FIG Bulletin

Recent developments

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General

CMA 2021/22 annual plan

The Competition and Markets Authority (CMA) has published its annual plan for 2021/22. In 2021/22, the CMA will focus on the following themes:

- protecting consumers and driving recovery during and after the coronavirus pandemic, focusing on protecting the vulnerable from breaches of competition and consumer protection laws and poorly functioning markets, as well as supporting the UK economy by fostering competition to promote innovation, productivity and growth;
- taking its place as a global competition and consumer protection authority as it assumes new responsibilities after the Brexit transition period;
- fostering effective competition in digital markets; and
- supporting the transition to a low carbon economy.

UK-EU trade and cooperation agreement: House of Lords EU Committee report on trade in services

The House of Lords EU Services Sub-committee has published a report, "Beyond Brexit: trade in services". The report examines the future UK-EU relationship on trade in services, including financial services, professional and business services, data and digital trade, the creative industries, and research and education. The Committee summarises its findings and conclusion on financial services as follows:

> *"The UK-EU Trade and Cooperation Agreement (TCA) does not include substantive provisions on financial services, and delays to key decisions about the future relationship, particularly on equivalence, mean that the sector is still in a period of uncertainty. The UK's exit from the passporting regime has led to the movement of some activity to the EU and firms facing the challenges involved in navigating different market access requirements in each Member State. The Committee is concerned that over time this may lead to a big shift of people and assets out of the UK. The Committee recognises that the UK and the EU will seek to change their regulatory regimes where it is in either party's interests, but calls on the Government not to disregard the value of a close UK-EU relationship in financial services."*

Future of UK financial services post-Brexit: BoE response to Treasury Committee inquiry

The House of Commons Treasury Committee has published the Bank of England's (BoE) written response to the committee's inquiry into the future of financial services in the UK after Brexit. The response considers the BoE's financial stability objective and the PRA's primary objectives of safety and soundness and insurance policyholder protection. Strong standards are therefore at the centre of the response. Points of interest include the following:

- leaving the EU gives the UK an opportunity to tailor its approach to financial services policy and regulation. The policy should consider how regulation can facilitate innovation, so that the UK can seize opportunities from new areas of growth and productive investment in financial services as they emerge, especially as such features are also supportive of long-term resilience. This could include digitisation of the economy and FinTech;

- regulation should promote competition (for example, by ensuring that standards are proportionate to firms' business models);
- "safe openness" to firms from other jurisdictions who are seeking to access the UK market, based on international collaboration and standards, will be a key element in the UK's future success. This approach ensures that the BoE can support openness, while mitigating the risks through regulatory assessments of deference, regulatory and supervisory cooperation, and a commitment to common international standards; and
- the BoE agrees with the government that there are significant benefits from a model where the technical details of regulatory standards are set by expert, independent regulators. Such a model puts weight on the regulators acting in a transparent and accountable way. Parliament will have a vital ongoing role in any future framework as it is the body that holds the regulators to account for achieving their objectives. The BoE is committed to helping Parliament fulfil this role.

FCA whistleblowing campaign

The Financial Conduct Authority (FCA) has launched a campaign to encourage individuals working in financial services to report wrongdoing. The campaign, which the FCA refers to as "In confidence, with confidence", encourages individuals working in financial services to report potential wrongdoing to the FCA, and reminds them of the confidentiality processes in place. It has also published a new whistleblowing webpage.

The FCA also reminds firms that its whistleblowing rules require firms to have effective arrangements in place for employees to raise concerns, and to guarantee these concerns are handled appropriately and confidentially. In particular, there is a requirement for firms to appoint a whistleblowers' champion to ensure there is senior management oversight over the integrity, independence and effectiveness of the firm's arrangements.

Diversity and inclusion: FCA speech

On 18 March 2021, the FCA published a speech by Georgina Philippou, Senior Adviser to the FCA on the Public Sector Equality Duty (PSED), entitled "From regulator to firm to consumer: a virtuous chain of events". Points of interest in the speech include:

- sharing best practice and exchanging ideas and experience is a crucial part of progressing diversity and inclusion (D&I) at an individual firm level and a collective sector level. However, collective does not mean uniform. It is important to recognise the range of firms across and within sectors;
- there is no "one size fits all" approach to culture and D&I, and it would be inappropriate for the FCA to mandate particular cultures. However, it expects firms to be able to articulate their purpose, explain how their governance structures bring about good decision making, set an appropriate tone from the top, and show that their people policies are effective in driving D&I;
- there is no rule in the FCA Handbook requiring firms to be diverse or even have an internal or external diversity policy, but this does not mean the FCA is silent or powerless. D&I is relevant not only to culture, people and leadership, but also to integrity, treating customers fairly, pricing structures, marketing and advertising, and environmental, social and governance (ESG) strategies, among other things. The FCA has a range of tools to use, including a unique power to influence and convene; and
- as a public body delivering public value, the FCA is subject to the PSED and must encourage D&I in carrying out its functions. In practice, this means the FCA has opportunities to consider the PSED in all its interactions with firms. Examples include

breaking down diversity barriers to entry into the industry, assessing the composition of boards and executives (including in senior managers regime interviews), considering the impact of its policy and competition work on different consumer groups, and engaging with firms through the supervisory and enforcement process.

MaPS to launch single consumer offering under holistic new MoneyHelper brand

The Money and Pensions Service (MaPS) has announced plans to launch a single consumer destination for financial wellbeing under a new MoneyHelper brand. This new brand will replace the legacy brands: Money Advice Service, the Pensions Advisory Service and Pension Wise. FAQs on the plans are available on the MaPS MoneyHelper webpage.

UK regulatory approach to cryptossets and stablecoins: FMLC response to HM Treasury consultation

The Financial Markets Law Committee (FMLC) has published its response to HM Treasury's consultation paper on the UK regulatory approach to stablecoins and a call for evidence on cryptoassets used for investment and the broader use of distributed ledger technology (DLT) in financial markets. In response, the FMLC draws attention to a number of legal uncertainties, including:

- definitional questions, such as identifying what a "token" is, as well as the difficulties arising from interpreting definitions under existing financial regulation in the context of token arrangements;
- the possible overlap of the new regime for stablecoins with the existing regime under the E-Money Regulations; and
- the difficulties arising from the application of concepts present in financial services regulation which reflect the traditional market infrastructure of intermediated securities, most, if not all, of which cannot readily be applied to a DLT context.

LIBOR transition: FMLC and EFMLG letter

The FMLC and the European Financial Markets Lawyers Group (EFMLG) have published a joint letter to HM Treasury on LIBOR transition. Given the problems of divergence and overlap that arise from the legislative approaches adopted by authorities in the UK, EU and US, the letter observes that market transactions could become subject to conflicting legal or regulatory requirements. The letter also stresses that international coordination around the exercise of any powers to adapt benchmark methodology or the terms of financial transactions is essential to avoid significant market confusion. The letter sets out areas of potential conflict and overlap that may arise owing to the differences in the legislative approaches.

In addition, the letter refers to a letter sent by the Global Financial Markets Association recommending the establishment of a "tough legacy" cross-border collaboration working group to help facilitate policy alignment wherever possible of regulatory and legislative solutions. Members of both the FMLC and the EFMLG express their support for the establishment of such an international initiative.

Promoting regulatory coherence in financial services: IRSG report

The International Regulatory Strategy Group (IRSG) has published a report on promoting regulatory coherence in financial services for pandemic recovery. On launching the report, the IRSG states: "A decade on from the last financial crisis and as COVID recovery efforts take centre

stage, the IRSG calls for renewed commitment to global regulatory coherence, together with an enhanced commitment to solving issues with international co-operation".

The report argues the case for a renewed commitment to "global solutions to global problems", with practical examples on where market fragmentation may give rise to financial instability and other risks. It also makes recommendations as to how local and international bodies can ensure this principle remains central to their work in the coming months and years. It makes recommendations in three specific areas: to foster operational resilience; to encourage innovation in digital governance; and to incentivise sustainable finance.

Delegated Regulation on framework for design and delivery of PEPP

Commission Delegated Regulation 2021/473 supplementing the Pan-European Personal Pension Product (PEPP) Regulation (*(EU) 2019/1238*) with regard to regulatory technical standards (RTS) specifying the requirements on information documents, on the costs and fees included in the cost cap, and on risk mitigation techniques for the PEPP, has been published in the Official Journal of the European Union (OJ). The Delegated Regulation will enter into force on 11 April 2021.

FMI business continuity plans: ECB advises on pandemic planning best practices

The European Central Bank (ECB) has published a paper on best practices applied by financial market infrastructures (FMIs) in their business continuity plans during the COVID-19 pandemic.

The ECB explains that since its outbreak, the Eurosystem has been collecting information on the preparedness of payment systems, payment schemes and their critical service providers for dealing with the pandemic. It has also been monitoring FMIs' responses and resilience in terms of withstanding this shock. Based on its observations, the Eurosystem has compiled a set of key market practices for pandemic crisis planning.

The ECB explains that the collection of actions in this document aims to:

- provide support for the overseers in monitoring overseen entities, thus ensuring that the respective system operators are managing the crisis effectively; and
- identify what market practices related to pandemic crisis planning are or could be applied by payment systems/schemes in their business continuity plans in a flexible way, considering the specificities of each entity. The ECB notes that these market practices may also be valid for other FMIs, therefore, the document refers to FMIs generically.

EU platform on sustainable finance issues transition finance report

On 19 March 2021, the European Commission published the EU platform on sustainable finance's report on transition finance. The report follows a request for advice by the Commission in January 2021.

The platform explains that the concept of transition is relevant to all the environmental objectives in the taxonomy for sustainable economic activities. However, the immediate priority is the finalisation of the first Delegated Regulation on climate change mitigation and adaptation under the Taxonomy Regulation. For this reason, its report focuses on transition in the context of climate change. It sets out the platform's key findings and recommendations in response to the six questions posed by the Commission.

The Commission has welcomed the platform's report and confirming that it will consider its advice when finalising sustainable finance related issues, such as the draft Delegated Regulation on climate mitigation and in preparing its renewed sustainable finance strategy.

FATF AML and CTF standards: unintended consequences of incorrect implementation

The Financial Action Task Force (FATF) has announced the launch of a project to study and mitigate the unintended consequences of the incorrect implementation of its anti-money laundering (AML) and counter-terrorist financing (CTF) standards.

The project focuses on four main areas:

- de-risking or the loss or limitation of access to financial services;
- financial exclusion;
- suppression of non-profit organisations (NPO) or the NPO sector as a whole; and
- threats to fundamental human rights.

The FATF will conduct the project in two phases. Phase one will involve research and engagement and phase two will focus on solutions. Input to inform the project is welcomed and, for phase one of the project, before 20 April 2021.

Virtual assets and virtual asset service providers: FATF consults on updating guidance

The FATF is consulting on draft updated guidance for a risk-based approach to virtual assets (VAs) (also known as cryptoassets) and virtual asset service providers (VASPs). The revised document provides updated guidance in six main areas. It clarifies the definitions of VAs and VASPs to make clear that these definitions are expansive and there should not be a case where a relevant financial asset is not covered by the FATF AML and CTF standards (either as a VA or as a traditional financial asset). It also updates the guidance to reflect the passage of time and the publication of other relevant FATF reports, as well as providing:

- guidance on how the FATF standards apply to stablecoins;
- additional guidance on the risks and potential risk mitigants for peer-to-peer transactions;
- updated guidance on the licensing and registration of VASPs; and
- additional guidance for the public and private sectors on the implementation of the "travel rule".

The revised guidance also includes principles of information-sharing and cooperation among VASP supervisors.

The FATF is asking for feedback on the areas of focus set out on an accompanying webpage, in addition to specific proposals on the proposed revisions to the text of the guidance. Comments can be made until 20 April 2021. The FATF will make any further amendments at its June 2021 meetings.

In addition to revising the guidance, the FATF is also considering the implementation of the revised FATF standards on VAs and VASPs, and whether further updates are necessary, through a second 12-month review. Relevant issues identified in the consultation, which are outside the scope of this review, may be considered in that review.

Banking and Finance

Depositor protection identity verification: PRA PS4/21

Following its consultation in CP3/21, the UK Prudential Regulation Authority (PRA) has published a policy statement, PS4/21, on depositor protection identity verification. The changes relate to the timing of identity verification required for eligibility of depositor protection under the Financial Services Compensation Scheme (FSCS) and amendments to the PRA's expectations set out in its supervisory statement, SS18/15, on depositor and dormant account protection.

The changes come into force on 29 March 2021.

ECB's economy-wide climate stress test: preliminary results

The European Central Bank (ECB) has published a blog post by Luis de Guindos, ECB Vice-President, summarising the preliminary results of the ECB's first economy-wide climate stress test.

MREL: SRB approach to eligibility of UK law instruments without bail-in clauses after Brexit

The Single Resolution Board (SRB) has published a communication stating that it will consider liabilities governed by UK law without a contractual bail-in recognition clause as eligible for minimum requirement for own funds and liabilities (MREL), if they satisfy MREL criteria and were issued on or before 15 November 2018. This exemption applies until 28 June 2025. Further details are in the communication.

SSM total supervisory fees for 2020: ECB decision

Decision (EU) 2021/490 of the ECB on the total amount of annual supervisory fees under the single supervisory mechanism (SSM) for 2019 has been published in the Official Journal of the European Union. The Annex to the decision sets out the calculation of the total amount of annual supervisory fees for 2020. The decision will enter into force on 28 March 2021.

EU CRR: European Commission adopts Implementing Regulation on ITS on public disclosures

The European Commission has published the text of an Implementing Regulation that it has adopted containing implementing technical standards (ITS) on public disclosure requirements for institutions under the Capital Requirements Regulation (CRR). The Annexes are published separately. The ITS will apply from 30 June 2021.

The European Banking Authority) (EBA) states that the ITS provide a comprehensive Pillar 3 disclosure framework that seeks to facilitate its implementation by institutions and to improve clarity for users of this information. They also implement regulatory changes introduced by the updated Capital Requirements Regulation (CRR II) and align the disclosure framework with international standards.

CHF LIBOR: European Commission consults on designating replacement rate

The European Commission has published a consultation paper to assess the suitability of designating a statutory replacement rate for certain settings of Swiss Franc (CHF) LIBOR. It is relevant to products including such as savings accounts, mortgages and loans, including

consumer credit agreements and small business loans, that were concluded before the EU Benchmarks Regulation (EU BMR) applied (that is, 1 January 2018), and are governed by the laws of one of the EU member states.

The FCA announced, on 5 March 2021, the cessation of CHF, GBP, JPY and EUR LIBOR rates at the end of 2021. It has no plans to require the administrator of LIBOR to continue publishing any of the CHF LIBOR settings on a non-representative, synthetic basis for a further period after this date.

The Commission has received submissions from market participants active in the banking sector in several member states, including Poland and Austria, according to which CHF LIBOR plays an important role in their financial markets. Among other things, stakeholders propose that the Commission statutory designation follows the recommendation of the Swiss National Working Group on Swiss Franc Reference Rates for replacing CHF LIBOR in mortgages.

Comments can be made on the consultation until 18 May 2021.

BRRD: EBA consults on draft revised guidelines on recovery plan indicators

The EBA has published a consultation paper on draft revised guidelines on recovery plan indicators under Article 9 of the Bank Recovery and Resolution Directive (BRRD). The EBA published the original guidelines in May 2015 and they entered into force in July 2015. It has decided to amend them to take into account relevant policy developments and practical supervisory experience acquired in recovery planning.

The consultation closes to responses on 18 June 2021. The EBA will finalise the revised guidelines having considered the consultation responses received. When the final version is published, the original guidelines will be repealed.

BRRD: EBA consults on draft guidelines for institutions and resolution authorities on improving resolvability

The EBA has published a consultation paper on draft guidelines for institutions and resolution authorities on improving resolvability, together with a separate Annex 2 containing a resolvability assessment template. The guidelines seek to implement existing international standards on resolvability and take stock of the best practices so far developed by EU resolution authorities on resolvability topics. However, the guidelines do not cover all topics relevant to resolvability, either because they are covered elsewhere or will be further specified in future EBA regulatory products.

The EBA's aim is for the guidelines to be the policy point of reference for both authorities and institutions on resolvability-related topics in the EU, as well as ensuring consistent progress on resolvability for all institutions and facilitating resolvability work for cross-border groups and monitoring in resolution colleges.

The consultation closes to responses on 17 June 2021. Following the consultation, the EBA intends to publish the final guidelines by the first half of 2021. Institutions and authorities within the scope of these guidelines must comply in full by 1 January 2024.

IBOR transition: IIFM white paper

The International Islamic Financial Market (IIFM) has published a white paper on "Global Benchmark Rate Reforms and Implications of IBOR Transition for Islamic Finance". The paper aims to highlight the challenges posed to Islamic financial product structures, transactions,

documentation, accounting, credit and legal related matters. It also contains recommendations on developing workable and unified solutions to overcome these challenges.

Payments

PSR annual plan and budget for 2021/22

The Payment Systems Regulator (PSR) has published its annual plan and budget for 2020/21, together with an accompanying factsheet. The plan sets out a summary of the PSR's key aims and activities for 2021/22 and its expected operating costs.

Instant payments: European Commission consultation

The European Commission has published a consultation paper on instant payments, together with its strategy for the initiative on instant payments in the EU. The consultation aims to inform the Commission on remaining obstacles, as well as possible enabling actions that it could take, to ensure a wide availability and use of instant payments in the EU. Comments can be made on the consultation until 2 June 2021.

The findings from the consultation will be used to promote, as part of the Commission's vision for the EU's retail payments market, the availability of competitive home-grown and pan–European payment solutions.

EU Retail Payments Strategy: Council of EU adopts conclusions

The Council of the EU has adopted conclusions relating to the European Commission's Retail Payments Strategy. The Council has also published the outcome of proceedings, which set out its conclusions on the Commission's communication for the further development of the retail payments market in the EU, which was published in September 2020.

The Council gives the Commission a strong political mandate for pushing forward its retail payments initiatives and for presenting legislative proposals, where appropriate, after an impact assessment. This includes a comprehensive review of the Payments Services Directive to take account of developments in the market and the challenges encountered in its implementation.

Securities and Markets

UK MiFIR: FCA update on use of TTP to modify DTO

The Financial Conduct Authority (FCA) has published an update on the use of its temporary transitional power (TTP) to modify the UK's derivatives trading obligation (DTO). The FCA previously published a December 2020 statement in which it said that it would keep its use of the TTP under review and consider, by 31 March 2021, whether market or regulatory developments warrant a review of its approach. The FCA has not observed market or regulatory developments in Q1 2021 that justify a change in its approach. Therefore, it will continue to use the TTP to modify the application of the DTO as previously set out.

The FCA will continue to monitor market and regulatory developments, and will review its approach if necessary. If it does see a case for a change, it will provide enough notice to market participants so that any changes can be implemented smoothly.

As specified in the December statement, the FCA expects firms and other regulated persons to be able to demonstrate compliance with the UK DTO.

RTS 27 reports and 10% depreciation notifications: FCA supervisory flexibility

The FCA has published a statement announcing a further extension to a temporary COVID-19 measure applying supervisory flexibility over 10% depreciation notifications. The temporary measure will be extended until the end of 2021 while the FCA consults on changes to the notification requirement. It intends to consult on the changes in spring 2021. The requirements apply to firms that provide portfolio management services or hold retail client accounts that include positions in leveraged financial instruments or contingent liability transactions.

The FCA also announces that it is establishing temporary measures relating to RTS 27 (Delegated Regulation (EU) 2017/575) reports on execution quality. It explains that since the next set of RTS 27 reports will be based on pre-Brexit data, the information they contain is likely to be of limited use for market participants and may even be misleading. In addition, it is currently preparing a consultation on the RTS 27 reporting obligation, with a view to abolishing it, due to doubts about the value of these reports compared with the burden of producing them. On this basis, the FCA states that it will not take action against firms who do not produce RTS 27 reports for the rest of 2021. It expects to have finalised its policy consideration of the future of these reports by the end of 2021.

EU EMIR and SFTR: European Commission adopts Delegated Regulation on fees charged to TRs for 2021

The European Commission has adopted a Delegated Regulation amending Delegated Regulations (EU) 1003/2013 and (EU) 2019/360 as regards the annual supervisory fees charged by the European Securities and Markets Authority (ESMA) to trade repositories (TRs) for 2021. Delegated Regulations (EU) 1003/2013 and (EU) 2019/360 set out the methodology for the fees paid to ESMA by TRs for the purposes of Article 72(3) of the European Market Infrastructure Regulation (EMIR) and Article 11(2) of the Regulation on reporting and transparency of securities financing transactions (SFTR) respectively.

The amendments to these Regulations reflect the effect of two UK TRs transferring part of their services and activities to the EU to be able to continue providing services and activities to counterparties established in the EU. As the new EU TRs effectively started their activity in the EU in January 2021, their level of activity in 2020 was almost non-existent and consequently

their annual supervisory fee for 2021 would be negligible, although their activities are likely to be significant.

The Delegated Regulation changes the reference period for the calculation of the applicable turnover of TRs from 2020 to January to June 2021. This will have the effect of ensuring that the annual supervisory fees for 2021 for these TRs will be calculated based on their applicable turnover during the first half of 2021.

The next step is for the Council of the EU and the European Parliament to consider the draft Delegated Regulation. If neither the Council nor the Parliament object, it will be published in the Official Journal of the European Union and will enter into force the day after its publication.

EU EMIR and SFTR: ESMA consults on simplification and harmonisation of TR fees

ESMA has published a consultation paper on technical advice to the European Commission on the simplification and harmonisation of fees to TRs under EMIR and the SFTR. It follows a formal request from the Commission in July 2020 to provide technical advice to review the following Commission Delegated Regulations:

- Commission Delegated Regulation (EU) 272/2012 (relating to credit rating agencies (CRAs));
- Commission Delegated Regulation (EU) 1003/2013 (relating to trade repositories under EMIR); and
- Commission Delegated Regulation (EU) 2019/360 (relating to trade repositories under the SFTR).

ESMA proposes to align the structure for the fees for registration and extension of registration under EMIR with the structure under the SFTR. It considers two approaches, one keeps two layers of TRs, simplifying the categories into lower and higher expected turnover TRs. The alternative approach would impose a single fixed fee.

ESMA also proposes to simplify method of determining the turnover of TRs for the purposes of calculation of the annual supervisory fees by including only revenues and excluding activity figures. In addition, it has specifically defined the calculation of lower fees in the case of extension of registration under SFTR, or where there is a concurrent application under both regimes. Finally, ESMA proposes a simplification of the calculation of fees for recognition of third-country TRs and the different payment conditions, by setting a single deadline for payment of 31 March.

The consultation closes on 24 April 2021. ESMA will submit this final report to the Commission by the end of Q2 or beginning of Q3 of 2021.

EU EMIR: Joint ESA Q&As on exchange of collateral

The European Supervisory Authorities (ESAs) have published joint Q&As on bilateral margin requirements under EMIR. They have been developed under the ESA's joint mandate under Article 11(15) of EMIR to define bilateral margin requirements.

Risks associated with CCPs: ESMA speech

ESMA has published a speech by Klaus Löber, chair of ESMA's CCP Supervisory Committee, which includes a discussion of evolving risks in the context of central clearing. Mr Löber

highlights a number of key risks relating to central counterparties (CCPs), including the following:

- the temporary recognition of the UK CCPs as third-country CCPs has resulted in two systemically important CCPs operating from outside the EU's jurisdiction. ESMA's CCP Supervisory Committee is tasked with (among other things) analysing potential risks, dependencies and stability implications that result from this situation. By mid-2022, the committee will assess whether the services provided by the two CCPs designated as tier 2 CCPs, or some of them, are of a systemic nature that is too substantial to be safely provided from abroad;
- during the COVID-19 pandemic, CCPs have adapted to new working conditions and adjusted their business continuity procedures, which operational resilience of information and communication technology (ICT) systems have been key in supporting. The CCP Supervisory Committee is going to review supervisory activities in respect of CCPs' operational and cyber resilience from a supervisory convergence perspective, with a view to identifying and promoting best practices in this field; and
- Mr Löber believes that environmental risks are becoming an increasingly pressing concern. Environment-driven disruptions can affect a CCP in a number of ways. For example, they can directly impact market prices of assets it clears, in particular commodity prices, or they could directly or indirectly impact on a CCP's business continuity following operational disruptions. There is also transition risk, consisting of the risk of a sharp change in asset prices following a technological or regulatory change. Business risk and legal risk are also relevant in this context. Mr Löber notes that the recent review of the ESMA Regulation, combined with EMIR 2.2, have mandated ESMA to include scenarios reflecting the risks stemming from adverse environmental developments in its CCP stress tests. As a first step, the CCP Supervisory Committee is considering internally environmental risk scenarios relevant to CCPs.

MiFID: ESMA statement on supervisory approach to position limits for commodity derivatives

ESMA has published a statement relating to its supervisory approach to position limits for commodity derivatives under the Markets in Financial Instruments Directive (MiFID).

ESMA notes that the Directive amending MiFID to help the EU's economic recovery from the COVID-19 pandemic ((EU) 2021/338) will substantially reduce the scope of commodity derivatives that are subject to position limits. These provisions will start to apply early in 2022. Given the delay in the application of the relaxation of these rules, ESMA states that it sees merit in already having in place a more favourable environment for the development of non-significant commodity derivatives that will no longer be subject to position limits in early 2022.

Although it cannot disapply EU law, ESMA believes that it is necessary to take into account the upcoming rule changes, as well as the impact of position limits on the development of new and less liquid commodity derivatives, the role of liquidity providers in developing those derivatives and the competitive environment in which EU commodity derivatives markets operate. It therefore expects national competent authorities (NCAs) to not prioritise their supervisory actions towards:

- entities holding positions in commodity derivatives, other than agricultural commodity derivatives, with a net open interest below 300,000 lots; and

- positions that are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4) of MiFID.

EU BMR: ESMA updates statement on impact of Brexit

ESMA has published an updated statement on the application of key provisions in the Benchmarks Regulation (EU BMR) in light of Brexit. The update specifies the EU's regulatory approach towards UK-based third-country benchmarks as well as UK endorsed and recognised benchmarks.

Following the end of the Brexit transition period, UK-based administrators that were initially included in the ESMA register of administrators and third-country benchmarks were deleted as the EU BMR no longer applies to UK-based benchmark administrators. They now qualify as third-country administrators.

However, due to the fact that the EU BMR transitional period, as defined in Article 51(5)4 of the EU BMR, has been extended to 31 December 2023 (by Regulation (EU) 2021/168), the change in the ESMA register does not yet have an effect on the ability of EU supervised entities to use the benchmarks provided by any third-country administrators, including UK ones. This means that, during the EU BMR transitional period, third-country benchmarks can still be used by supervised entities in the EU if the benchmark is already used in the EU as a reference for financial instruments, financial contracts, or for measuring the performance of an investment fund. Therefore, until 31 December 2023, EU supervised entities can use third-country UK-based benchmarks even if they are not included in the ESMA register.

In the absence of an equivalence decision by the European Commission, UK-based administrators have until the end of the extended EU BMR transitional period to apply for recognition or endorsement in the EU for the benchmarks provided by UK-based administrators to be included in the ESMA register again.

The extended EU BMR transitional period also applies to UK-recognised or endorsed third-country benchmarks which were deleted from the ESMA register at the end of the Brexit transition period.

Insurance

Settling RTA whiplash-related injuries without a medical report

The Civil Liability (Specification of Authorised Persons) Regulations 2021 (SI 2021/326) have been published, together with an explanatory memorandum. The Regulations have been made under section 9(1) of the Civil Liability Act 2018. They relate to section 6 of the Act, which restricts the settlement of road traffic accident (RTA) whiplash-related injury claims without a medical report (known as a ban on "pre-medical offers").

The Regulations specify which authorised persons are subject to the Financial Conduct Authority's (FCA's) enforcement of the ban. All persons authorised under the Financial Services and Markets Act 2000 (FSMA) dealing with whiplash claims are subject to the FCA's powers in this area. The explanatory memorandum states that this affects mainly regulated claims management companies (CMCs) and defendant insurers.

The Regulations were made on 15 March 2021 and come into force on 31 May 2021. They will apply in England and Wales.

Separately, a draft of the Civil Liability Act 2018 (Financial Conduct Authority) (Whiplash) Regulations 2021 was published, together with a draft explanatory memorandum. These draft Regulations are being made under section 8 of the Civil Liability Act 2018. They will enable the FCA to use its supervisory and enforcement powers under FSMA to monitor and enforce compliance with the requirements of section 6 of the Civil Liability Act 2018. The draft Regulations will also enable the FCA to impose financial penalties and charge fees in connection with fulfilling its functions under the Civil Liability Act 2018.

The draft Regulations state that they come into force on 31 May 2021. They will apply in England and Wales.

COVID-19: FCA updated statement on non-damage BI settlements and deductions

On 24 March 2021, the FCA published an updated statement on non-damage business interruption (BI) settlements and deductions made for government support to set out the FCA's expectations of firms. The FCA states that it expects firms to take the following into account when assessing whether it is appropriate to make deductions from BI insurance claim payouts:

- the exact type and nature of the government support;
- how the policyholder used this support; and
- the type of policy and its precise terms, including any set methodology for calculating the value of a claim set out under the relevant section of the policy.

In addition, the FCA expects firms to reflect the above matters appropriately in their communications with policyholders when making settlement offers and reaching settlement on relevant business interruption claims.

The FCA also refers firms to its September 2020 Dear CEO letter. Among other things, the letter confirmed the FCA's expectation that firms explicitly consider the treatment of the various forms of government support at board level and appropriately document their consideration and conclusions.

The FCA also explains that, on 25 September 2020, in discussions between the Association of British Insurers (ABI) and the Economic Secretary to HM Treasury, the ABI confirmed that a

number of insurers have agreed not to deduct certain grants (set out in the statement) from COVID-19 claim payments. The FCA states that even if an insurer's policy is with a different insurer to those listed in the statement, its views about the appropriateness of deducting small business grants still apply.

The FCA will consider how firms treat their policyholders regarding non-damage BI claims as part of its usual supervisory activities. It may intervene and take further actions where firms do not appear to be meeting its expectations and treating their customers fairly on these points.

COVID-19: FCA update on BI insurance test case

On 22 March 2021, the FCA updated its webpage on its business interruption insurance test case to publish claims data for the first time. The data published is based on insurer submissions to the FCA as at 3 March 2021. The FCA intends to publish the data on a monthly basis.

General insurance pricing practices: FCA extends implementation dates for Handbook changes

In its consultation on general insurance pricing practices, CP20/19, the FCA proposed that firms would have four months to implement any rule changes that it might make. Following responses to this consultation, the FCA has published a statement proposing to extend the timetable for implementing such changes. The FCA proposes to give until the end of September 2021 for the systems and controls rules and the product governance rules, and until the end of 2021 for the pricing, auto-renewal and reporting requirements. In reaching this decision, the FCA states it has sought to balance ensuring firms have enough time to put the changes into effect and acting quickly to address consumer harm.

The FCA states that it has not yet reached a final decision on the details of any rules it might introduce, but it is making this announcement now so firms can plan their change programmes effectively. The FCA intends to publish the policy statement, and any rules it makes, at the end of May 2021. The implementation period will start from this point.

Macroprudential supervision: IAIS consults on draft application paper

The International Association of Insurance Supervisors (IAIS) has published for consultation a draft application paper on macroprudential supervision.

The IAIS adopted its "holistic framework" in November 2019, which is designed for assessing and mitigating systemic risk in the insurance sector. As part of the holistic framework, the IAIS revised Insurance Core Principle (ICP) 24 (macroprudential surveillance and insurance supervision) to more explicitly address, among other things, the build-up and transmission of systemic risk at the individual insurer and sector-wide level.

The draft application paper aims to help with practical application of the supervisory material related to macroprudential supervision in ICP 24. It does not establish new standards or expectations for supervisor's implementation of a macroprudential supervision framework. Instead, it provides guidance and examples of good practice on:

- considerations on developing and applying a macroprudential supervision framework in a proportionate way;
- ways that supervisors may tailor requirements of data collection according to jurisdictional circumstances and market structure; and
- the practical application of the elements included under ICP 24.

The consultation closes on 7 May 2021. Feedback received will be used by the IAIS to further develop the application paper before it is finalised.

Funds and Asset Management

UCITS liquidity risk management: ESMA 2020 common supervisory action results

The European Securities and Markets Authority (ESMA) has published the results of the 2020 common supervisory action (CSA) on UCITS liquidity risk management (LRM). The purpose of the CSA was simultaneously to conduct coordinated supervisory activities in 2020 and to assess whether UCITS managers comply with their liquidity management obligations. The CSA was also an opportunity to strengthen the ongoing exchange of supervisory knowledge and experience among national competent authorities (NCAs).

Overall, cases where NCAs identified significant liquidity risks that could jeopardise the capacity of the UCITS under review to meet redemption requests, or to honour their other liabilities, were low. However, for a very limited number of UCITS, liquidity profiles indicated potential asset to liability mismatch risks, which were only sometimes mitigated using liquidity management tools. In most cases, the level of compliance with the applicable rules on LRM was satisfactory. However, there were shortcomings in some cases and a need for improvement in certain key areas.

NCAs will undertake follow-up actions on individual cases to ensure that regulatory breaches and weaknesses identified are remedied. Further work will be carried out at the level of ESMA to promote convergence in the way NCAs follow-up on the supervisory findings made during the CSA.

ESMA advises that the CSA results should be read in conjunction with its report responding to the European Systemic Risk Board's recommendation on liquidity risks in investment funds, in which it defined five priority areas for consideration.

EU MMF Regulation: ESMA consultation

ESMA is consulting on potential reforms of the EU Money Market Funds Regulation (MMF Regulation). ESMA sets out four types of potential reforms for MMFs:

- reforms targeting the liability side of MMFs – such as decoupling regulatory thresholds from suspensions/gates to limit liquidity stress, and to require MMF managers to use liquidity management tools such as swing pricing;
- reforms targeting the asset side of MMFs by, for example, reviewing requirements around liquidity buffers and their use;
- reforms targeting both the liability and asset side of MMFs by reviewing the status of certain types of MMFs such as stable Net Asset Value (NAV) MMFs and Low Volatility Net Asset Value (LVNAV); and
- reforms that are external to MMFs themselves by assessing whether the role of sponsor support should be modified. In addition, ESMA is also gathering feedback from stakeholders on other potential changes, particularly linked to ratings, disclosure and stress testing.

ESMA will consider the feedback it receives to this consultation in Q2 2021 and expects to publish its opinion on the review of the MMF Regulation in the second half of 2021. Article 46 of the MMF Regulation requires the European Commission to review, following consultations with ESMA, the adequacy of the MMF Regulation from a prudential and economic point of view by 21 July 2022.

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