ALLEN & OVERY

Key Regulatory Topics: Weekly Update

3 May 2019 – 9 May 2019

BREXIT

Counter-Terrorism International sanctions guidance published
On 3 May, the Secretary of State for Foreign and Commonwealth Affairs published statutory guidance, as required by section 43 of the Sanctions and Anti-Money Laundering Act 2018, in relation to the Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019 published in the event of a no-deal Brexit. The guidance outlines the prohibitions and requirements contained in the Regulation.
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CONSUMER/RETAIL

FCA consultation on mortgage advice and selling standards
On 7 May, the FCA published a consultation paper (CP19/17) outlining its proposals for changes to its mortgage advice and selling standards. The mortgages and markets study (MMS), published in March, identifies three harms: (i) advice rules and guidance are a barrier to the development of tools to help consumers choose and buy a mortgage; (ii) consumers who would like to buy a mortgage on an execution-only basis find it hard because they are diverted to advice and because execution-only sales channels are not always easy to navigate; and (iii) consumers are overpaying for their mortgages, even when they get advice. To address the three harms, the FCA proposes to: (a) change its perimeter guidance on mortgage advice to clarify that tools that allow search and filtering based on objective criteria are not necessarily giving advice; (b) permit more interaction with consumers before firms are required to give advice; (c) make other changes that may help firms to make their execution-only sales channels easier to use; and (d) require advisers, if they recommend a mortgage that is not the cheapest of the mortgages meeting the customer's needs and circumstances, to explain why they have not recommended a cheaper mortgage. The deadline for comments is 7 July. The FCA intends to publish a policy statement with final rules towards the end of the year.
Read more

FCA report on buying mortgages without advice
On 7 May, the FCA published a report on buying mortgages without advice. The report is intended to help the mortgage sector consider how best to inform customers about the differences between buying a mortgage on an execution-only basis or on an advised basis. It follows research with recent mortgage applicants into how clear they found several existing execution-only disclosure documents. The research concluded that execution-only consumers had a general understanding that they were selecting their mortgage without receiving advice. However, it also showed that consumers who went down either application route (execution-only or advised) struggled to comprehend the disclosure documents.

[Read more]

FINANCIAL CRIME

Please see the Brexit section for the update regarding the Counter-Terrorism International sanctions guidance.

Please see the Fintech section for the FCA's consideration of the government's approach to cryptoasset regulation and supervision.

Government response to House of Commons Treasury Committee report on economic crime
On 7 May, the House of Commons Treasury Committee published the government's response to its March report on economic crime. The government has adopted many of the Committee's recommendations, including the introduction of new powers and resources, taking steps to ensure that the UK's commitment to tackling economic crime will not diminish on the UK's exit from the EU, and launching a consultation in the reform of Companies House. Some of the Committee's recommendations were rejected by the government, including the creation of a register of PEPs and any additional attempts to measure the size and scale of economic crime. There are some areas where the government has chosen not to respond, including reform of SARs.
[Read more]

FINTECH

FCA considers government's approach to cryptoasset regulation and supervision
On 9 May, the FCA published the minutes of its board meeting that was held on 28 March. Among other things, the minutes report that HMT is consulting on domestic legislation to implement an AML regime for certain cryptoasset activities by January 2020. HMT proposed additional elements that would require the UK to meet the relevant Financial Action Task Force (FATF) standards and had asked the FCA to take on supervision of the new regime. The FCA board noted that the new regime would introduce AML supervision for businesses that enable cryptoasset exchanges and act as custodians for "wallets" storing cryptoassets for clients. Subject to the outcome of the consultation, it may also include businesses enabling exchange of one cryptoasset for another and cryptoasset ATMs and, potentially, businesses facilitating peer-to-peer exchange of cryptoassets. The FCA board also discussed the risks and issues, associated with taking on these new supervisory responsibilities. In relation to risks not covered by the regime, such as technology and resilience requirements, financial promotions and consumer protections, the FCA board considered whether communication alone was sufficient for managing risks and whether additional rules were required. It agreed that further discussion in relation to this would be necessary.
[Read more]

UK Jurisdiction Taskforce consultation on cryptoassets, DLT and smart contracts
On 9 May, the UK Jurisdiction Taskforce published a consultation paper on the status of cryptoassets, distributed ledger technology (DLT) and smart contracts, with the aim of providing clarity on these areas. The consultation seeks to clarify: (i) the circumstances in which a cryptoasset may be characterised under English law as property; and (ii) in what circumstances smart contracts are capable of giving rise to binding legal obligations. The deadline for comments is 21 June. It is then intended that the Legal Statement will be published in late summer.
[Read more]

FUND REGULATION

Please see the Sustainable Finance section for an update on ESMA's final reports on technical advice on integrating sustainability risks and factors in the UCITS Directive and AIFMD.

INSURANCE

Please see the Sustainable Finance section for details of EIOPA's technical advice on integrating sustainability risk and factors under the Solvency II Directive and the Insurance Distribution Directive (IDD).

PRA updates Solvency II remuneration policy statement template and identified staff table for category 1 and 2 firms
On 9 May, the PRA updated its section regarding remuneration requirements on its 'strengthening accountability' webpage. The PRA updated versions of its: (i) Solvency II remuneration policy statement reporting template; and (ii) Solvency II identified staff table. Firms in scope have been asked to submit a copy of their remuneration policy statement for their most recent reporting period to the Bank of England Electronic Data Submission as an occasional submission by 31 July.
Read more

EIOPA thematic review on Big Data Analytics in motor and health insurance
On 8 May, EIOPA published its thematic review on the use of Big Data Analytics (BDA) in the motor and health insurance sectors. The thematic review has revealed a strong trend towards increasingly data-driven business models throughout the insurance value train. The majority of firms were using, or contemplating using, BDA tools and cloud computing services. EIOPA concludes that, while there are many opportunities for BDA for the insurance industry and consumers, there are also risks that need to be addressed. EIOPA highlights ethical issues with both the fairness of the use of BDA, and the accuracy, transparency, auditability, and explainability of BDA tools such as artificial intelligence and machine learning (ML). In particular, it notes that biases inherent in data being used could be reinforced through ML algorithms if firms do not have adequate governance arrangements in place.
Read more

Implementing Regulation on technical information for calculation of technical provisions and basic own funds for Q2 2019 reporting under Solvency II published in OJ
On 7 May, Commission Implementing Regulation (EU) 2019/699 laying down technical information for the calculation of technical provisions and basic own funds for reporting with reference dates from 31 March until 29 June in accordance with the Solvency II Directive, was published in the OJ. The Implementing Regulation sets out the technical information to be used by reinsurers and insurers when calculating technical provisions and basic own funds for reporting with reference dates in Q2 2019. In order to ensure uniform conditions for insurers and reinsurers calculating technical provisions and basic own funds, the Solvency II Directive requires that technical information on relevant risk-free interest rate term structures, fundamental spreads for the calculation of the matching adjustment and volatility adjustments must be laid down for every reference date. The EC adopted the Implementing Regulation on 6 May, and it enters into force on 8 May (that is, the day after its publication in the OJ).
Read more

MARKETS AND MARKETS INFRASTRUCTURE

Please see the Sustainable Finance section for ESMA's final report on technical advice on integrating sustainability risks and factors in MiFID II.

Council of EU invites COREPER to confirm agreement on EP's first reading on EMIR Refit Regulation
On 7 May, the Council of the EU published an "I/A" item note (dated 6 May), inviting COREPER to confirm its agreement to the EP's first reading position on the proposed Regulation to amend EMIR. The I/A note states that the outcome of voting in the EP reflects the compromise agreement reached between the institutions. If the Council approves the EP's position, the legislative act will be adopted. It will then be published in the OJ and enter into force.
Read more

PAYMENT SERVICES AND PAYMENT SYSTEMS

Payment Systems Regulator's (PSR's) consultation paper on specific direction for implementing confirmation of payee service
On 9 May, the PSR published a consultation paper (CP19/4) outlining its proposals to give a specific direction requiring PSPs in the six largest banking groups to implement a Confirmation of Payee (CoP) service. In November 2018, the PSR consulted on a proposal to give a general direction for all PSPs to implement CoP. The responses to that consultation were supportive of the proposal for a direction and provided useful feedback on its design and proposed deadlines. As such, the PSR has proposed a specific direction to the following PSPs that sit within six banking groups (representing about 90% of bank transfers) that offer their UK account holders access to the Faster Payments

Scheme (FPS) and CHAPS: (i) Bank of Scotland plc; (ii) Barclays Bank UK plc; (iii) Barclays Bank plc; (iv) Cater Allen Ltd; (v) Coutts and Company; (vi) HSBC Bank plc; (vii) HSBC UK Bank plc; (viii) Lloyds Bank plc; (ix) Nationwide Building Society; (x) National Westminster Bank plc; (xi) Royal Bank of Scotland plc; (xii) Santander UK plc; and (xiii) Ulster Bank Ltd (Directed PSPs). The revised implementation deadlines proposed by the PSR require Directed PSPs to respond to CoP requests from 31 December. The deadline for comments on the consultation is 5 June.
Read more

HMT summary of responses on cash and digital payments
On 3 May, HMT published a summary of responses to its March call for evidence on cash and digital payments in the new economy. HMT states that the responses reflect the change in the way payments are being made. Respondents expect the use of digital payments to continue to grow over the next ten years, highlighting the ease and convenience of these methods. HMT wants to ensure that there is comprehensive oversight of the overall UK cash infrastructure, and has therefore decided to set up and chair the Joint Authorities Cash Strategy Group. Respondents suggested options to increase the visibility of cash transactions, and on how behavioural insights could be used to reduce the risks around cash and tax non-compliance.
Read more

PENSIONS

Pension Charges Bill 2017-19 presented in Parliament
On 8 May, the Pension Charges Bill 2017-19 received its first reading in the House of Commons, sponsored by Angela Eagle, a Labour MP and former Pensions Minister. The Bill proposes to introduce greater transparency in charges applied to pension savings by those who manage them on behalf of beneficiaries, and to introduce a mandatory cap on such charges. The Bill has three main aims: (i) to drive down significantly the total cost of pension fund management; (ii) to achieve better value for money in a currently failing market; and (iii) to ensure that a higher proportion of pension savings will actually go to help the beneficiaries to achieve a comfortable retirement. A second reading of the Bill is yet to be announced.
Read more

PRUDENTIAL REGULATION

Council of EU invites COREPER to agree EP's first reading position on CRR II, CRD V, BRRD II and SMR II
On 7 May, the Council of the EU published a series of "I/A" item notes (dated 3 May) inviting COREPER to confirm its agreement to the EP's first reading position on the banking reform package in relation to CRR II, CRD V, BRRD II and SMR II. The Council and the EP reached provisional political agreement on the proposals in December 2018, and the EP adopted the texts of the proposed legislation on 16 April. If the Council approves the EP's position, the legislative acts will be adopted.
I/A item note on CRR II
I/A item note on CRD V
I/A item note on SRM II
I/A item note on BRRD II

BCBS progress report on adoption of the Basel regulatory framework
On 7 May, the BCBS published a progress report on the adoption of the Basel regulatory framework, and sets out the adoption status of Basel III standards for each BCBS member jurisdiction as of the end of March. The report is intended to monitor the adoption progress of all Basel standards agreed to date, and outlines the status of the adoption of Basel III risk-based capital standards, the leverage ratio, liquidity requirements and the framework for measuring and controlling large exposures. Since the last report was published in October 2018, the BCBS states that member jurisdictions have made further progress in implementing standards for which the deadlines have already passed, relating to matters including the revised securitisation framework and the leverage ratio based on the existing (2014) exposure definition.
Read more

RECOVERY AND RESOLUTION

Please see the Prudential Regulation section regarding the EP's first reading position on BRRD II and SMR II.

SUSTAINABLE FINANCE

EIOPA's technical advice on integrating sustainability risk and factors under the Solvency II Directive and the Insurance Distribution Directive (IDD)
On 3 May, EIOPA published the final version of its technical advice (dated 30 April) on integrating sustainability risks and factors into the delegated regulations made under the Solvency II Directive and the IDD. Part of EIOPA's advice is concerned with the integration of sustainability in the ‘prudent person principle’ for investments under the Solvency II Directive. In particular, insurers should reflect the impact of their investments on sustainability, promoting a stewardship approach.
Read more

ESMA’s final reports on technical advice on integrating sustainability risks and factors in the UCITS Directive, AIFMD and MiFID II
On 3 May, ESMA published two final reports on technical advice to the EC on integrating sustainability risks and factors in: (i) the UCITS Directive and AIFMD; and (ii) MiFID II. ESMA consulted on the draft technical advice in December 2018. To ensure consistency, ESMA has developed its final report in cooperation with EIOPA, which has received a similar mandate regarding the Solvency II Directive. ESMA's initial consultations contained a separate paper on guidelines for disclosure requirements applicable to credit ratings, including the consideration of environmental, social and governance factors. It expects to publish the final report of this paper by the end of July.
Final Report - MiFID II
Final Report - UCITS and AIFMD

OTHER DEVELOPMENTS

EBA seeks time extension for responding to EC's call for advice on benchmarking of national loan enforcement frameworks
On 7 May, the EBA published a letter (dated 5 March) that it sent to the EC regarding the EC's January call for advice (CfA) on benchmarking of national loan enforcement frameworks (including insolvency frameworks) from a bank creditor perspective. The EBA expresses support for the project and confirms the importance of the exercise in the context of the action plan for tackling NPLs and achieving further risk reduction in the banking union. However, it believes that the timeline of the exercise is extremely challenging given several constraints, including the need to specify the appropriate sample of institutions, the specific nature of the non-supervisory type of data to be collected and the ongoing heavy EBA workload. As such, the EBA has requested that the EC amend the timeline of the CfA to better suit the proposed data collection and analysis.
Read more

House of Commons European Scrutiny Committee Sixty-fourth Report of session 2017-19 published
On 7 May, the House of Commons European Scrutiny Committee published its sixty-fourth report of the 2017-19 parliamentary session that considers, among other things, the proposed legislative reforms to the European System of Financial Supervision (ESFS). The Committee states that the changes to the powers of the ESAs under the ESFS reforms are directly relevant to the UK financial services industry, both before and after the UK leaves the EU. Clearing the legislative files from scrutiny, the Committee gives the following reasons: (i) the government has accepted that any preferential access for UK financial services firms to the EU market will be based on the "equivalence" mechanism. As such, the ESFS review will give the ESAs a greater role in monitoring to what extent a non-EU country has maintained adequate regulation of specific financial sectors after equivalence has been granted; and (ii) from January 2022, ESMA is gaining direct new supervisory responsibilities for several market-related activities carried out within the EU by non-EU firms, namely larger Data Reporting Service Providers and certain benchmarks used in financial contracts.
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House of Commons Treasury Committee urges government to implement access to cash review recommendations

On 3 May, the House of Commons Treasury Committee published the following letters regarding the access to cash review: (i) letter (dated 13 March) from Nicky Morgan, Committee Chair, to Philip Hammond, Chancellor of the Exchequer; and (ii) letter (dated 2 May) from the Chancellor to Nicky Morgan, in which he responds to her comments and questions. Ms Morgan asked the Chancellor to place on record HMT's commitment to implement the review recommendations and introduce the necessary legislation. She also asked the Chancellor to carry out analysis of the incidence of shops and service providers in the UK not accepting cash, and explain whether HMT has held discussions with public and private sector bodies that constitute the UK's wholesale cash infrastructure on how it can be run more efficiently and sustainably. Among other things, the Chancellor responds that the government is committed to safeguarding access to cash for those who need it, and to supporting digital payments. The Chancellor referred to the government's response to its call for evidence on cash and digital payments, which made clear its commitment to act on the review recommendations. HMT acknowledges the urgency of the issue and has decided to set up and chair a Joint Authorities Cash Strategy Group (with members from HMT, the BoE, the FCA and the PSR). The group will facilitate further co-ordination among authorities, provide comprehensive oversight of the overall cash infrastructure and consider how best to ensure access to cash for those who need it. Part of this work will include co-ordinating the relevant authorities' response to the review recommendations.
Letter from Nicky Morgan to Philip Hammond
Letter from Philip Hammond to Nicky Morgan

FCA launches Financial Services Regulatory Partners Phoenixing Group
On 3 May, the FCA announced the launch of a new working group known as the Financial Services Regulatory Partners Phoenixing Group. "Phoenixing" involves firms and individuals deliberately seeking to avoid their liabilities to consumers or poor conduct history by closing down firms, or resigning senior positions, only to re-emerge in a different legal entity, which can have a detrimental effect on individual consumers as well as a knock-on effect on the wider economy. The group comprises representatives of the FCA, the FSCS, the FOS, the Insolvency Service and Scotland's Accountancy in Bankruptcy. The FCA held the group's first roundtable event in order to build on existing collaboration and to share data on issues such as FSCS claims, complaints and unpaid FOS awards.
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