on costs and charges have been added. By way of reminder, MiFID II and MiFIR are now included in the single interactive rulebook.

[Read more](#)

### **EC adopts Delegated Regulation on homogeneity of underlying exposures in securitisation**

On 28 May, the EC adopted a Delegated Regulation relating to RTS on the homogeneity of the underlying exposures in securitisation. The homogeneity is one of the crucial requirements for a securitisation to be assessed as simple, transparent and standardised and to be eligible for more risk-sensitive risk weights under the new EU securitisation framework. The delegated act establishes a set of four conditions for the underlying exposures to be considered homogeneous: (i) they have been underwritten according to standards that apply similar approaches to assessing credit risk; (ii) they are serviced in accordance with similar procedures for monitoring, collecting and administering cash receivables; (iii) they fall within the same asset type; and (iv) for a majority of asset types, one or more

homogeneity factors apply. The Delegated Regulation is based on final draft RTS published by the EBA in July 2018.

[Read more](#)

### **EMIR Refit Regulation published in OJ**

On 28 May, the EMIR Refit Regulation was published in the OJ. The regulation will enter into force 20 days after publication in the OJ (17 June) and will apply from that date, with some exceptions.

[Read more](#)

### **ESMA consultation papers on tiering, comparable compliance and fees for TC-CCPs under EMIR 2.2**

On 28 May, ESMA published three consultation papers in connection with EMIR 2.2: (i) consultation paper regarding draft technical advice on criteria for tiering third country CCPs (TC-CCPs) under Article 25(2a) of EMIR 2.2. The consultation requests stakeholders' views on the draft technical advice to further specify the criteria for determining whether a TC-CCP should be considered a Tier 2 CCP (systemically important or likely to become systemically important); (ii) consultation paper regarding draft technical advice on comparable compliance by tier 2 CCPs under Article 25a of EMIR. The consultation discusses what and how ESMA should assess to apply comparable compliance, with the aim of identifying the main aspects to be detailed in the Commission's Delegated Act on comparable compliance; and (iii) consultation paper on ESMA's fees for TC-CCPs under EMIR 2.2. The consultation sets out, among other things, ESMA's approach to the fees to be paid by TC-CCPs. The deadline for comments on all three consultation papers is 29 July.

[Consultation paper on the criteria for tiering under Article 25\(2a\) of EMIR](#)

[Consultation paper on comparable compliance under Article 25a of EMIR](#)

[Consultation paper on ESMA's fees for TC-CCPs under EMIR 2.2](#)

### **ESMA Q&As on implementation of EMIR**

On 28 May, ESMA published an updated version of its Q&As on the implementation of EMIR. The updated Q&As provide clarity on the EMIR Refit Regulation and amends existing Q&As on novation and clearing obligations.

[Read more](#)

### **ESMA opinion on calculating market size of ancillary activity**

On 27 May, ESMA published an updated opinion on ancillary activity calculations under MiFID II for the year 2018. ESMA estimates the market size of various commodity derivatives, including metals, oil, coal, gas and emissions allowances. The estimations are based on data collected from trading venues and annualised OTC totals based on 4 months (January-April 2018) from EMIR reporting.

[Read more](#)

### **ESMA consultation paper on periodic information and notification of material changes to be submitted to ESMA by TRs**

On 27 May, ESMA published a consultation paper (dated 23 May) outlining draft guidelines on periodic information and notification of material changes to be submitted by TRs. The Guidelines clarify the format and frequency of the different categories of information which ESMA expects to receive in its role as supervisor of trade repositories registered in accordance with EMIR and/or SFTR and to clarify the obligations of TRs in accordance with Article 55(4) of EMIR and Article 5(4) of SFTR. This is done by: (i) establishing reporting schedules for TRs; (ii) establishing reporting calendars for TRs based on reporting schedules; (iii) standardising reporting templates, channels and naming conventions; and (iv) providing additional reporting clarifications in areas where ESMA has identified a supervisory need. The deadline for comments is 27 August. ESMA intends to publish the final guidelines in the fourth quarter of this year.

[Read more](#)

### **ESMA Q&As on the Securitisation Regulation**

On 27 May, ESMA updated its Q&As on the Securitisation Regulation. The updates include new guidance on STS notifications and additional information surrounding disclosure and reporting requirements. New or modified Q&As are flagged as such.

[Read more](#)

### **ESMA call for evidence of position limits in commodity derivatives**

On 24 May, ESMA published a call for evidence on position limits and position management in commodity derivatives under MiFID II. The call for evidence is seeking stakeholders' input on the impact of position limits and position management controls on liquidity, market abuse and orderly pricing and settlement

conditions in commodity derivatives markets. Stakeholders are invited to share their views on potential improvements to the existing framework. ESMA also seeks views on the impact of Brexit on the commodity derivatives regime under MiFID II. The deadline for comments is 5 July. ESMA intends to consult on its draft report to the EC in the last quarter of the year with a view to finalising the report by the end of March 2020.

[Read more](#)

## **PENSIONS**

### **EP first reading on PEPP Regulation**

On 29 May, the Council of the EU published an "I/A" item note addressed to COREPER inviting it to confirm its agreement to the EP's first reading on the proposed PEPP Regulation. If the Council approves the EP's position, the legislative act will be adopted and will then be published in the OJ.

[Read more](#)

## **PRUDENTIAL REGULATION**

### **EBA final report on draft ITS amending the common reporting framework**

On 28 May, the EBA published its final report on draft ITS amending Implementing Regulation (EU) 680/2014 with regard to the common reporting framework (COREP) under the CRR. The final draft ITS introduces: (i) amendments to the ITS on supervisory reporting with regard to the new securitisation framework; (ii) amendments to the ITS on supervisory reporting with regard to the LCR amending Act; and (iii) clarifications and corrections as regards reporting on COREP and additional monitoring metrics for liquidity. The next step is for the EBA to submit the final draft ITS to the EC for adoption.

[Read more](#)

### **ESMA consultation paper on amendments to ITS specifying main indices and recognised exchanges of the CRR**

On 24 May, ESMA published a consultation paper on amendment to Commission Implementing Regulation 2016/1646, which specifies the main indices and recognised exchanges pursuant to Article 197 of the CRR. ESMA is consulting on the methodology provided in the ITS to determine the list of main indices whose components can be used as collateral and proposes a new methodology. This new methodology relies on two tests. The first test aims to capture indices comprised predominantly of medium and large stocks. The second brings in indices of small cap stocks as long as all components are sufficiently liquid. The deadline for comments is 5 July.

[Read more](#)

## **OTHER DEVELOPMENTS**

### **IOSCO publishes update on 2019 work programme**

On 30 May, IOSCO issued a statement following a meeting held on 13-15 May, to discuss priority issues facing securities market regulators and supervisors. IOSCO's priorities include, among other things: (i) cryptoassets; (ii) market fragmentation; (iii) asset management (iv) Fintech; (v) cyber task force; and (vi) data protection.

[Read more](#)

### **US-UK financial regulatory working group joint statement published**

On 29 May, HMT published a joint statement by members of the US-UK Financial Regulatory Working Group following their second meeting, held on 23 May in Washington DC. The participants discussed the outlook for financial regulatory reforms and future priorities, including possible areas for further regulatory cooperation to facilitate safe and efficient financial services activity between U.S. and UK markets. They also discussed the implications of the United Kingdom's exit from the EU on financial stability and cross-border financial regulation. Furthermore, participants commented on the Working Group's progress since the inaugural meeting in September 2018, including successfully extending existing bilateral financial regulatory arrangements between the US and the European Union with respect to the UK and updating existing bilateral financial regulatory arrangements between the US and UK. The importance of financial innovation was also discussed, and the Financial Innovation Partnership between the US Treasury and HMT was launched in order to promote further engagement and collaboration on financial services innovation. The next meeting of the Working Group will be in the second half of 2019 in London.

[Joint statement](#)

[Financial Innovation Partnership statement](#)

### **EBA 2018 annual report**

On 29 May, the EBA published its annual report for 2018. The EBA provides a detailed account of the work undertaken and its achievements in 2018, and outlines its priorities for 2019, which include, among other things: (i) preparing the Basel III (final) implementation in the EU; (ii) preparing for the application of major new items of EU legislation; (iii) understanding risks and opportunities arising from financial innovation, including sustainable finance; (iv) monitoring the implementation and convergence of resolution and prudential policies; (v) improving AML and CFT supervision and enhancing cooperation; (vi) protecting consumers and contributing to secure and easy retail payments in the EU; and (vii) supporting efforts to tackle NPLs.

[Read more](#)

### **FSB publishes progress reports regarding correspondent banking**

On 29 May, the FSB published two reports in relation to its work on correspondent banking. The first is the sixth progress report on the FSB's November 2015 action plan to assess and address the decline in correspondent banking. Points of interest include: (i) SWIFT data as of end-2018 shows continued declines in the number of correspondent banking relationships during 2018; (ii) increased concentration in 2018 is indicated through a smaller number of correspondents per corridor, a higher number of messages per correspondent, and a smaller number of foreign correspondents per country; and (iii) technical measures recommended by CPML to improve the efficiency of due diligence procedures and reduce compliance costs are now generally available for use, but their concrete implementation still requires continued focus by industry and the official sector. The second is a monitoring report in relation to implementation of the FSB's 2018 recommendation on remittance service providers' access to banking services. The report finds that while positive steps have been taken, further work is needed and the report concludes with a number of possible next steps aimed at national authorities, international organisations, remittance service providers and banks.

[Progress report on implementation of the FSB's November 2015 action plan](#)

[Progress report on remittance service providers' access to banking services](#)