FIG Bulletin

Recent developments

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Hogan Lovells

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Financial Services Act 2021 (Commencement No 2) Regulations 2021

The Financial Services Act 2021 (Commencement No 2) Regulations 2021 (SI 2021/739) have been published. The Regulations set out commencement dates for a number of provisions in the Financial Services Act 2021 (FS Act). Regulation 2 brings into force, on 28 June 2021, paragraphs 10 to 21 of Schedule 12 to the FS Act as they extend to Northern Ireland, dealing with forfeiture powers extended to include accounts held at payment and e-money institutions. Regulation 3 brings into force, on 1 July 2021, the following of provisions of the FS Act:

- sections 8 to 21 and schedule 5 relating to benchmarks;
- section 27 and schedule 10 relating to access to financial services markets;
- section 28 and schedule 11 relating to variation or cancellation of permission to carry on regulated activity at the Financial Conduct Authority's (FCA's) initiative;
- section 29 on FCA rules about the level of care provided to consumers by authorised persons;
- section 34 on the application of money laundering regulations to overseas trustees;
- section 37 relating to regulated activities and the application of the Consumer Credit Act 1974;
- section 38 on amendments to the UK Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation;
- section 39 relating to the retention of personal data under the UK Market Abuse Regulation;
- section 40 on clearing, and procedures for reporting over-the-counter derivatives; and
- section 43 relating to subordinated legislation made under retained direct EU legislation.

Financial promotion approvals regulatory framework: HM Treasury response to consultation

HM Treasury has published a response to its July 2020 consultation on the regulatory framework for approval of financial promotions. In the response, HM Treasury summarises responses received to its consultation paper, and explains the next steps.

Most respondents support the introduction of a regulatory gateway, with a slight preference for option 1 (imposing FCA requirements to restrict financial promotion approvals – summarised in paragraph 1.6 of the response). HM Treasury agrees that a gateway should be introduced for the approval of unauthorised persons' financial promotions by way of option 1.

All new and existing authorised firms will be prohibited from approving unauthorised persons' financial promotions by way of a requirement on their permission – the "Financial Promotion Requirement". Both new and existing authorised firms that wish to approve financial promotions will have to apply to the FCA to have the prohibition removed either entirely (allowing them to approve all types of financial promotions) or partially (allowing them to approve certain types of financial promotions). Firms will do this by submitting a variation of requirement (VREQ) application to the FCA. The FCA will determine, and accept or refuse, an application under powers in Part 4A of the Financial Services and Markets Act 2000 (FSMA). The FCA will be able to refuse an application if this is deemed necessary in order to advance its operational objectives.

The Treasury explains that permissions to approve financial promotions could be limited to a specific type or types of products or services dependent on the firm's expertise. It states that the proposed gateway is not intended to require the FCA to grant permission on a promotion by promotion basis, thereby reducing the additional administrative burden on firms.

There will be three exemptions to the new regime:

- firms approving the financial promotions of an unauthorised person within the same group;
- the approval of authorised firms' own promotions for communication by unauthorised persons; and
- principals approving financial promotions for their appointed representatives in relation to regulated activities, for which the principal has agreed to accept responsibility.

HM Treasury has also developed proposals to implement a transitional period (with three distinct phases set out in Chart 1.C in the response) allowing an orderly transition between the two regimes. Unauthorised persons will remain able to communicate any financial promotion that was approved prior to the implementation of this gateway provided the promotion remains unchanged and continues to comply with FCA rules.

HM Treasury intends to bring forward the necessary legislation when parliamentary time allows. The FCA will consult on its proposals for implementing the gateway in due course.

UK implementation of IFPR and Basel 3 standards: HM Treasury response to consultation

HM Treasury has published the response to its consultation paper on implementing the Investment Firms Prudential Regime (IFPR) and the final Basel 3 (or Basel III) standards using powers under the FS Act 2021. In the response, HM Treasury summarises the 12 responses received to its February 2021 consultation paper and explains the next steps. In the light of comments received, HM Treasury has changed its approach in a few areas. The changes are outlined in the response.

Among other things, HM Treasury:

- intends to lay the secondary legislation required to revoke the specific provisions in the UK Capital Requirements Regulation (UK CRR) shortly (except in relation to leverage), and to pass a second statutory instrument, before the end of 2021, which makes amendments to legislation that are needed as a consequence of these revocations, and revokes provisions relating to leverage;
- now considers that applying the equivalence provision contained in Article 132 of the UK CRR would be a disproportionate method for addressing the prudential risks arising from UK banks' investments in overseas funds. It has decided to remove the equivalence provision;
- has decided to implement the Fundamental Review of the Trading Book (FRTB) reporting requirements alongside FRTB revisions to Pillar 1 capital requirements (that is, as part of Basel 3.1 and not from 1 January 2022) due to concerns about implementation costs;
- sees no reason to depart from its proposed approach of amending the Financial Services and Markets Act (PRA-Regulated Activities) Order 2013 (SI 2013/556) to remove reference to the EUR730,000 initial capital requirement (ICR), which will become obsolete. The proposed amendment will not, of itself, designate these firms for prudential supervision by the PRA; and

- has decided to remove FCA-regulated EUR730,000 ICR firms from the scope of the UK resolution regime. Additional firms brought into the scope of the £750,000 capital requirement will also not be within scope of the UK resolution regime.

HM Treasury intends to lay the relevant implementing secondary legislation to a timeline that provides firms with adequate time to prepare ahead of the 1 January 2022 implementation date.

FCA regulation of LC&F: Treasury Committee report

The House of Commons Treasury Committee has published a report following its inquiry into the FCA's regulation of London Capital & Finance plc (LC&F). The findings and recommendations set out in the report include that:

- the committee welcomes the FCA's ongoing transformation programme, but the FCA board should set an end date and create and publish milestones to review changes in culture;
- it is not readily justifiable for the FCA to require the firms it regulates to adhere to the principles of the Senior Managers Regime, but seemingly not to apply similar principles internally when there are failings of practice and culture. The committee believes there are doubts as to whether the FCA has, in the LC&F case, met the standards it seeks to impose on others;
- the FCA should require authorised firms to make clear the risks to customers associated with their unregulated activities. It should also set out in its annual perimeter report how its supervisory strategies and policies reflect the activities of authorised firms both within and outside the regulatory perimeter. The FCA should be given the power to recommend perimeter changes formally to HM Treasury;
- in the future, the FCA should be more interventionist and make more frequent use of its powers regarding financial promotion breaches rather than maintaining a culture of risk aversion. HM Treasury should, as a priority, re-evaluate the Financial Promotion Order exemptions to determine their appropriateness and consider what changes are needed to protect consumers;
- the government should include measures in the Online Safety Bill to address fraud via online advertising. Pending any legislative changes, the FCA should continue to work with online platforms to remove misleading and fraudulent advertisements as quickly as possible; and
- HM Treasury's ongoing consultation on the regulation of mini-bonds is welcome, but the committee notes the delay in its launch. HM Treasury should proceed with its analysis as soon as the consultation closes and publish the outcome by the end of September 2021, setting a way forward that can be implemented rapidly.

Financial holding companies: PRA CP12/21 on regulatory framework

The Prudential Regulation Authority (PRA) has published a consultation paper, CP12/21, on the further implementation of the regulatory framework for financial holding companies (FHCs).

Following the UK's implementation of the fifth Capital Requirements Directive (CRD V), holding companies in UK banking groups are subject to supervisory approval and consolidated supervision under a legislative framework under Part 12B of FSMA. A UK consolidation group's approved parent holding company is responsible for ensuring that consolidated prudential requirements are met. If the relevant holding company cannot be approved, another group entity may be temporarily designated as responsible for ensuring that the requirements are met. The FSAct 2021 gave the PRA the power to make rules relating to approved or designated holding companies.

In CP12/21, the PRA sets out proposals for rules and guidance relating to approved and designated holding companies:

- Appendix 1 to CP12/21 contains the draft text of the PRA Rulebook: PRA (Rules applying to holding companies) Instrument 2021, which contains proposed revisions to a number of Parts of the PRA Rulebook to bring approved and designated holding companies within their scope by applying them to "CRR consolidation entities". A CRR consolidation entity is defined as a UK parent institution, a PRA approved parent holding company, a PRA designated parent holding company or a PRA designated institution;
- Appendix 2 to CP12/21 contains the text of a new PRA statement of policy (SoP): Supervisory measures and penalties in relation to financial holding companies. This reflects the PRA's obligation under section 129Z2 of FSMA to prepare and issue an SoP on the taking of supervisory measures, including directions, under section 192T of FSMA and the imposition and amount of penalties under section 192Y of FSMA; and
- Appendix 3 to CP12/21 (included in the main document for CP12/21) contains proposed amendments to the PRA's SoP on its approach to enforcement, reflecting the PRA's powers concerning holding companies under section 192Y of FSMA.

The deadline for responses is 22 July 2021. The PRA intends to implement its proposals on 15 September 2021.

PRA occasional consultation paper CP13/21

The PRA has published an occasional consultation paper, CP13/21, proposing minor amendments to its Rulebook, supervisory statements (SSs), reporting data items and instructions, the Branch Return, and associated guidance and notes.

The chapters in CP13/21 are relevant to different types of firms, as follows:

- chapters 2 and 3: banks, building societies, and PRA-designated investment firms;
- chapter 4: Capital Requirements Regulation (CRR) firms;
- chapter 5: PRA-supervised third country branches;
- chapter 6:
    - Audit Committee – CRR firms, UK Solvency II insurance and reinsurance firms, and the Society of Lloyd's and managing agents; and
    - Auditors – major UK banks and building societies.

The deadline for responses is 25 August 2021.

ESG: FCA CP21/7 on enhancing climate-related disclosures by asset managers, life insurers and FCA-regulated pension providers

The FCA has published a consultation paper, CP21/17, on enhancing climate-related disclosures by asset managers, life insurers and FCA-regulated pension providers. It proposes to introduce the following climate-related financial disclosure rules and guidance, consistent with the recommendations and recommended disclosures developed by the Task Force on Climate-related Financial Disclosures (TCFD):

- **entity-level disclosures:** firms would be required to publish, annually, an entity-level TCFD report on how they take climate-related risks and opportunities into account in managing or administering investments on behalf of clients and consumers; and

- **product or portfolio-level disclosures:** firms would be required to produce, annually, a baseline set of consistent, comparable disclosures in respect of their products and portfolios, including a core set of metrics.

The FCA intends to introduce a new Environmental, Social and Governance (ESG) sourcebook to set out its proposed rules and guidance. The proposals in CP21/17 relate solely to climate-related disclosures, but the FCA anticipates that the ESG sourcebook will expand over time to include new rules and guidance on other climate-related and wider ESG topics.

The scope of the proposed rules and guidance would cover 98% of assets under management in both the UK asset management market and held by UK asset owners, representing £12.1 trillion in assets managed in the UK. However, the FCA's proposals would not apply to firms with less than £5 billion in assets relating to relevant activities.

The consultation closes on 10 September 2021. The FCA intends to confirm its final policy on climate-related disclosures before the end of 2021.

In its press release, the FCA states that, given the global reach of regulated firms operating in the UK, the FCA has approached the design of the regime with international consistency in mind and to accommodate firms' different business models.

ESG: FCA CP21/18 on enhancing climate-related disclosure requirements by standard listed companies and seeking views on ESG topics in capital markets

The FCA has published a consultation paper, CP21/18, on proposals to extend the application of its TCFD-aligned Listing Rule (LR) in LR 9.8.6R(8) for premium-listed commercial companies to issuers of standard listed equity shares (excluding standard listed investment entities and shell companies), and seeking views on other topical ESG issues in capital markets, including green and sustainable debt markets and ESG data and rating providers. Comments are requested by 10 September 2021.

The FCA proposes adding a new rule LR 14.3.27R directly mirroring LR 9.8.6R(8), which requires in-scope standard listed companies to include a statement in their annual financial report setting out certain information about their climate-related disclosures, including whether they comply with the TCFD recommendations and recommended disclosures and to explain any non-compliance. The FCA also proposes to include at LR 14.3.28G to LR 14.3.31G the same guidance as is included in LR 9.8.6BG to LR 9.8.6EG for the purposes of LR 9.8.6R(8), and to update the Listing Rules section of Technical Note 801.1 to reflect the new rule and guidance.

While it is proposed that the new rule would apply to issuers of equity shares in LR 14, excluding standard listed investment companies and shell companies, the FCA invites views on whether the rule should be extended to issuers of global depositary receipts in LR 18 and standard listed issuers of shares other than equity shares, and whether and how issuers of standard listed debt and debt-like securities (in LR 17) should be reflected in the scope of the rule.

The new rule would apply on a comply or explain basis and take effect for accounting periods beginning on or after 1 January 2022. While the FCA confirms its support for a pathway to mandatory climate-related disclosures, it has concluded that it is not the right time to consult on transitioning the TCFD-aligned Listing Rules to a mandatory compliance basis.

The FCA also seeks views (but without proposed rule changes) on other topical ESG issues in capital markets, particularly in relation to green, social and sustainability bonds. The paper discusses sustainability frameworks and how they are reflected in bond prospectuses and transaction documents. It also outlines issues related to third party reviews, as well as ESG data and rating providers.

UK regulatory reform: FCA speech on building regulatory environment for future

The FCA has published a speech by Nikhil Rathi, FCA Chief Executive, on building a regulatory environment for the future. In his speech, Mr Rathi explains the FCA has to be agile and confident to build and operate an effective regulatory regime for the firms and consumers of the future. He highlights three ways the FCA is doing this, namely: (1) meeting the needs of UK markets; (2) setting the bar high at the gateway for entry to regulation and intervening assertively to deal with misconduct; and (3) playing its part in international regulatory discussions.

Mr Rathi states that the FCA has contributed to an HM Treasury consultation on reform of the broader Markets in Financial Instruments Directive regime to be published in summer 2021. The proposals are the product of the FCA's experience of the EU regime, listening to the views of market participants and reflecting the future of UK markets. Areas most in need of reform include market structure, the operation of the transparency regime, the regulation of commodity derivatives markets, and improving access to market data.

In addition, Mr Rathi notes that the FCA will consult in July 2021 on removing other barriers to companies listing.

He states that cooperation with the EU is generally working well, but highlights some areas where challenges remain due to lack of equivalence, including relating to the derivatives trading obligation and money market funds.

Mr Rathi comments that there are 1,450 EEA firms currently accessing UK markets via the temporary permissions regime. The move to a more permanent arrangement requires a rigorous review of all firms seeking to enter the UK authorisation gateway. Since the end of the transition period, the FCA has taken action against 13 firms, restricting their business, and the FCA is taking steps to remove a further 120 firms from its regulatory perimeter. The FCA's robust approach continues in its supervision of firms. It will act quickly to remove firms' permissions where they are not using their authorisation or are misusing it. The FCA also anticipates that, where there are significant risks, it will need to supervise overseas firms accessing the UK market more directly to ensure they meet the required standards.

Mr Rathi also discusses some of the steps the FCA has taken in relation to international cooperation, partnerships and steps taken regarding ESG and LIBOR transition.

BMR: FCA CP21/9 on proposed decision to require synthetic LIBOR for six sterling and yen LIBOR settings

The FCA has published a consultation paper, CP21/19, on its proposed decision to use its powers under Article 23D(2) of the UK Benchmarks Regulation (UK BMR) to require the administrator of LIBOR, ICE Benchmark Administration (IBA), to change the way 1-month, 3-month and 6-month sterling and Japanese yen LIBOR settings (together, the six LIBOR settings) are determined beyond the end of 2021. It has also published a related statement.

In March 2021, the FCA confirmed the dates the LIBOR panels will end, including the cessation of all sterling and Japanese yen LIBOR panels immediately after end-2021. In CP21/19, the FCA sets out its proposal to use its new UK BMR powers to require IBA to publish the six LIBOR settings on a changed methodology (that is, "synthetic") basis, effective immediately after end-2021.

The proposed changed methodology would reflect the FCA's intended technical specification in Chapter 2 of CP21/19. It would take effect immediately after end-2021. However, the FCA's Article 23D(2) decision is contingent on its other, future decisions under the UK BMR. It would apply if it decides, as it currently expects, to compel the continued publication of the six LIBOR settings by IBA under Article 21(3) of the UK BMR and to designate them as Article 23A benchmarks. The FCA is not consulting on these future decisions.

The FCA can only mandate publication for a maximum period of 12 months at a time. However, for Japanese yen LIBOR settings, the FCA is advising market participants now that it intends to compel only for one 12-month period until end-2022, after which point publication will cease. It is not consulting on this.

CP21/19 closes to responses on 27 August 2021. The FCA intends to communicate its final decision as soon as practicable in Q4 2021.

Where a synthetic LIBOR is implemented, the FCA must determine its permitted use. It is currently considering responses to its consultation on its proposed policy in this area before publishing its final policy framework. The FCA aims to consult further in Q3 2021 on a proposed decision on precisely what legacy use to allow for any synthetic sterling and yen LIBOR.

LIBOR transition: IA encourages transition of LIBOR-linked bond transition

The Investment Association (IA) has published a document calling for intensified collective efforts as the final stage of LIBOR-linked bond transition approaches.

The FCA and the PRA expect all legacy sterling LIBOR contracts, wherever possible, to have been amended by the end of Q3 2021 to include at least a contractually robust fall-back that takes effect on an appropriate event, or, preferably, an agreed conversion to a robust alternative reference rate. A large number of outstanding LIBOR-linked bonds have still not yet transitioned to a new rate, despite the deadline of 31 December 2021. The IA describes this as a matter of serious concern for the industry and for the buy-side in particular. The IA and its members believe broader market participants must therefore increase their efforts to ensure effective collaboration and successful transition. In particular, the document highlights the role of issuers, regulators, benchmark providers, third-party operational providers and banks and advisers in this regard.

Issuers and sell-side representatives consider it would be helpful to have a guide setting out the key features the buy-side expects a LIBOR transition consent solicitation to have. The aim is to ensure such proposals are acceptable to investment managers and to maximise the chance of them being successful. In particular, the IA encourages issuers and their sell-side advisers to incorporate certain common features. These are outlined on page 5 of the document in a LIBOR consent solicitation high-level framework for success. However, the IA notes that consent solicitations may not be suitable in all cases and other transition tools are available, including tender offers, bond repurchases or exchanges or the exercise of call options.

LIBOR transition: European Commission, EBA, ECB and ESMA on forthcoming cessation of all LIBOR settings

The European Commission has issued a joint statement with the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA) and the European Central Bank (ECB) in its banking supervisory capacity (together, the authorities), strongly encouraging all market participants to cease their use of all LIBOR settings.

In the statement, the authorities note that LIBOR will shortly cease to be published. To ensure a smooth transition away from LIBOR, market participants are encouraged to actively reduce their exposure to LIBOR and not wait for the exercise by the Commission of its new powers to designate a replacement for LIBOR under Article 23b of the Benchmarks Regulation. The authorities therefore strongly encourage market participants to use the time remaining until the cessation or loss of representativeness of USD LIBOR, GBP LIBOR, JPY LIBOR, CHF LIBOR and EUR LIBOR to substantially reduce their exposure to these interest rates by:

- stopping the use of the 35 LIBOR settings, including USD LIBOR, as a reference rate in new contracts as soon as practicable and in any event by 31 December 2021;
- limiting the use of any LIBOR setting published under a changed methodology (also known as synthetic LIBOR) only to contracts that are particularly difficult to amend before LIBOR's cessation (tough legacy contracts); and
- including robust fallback clauses nominating alternative rates in all contracts referencing LIBOR.

The authorities will continue to closely monitor the situation and LIBOR exposures.

Review of Distance Marketing of Consumer Financial Services Directive: European Commission consultation

The European Commission is consulting on a review of the Distance Marketing of Consumer Financial Services Directive (DMD). The Commission explains that, since the DMD came into force in 2002, the retail financial sector has gone increasingly digital, with new products and actors in the market and new sales channels being used. Also, many of the DMD's substantial elements have been taken over by sectoral legislation that has been adopted since 2002.

The Commission has launched the consultation to gather views on the DMD from all relevant stakeholders. It particularly wants to hear from consumers, retail financial services providers and authorities responsible for supervising and enforcing the DMD. The Commission advises that it wants to make the DMD future proof.

Comments can be made on the DMD, by submitting a completed questionnaire, until 28 September 2021. Following the consultation, the Commission intends to publish its proposals in the first quarter of 2022.

ESG: EBA report on management and supervision of ESG risks for credit institutions and investment firms

On 23 June 2021, the EBA published a report and factsheet on the management and supervision of ESG risks for credit institutions and investment firms. The report is mandated under Article 98(8) of the Capital Requirements Directive (CRD) and Article 35 of the Investment Firms Directive (IFD). It provides a comprehensive proposal on how ESG factors and ESG risks should be included in the regulatory and supervisory framework for credit institutions and investment firms. The report focuses on the resilience of institutions to the potential financial impact of ESG risks across different time horizons. The EBA states that this requires careful assessments by institutions and supervisors who should take a comprehensive and forward-looking view, as well as early, proactive actions.

The EBA has submitted the report to the EU Parliament, the Council of the EU and the European Commission, which are invited to take it into consideration in the context of the renewed sustainable finance strategy and the review of the CRD and the Capital Requirements Regulation. The EBA will use the report and recommendations to develop guidelines on the management of ESG risks by institutions and an update of the supervisory review and evaluation process (SREP) guidelines to include ESG risks in the supervision of credit institutions.

Banking and Finance

CRR: ECB extends leverage ratio relief for banks until March 2022 due to COVID-19

The European Central Bank (ECB) has adopted a Decision on the temporary exclusion of certain exposures to central banks from the leverage ratio total exposure measure (TEM) in view of the COVID-19 pandemic and repealing Decision (EU) 2020/1306.

Article 500b of the Capital Requirements Regulation (CRR), which was introduced by Regulation (EU) 2020/873 (COVID-19 CRR Amending Regulation), currently allows institutions to exclude exposures to their central bank from the TEM where the institution's competent authority has determined there are exceptional macro-economic circumstances. In September 2020, the ECB adopted Decision (EU) 2020/1306, which allows credit institutions to exclude certain central bank exposures from the leverage ratio, in the light of the COVID-19 pandemic.

Article 500b will cease to apply on 27 June 2021, with its provisions on the exclusion of central bank exposures replicated in new Article 429a, which was inserted by the CRR II Regulation and will apply from 29 June 2021.

The ECB has decided to extend the effect of the exclusion, as it considers that exceptional macro-economic circumstances continue to apply in respect of the eurozone. The Decision, which is made under Article 429a(5) of the CRR, will apply from 28 June 2021 in respect of any credit institution that is a significant supervised entity for the purposes of the ECB's banking supervision role under the Single Supervisory Mechanism (SSM). The Decision also repeals Decision (EU) 2020/1306 with effect from 28 June 2021.

The Decision will cease to apply on 31 March 2022. The ECB states that this date was chosen to facilitate the implementation of monetary policy measures linked to the situation resulting from the COVID-19 pandemic, including measures under the Pandemic Emergency Purchase Programme. The ECB warns that banks that make use of the exclusion should plan to maintain sufficient capital in preparation for the expiry of the exclusion in March 2022.

BRRD: SRB approach and expectations on notifications of impracticability of bail-in recognition clauses in contracts

The Single Resolution Board (SRB) has published a document setting out its approach and expectations on notifications of impracticability to include bail-in recognition clauses in contracts.

Under Article 55(2) of the Bank Recovery and Resolution Directive (BRRD), if a bank determines that it is impracticable to include a contractual recognition clause in a liability contract, it must make a notification to its resolution authority. The resolution authority then assesses the notification and may require the bank to include the clause. Article 55(7) requires resolution authorities to specify, if deemed necessary, categories of liabilities for which banks may reach the conclusion that it is impracticable to include the relevant bail-in recognition clauses.

In the document, the SRB sets out its expectations on these notifications, the conditions and categories for impracticability, as well as the process by which it may require banks to include such clauses following the receipt of the notification.

EU challenges of resolving mid-sized banks: SRB speech

The SRB has published a speech given by Pedro Machado, SRB Director of Resolution Planning and Decisions, on the challenges of resolving mid-sized banks.

EU banking union: Council of EU progress report

The Council of the EU has published a progress report on strengthening the EU banking union. In the report, the Council summarises work undertaken during the Portuguese Presidency of the EU relating to the Council's June 2016 conclusions on the roadmap to complete the banking union. The report focuses on technical discussions between member states on the design of the proposed European Deposit Insurance Scheme (EDIS), relating to issues including:

- the use of a hybrid model as a potential compromise model for launching EDIS and the key elements of such a model;
- the scope of EDIS and, in particular whether it should apply to certain entities outside the scope of the CRR, to institutional protection schemes and to third-country branches;
- the treatment of options and national discretions in the context of EDIS; and
- the design of the methodology for calculating risk-based contributions.

The report also summarises discussions on member states' views on the interaction between EDIS and the review of the Crisis Management and Deposit Insurance framework and, in particular, how closely connected the two initiatives should be.

CRR: Implementing Regulation amending ITS as regards disclosure of indicators of global systemic importance

Commission Implementing Regulation (EU) 2021/1018, which amends the implementing technical standards (ITS) laid down in Commission Implementing Regulation (EU) 2021/637 as regards the disclosure of indicators of global systemic importance and repeals Implementing Regulation (EU) 1030/2014, has been published in the Official Journal of the European Union.

Article 441 of the CRR, as amended by CRR II, requires global systemically important institutions (G-SIIs) to disclose, on an annual basis, the values of the indicators used for determining their score in accordance with the identification methodology referred to in Article 131 of the CRD (as amended by CRD V). The Implementing Regulation amends Commission Implementing Regulation (EU) 2021/637 by adding a new Article 6a, incorporating the Article 441 disclosure provisions into the ITS on institutions' public disclosures of the information referred to in Titles II and III of Part Eight of the CRR.

In addition, the Implementing Regulation repeals Commission Implementing Regulation (EU) 1030/2014. This is because Implementing Regulation (EU) 2021/637 was adopted on the basis of Article 434a of the CRR and lays down new disclosure requirements rather than those set out in Commission Implementing Regulation (EU) 1030/2014.

To ensure a seamless transfer from Commission Implementing Regulation (EU) 1030/2014, the date of application of the Implementing Regulation needs to be the same as the date of application of Commission Implementing Regulation (EU) 2021/637. Accordingly, the Implementing Regulation enters into force on 24 June 2021 and applies from 28 June 2021.

CRR: European Commission extends transition period for treatment of exposures to third-country CCPs

The European Commission has extended by one year the transitional period during which EU credit institutions can treat exposures to a third-country central counterparty (CCP) that has not been recognised in accordance with the European Market Infrastructure Regulation (EMIR) as if they were exposures to a recognised (or qualifying) CCP. This transitional regime will now continue to apply until 28 June 2022.

The Commission states that this is the final possible extension of this transitional period under the CRR. Exposures to those non-EU CCPs which will not be recognised by ESMA by 28 June 2022 will no longer be eligible for lower capital requirements after that date. The Commission emphasises that stakeholders should start preparing for this possibility. In the meantime, the Commission will continue its work on equivalence assessments (which are not guaranteed to be successful).

CRD: EBA report on treatment of incoming third-country branches

The European Banking Authority (EBA) has published a report on the treatment of incoming third-country branches (TCBs) under the national law of member states, in accordance with Article 21b(10) of the Capital Requirements Directive (CRD).

The EBA explains that recent structural changes have renewed the EU's interest in the regulation of TCBs. Cross-border regulatory reforms in the aftermath of the financial crisis, as well as the UK's withdrawal from the EU, have determined the reorganisation of the presence of third-country groups (TCGs) within the EU, including by way of TCBs. This has prompted calls for an assessment of the state of play and for further harmonisation of EU law.

In the report, which is addressed to the European Parliament, the Council of the EU and the European Commission, the EBA outlines the results of a stock-taking exercise conducted with competent authorities about their national laws and supervisory practices. The EBA has identified a variety of regulatory and supervisory approaches across the EU, and the consequent divergent treatment of TCBs in different member states.

The EBA states that, in light of the significant volume of activities carried out via TCBs, as evidenced by the amount of assets held by such entities in the EU, and of the current fragmented state of play, the related arbitrage opportunities and potential associated risks, the EBA is of the view that further harmonisation of the EU legal framework applicable to TCBs is needed. Accordingly, the EBA sets out 14 high-level policy recommendations for further harmonising EU law applicable to TCBs. It states that these need to be developed further based on a comprehensive impact assessment and offers the Commission its assistance for that purpose.

Under Article 21b(10), once the EBA has submitted its report, the Commission is to submit a legislative proposal to the Parliament and the Council, where appropriate, based on the EBA's recommendations. In the meantime, the EBA will continue to monitor the establishment of TCBs in the EU.

CRR: EBA draft RTS on calculation of specific credit risk adjustments

The EBA is consulting on amendments to the regulatory technical standards (RTS) on the calculation of specific and general credit risk adjustments under Article 110(4) of the CRR. The EBA's proposed revision reflects the European Commission's action plan to tackle non-performing loans (NPL) in the aftermath of the COVID-19 pandemic, which indicated that the treatment of defaulted exposures under the standardised approach needed to be revised. The action plan asked the EBA to consider the appropriate regulatory treatment of defaulted assets, as laid out in the CRR, which have been sold at a discount.

The proposed amendment to the existing RTS on credit risk adjustments ensures that the prudential framework does not create disincentives to the sale of NPL assets. It introduces a change to the recognition of total credit risk adjustments. This ensures that the risk weight can remain the same in the balance sheets of both the seller and the credit institution buying the assets. In particular, the price discount stemming from the sale will be recognised as a credit risk adjustment for the purposes of determining the risk weight.

The deadline for comments on the proposed revision to the RTS is 24 September 2021. The EBA will hold a public hearing on the proposals on 13 July 2021.

While this amendment is intended to clarify the regulatory treatment of sold NPL assets, the EBA also recommends that the treatment set out in this RTS be included in the Commission's considerations as part of the future revised CRR (CRR III) proposal.

CRR: EBA report on monitoring of Additional Tier 1 capital instruments

The EBA has published an updated report on the monitoring of Additional Tier 1 (AT1) capital instruments of EU institutions. The purpose of the report is to inform external stakeholders about the EBA's continuing work in monitoring issuances ATI capital instruments and to present the results of this monitoring, in line with Article 80 of the CRR. This report constitutes the EBA's fourth update.

The EBA notes that, while the initial focus of this report is on AT1 instruments, several findings are relevant for other types of own funds instruments, in particular Tier 2 ones. Among other things, the EBA also flags that this report integrates a dedicated part on environmental, social and governance (ESG) capital bonds, as a follow-up of the preliminary observations published in the TLAC/MREL monitoring report. This guidance is valid with no distinction between any type of loss-absorbing regulatory instruments, although it targets more prominently Tier 2 and eligible liabilities instruments which fall more naturally in the ESG sphere.

CRR: EBA consults on amendments to reporting on securitisation, asset encumbrance and G-SIIs

The EBA has published a consultation paper on draft ITS amending Commission Implementing Regulation (EU) 2021/1451 with regards to COREP (common reporting), asset encumbrance and global systemically important institution (G-SII) supervisory reporting. A related press release links to the four annexes to the consultation paper. Among others things, this consultation aims to enhance proportionality in the area of asset encumbrance reporting, as recommended by the EBA's Report on the Study on the Cost of compliance with supervisory reporting requirements. The consultation runs until 23 September 2021.

The EBA expects to submit the finalised draft ITS to the European Commission in Q4 2021 or Q1 2022, with the revised requirements expected to apply from the reference date of 31 December 2022.

Consumer Finance

Recurring subscription payments: European Commission writes to major credit card companies

The European Commission has updated its webpage on coordinated actions relating to consumer rights to announce that, together with the EU and EEA national consumer enforcement authorities, the Commission has written to three major credit card companies about issues with recurring subscription payments.

The Commission notes that recent research shows that as many as one in 12 EU and UK consumers has ordered a cheap product or service online, only to find out later there is a costly monthly subscription. Common cases involve mobile phones and beauty products sold online. Some of the main causes of this is hidden or small print about recurring payments and only information about a one-off payment amount, not the recurring subscription amount, in the payment window where the consumer enters their credit card information.

While credit card companies are not the ones running these schemes, the Commission reminds the credit card companies that they have a duty to properly inform their customers. Under the Payment Services Directive and the Unfair Commercial Practices Directive, consumers must be made aware of the specific amount for payment transactions and they must not be misled. The Commission therefore has asked the credit card companies to present all necessary information in the payment window for the consumer when they make a payment involving recurring subscription fees.

In a related press release, the Commission states that the three credit card companies now have two months to inform it and the network of national consumer authorities about the positive changes they intend to make to their existing payment processes.

Payments

Payment and Electronic Money Institution Insolvency Regulations 2021 (SI 2021/716)

The Payment and Electronic Money Institution Insolvency Regulations 2021 (SI 2021/716) have been published, together with an explanatory memorandum. They come into force on 8 July 2021. No changes have been made to the Regulations from the previous draft version.

The Regulations create a new special administration regime for payment and electronic money institutions. It applies with modifications Part 24 of the Financial Services and Markets Act 2000 (which makes provision for insolvency) to those institutions except in respect of special administration. It also makes an amendment to the Bank Recovery and Resolution and Miscellaneous Provisions (Amendment) (EU Exit) Regulations 2018 and to the Bank Recovery and Resolution (Amendment) (EU Exit) Regulations 2020.

UK real time gross settlement system: BoE speech

The Bank of England (BoE) has published a speech given by Victoria Cleland, Executive Director for Banking, Payments and Innovation, on "A new dawn for payments". In her speech, Ms Cleland talks about the evolution of payments systems in the UK, sets out the role of BoE's Real Time Gross Settlement (RTGS) system and its vision for the future.

Proposed codified Regulation on cross-border payments: Addendum to JURI report

The European Parliament's Legal Affairs Committee (JURI) has published an Addendum to its report on the European Commission's legislative proposal for a Regulation on cross-border payments in the EU.

PSD2: European Commission adopts draft Delegated Regulation with RTS on framework for home-host cooperation and information exchange

The European Commission has adopted a draft Delegated Regulation supplementing the revised Payment Services Directive (PSD) with regard to regulatory technical standards (RTS) specifying the framework for cooperation and the exchange of information between competent authorities of the home and the host member states in the context of supervision of payment institutions and electronic money institutions exercising cross-border provision of payment services. The RTS specify:

- the framework for cooperation and for exchanging information between the competent authorities of the home member state and the host member state under Title II of the PSD; and
- how to monitor compliance with national law transposing Titles III and IV of the PSD.

The Council of the EU and the European Parliament will now scrutinise the draft Delegated Regulation. The draft Delegated Regulation will enter into force, and apply, 20 days after its publication in the Official Journal of the European Union and apply from 1 January 2021.

Securities and Markets

UK CCPs: BoE discussion paper on supervisory stress test framework

The Bank of England (BoE) has published a discussion paper on supervisory stress testing of UK central counterparties (CCPs) and announced its first public CCP stress test, which will run over a nine-month period in 2021-22, beginning around the start of the fourth quarter of 2021. The three recognised UK CCPs (ICE Clear Europe Ltd (ICEU), LCH Ltd (LCH) and LME Clear Ltd (LMEC)) will participate. All of their clearing services will be in scope. This stress test will be exploratory in nature. The CCPs will not be tested against regulatory requirements and there will be no pass-fail thresholds. However, if deficiencies are identified, the BoE will take remedial action. The outcomes from the exercise will be published around the end of the second quarter of 2022.

The BoE intends to use CCP supervisory stress testing as a key mechanism through which to undertake assessments of the resilience of individual CCPs, as well as assessments of the broader resilience of the clearing network and its interactions with the rest of the financial system. CCP supervisory stress tests will also be used to promote transparency and help establish public confidence in the UK CCP system.

In the discussion paper, the BoE sets out a range of proposals and options for the design of the CCP supervisory stress-testing framework. Comments can be made on the discussion paper until 17 December 2021. The BoE will use responses received, in conjunction with the findings from the 2021-22 stress test, to inform further development of the CCP supervisory stress-testing framework.

Proposed Regulation on pilot regime for market infrastructures based on DLT: ECB opinion

An opinion of the European Central Bank (ECB) on a proposed Regulation on a pilot regime for market infrastructures based on distributed ledger technology (DLT) has been published in the Official Journal of the European Union. The Commission adopted the proposed Regulation in September 2021 as part of its Digital Finance Strategy.

The European Parliament and the Council of the EU wrote to the ECB asking it to produce the opinion in November 2020. The aim of the proposed Regulation is to enable investment firms, market operators and central securities depositories (CSDs) to operate market infrastructures based on DLT, either as a DLT multilateral trading facility (DLT MTF) or a DLT securities settlement system (DLT SSS).

The ECB generally welcomes the proposed Regulation. However, it raises a number of general concerns, as well as concerns relating to monetary policy, oversight and systemic issues, financial stability aspects, and prudential supervision. Where the ECB recommends that the proposed Regulation is amended, specific drafting proposals are set out in a separate technical working document, which can be found attached to the original version of the opinion.

CRAs: ESMA technical advice on supervisory fees

Following its January 2021 consultation, the European Securities and Markets Authority (ESMA) has published a final report setting out its technical advice to the European Commission on supervisory fees charged to credit rating agencies (CRAs). The technical advice has been sent to the European Commission and will feed into the upcoming review of the Fees Regulation.

Insurance

Resolution powers and planning: IAIS application paper

The International Association of Insurance Supervisors (IAIS) has published an application paper on resolution powers and planning. In this paper, the IAIS provides supporting materials for supervisors and resolution authorities on the practical application of resolution powers, as well as on cooperation and coordination between authorities when planning for, and exercising, these powers. It also provides support on resolution planning, which may be beneficial to both authorities and insurers. In particular, the paper provides background for the application of insurance core principle (ICP) 12 (Exit from the Market and Resolution), including the Common Framework for the Supervision of Internationally Active Insurance Groups (ComFrame) standards and guidance. It is also relevant to ICP 25 (Supervisory Cooperation and Coordination), including the ComFrame standards and guidance related to crisis management planning. In addition, the paper aims to address issues that were identified during the development of supervisory material in ICP 12 and ComFrame.

Supervising control functions: IAIS application paper

The IAIS has published an application paper on supervision of control functions. In this paper, the IAIS describes practices aimed at helping supervisors address issues relating to supervising control functions, as described in the ICPs and ComFrame. In particular, it supports the observance of ICP 8 (Risk Management and Control Functions), and is also relevant to ICP 5 (Suitability of Persons) and ICP 7 (Corporate Governance). This paper is largely based on the results of a survey of the experiences and supervisory practices of IAIS members. This survey identified challenges in supervising control functions and effective supervisory practices for addressing these challenges.

Supervisory colleges: IAIS consults on draft application paper

The IAIS has launched a consultation on a draft revised application paper on supervisory colleges. The application paper on supervisory colleges, first published in October 2014, provides guidance on best practices, together with examples, throughout all phases of the supervisory college process, explaining the work of supervisory colleges and the role and involvement insurers may have in them. It has been updated to reflect subsequent developments of IAIS supervisory material, including revisions to insurance core principle (ICP) 3 (Information Sharing and Confidentiality Requirements) and ICP 25 (Supervisory Cooperation and Coordination) and the adoption of ComFrame, which took place in November 2019. Further amendments refocus the content on those aspects of supervisory college operations that are most relevant for the insurance industry.

The deadline for comments on the proposed revisions is 24 August 2021.

The IAIS will hold a public background session on the two papers via *webinar* on 30 June 2021.

Culture: IAIS consults on draft issues paper

The IAIS has launched a consultation on a draft issues paper on insurer culture. The draft issues paper explores the concept of insurer culture as a point of intersection for prudential and conduct risks and includes selected examples to illustrate the broader role of culture in this regard. As well as exploratory observations on the importance of insurer culture, it identifies the various ICPs that explicitly refer to supervisory expectations regarding insurer culture. The aim of the paper is to help supervisors identify and address prudential and conduct issues in a more timely and effective manner, with a view to potentially reducing the occurrence of widespread misconduct and possible financial and consumer harm. Given the complexity of culture as a concept and the multidimensional elements that influence the cultural make-up of individual insurance businesses, the paper is not intended as an exhaustive analysis of the issues nor does it develop detailed supervisory guidance.

The deadline for comments on the draft paper is 23 August 2021.

Funds and Asset Management

AIFMD: ESMA guidelines addressing leverage risks

The European Securities and Markets Authority (ESMA) has published a webpage with the official translations, including the English language version, of its guidelines to address leverage risks under Article 25 of the Alternative Investment Fund Managers Directive (AIFMD). The publication of the official translations triggers a "comply or explain" date for national competent authorities to incorporate the guidelines into their national frameworks by 23 August 2021.

The guidelines provide national competent authorities with a set of indicators to consider when performing their risk assessment and a set of principles to take into account when calibrating and imposing leverage limits. They follow the two-step approach introduced by the International Organization of Securities Commissions, and translate this approach into the EU framework.

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