FIG Bulletin

Recent developments

23 November 2020

Hogan Lovells

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General

Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2020

The Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2020 (SI 2020/1274) have been published, together with an explanatory memorandum. The Regulations extend by 12 months (to 31 December 2021) the transitional arrangements under Parts 2 and 3 of the Financial Services (Gibraltar) (Amendment) (EU Exit) Regulations 2019 (SI 2019/589), which enable specified categories of Gibraltar-based firms to provide financial services in the UK and facilitate the access by similar types of UK-based firms to Gibraltar's financial services market.

The Regulations come into force on 14 December 2020.

HM Treasury intends for the transitional arrangements to be replaced by the Gibraltar Authorisation Regime, which will be established by the Financial Services Bill 2019-21.

Financial Services and Economic and Monetary Policy (Consequential Amendments) (EU Exit) Regulations 2020

The Financial Services and Economic and Monetary Policy (Consequential Amendments) (EU Exit) Regulations 2020 (SI 2020/1301) have been published, together with an explanatory memorandum. These Regulations update references to "exit day" in financial services-related statutory instruments made under the European Union (Withdrawal) Act 2018 so that they refer instead to "IP completion day".

The Regulations come into force on 30 December 2020.

Future of UK financial services: Treasury Committee inquiry

The Treasury Committee has launched an enquiry and call for evidence on the future of financial services in the UK. Evidence may be submitted until 8 January 2021.

The questions asked in the call for evidence are:

- How can the UK financial services sector take advantage of the UK's new trading environment with the rest of the world?
- What changes should be made to the UK's financial services regulations and regulatory framework once the UK is independent of the European Union?
- What should the Government's financial services priorities be when it negotiates trade agreements with third countries?
- Should the UK open its financial services markets to external competition from countries outside of Europe, or should the UK maintain the current regulatory barriers that apply to third countries?
- What skills and immigration policy will the UK financial services sector need once the UK has left the European Union?
- How can Government policy and the UK regulators facilitate the emergence of FinTech and new competition; develop new areas of growth for the financial services sector; and promote the UK as the best place to incubate new financial technologies and firms?
- Through what legislative mechanism should new financial regulations be made?
- What role does Parliament have to play in influencing new financial services regulations?
- How should new UK financial regulations be scrutinised?

- What progress has the Government and regulators made in facilitating key financial services equivalence agreements with third countries; and would an alternative mechanism serve the interests of the UK market better?
- How should financial services regulators be funded?
- Should the mandate and statutory objectives of the financial services regulators change to include wider public policy issues?
- How important is the independence of regulators and how might this best be protected?
- How can the balance between lighter touch regulation and prudential safeguards be best secured?
- How should consumer interests be taken into account when considering potential regulatory changes?
- What are the strengths and weaknesses of the EU model of scrutinising financial services legislation?
- Should the UK seek to replicate the EU's model for drafting and scrutinising financial services regulation?

A previous inquiry on the future of financial services was closed before it could report due to the dissolution of Parliament ahead of the general election on 12 December 2019.

Client data: FCA warns firms to be responsible when leaving the market or merging

The UK Financial Conduct Authority (FCA) has published a statement reminding firms of their responsibilities when handling client data. The FCA notes that the current economic climate may cause some firms to leave the market or merge with other firms. In these circumstances, it reminds firms that they must lawfully process and transfer data.

The FCA reminds firms of the need to consider:

- the FCA's Principles for Businesses, in particular Principles 3 (Management and control), 6 (Customers' interests) and 7 (Communications with clients); and
- data protection legislation, including the Data Protection Act 2018, the General Data Protection Regulation, the Privacy and Electronic Communications Regulations (SI 2003/2426) and guidance published by the Information Commissioner's Office.

The FCA explains that it will act where it identifies breaches of the FCA Handbook requirements. It expects firms that intend to transfer or receive personal client data to be able to demonstrate how they have considered the fair treatment of consumers and how their actions comply with data protection and privacy laws.

UK IFPR and CRR II: Joint HM Treasury, FCA and PRA statement on implementation

HM Treasury, the FCA and the PRA have jointly announced a target date of 1 January 2022 for the implementation of the Investment Firms Prudential Regime (IFPR) and on reforms to the prudential requirements for UK banks reflecting the EU Capital Requirements Regulation II (CRR II). They indicate that the target implementation date for the final Basel III reforms will remain 1 January 2023, in line with their April 2020 statement.

The authorities had previously indicated that the IFPR and CRR II reforms would be implemented in summer 2021, in line with their EU equivalents. They state that they decided to set the revised implementation date in response to feedback from industry relating to these specific proposals and in response to the September 2020 Regulatory Initiatives Grid, where industry raised concerns about the general volume of regulatory reform in 2021.

HM Treasury states that it will ensure the relevant secondary legislation is in place in good time, and the regulators will endeavour to provide industry with as much sight of the final rules as possible ahead of 1 January 2022.

Price comparison websites: FCA Dear CEO letter on supervisory strategy

The FCA has published a Dear CEO letter to firms in price comparison websites (PCW) portfolio, on the FCA's supervision strategy for such firms. Firms in the PCW portfolio include:

- PCWs that conduct comparisons for regulated products on their own site; and
- PCWs that outsource their comparison services to other firms.

The letter sets out the FCA's view of the key risks these firms pose to their consumers or the markets in which they operate, and outlines its expectations of such firms, including how firms should be mitigating the key risks. It also describes the FCA's supervisory strategy and programme of work to ensure that firms are meeting its expectations, and harms are being remedied.

Regulated fees and levies: FCA CP20/22 on 2021/22 proposals

The FCA has published a consultation paper, CP20/22, on changes in the way it will raise regulated fees and levies rates from 2021/22. The FCA proposals:

- revalorise and simplify all FCA authorisation application fees and introduce some new transaction fees;
- proposes the structure of periodic fees for cryptoasset businesses; and
- sets out proposals for the third stage of the FCA's consultation to introduce income to calculate periodic fees for firms that operate multilateral trading facilities and organised trading facilities.

The consultation ends on 22 January 2021. The FCA plans to publish its feedback and final rules in its March 2021 Handbook Notice.

FCA Regulation round-up

The FCA has published its Regulation round-up for November 2020. Among other things, it includes items on:

- the treatment of maturing dormant child trust fund (CTF) accounts - the FCA has published a webpage setting out information for CTF providers on the treatment of dormant accounts at maturity, including legislative changes under the Child Trust Funds (Amendment) Regulations 2020 (SI 2020/29), which came into force on 6 April 2020. Providers are required to move dormant CTFs to a "protected account" (an ISA or a matured CTF) on the account holder's 18th birthday. The FCA explains that its PERG 13.5A guidance on CTFs is relevant to protected accounts. Generally, it would not expect a firm administering assets held in a protected account pending instructions from a non-contactable client to be carrying on investment services or activities for the purposes of MiFID requirements. The FCA also highlights the availability of a modification by consent in relation to COBS client agreement requirements where firms are unable to contact clients;

- risk transfer agreements (RTAs) - the FCA reminds insurers of their responsibilities regarding the provision of RTAs. It has seen instances where terms of business agreements (TOBAs) do not reflect the intent of the arrangements, or accurately reflect the intermediaries' operations. The FCA expects insurers to regularly review their agreements for inappropriate wording and maintain adequate oversight to ensure terms of business agreements are complied with. Insurers and intermediaries have a duty to their clients to ensure RTAs are properly in place; and
- the FCA reminds firms that the definition of "pension transfer" in the FCA Handbook changed on 1 October 2020. It now refers to the transfer of safeguarded benefits to flexible benefits in a different scheme and to some transfers involving guaranteed annuity rates. As a result, the regulated activity of advising on pension transfers and opt-outs now covers only transfers of this type. Accordingly, the non-standard limitation for firms not wishing to advise on defined benefit pension transfers has been revised. Firms should use this revised wording. The FCA has updated its webpage on defined pension transfers to reflect this.

FOS Ombudsman News issue 155

The Financial Ombudsman Service (FOS) has published issue 155 of its Ombudsman News, which includes:

- quarterly complaints data for Q3 2020;
- an overview (set out on a webpage) of the FOS' general approach to complaints about consumer credit, including information and case studies on how the FOS approaches specific types of consumer credit complaints;
- the FOS' annual report and accounts 2019/20;
- operational information about the FOS and its approach to complaints caused or affected by COVID-19; and
- a blog on helping small businesses with life-changing financial disputes.

Sanctions (EU Exit) (Consequential Provisions) (Amendment) Regulations 2020

The Sanctions (EU Exit) (Consequential Provisions) (Amendment) Regulations 2020 (SI 2020/1289) have been published. These Regulations amend the ISIL (Da'esh) and Al-Qaida (United Nations Sanctions) (EU Exit) Regulations 2019 (SI 2019/466), the Counter-Terrorism (International Sanctions) (EU Exit) Regulations 2019 (SI 2019/573) and the Counter-Terrorism (Sanctions) (EU Exit) Regulations 2019 (SI 2019/577) (together, the 2019 Regulations). The amendments provide that the 2019 Regulations will themselves make amendments to:

- the Charities Act 2011;
- the Sanctions and Anti-Money Laundering Act 2018;
- the Electronic Money Regulations 2011 (SI 2011/99);
- the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (SI 2017/692); and
- the Payment Services Regulations 2017 (SI 2017/752).

These come into effect at the end of the transition period of the counter-terrorism sanctions framework established by the 2019 Regulations. This counter-terrorism sanctions framework is intended to replace the counter-terrorism sanctions regimes currently implemented through EU Council Decisions and Regulations (and associated UK legislation) and the Terrorist Asset-Freezing etc Act 2010.

The Regulations will come into force in accordance with regulations made by the Secretary of State under section 56 of the Sanctions and Anti-Money Laundering Act 2018.

FSCS and SFO memorandum of understanding

The Financial Services Compensation Scheme (FSCS) and the Serious Fraud Office (SFO) have entered into a memorandum of understanding (MoU) which explains that the two organisations are committed to working together in the public interest to achieve the appropriate outcomes in the investigation and prosecution of serious or complex fraud and bribery and corruption offences. In support of this aim, the MoU sets out the framework for effective liaison and communications between the SFO and the FSCS.

NCA Suspicious Activity Reports Annual Report 2020

The National Crime Agency (NCA) has published its Suspicious Activity Reports Annual Report 2020. Among other key statistics, the report shows that a record number of 573,085 SARs were received and processed by the UK Financial Intelligence Unit (UKFIU) of the NCA in 2020. This was a 20% increase on the previous period of 478,437. In addition, there were 62,408 requests for a defence against money laundering or terrorist financing, an 81% increase on 2018/19.

Benchmark reform: FSB 2020 progress report

The Financial Stability Board (FSB) has published a progress report for 2020 on reforming major interest rate benchmarks. Among other things, the FSB reports that:

- the transition away from LIBOR remains a significant priority, and although important progress has been made over the course of 2020, this work must accelerate further in early 2021;
- the disruption to global financial markets associated with the COVID-19 pandemic has further highlighted the fundamental weaknesses in LIBOR and has reinforced the critical importance of the FSB's efforts to reform the production and use of global interest rate benchmarks. The FSB's view remains that financial and non-financial sector firms across all jurisdictions should continue their efforts in making wider use of more robust risk-free rates in order to reduce reliance on interbank offered rates where appropriate.

COVID-19: FSB report on financial stability impact and policy responses and letter to G20

The FSB has published a letter sent to G20 leaders ahead of their next summit on the findings of its reports on issues relating to the COVID-19 pandemic and on initiatives that should be prioritised to ensure financial stability beyond COVID-19. It has also published a report referred to in the letter and submitted to the G20, "COVID-19 Pandemic: Financial Stability Impact and Policy Responses".

The FSB will provide a further update to the G20 by April 2021 on the COVID-19 responses of member authorities and standard-setting bodies, its financial stability risk assessment and its work on the effectiveness of policy responses.

COVID-19: FSB holistic review of March 2020 market turmoil

The FSB has published a report setting out the findings of its holistic review of the March 2020 market turmoil, brought about by the COVID-19 shock. In the report, the FSB examines the drivers, effects and implications of the financial market turmoil in March 2020.

The FSB notes that the policy response was speedy, sizeable and sweeping. It found that, without the intervention of central banks, it is highly likely that the stress in the financial system would have worsened significantly. This would have had a major impact on the ability of financial and non-financial firms to raise funds. It concludes that the March turmoil reinforced the need to better understand interconnections and amplification channels in the financial system and to consider the nature of vulnerabilities in non-bank financial intermediation relating to the liquidity stress and the implications of central bank liquidity support, and draw lessons about overall resilience of the NBFI sector.

The FSB proposes a non-bank financial intermediation work programme.

FSB 2020 Resolution Report

The FSB has published its 2020 Resolution Report on the implementation of its resolution reforms. The report includes a section on lessons learnt for resolution planning from the COVID-19 pandemic, and a summary of actions and timelines for future work.

G20 financial regulatory reforms: FSB 2020 Annual Report on implementation and effects

The FSB has published its annual report on the implementation and effects of the G20 financial regulatory reforms. Given the pandemic, there has been limited additional progress implementing the G20 reforms during the last year.

However, the FSB finds that the G20 reforms after the 2008 financial crisis have served the financial system well during the COVID-19 pandemic. Greater resilience of major banks at the core of the financial system has allowed the system largely to absorb, rather than amplify, the macroeconomic shock. Bold and decisive actions by authorities sustained the supply of credit to the real economy and helped maintain global financial stability.

The pandemic represents the first major global test of the post-crisis financial system, and an opportunity to examine whether reforms have worked as intended. The FSB and SSBs will carry out further work to identify potential lessons learned for international standards. In addition, the FSB and standard setting bodies will continue to promote approaches to deepen international cooperation, coordination and information sharing, with the support of the G20.

Banking and Finance

CRD V and BRRD II-derived UK legislation: PRA statement on application of temporary transitional power

The UK Prudential Regulation Authority (PRA) has published a statement on the application of its temporary transitional power (TTP) to legislation implementing the Capital Requirements Directive (CRD) V and the Bank Recovery and Resolution Directive (BRRD II).

The PRA states that it and the Bank of England (BoE) have not identified any further exceptions to their transitional directions necessary as a result of onshoring amendments to CRD V and BRRD II-derived legislation. This means that transitional relief will apply to the small number of relevant obligations that are changed by onshoring amendments made to CRD V and BRRD II-derived legislation at the end of the Brexit transition period.

The PRA emphasises that firms must ensure that they are ready to comply with changes to legislation and the PRA rules that are being made to implement CRD V and BRRD II to the extent that these are relevant to firms. This is because these amendments are not onshoring amendments made under the European Union (Withdrawal) Act 2018 (EUWA) and consequently the TTP will not apply.

The PRA's intention remains not to grant transitional relief in respect of the rules in its Contractual Recognition of Bail-in (CROB) and Stay in Resolution Parts, except in relation to phase two liabilities as referenced in relation to CROB. This policy will remain the same irrespective of any changes to PRA rules made due to BRRD II.

The PRA states that it may need to reconsider its approach if it makes changes to the final rules following responses to its consultations on CRD V and BRRD II, which were published in July 2020 and October 2020.

Prudential regime for small banks and building societies: PRA speech

The BoE has published a speech given by Sam Woods, BoE Deputy Governor for Prudential Regulation and PRA CEO, on introducing a simpler prudential regime for small banks and building societies. The PRA is considering introducing a graduated regime in which firms can migrate from a very simple regime through a series of steps to the full Basel-based regime as they become larger or involved in more complex activities, or both. In his speech, Mr Woods considers which firms should be in the regime and how requirements could be made simpler.

The PRA is considering publishing a discussion paper in spring 2021.

2021 Climate Biennial Exploratory Scenario: BoE information

The BoE has published information on the Climate Biennial Exploratory Scenario (CBES), which it plans to launch in June 2021. It lists the financial institutions that have been invited to take part in the CBES, sets out a timeline and its planned engagement with participants ahead of launch.

CRR: PRA Dear CFO letter on treatment of legacy instruments

The PRA has published a letter it has sent to the chief financial officers of UK deposit-takers on the remediation of prudential treatment of legacy instruments before the end of the transition period specified in the Capital Requirements Regulation (CRR). The PRA is communicating its position in light of a related European Banking Authority (EBA) opinion published on 21 October 2020.

The CRR contains provisions grandfathering certain capital instruments that did not, at the time the CRR was adopted, comply with the new definition of own funds, with the aim that these instruments would be gradually phased out from own funds. These grandfathering provisions will expire at the end of the transition period on 31 December 2021. In its opinion, the EBA highlights the risks from certain features in these legacy instruments to the eligibility of other capital and eligible liabilities instruments and advises firms to take appropriate remedial actions before the end of the CRR transition period.

The PRA states that it shares the EBA's concerns on issues relating to subordination provisions and flexibility of distribution payments, as these pose risks to the eligibility of firms' own funds and eligible liabilities instruments. As explained in its Supervisory Statement 7/13, the PRA expects firms to avoid complex features and capital structures that may complicate prudential assessment and may also undermine capital instruments' loss-absorbing properties and CRR compliance. The PRA notes that firms are responsible for compliance with applicable regulations, such as the CRR and binding technical standards, taking into account relevant guidance. The PRA also refers firms to the BoE's minimum requirement for own funds and eligible liabilities (MREL) Statement of Policy.

In light of this established policy, the PRA expects affected firms to undertake a risk-based approach and assess appropriate remedial actions before the end of the CRR transition period. A firm’s choice of remedial action may depend on a number of factors, including call options, governing law, issuing entity, and market conditions.

The PRA requests that firms share an action plan with their usual PRA supervisory contact by 31 March 2021. If a firm intends to keep affected legacy instruments as non-regulatory capital, and non-eligible liability instruments beyond the end of the CRR transition period, the action plan should include a reasoned analysis of any prudential risks, including concerns for resolvability or insolvency, and potential actions to mitigate those risks.

EU-wide banking sector stress test: EBA publishes methodology and key milestones

The EBA has published the final version of its methodology for the 2021 EU-wide banking sector stress test, together with draft templates and template guidance for the test, and the key milestone dates for the exercise. The EBA states that the draft version of the templates and template guidance may be subject to minor technical adjustments before its final publication.

The EBA intends to launch the stress test in January 2021, with results to be submitted to it in four stages between the start of April 2021 and mid-July 2021. It intends to publish the results by 31 July 2021.

Liquidity coverage ratio: EBA report on unwind mechanism

The EBA has published a report on the unwind mechanism of the liquidity coverage ratio (LCR) under Commission Delegated Regulation (EU) 2015/61 (LCR DR). The LCR DR amended the LCR Delegated Regulation ((EU) 61/2015) to require the EBA to report to the European Commission, by 19 November 2020, on the technical suitability and possible unwarranted side effects of the unwind mechanism envisaged in the computation of the LCR.

Sustainable finance: UK Finance white paper

UK Finance has published a white paper on sustainable finance, which sets out a principles-based framework for the way in which credit institutions measure and report multi-year commitments to sustainable finance.

The paper recognises that legislators, regulators and business leaders have signalled their intention that greater definition be given to environmental, social and governance (ESG) reporting. One of the aims of the paper is to provide an opportunity for pre-positioning in advance of the ESG framework being more clearly defined by standard setters and others.

Consumer Finance

Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020

The Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311) have been published, together with an explanatory memorandum and a final impact assessment. The Regulations:

- establish the first part of a debt respite scheme for individuals in problem debt. This gives eligible people, who receive professional debt advice, access to a 60-day period in which interest, fees and charges are frozen and enforcement action is paused. This moratorium period is commonly known as "breathing space";
- establish an alternate route by which the protections of a moratorium may be accessed by individuals receiving mental health crisis treatment, and ensure that the protections are in place for the duration of their crisis treatment;
- provides for the Statutory Debt Repayment Plan (SDRP), a statutory agreement that will enable a person in problem debt to repay their debts to a manageable timetable, with legal protections from creditor action for the duration of their plan. However, the Government intends to implement the SDRP over a longer timeframe and has not yet set a specific implementation date for this part of the scheme.

The Regulations come into force on 4 May 2021, with the exception of certain specified provisions (referred to in regulations 1(3) to (7)).

COVID-19: FCA confirms support for mortgage borrowers

Following its consultation on draft guidance, the UK Financial Conduct Authority (FCA) has confirmed updated guidance to firms setting out the enhanced support that should be available to mortgage borrowers experiencing payment difficulties as a result of the coronavirus. We reported on the FCA's consultation proposals in our separate briefing: FCA extends the COVID-19 payment deferral scheme for mortgages and updates its additional guidance.

The FCA has also published feedback to the draft guidance, and its response, in a feedback statement, FS20/17. The FCA explains that its final guidance is published subject to several changes. These include amendments to clarify:

- the relationship between the "Payment Deferral Guidance" (Mortgages and Coronavirus: Payment Deferral Guidance) and the "Tailored Support Guidance" (Mortgages and Coronavirus: Tailored Support Guidance) and when firms should follow each;
- when firms should offer payment deferrals, including for customers who have already taken a payment deferral under the guidance (including its previous versions) and those who are experiencing payment difficulties and need support for the first time as a result of coronavirus; and
- how payment deferrals taken under the Payment Deferral Guidance interact with the FCA's guidance published in PS 20/11 (Removing barriers to intra-group switching and helping borrowers with maturing interest-only and part-and-part mortgages).

The newly published finalised guidance, which update the FCA's guidance that was published in September 2020, comprise:

- Mortgages and Coronavirus: Payment Deferral Guidance; and

- Mortgages and Coronavirus: Tailored Support Guidance.

The FCA has also confirmed that no one should have their home repossessed, without their agreement, until after 31 January 2021.

The FCA will continue to keep the support available to consumers under review. It reiterates that consumers should keep up with payments on their mortgage if they can afford to do so and should only seek support where such support is absolutely necessary.

COVID-19: FCA updates guidance on delaying mortgage capital repayments

The FCA has updated its webpage on PS20/11: Removing barriers to intra-group switching and helping borrowers with maturing interest-only and part-and-part mortgages. PS20/11 included temporary guidance, published on 23 October 2020, to help some borrowers with maturing interest-only and part-and-part mortgages who are affected by the conditions created by the COVID-19 pandemic.

The FCA has issued an updated version of the guidance in relation to delaying the capital repayment until 31 October 2021 on interest-only and part-and-part mortgages that mature between 20 March 2020 and 31 October 2021. The updated guidance states that a customer can take advantage of a mortgage payment deferral after their mortgage has matured and will still be able to delay repaying their capital until 31 October 2021. The FCA previously stated that if a customer fails to make interest payments after maturity then the guidance would no longer apply. However, in light of the FCA's updated guidance on mortgage payment deferrals (see above), it has clarified this.

COVID-19: FCA confirms support for consumer credit customers

On 19 November 2020, the FCA confirmed its updated guidance to firms setting out the enhanced support that should be available to consumer credit customers experiencing payment difficulties as a result of the coronavirus. The guidance covers users of personal loans, credit cards, store cards, catalogue credit, rent to own, buy now pay later, pawnbroking, motor finance and high-cost short-term credit. We reported on the FCA's preceding consultation in: COVID-19: FCA consults on extended support for consumer credit customers.

The FCA has also published feedback to the draft guidance, and its response, in a feedback statement, FS20/18. Most respondents supported the FCA's proposals.

The FCA has published the following final guidance on its webpage, updating its previous September guidance:

- Consumer credit and Coronavirus: Tailored Support Guidance;
- Personal loans and coronavirus: Payment Deferral Guidance;
- Credit cards (including retail revolving credit) and coronavirus: Payment Deferral Guidance;
- Motor finance agreements and coronavirus: Payment Deferral Guidance;
- High-cost short-term credit and coronavirus: Payment Deferral Guidance;
- Rent-to-own, buy-now pay-later, pawnbroking and coronavirus: Payment Deferral Guidance; and
- the COVID-19 Consumer Credit Instrument 2020 amending the FCA Handbook (CONC).

The guidance will come into effect on 25 November 2020, although the FCA encourages firms to provide the enhanced support sooner if they are able to.

The FCA reiterates that consumers should keep up with payments on their loans or credit products if they can afford to do so, and should only request payment deferrals where absolutely necessary.

Payments

Payment Services and Electronic Money (Amendment) Regulations 2020 published

The Payment Services and Electronic Money (Amendment) Regulations 2020 (SI 2020/1275) have been published, together with an explanatory memorandum. The Regulations amend the Electronic Money Regulations 2011 and the Payment Services Regulations 2017 to apply sections 93(4) and 233 to 236 of the Banking Act 2009, with modifications, to authorised electronic money institutions, small electronic money institutions, authorised payment institutions and small payment institutions. This will allow HM Treasury to make regulations to modify insolvency law with respect to these institutions, including setting up a bespoke insolvency regime applicable to them.

The Regulations come into force on 8 December 2020.

HM Treasury did not conduct an open consultation on the Regulations, but it did informally consult some affected parties, including the FCA, the Insolvency Service and a number of insolvency practitioners and trade associations representing payments and electronic money institutions. Stakeholders supported the proposed changes.

HM Treasury will run a full open consultation on the regulations and rules that will create the Special Administration Regime for payments and e-money firms.

Application of PSD2 to contactless payment cards: ECJ case

The Court of Justice of the EU (ECJ or CJEU) has handed down its judgment in DenizBank AG v Verein für Konsumenteninformation (Case C-287/19). This case involved a request for a preliminary ruling relating to the application of the revised Payment Services Directive (PSD2).

Banks and other payment service providers will be relieved to hear that the ECJ did not follow the Advocate General's April 2020 opinion that tacit (or passive) acceptance of changes to terms and conditions in payment services contracts could only be available for "non-essential changes". Instead, the ECJ found that PSD2 does not restrict the type of terms that can be changed by tacit consent, but where the payment service user is a consumer the Unfair Terms in Consumer Contracts Directive applies. However, the Court has confirmed the Advocate General's other finding that contactless functionality is a separate payment instrument.

Read more in our briefing: CJEU rules on scope of variation provisions under PSD2.

Securities and Markets

UK BMR: FCA approach to orderly wind down of LIBOR and consultation on Statements of Policy

The UK Financial Conduct Authority has published a document on the Benchmarks Regulation (UK BMR) and proposed amendments under the Financial Services Bill 2019-21, which will enable it to designate a critical benchmark and to impose changes to that benchmark.

The FCA has also published a statement on its proposed new powers, policy and decision-making under the BMR, announcing the following consultations on Statements of Policy required of the FCA under the BMR:

- Consultation on proposed policy with respect to the designation of benchmarks under new Article 23A; and
- Consultation on proposed policy with respect to the exercise of the FCA's powers under new Article 23D (imposing requirements on the administrator of a critical benchmark).

In another statement announcing these consultations, the FCA sets out its potential approach to the use of its proposed new powers to ensure an orderly wind down of LIBOR. This statement is published in light of the announcement by ICE Benchmark Administration Limited (IBA), the FCA-regulated and authorised administrator of LIBOR, that it will consult on its intention that the euro, sterling, Swiss franc and yen LIBOR panels will, subject to confirmation following the consultation, cease at the end of 2021.

IBA states that discussions involving itself, the FCA, other official sector bodies and the panel banks are continuing regarding the future of USD LIBOR. It expects to be able to make further announcements regarding USD LIBOR when the discussion process concludes. It states that there can be no certainty or guarantee that it will be able to publish any USD LIBOR settings after 31 December 2021.

The deadline for responses to the FCA consultations is 18 January 2021. The FCA will finalise its statements of policy in due course, taking into account responses to the consultations.

The FCA plans to consult in Q2 2021 on its policy intentions for exercising powers under the proposed Article 21A and Article 23C BMR. It will also conduct a further consultation in due course on any future decision to use its powers under the proposed Article 23D in relation to LIBOR.

UK listing regime: HM Treasury call for evidence

HM Treasury has launched a review of the UK listing regime, chaired by Lord Hill of Oareford, as part of a plan to strengthen the UK's position as a leading global centre. It has also published the review's terms of reference and a call for evidence.

The deadline for submitting responses is 5 January 2021. Following receipt of responses, the review will report to HM Treasury in early 2021.

ESMA strategic supervisory priorities for 2020

The European Securities and Markets Authority (ESMA) has published a press release on the identification of its EU strategic supervisory priorities for national competent authorities (NCAs). ESMA identifies costs and performance for retail investment products and market data quality as the EU strategic supervisory priorities and, more specifically:

- costs and fees charged by fund managers; and
- improving the quality of transparency data reported under the Markets in Financial Instruments Regulation (MiFIR).

CCP resolution: FSB final guidance on assessing adequacy of financial resources

The Financial Stability Board (FSB) has published final report on guidance on financial resources to support central counterparty (CCP) resolution and on the treatment of CCP equity in resolution. The purpose of the guidance is to assist resolution authorities in determining whether there is a gap in the resources and tools available for the resolution of a CCP that must be addressed.

The draft guidance does not cover the wind-down plans of systemically important CCPs. It does not replace or supersede the FSB's key attributes of effective resolution regimes for financial institutions or its July 2017 guidance on CCP resolution and resolution planning.

The FSB consulted on a draft version of the guidance in May 2020 and has published a summary of responses to the consultation and the policy decisions it has taken in response to this feedback.

Recognition of EU and UK bail-in clauses for other liabilities: AFME and ICMA model clauses

The Association for Financial Markets in Europe (AFME) has published a document containing model clauses developed by it and the International Capital Market Association (ICMA) relating to the recognition of EU and UK bail-in clauses for liabilities other than debt instruments or liabilities governed by industry standard master agreements (other liabilities).

The document sets out model clauses relating to:

- the contractual recognition of bail-in powers for other liabilities governed by a non-EEA law reflecting the requirements of Article 55 of the Bank Recovery and Resolution Directive; and
- the contractual recognition of bail-in powers for other liabilities governed by a non-English law reflecting the requirements of the UK bail-in regime, as set out in Part I of the Banking Act 2009.

AFME states that these clauses were originally developed by a group of leading law firms for AFME and ICMA. Their intended uses include contracts related to new issues of bonds, bond issuance programmes and euro commercial paper issuance programmes.

Insurance

COVID-19: FCA update on business interruption insurance test case

The UK Financial Conduct Authority (FCA) has updated its webpage on its business interruption insurance test case. Among other things, the FCA has published draft transcripts of the Supreme Court hearing on days one, two and three, and a link to the videos of the appeal hearing.

The Supreme Court appeal hearing has now ended. The FCA notes that Lord Reed recognised the importance of an early judgment for the businesses affected. He said that the Justices would do what they could to provide judgment as quickly as possible but could not comment on whether that would be before Christmas or in January. The FCA will update its webpage as soon as it can.

GI firms: PRA Dear Chief Risk Officer letter reserving and exposure management

The UK Prudential Regulation Authority (PRA) has published a letter to Chief Risk Officers of general insurance (GI) firms, sharing insights from its recent review of the GI sector, focussing on reserving and exposure management, including some observations on contract uncertainty in light of COVID-19.

The PRA notes that bias in reserve estimates and possible weakening in case reserve estimates persist as areas of concern, despite being highlighted in its November 2019 letter to chief actuaries. It states that firms can expect the PRA to sharpen its focus on those firms that have material exposure to financial lines of business if it considers that adequate measures have not been taken.

The PRA also notes that the pandemic has given rise to additional complexity and uncertainty in estimating ultimate losses. It highlights issues concerning four key areas that it encourages firms to consider as part of their year-end reserving exercise: data, discontinuities in historical trends, appropriateness of common reserving methodologies and reinsurance adequacy.

The PRA also highlights best practices that it has observed in its reviews of exposure management practices. The PRA states that it will sharpen its focus on those firms which are materially exposed to man-made catastrophe risk and where progress towards better practice remains slow.

The PRA encourages firms to actively consider whether current risk and capital management frameworks, including current stress and scenario testing, sufficiently address the risks posed by contract uncertainty and unintended exposures. It states that it may be useful to consider the identification, definition, and monitoring of all risk related to contract wording, including any key assumptions related to expected coverage.

The PRA states that CROs can expect the PRA to inquire how they have considered each of the points raised in the letter. It expects this letter to be discussed at the board risk committee, alongside any further analysis deemed necessary to identify actions that should be taken by the firm in response. It also recommends sharing the Dear CRO letter with the holder of the chief actuary function.

GI industry: PRA response on framework for assessing financial impacts of physical climate change

The PRA has published its response to the insurance industry feedback to its publication, "A framework for assessing financial impacts of physical climate change: A practitioner's aide for the general insurance sector", which it published in May 2019. The PRA summarises the feedback received and areas where further development is recommended.

Based on the feedback, the PRA identifies the following priority areas for further development:

- assessing each hydro-meteorological region-peril in detail and commenting on their future climate projection characteristics;
- assessing how current catastrophe model calibrations allow for climate change that has crystallised to date; and
- assessing how the insurance industry's experience on quantifying physical climate change risk on the liability side of the balance sheet could be used to develop a similar framework for assessing the risk on the asset and investment side of the balance sheet.

The PRA will continue to engage with insurance firms on their progress with embedding the expectations set out in its supervisory statement on enhancing banks' and insurers' approaches to managing the financial risks from climate change (SS3/19) and in its 1 July 2020 letter to all PRA-regulated firms on managing climate-related financial risk. It will also consider whether a follow-up report is required, depending on the progress across industry and results from other climate exercises.

Solvency II: ECJ case on re-organisation and winding-up provisions

In Bulstrad Vienna Insurance Group AD v Olympic Insurance Company Ltd (Case C 427/19), the European Court of Justice (ECJ) considered the interpretation of re-organisation and winding-up provisions in Title IV of the Solvency II Directive. It followed a reference for a preliminary ruling from a Bulgarian court.

The ECJ ruled that Article 274 of the Solvency II Directive must be interpreted as meaning that:

- a decision of the competent authority to withdraw the authorisation of the insurance undertaking concerned, and to appoint a provisional liquidator, cannot constitute a "decision to open winding-up proceedings with regard to an insurance undertaking" within the meaning of that article. This is unless either, firstly, the law of the home member state of the insurance undertaking provides that that provisional liquidator is empowered to realise the assets of the insurance undertaking and distribute the proceeds among its creditors; or, secondly, that the withdrawal of the authorisation of the insurance undertaking has the effect of automatically opening the winding-up proceedings, without the need for a separate authority to adopt a formal decision to that end; and
- if the conditions required for a decision to withdraw the authorisation of an insurance undertaking, and to appoint a provisional liquidator for that undertaking, to constitute a "decision to open winding-up proceedings with regard to an insurance undertaking" (within the meaning Article 274) are not met, the courts of other member states are not obliged to apply the law of the home member state of the insurance undertaking concerned. In this case, this is where such law provides for the stay of all court proceedings that have been opened with regard to such an undertaking.

Funds and Asset Management

FSCS levy calculations: FCA clarifies process for reporting income

The FCA has published a new webpage for investment managers, clarifying the options for reporting income for Financial Services Compensation Scheme (FSCS) levy calculations.

The clarification is necessary as the FCA has become aware that some firms may be reporting income for the FSCS levy that does not need to be reported. It relates to the requirements on asset managers to report "look through" income for the FSCS levy. Income relating to beneficiaries who are FSCS-eligible claimants must be reported under Chapter 6 of the Fees manual (FEES 6).

The FCA explains that, when calculating annual eligible income (in accordance with the FCA Glossary definition) there are two options:

- to only include such annual income if it is attributable to business in respect of which the FSCS may pay compensation; or
- include all such annual income.

Therefore, firms must include income they know relates to eligible claimants, and income that may relate to eligible claimants. If the firm cannot identify whether the underlying beneficiary is an eligible claimant, income derived from that business must be included, because the FSCS may pay compensation in relation to it.

The FCA further clarifies that, if the firm can identify income that relates to beneficiaries who are not eligible claimants, that income can be excluded. In any case, a firm can report all income if it chooses to do so.

The FCA webpage includes an example to illustrate the requirements.

Executive remuneration: Investment Association principles and guidance

The Investment Association has published a revised version of its principles of remuneration. The main changes from the November 2019 version are clarified sections on pensions, non-financial performance measures, post-employment shareholding requirements and deferral of bonuses. These are explained further in the IA's letter to remuneration committee chairs.

The Investment Association has also updated its guidance "Executive Remuneration in UK listed companies – Shareholder Expectations during the COVID-19 Pandemic".

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