

# ALLEN & OVERY

## *Key Regulatory Topics: Weekly Update*

30 August – 5 September 2019



### **BREXIT**

Please refer to the Payment Services and Payment Systems section for an update regarding the operational implications of a “no-deal Brexit” on SCT and SDD transactions.

#### **Can the UK Parliament stop a no-deal Brexit?**

In light of developments in the last couple of weeks, in particular the UK Government’s announcement on 28 August that Parliament will be prorogued in the week commencing 9 September and will not reconvene until 14 October, A&O has updated its analysis of the options available to MPs should they seek to prevent a no-deal Brexit. In particular, the firm considers the proposed legislation seeking to force the Government into agreeing an extension of the Article 50 period until 31 January 2020 and the Government’s threat to seek an early election if this legislation passes. Please find the publication [here](#).

#### **EC publishes Brexit Communication**

On 4 September, the EC published its 6th Brexit preparedness communication titled “Finalising preparations for the withdrawal of the United Kingdom from the European Union on 1 November 2019”. In the area of financial services, the EC strongly encourages insurance firms and other financial service operators that have not yet done so to finalise their preparatory measures by 31 October 2019. The communication refers to the temporary recognition of UK central counterparties which expires on 30 March 2020 and of UK central securities depositories which expires on 30 March 2021. Additionally, the EC has adopted two Delegated Regulations to allow EU27 operators with outstanding non-cleared derivative contracts to replace UK counterparties with EU counterparties within 12 months of the United Kingdom’s withdrawal, without losing the prudential treatment that these contracts currently enjoy. The EC’s assessment is that firms have largely prepared for a withdrawal without an agreement, including by novating their outstanding contracts to replace UK counterparties, and that they now have to finalise their preparations in the timeframe given by these contingency measures. The EC therefore does not consider that the adoption of additional contingency measures is necessary. It will continue to assess the situation in the markets after the withdrawal date and decide on the appropriate course of action on the basis of the EU legislation in force at the relevant point in time, taking into account in particular the framework introduced by EMIR with regard to the requirements for the recognition of third-country central counterparties.

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#### **BoE economic analysis of Brexit**

On 4 September, the House of Commons Treasury Committee published a letter received from the BoE Governor, Mark Carney, on the banks economic analysis of Brexit. The letter highlights that given advancements in preparations for a ‘no deal no transition’ scenario, the BoE’s assessment of a worst case scenario has become less severe. However, the BoE’s assessment of scenarios where there is a withdrawal agreement followed by a transition to a WTO trading relationship or by a transition to a new economic partnership remain unchanged. The letter expands on the detail underlying those assessments.

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### **CONDUCT**

### **BSB: Statement of good practice 2**

On 3 September, the Banking Standards Board (BSB) published the final version of its statement of good practice regarding the certification regime and regulatory references. This statement of good practice is intended to help firms implement the regulatory reference requirement of the SM&CR by providing a high-level set of principles and good practice guidance. The principles include: (i) fairness; (ii) proportionality; and (iii) consistency. The guidance looks at good practices when providing and obtaining regulatory references as well as the type of information to include in a reference.

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## **CONSUMER/RETAIL**

### **FCA: Guidance for firms on the fair treatment of vulnerable customers**

On 4 September, the FCA announced that it will be delaying its response to the guidance for firms on the fair treatment of vulnerable customers from autumn to H1 2020.

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### **Letter from HMT to House of Lords regarding crowdfunding service providers**

On 30 August, HMT published a letter from the Economic Secretary to the Treasury, John Glen, to the House of Lords EU Committee Chair, Lord Boswell of Aynho. The letter includes: (i) an update on the EC's proposed Regulation on European crowdfunding service providers for businesses; (ii) reference to the differences between the proposed version of the Council of the European Union and the EP, for example, there are a significant number of important provisions that ensure consumer protection under the Council text, which are not included in the version agreed by the EP; and (iii) references to questions raised by Lord Boswell in a previous correspondence, for example, on the matter of whether the government intends to implement the legislation even if not required to do so during a possible transition period, and if the text moves towards the position of the EP. Mr. Glen writes that this will depend on the final text agreed, and whether implementation of the legislation would enhance the competitiveness of the UK's crowdfunding and P2P lending sectors, while ensuring that consumer investors are adequately protected.

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## **FINANCIAL CRIME**

### **PRA: Money laundering / terrorist financing risks in prudential supervision**

On 5 September, the PRA published a Dear CEO letter on ML/TF risks in prudential supervision. The letter draws attention to the recently published EBA opinion on this issue and sets out the PRA's full support and continuing effort to consider ML/TF issues in their prudential assessments of firms. Furthermore, the PRA reminds firms that: (i) it is their responsibility to ensure that members of the management body and senior management are, at all times, of sufficiently good repute, and possess sufficient knowledge, skills and experience to perform their duties; and (ii) in line with the PRA's General Organisation Requirements (GOR) Rule 2.1, they must have robust governance arrangements.

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### **Private polling data and market integrity**

On 5 September, the House of Commons Treasury Committee published a letter from the FCA Chief Executive, Andrew Bailey, to the former Committee Chair, Nicky Morgan. The letter refers to previous correspondence of Nicky Morgan from 24 October 2018, in which she asked five detailed questions relating to the potential risks of private polling data to the integrity of the UK financial markets. Annex A of the letter sets out to answer these questions, however, Mr. Bailey highlights that the underlying question being asked is whether more needs to be done to prevent private polling being used to give a trading advantage in advance of election results. Mr. Bailey writes that it would not be effective to rely on MAR to restrict the sharing of polling information that is not inside information while polls are open. Nor – outside particular circumstances, which financial firms are polling firms would need to assess on a case-by-case basis – can MAR be relied upon to prevent trading using this information.

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### **FCA: The fight against skimmers and scammers**

On 5 September, the FCA published a speech given by the FCA Chair, Charles Randell, on the fight against fraud. Mr. Randell discusses how: (i) the FCA is committed to the success of the Economic Crime Plan alongside public and private sector partners to beat investment fraud; (ii) policy makers need to embed fraud

prevention into the development of any new savings and investment policies, drawing on the experience of the roll out of the pension freedom policy; (iii) it is vital to reduce confusion around what is and is not regulated and protected by the FSCS to promote responsible saving. Mr Randell considers the financial promotion regime ripe for review; (iv) non-financial firms that enable fraud need to step up their contribution to the fight against it; and (v) policy on online harms should go further to encapsulate online financial scams. [Read more](#)

#### **EBA: AML and CTF**

On 5 September, the EBA published a speech by the EBA Chair, Jose Manuel Campa, on the EBA's AML and CTF powers. In his speech, Mr. Campa addresses the EBA's powers as well as its limitations in the area of AML and CTF. The speech also highlights that the EBA is working on mapping and improving the way prudential supervisors consider relevant ML/TF risks. On the basis of this work, the EBA will amend its guidelines on internal governance, the guidelines on SREP and those on the assessment of suitability of board members and key functions to provide additional guidance on the ML/TF risks. Furthermore, the speech looks at the EBA's future role in AML and CTF and what challenges still remain.

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#### **FCA: Polling and Market Abuse Regulation**

On 3 September, the FCA published a new webpage on polling and MAR in response to questions on how MAR might apply to information obtained via electoral polling. The website sets out an example: if an established polling firm is due to publish polling results and on publication the results are likely to affect the price of government bonds traded on regulated trading venues and meet the other criteria to be classified as inside information, then it could be an offence under MAR to share that information prior to publication other than where necessary "in the normal exercise of employment, a profession or duties". It could also be an offence for anyone in possession of the information to trade in the relevant government bonds in advance of publication of the polling results if it is trading on the basis of the anticipated bond price movement that will result from publication of the results. The FCA notes that it will be for authorities other than the FCA to enforce legislation that falls outside the scope of the FCA's remit and its powers for enforcement.

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#### **General Counsel of the SFO speech at the Cambridge Symposium on Economic Crime 2019**

On 3 September, Sara Lawson QC, General Counsel of the SFO spoke about "risks facing us today and how they may impact on stability and security". She referred to the new SFO Internal Guidance on Corporate Co-operation to assist in deciding whether a company can be offered a Deferred Prosecution Agreement and stated "prosecutors are instructed to take the nature and extent of co-operation into account both under that Guidance and under the DPA Code of Practice". She also referred to the publication in July of the Economic Crime Plan 2019-2022 and the Plan's seven priority areas agreed in January by the Economic Crime Strategic Board, which includes the SFO as a partner agency. The plan relies in large part on the newly established NECC – National Economic Crime Centre. The 7 priority areas are: (i) developing a better understanding of the threat posed by economic crime; (ii) better sharing and use of information; (iii) ensuring that the powers, procedures and tools of law enforcement in the public and private sectors are effective; (iv) strengthening the capabilities of law enforcement and the justice system and private sector to deter and disrupt economic crime; (v) enhancing the management of risk; (vi) improving transparency of ownership of legal entities; and (vii) delivering an ambitious international strategy to enhance this.

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### **FUND REGULATION**

#### **ESMA Economic Report: Stress simulation for investment funds**

On 5 September, an economic report was published by ESMA concerning stress simulation for investment funds. The report provides an overview of the framework used by ESMA for stress simulations. The different building blocks of a stress simulation framework are outlined, along with a menu of options that can be selected by stress testers. In particular, ESMA discusses the calibration of redemption shocks for investment funds, methods to assess the resilience of funds to shocks, ways to measure the impact of fund managers' liquidation strategies on financial markets, and possible second-round effects. ESMA will use the stress simulation framework as part of its regular risk monitoring.

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#### **National private placement regime**

On 3 September, the FCA updated its website on the national private placement regime (NPPR) to highlight that on the 9 September it will be introducing changes to the submission of notifications by AIFMs marketing AIFs under Regulations 57, 58 and Regulation 59 of the Alternative Investment Fund Managers Regulations 2013 (as amended). AIFMs marketing funds under Regulations 58, 59 and, for UK AIFMs only, Regulation 57, will return to submitting notifications via Connect. Full scope EEA AIFMs marketing AIFs under Regulation 57 of the Alternative Investment Fund Managers Regulations 2013 (as amended) will be required to submit notifications using new forms.

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### **ESMA: Guidelines on liquidity stress testing in UCITS and AIFs**

On 2 September, ESMA published its final report setting out guidelines on liquidity stress testing (LST) in UCITS and AIFs. The final report provides an overview of the feedback received to the February consultation paper and explains how ESMA has taken this feedback into account. The guidelines, for example, stipulate that managers must build LST models and maintain a good understanding of liquidity risks and a fund's overall liquidity profile. More specifically, the guidelines highlight what must be documented in an LST policy and how often testing should occur. At the point of developing new funds, in addition to applying for authorisation, managers will have to show that a fund can remain sufficiently liquid during normal and stressed circumstances. The guidelines in Annex III of this report will be translated into the official EU languages and published on the ESMA website. The publication of the translations will trigger a two-month period during which NCAs must notify ESMA whether they comply or intend to comply with the guidelines. The guidelines will apply from 30 September 2020.

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## **INSURANCE**

### **Insurance special purpose vehicles: Updates to authorisation and supervision**

On 3 September, the PRA published a consultation paper which sets out proposed updates to its approach and expectations in relation to the authorisation and supervision of insurance special purpose vehicles. The proposals would make amendments to the Insurance Special Purpose Vehicles Part of the PRA Rulebook (Appendix 1), including Supervisory Statement (SS) 8/17 'Authorisation and supervision of insurance special purpose vehicles' (Appendix 2) and the Multi-arrangement insurance special purpose vehicle New Risk Assumption Notification Form (Appendix 3). The deadline for responding is 3 December.

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### **Public consultation on draft issues paper on use of BDA in Insurance**

On 2 September, the IAIS published for consultation a draft issues paper on the use of big data analytics (BDA) in insurance. The paper builds on the IAIS Issues Paper on Increasing Digitalisation in Insurance and its Potential Impact on Consumer Outcomes (November 2018) by focusing more specifically on issues relating to the use of personal and other data by insurers as a result of digitalisation. The scope of the paper focuses on the use of algorithms and advanced analytics capabilities by insurers to make decisions based on patterns, trends and linkages and the availability to insurers of new alternative data sources, collectively referred to as BDA. The paper considers the manner in which insurers are now able to collect, process and use data across various stages of the insurance product lifecycle, namely product design, marketing, sales and distribution, pricing and underwriting and claims handling. The paper also makes certain observations about the potential implications for supervisors as a result of the use of BDA in insurance. The deadline for responding is 16 October.

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## **MARKETS AND MARKETS INFRASTRUCTURE**

### **EBA adds the Securitisation Regulation to its online Interactive Single Rulebook and Q&A tools**

On 4 September, the EBA announced it has updated its online Interactive Single Rulebook and Q&A tool with the inclusion of the "simple, transparent and standardised" (STS) Securitisation Regulation. Users will now be able to review on the EBA website all the EBA's final Technical Standards and Guidelines associated with the Securitisation Regulation.

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## **PAYMENT SERVICES AND PAYMENT SYSTEMS**

### **Operational implications of a "no-deal Brexit" on SCT and SDD transactions**



On 2 September, the European Payments Council (EPC) published a press release on the operational implications of a no-deal Brexit on SEPA credit transfer (SCT) and SEPA direct debit (SDD) transactions. If a “no-deal Brexit” occurs on 31 October, the UK would maintain its participation in the SEPA payment schemes. From the payments perspective, in case of a “no-deal Brexit”, as of 1 November the UK will have to be considered as a non-EEA SEPA country like currently Andorra, Guernsey, Isle of Man, Jersey, Monaco, San Marino, Switzerland and Vatican City State. SEPA transactions to be executed or settled as of 1 November involving a UK-based SEPA scheme participant must contain: (i) the full address details of the originator or debtor; and (ii) the BIC code of the beneficiary bank or debtor bank when the originator bank or creditor bank explicitly requests this data element from the originator or creditor. The EPC strongly recommends each SEPA scheme participant to identify as soon as possible its customers with incoming and outgoing cross-border SEPA transactions involving both a UK and an EEA payment account, and to inform all customers concerned about the need to provide these extra SEPA transaction data in case of a “no-deal Brexit” as from 1 November (as execution or settlement date).

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### **FCA: Strong Customer Authentication**

On 2 September, the FCA published a webpage on SCA under PSD2. The website sets out that in response to concerns about industry readiness to apply SCA to e-commerce card transactions, and to minimise potential disruption to consumers and merchants, the EBA accepted that the FCA and other NCAs may give some firms extra time to implement SCA. At the FCA’s request, UK Finance co-ordinated an industry plan to implement SCA for card-not-present transactions for e-commerce as soon as practicable. The FCA has reviewed the plan and welcomes the industry’s commitment to a timely, coordinated and collaborative approach. The FCA will not take enforcement action against firms simply for not meeting the relevant requirements for SCA from 14 September in areas covered by the agreed plan, where there is evidence that they have taken the necessary steps to comply with the plan. After 14 March 2021, any firm that fails to comply with the requirements for SCA will be subject to full FCA supervisory and enforcement action as appropriate. The FCA is also concerned some third-party providers (TPPs) may not be able to continue providing their services after 14 September. This is because TPPs have not always been able to use and migrate their customers to new or modified interfaces, and the implementation of SCA will prevent TPPs from accessing account data without the customer being present. This could cause significant disruption for customers of open banking services provided by TPPs. To avoid disruption to consumers and TPPs, the FCA has agreed an adjustment period. Therefore, in certain circumstances, firms have until 14 March 2020 to implement SCA for online banking. After 14 March 2020, failure to comply with the requirements for SCA and identification will be subject to full FCA supervisory and enforcement action as appropriate.

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## **PRUDENTIAL REGULATION**

Please refer to the Markets and Markets Infrastructure section for an update regarding ESMA’s guidelines on liquidity stress testing in UCITS and AIFs.

### **Stress tests and the countercyclical capital buffer: the U.K. experience**

On 4 September, the BoE published a speech by an FPC member, Donald Kohn, on the UK experience of banks’ stress tests and the countercyclical capital buffer (CCyB). The speech addresses issues such as: (i) the BoE’s framework and approach to assessing the threat level on UK bank exposures; (ii) how the CCyB and stress tests have been applied to deliver countercyclical capital and other macroprudential judgments and policies; and (iii) the research conducted by the BoE in producing stress test results.

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## **OTHER DEVELOPMENTS**

### **Record of Financial Stability Report meeting: July 2019**

On 4 September, HMT published meeting minutes between the Chancellor of the Exchequer, Sajid Javid and the Governor of the BoE, Mark Carney, who met to discuss the bank’s Financial Stability Report. The following items were discussed at the meeting: (i) the resilience of the UK financial system to Brexit. The Governor noted that the single most important determinant of the UK’s economic outlook remained the nature and timing of Brexit. The perceived likelihood of a no-deal Brexit had increased since the start of this year, and although the degree of preparedness of the UK economy for such a scenario had improved, material risks of economic disruption remained; (ii) global risks. Global business confidence had been hit by the possibility that trade tensions become more pervasive, persistent and damaging. Financial markets were

pricing in lower growth, with risk-free interest rates falling markedly and corporate earnings expectations declining sharply; (iii) vulnerabilities in open-ended funds. Under stress, open-ended funds may need to sell assets quickly, creating an incentive for investors to redeem when they expect others to do so. This self-reinforcing dynamic could trigger a jump to suspension by the fund. And, more broadly, the ability of the market to absorb asset sales could be tested. The FPC therefore continued to judge that the mismatch between redemption terms and the liquidity of some funds' assets had the potential to become a systemic issue; (iv) the transition away from Libor. The continued reliance of global financial markets on Libor posed risks to financial stability that could be reduced only through a transition to alternative benchmark rates by end-2021; (v) developments in payments. Payments were currently a focal point for innovation. Consistent with its mandate, the FPC would aim to ensure that systemically important payment systems support financial stability, while allowing competition and innovation in payments to thrive; and (vi) climate change. The move to a carbon-neutral economy, with the associated changes in policies, technologies and physical risks, would prompt a reassessment of the value of a large range of assets. It was therefore important that the financial system can do its part to support a smooth transition to a carbon-neutral economy.

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### **ECB priorities**

On 4 September, the ECB published the introductory statement by the Chair of the Supervisory Board of the ECB, Andrea Enria, at the first ordinary hearing at ECON this year. The introductory statement draws upon important themes such as: (i) key ECB supervisory priorities, for example, the completion of the post-crisis repair process (e.g. ensuring the full, timely and consistent implementation of Basel III) together with a focus on emerging risks and on the drivers of low profitability and low market valuations for European banks; and (ii) priorities for the near future. In particular the ECB will: (a) follow up on its guidance on NPLs, as well as on the recommendations stemming from our targeted review of internal models; (b) conduct on-site missions focusing on trading risk and asset valuations; (c) continue to evaluate the banks' credit underwriting criteria and the quality of their internal capital and liquidity adequacy assessment processes; (d) monitor the sustainability of banks' business models, specifically with a view to profitability and the ongoing digitalisation of financial services; and (e) closely monitor banks' vulnerability to IT and cyber risk. Other key issues will be Brexit and the EU-wide stress test. Comprehensive assessments will continue to increase in number and relevance as banks relocate business to the euro area as a consequence of Brexit and as Member States – Bulgaria, followed by Croatia – apply for close cooperation. Andrea Enria also states that banks should now speed up the implementation of their Brexit plans so as to be fully prepared in the event of a hard Brexit at the end of October.

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