ALLEN & OVERY

Key Regulatory Topics: Weekly Update

24 – 30 January 2020

SEMINARS

You ain't seen nothin' yet: countdown to Brexit (27 February)
Continuing our series of talks on the implications of Brexit for financial services providers, focusing in particular on EU banks, we will discuss the current state of play, including the Withdrawal Agreement, transitional period and the likely outcome of negotiations of the future UK-EU trade agreement, an update on the regulation of EU market participants in the transitional period and beyond, and a discussion of changes to the legislative and regulatory rule sets in light of the revised Brexit Statutory Instruments and 'standstill' directions made by the UK regulators.

If you would like to register to attend any of the seminars, you will first need to create a profile for yourself at www.aoseminars.com. Once created and approved you will have full access to the site which includes being able to register to attend seminars and download past seminar materials. You will also be automatically signed up for our mailing list. Once approved to register for a seminar you simply need to log in and click on the register to attend button underneath the seminar you wish to attend. You will receive an automated confirmation email to confirm the booking.

BREXIT

Please see the section on Markets and Markets Infrastructure for an update on the FCA's letter to CEOs on the Benchmark Administrator Supervisory Strategy, including the FCA's recommendation that CEOs consider how the end of the implementation period will affect them and their customers.

FCA provides information for firms during the Brexit implementation period (IP)
On 30 January, the FCA published a press release providing information for firms during the Brexit implementation period. With regard to the Temporary Permissions Regime (TPR) notification window, the windows for EEA firms to notify the FCA that they want to use the TPR, or for fund managers to notify the FCA of any funds they want to continue to market in the UK under the Temporary Marketing Permissions Regime, closed on 30 January. Firms and fund managers that have already submitted a notification do not currently need to take further action. The FCA will confirm its plans for reopening the notification window later this year, which will allow additional notifications to be made by firms and fund managers before the end of the IP.
Read more

The Financial Services (Consequential Amendments) Regulations 2020
On 28 January, the Financial Services (Consequential Amendments) Regulations 2020 were published, together with an Explanatory Memorandum. This instrument amends the financial services temporary permissions and transitional regimes made under the European Union (Withdrawal) Act 2018 which are already in force, and were due to apply from "exit day". The application of the regimes needed to be delayed until the end of the implementation period (IP). If they were not delayed, the regimes would start on "exit day" and would run in parallel to the IP which would result in significant legal uncertainty and would constitute a

breach of the UK's commitments under the withdrawal agreement to apply EU law during the IP. To prevent this, these Regulations amend the EU Exit Statutory Instruments that implemented these regimes to repurpose the relevant temporary regimes such that they have effect by reference to IP completion day rather than "exit day". All other characteristics of the regimes, such as their scope and duration, remain unchanged.
The Financial Services (Consequential Amendments) Regulations 2020
Explanatory Memorandum

HM Treasury's letter on equivalence in financial services
On 27 January, HM Treasury published a letter to the House of Lords European Union Committee in relation to equivalence in financial services. As set out in the Political Declaration, the UK and EU have committed to start assessing equivalence under existing frameworks after the UK's withdrawal, endeavouring to conclude these assessments before the end of June 2020. HM Treasury is ready to begin this process as soon as possible and believes that there is sufficient time for these assessments to take place. The UK Government's priority with respect to the Political Declaration commitments is to seek equivalence across all of the equivalence regimes which exist in EU legislation. Under the Equivalence Determinations for Financial Services and Miscellaneous Provisions (Amendment etc) (EU Exit) Regulations 2019, HM Treasury will make equivalence decisions by regulation subject to the negative procedure. As part of the process of laying an instrument to make an equivalence or equivalence determination, HM Treasury will publish an Explanatory Memorandum which summarises the assessment process that has been conducted.
Read more

CONDUCT

Global Foreign Exchange Committee (GFXC) Report: The Role of Disclosure and Transparency on Anonymous E-Trading Platforms
On 30 January, the GFXC published a report which explores the key topics and issues regarding disclosure and transparency on anonymous E-Trading Platforms and how the FX Global Code applies to this landscape. The objectives of the report were to: (i) map and describe the current e-trading platform landscape, with a particular focus on anonymous trading venues, as a framework for market participants; (ii) summarise the key challenges raised by the GFXC working group regarding engaging on e-trading platforms, including whether and how these challenges are currently being overcome; and (iii) inform the GFXC's upcoming work on anonymous trading and disclosures, by highlighting some of the main challenges that anonymous E-Trading Platforms present in the context of the disclosure expectations. The GFXC also published the results of its 2019 Survey which aimed to measure the awareness, adoption, implementation and effects of the FX Global Code for market participants.
GFXC report
GFXC survey results

Bank for International Settlements (BIS) assesses the effectiveness of the FX Global Code
On 30 January, BIS published a letter addressed to the GFXC on its assessment of the effectiveness of the FX Global Code (the Code). The BIS Markets Committee was asked by the Governors of the BIS Global Economy Meeting to assess the effectiveness of the Code, with recommendations to be provided to the GFXC as input to its review of the Code. The scope of BIS's assessment included: (i) breadth of Code adoption; (ii) effectiveness of adherence mechanisms; and (iii) effect of the Code on market behaviours and market functioning. For the Code to be successful, BIS's letter noted that it is vital that market participants from all segments recognise that adherence to the Code is an implicit part of their participation in the global FX market. The letter goes on to state that to date, only a fraction of the largest buy-side participants, such as asset management firms, have adopted the Code; as their share in global FX trading increases further, it is important that large buy-side participants adopt the Code to ensure a fair and effective FX market.
BIS letter to GFXC
BIS press release

CONSUMER/RETAIL

FCA's letter to banks on changes to overdraft pricing
On 28 January, the FCA published a letter to banks to understand more about banks new overdraft pricing. The FCA's new rules on overdraft pricing, set out in its Policy Statement (PS 19/16), come into force on 6 April. The FCA requests a summary of how banks have arrived at their new overdraft rates, specifically

information including: (i) internal and external factors that were considered; (ii) how these factors were taken into account in setting their new overdraft rates; (iii) a timeline of key decisions; (iv) a summary of decision-making executive meetings where setting their new rates have been discussed, together with minutes of those meetings, if available, including attendance lists; and (v) any pricing paper proposals put to their decision-making committees. The FCA also requests banks to summarise their approach to dealing with customers who will be worse off following pricing changes and the measures taken to support these customers.
Read more

FINANCIAL CRIME

Please see our Investigations Insight Blog for the recent article on 'When criminal law affects your obligations to others'. Looking back at 2019, there were a number of interesting English civil court rulings which highlighted the difficulties faced by a party trying to balance obligations (e.g. to a contractual counterparty, a customer or to the court) when there is suspected criminality or a clash with foreign criminal law. The following four issues are discussed in the article: (i) terminating customer relationships on suspicion of financial crime / money laundering; (ii) breaching confidentiality to report suspected criminality; (iii) English law disclosure obligation clashes with foreign criminal law; and (iv) bank breaches of Quincecare duty.

Please also see the section on Other Developments for an update on the EC Work Programme 2020 which includes the EC's aim of devising an action plan on anti-money laundering.

Joint HM Treasury and HMRC technical consultation on the Fifth Money Laundering Directive and Trust Registration Service
On 24 January, HM Treasury and HMRC published a joint technical consultation on the Fifth Money Laundering Directive and Trust Registration Service. The consultation is to test whether the draft legislation transposes the trusts registration aspects in MLD5 in a proportionate manner. The consultation also invites comments on the process for legitimate interest requests and the proposed penalty regime. The deadline for comments is 21 February.
Read more

FINTECH

Please see the section on Other Developments for an update on the EC Work Programme 2020 which includes the EC's plan to put forward a proposal on cryptoassets and an update on the IOSCO Work Programme 2020 which details their focus on cryptoassets as well as their aim to address issues regarding the Fintech Network and Global Stablecoins.

MARKETS AND MARKETS INFRASTRUCTURE

Please see the section on Other Developments for an update on the IOSCO Work Programme 2020 which sets out their aim to focus work on market fragmentation in securities and derivatives markets.

FCA's Dear CEOs letter on its Benchmark Administrator Supervisory Strategy
On 28 January, the FCA published a Dear CEO letter which sets out the FCA's view of the potential for harm that benchmark administrators could pose to their customers and the markets in which they operate. The FCA's notes in its letter three main ways in which benchmark administrators could harm consumers or markets: (i) customers receiving sub-standard quality benchmarks; (ii) disruption to the market from poorly managing the cessation or recalculation of benchmarks or a lack of operational resilience at firms; and (iii) customers paying excessive fees and charges resulting from high costs of switching, complex licensing arrangements and a preference from customers to use established benchmarks. Over the next two years, the FCA will engage and work with CEOs to continue to identify which factors can lead to harm. Further, the letter notes, inter alia, that the Senior Managers and Certification Regime will be extended to benchmark administrators from December 2020, with the aim of improving senior management accountability. The FCA encourages CEOs to respond to its Consultation Paper (CP 19/31) on Extending the Senior Managers Regime to Benchmark Administrators.

Read more

FCA provides further clarity on the publishing of non-representative LIBOR
On 24 January, the FCA published a letter to ISDA in response to ISDA's request for further clarity on the length of any "reasonable period" in which a non-representative LIBOR might be published prior to LIBOR's final cessation. The FCA's letter notes that market participants should not assume that any period of non-representative LIBOR based on reduced panel bank submissions would last for more than a short period (this being a period of months, not years).
Read more

PAYMENT SERVICES AND PAYMENT SYSTEMS

Payment Systems Regulator (PSR) seeks views on UK's New Payments Architecture
On 28 January, the PSR published a call for input on competition issues that could arise in the UK's New Payments Architecture (NPA). The PSR wants to see the NPA delivered in a way that drives innovation in payment systems and benefits the people and businesses who use them. This can be done by boosting competition between existing and new payments services as well as enhancing resilience and security in payments. The PSR is inviting all interested parties to respond to a 'Call for Input' which seeks to gather feedback on the likelihood of competition issues materialising in the NPA and how harmful or significant they could prove to be. The overall aim is to provide greater clarity and more detail on the PSR's expectations, concerns and regulatory approach. Ultimately, the PSR will publish a 'Policy Statement' to explain what bidders, participants and other users can expect from the PSR as the NPA becomes a reality. The PSR expects to publish this statement before the end of this year.
Read more

PSR's speech at the Westminster Business Forum
On 24 January, the PSR published a speech by Chris Hemsley at the Westminster Business Forum. The speech discussed how the PSR is acting in response to feedback across some of its key projects. The PSR is continuing to work on: (i) collaboration across regulators; (ii) a clearer statement of the PSR's role; (iii) long term sustainable cash access models; (iv) the New Payments Architecture; and (v) the prevention of fraud and protection of those who fall victim to it.
Read more

PRUDENTIAL REGULATION

ESMA launches a common supervisory action (CSA) with national competent authorities (NCAs) on UCITS liquidity risk management
On 30 January, ESMA published a press release announcing the launch of a CSA with NCAs on the supervision of UCITS' managers liquidity risk management across the EU. The CSA will be conducted during 2020 on the basis of a common methodology developed together with ESMA. The CSA assessment framework, including scope, methodology, supervisory expectations and timeline, results from a joint effort to carry out comprehensive supervisory action in a convergent manner. The first stage of the CSA will involve NCAs requesting quantitative data from a large majority of the UCITS managers based in their respective Member States, to get an overview of the supervisory risks faced. In the second stage, NCAs will focus on a sample of UCITS managers and UCITS to carry out more in-depth supervisory analyses.
Read more

Corrigendum to the Investment Firms Regulation (IFR)
On 24 January, a corrigendum to the IFR was published in the OJ. This amends Article 63(4)(e) and Article 63(4)(f)(8) by altering the deadline for ESMA to submit draft regulatory technical standards and draft implementing technical standards from 26 September 2021 to 26 September of this year.
Read more

SUSTAINABLE FINANCE

Please see the section on Other Developments for an update on the EC Work Programme 2020 which sets out the EC's ambition of a European Green Deal as well as an update on the IOSCO Work Programme 2020 which includes an aim to address issues related to the IOSCO Sustainable Finance Network.

EP announces approval of text of proposed Taxonomy Regulation
On 24 January, the EP published an updated version of its procedure file for the proposed framework to facilitate sustainable investment, namely the Taxonomy Regulation. This updates the key events to announce that on 23 January the text of the Taxonomy Regulation was approved in committee.
Read more

OTHER DEVELOPMENTS

Decisions of the EEA Joint Committee to amend the EEA agreement
On 30 January, the OJ published decisions of the EEA Joint Committee to amend the EEA agreement. All of the decisions amend Annex IX.
Decision No 62/2018
Decision No 63/2018
Decision No 64/2018

International Organization of Securities Commissions (IOSCO) Work Programme 2020
On 30 January, IOSCO published their work programme for 2020 which provides an update on the initiatives that IOSCO is undertaking in relation to existing priority issues as well as an overview of the work that they will be initiating. IOSCO will also be addressing issues related to the IOSCO Sustainable Finance Network, Fintech Network and matters of special importance to growth and emerging markets. For corporate debt and leveraged finance, IOSCO has concerns about the potential conduct-related risks that may exist in these markets which could also have implications for market integrity in the event of an economic downturn. IOSCO will focus its attention on the risks created by current origination practices, chains of intermediation in the corporate debt market and associated conflicts of interest. In relation to cryptoassets, IOSCO will publish a final report in February which follows its consultation report on "Issues, Risks and Regulatory Considerations Relating to Crypto-Asset Trading Platforms". The ICO Network will continue to develop the IOSCO ICO Support Framework to ensure that it remains updated and IOSCO is examining regulatory issues arising from "Global Stablecoins" as they relate to securities markets. Also, IOSCO is focusing work on market fragmentation in securities and derivatives markets, retail distribution and digitalisation as well as asset management. Furthermore, IOSCO published a press release setting out their priorities for 2020, namely: (i) cryptoassets; (ii) artificial intelligence and machine learning; (iii) market fragmentation; (iv) passive investing and index providers; and (v) retail distribution and digitalisation.
IOSCO annual work programme 2020
IOSCO press release

EC Work Programme 2020
On 29 January, the EC published their work programme for 2020 which sets out the most important initiatives the EC intends to take in its first year, including the commitments for the first 100 days. The EC will put the United Nations Sustainable Development Goals at the heart of its policymaking. The six headline ambitions are: (i) a European Green Deal; (ii) a Europe fit for the digital age, including the aim of putting forward a proposal on cryptoassets; (iii) an economy that works for people, which includes the aim of devising an action plan on anti-money laundering and the capital markets union; (iv) a stronger Europe in the world; (v) promoting the European way of life; and (vi) a new push for European democracy. In light of these ambitions, the EC has analysed legislative proposals that are currently pending agreement with the EP and Council, and listed in Annex III of the programme those legislative initiatives that should get priority attention in 2020. The EC has also published a factsheet, providing the timeline and structure for the programme.
EC work programme
Factsheet on work programme

FCA announces the appointment of Christopher Woolard as Interim Chief Executive
On 24 January, the FCA published a press release to announce that HM Treasury, following advice given by the Board of the FCA, has appointed Christopher Woolard as Interim Chief Executive.
Read more