FIG Bulletin

Recent developments
23 January 2017 to
27 January 2017

Hogan Lovells

Contents

1. Financial Conduct Authority and Payment Systems Regulator

1.1 FCA Handbook changes: Handbook Notice 40

On 26 January 2017, the Financial Conduct Authority (FCA) published Handbook Notice 40 which introduces the Handbook and other material made by the FCA Board under its legislative powers on 25 January 2017. It also contains information about other publications relating to the Handbook.

On 25 January 2017, the FCA Board made changes to the Handbook in the following instruments:

- Handbook Administration (No 44) Instrument 2017, FCA 2017/1, which makes minor administrative changes to various modules of the FCA Handbook. These amendments are listed in paragraphs 2.2 and 2.3 of the Handbook Notice. The instrument came into force on 26 January 2017, except for Part 2 of Annex E, which comes into force on 27 March 2017;
- Conduct of Business (Lifetime Mortgages) Instrument 2017, FCA 2017/2, which makes changes to remove barriers to the development and take-up of lifetime products and ensure that the mortality data referenced in the Mortgages and Home Finance: Conduct of Business sourcebook is updated. The instrument came into force on 26 January 2017. An appendix to the Handbook Notice (see page 17) contains a key facts illustration about lifetime mortgages;
- Alternative Investment Fund Managers Directive (Reporting) Instrument 2017, FCA 2017/3, which makes changes to close a significant information gap on the activities and risks incurred by alternative investment fund managers that have a large presence in the UK financial markets. The FCA says that the changes will also improve its monitoring of potential supervisory and systemic risks posed by the sector. The instrument comes into force on 29 June 2017;
- Decision Procedure and Penalties Manual and Enforcement Guide (Review) Instrument 2017, FCA 2017/4, which makes changes to implement the recommendations of HM Treasury's review of enforcement decision-making at the financial services regulators and Andrew Green QC's report into the FSA's enforcement actions following the failure of HBOS plc, and makes the FCA's enforcement process more open and improves public confidence in the regulatory system. Part of this instrument comes into force on 31 January 2017 and the remainder on 1 March 2017.

1.2 CP17/2: CASS 7A and the special administration regime review

On 23 January 2017, the FCA published a consultation paper, CP17/2, which seeks feedback on a number of aspects of the client assets regime, in particular regarding the client money distribution rules and their interaction with the special administration regime (SAR), which was created by HM Treasury in 2008, following the failure of Lehman Brothers International (Europe) . The SAR works with the Client Assets sourcebook (CASS), and in particular the client money distribution rules (CASS 7A), to provide a mechanism under which client assets can be returned to clients in the event of an investment firm failure.

Following the report of the Bloxham Review, HM Treasury has published amendments to the SAR Regulations and CP17/2:

- seeks feedback on proposed changes to the CASS rules affecting the return of client assets, against the backdrop of the amendments to the SAR Regulations;
- explains why certain other proposals in the FCA's 2015 consultation paper CP13/5 and its March 2016 discussion paper DP16/2 are not being taken forward; and
- seeks feedback on minor consequential changes to the client money rules (CASS 7) and CASS 7A to address the forthcoming

indirect clearing requirements under the Regulation on over-the-counter derivatives, central counterparties and trade repositories (known as EMIR) and the Markets in Financial Instruments Regulation (MiFIR) regulatory technical standards (RTS).

The FCA recommends that CP17/2 is read alongside the SAR Regulations and paragraph 1.16 of the consultation paper sets out the principle provisions in CASS and the SAR Regulations for a number of the topics discussed in the consultation paper.

Comments on the proposals in chapter 3 of the consultation paper (in relation to the EMIR and MiFIR RTS proposals) are requested by 23 February 2017. Comments on the proposals in chapter 2 of the consultation paper are requested by 24 April 2017.

1.3 General insurance value measures pilot: FCA publishes first set of data

On 25 January 2017, the FCA announced the publication of the first set of data (also available in XLS format) in its general insurance value measures pilot. The data is for 38 insurers who provided claims data for the year ending 31 August 2016 for the pilot products.

In its general insurance add-ons market study, the FCA found poor value in both add-on and some stand-alone products sold by firms. It also found that consumers find it difficult to assess value due to the lack of a commonly available measure.

In its June 2015 discussion paper, DP15/4, the FCA set out options for publishing value measures in general insurance markets. To help address these issues, in its subsequent feedback statement, FS16/1, which was published in March 2016, the FCA said that it would pilot the publication of value measures data. These data include claims frequencies, claims acceptance rates and average claims pay-out by insurer for four general insurance products:

- home insurance (combined buildings and contents);
- home emergency insurance;
- personal accident insurance sold as an add-on to motor or home insurance;
- key cover sold as an add-on to motor.

By publishing this pilot data, the FCA says that consumer groups and market commentators will have commonly available indicators of value for insurers by which to help assess products. Firms may also use the data to compare to their peers. The FCA expects that use of the published data by these stakeholders will improve transparency in these markets and influence both consumer and firm behaviour, incentivising firms to improve the value their products offer to consumers. The data is not targeted at individual consumers, although the FCA recognises that a small number may use the data directly.

The FCA will publish further pilot data for the year ending 31 August 2017 and will consider a further publication of data for the year ending 31 August 2018.

1.4 Investment advisers' and authorised firms' responsibilities when accepting business from unauthorised introducers or lead generators: FCA alert

On 24 January 2017, the FCA published an alert highlighting some of the risks arising from authorised firms accepting business from unauthorised introducers/lead generators and/or other authorised firms.

The FCA says that many authorised firms receive customer introductions from introducers. It is very concerned at the increase it has seen in cases in which the introducer has an inappropriate influence on how the authorised firm carries out its business, in particular, where the introducer influences the final investment choice. The FCA also has concerns where the authorised firm delegates regulated activities, for example, by outsourcing their advice process to unauthorised entities or to other authorised firms that do not have the relevant permissions, or are not their appointed representatives.

The FCA says that many authorised firms it has visited do not have adequate input or control over the advice they are ultimately responsible for giving to customers. It says that this has been particularly evident in relation to advice on switching and transfer/conversion of pension benefits. The FCA has specific concerns where this advice involves the movement of pension pots to unregulated, high risk, illiquid products, whether they are based in the UK or overseas. The FCA gives details of areas of concern identified and warning signs.

The FCA reminds authorised firms that it is essential that at all times they maintain full and complete ownership of the advisory process between themselves and their customer. The webpage gives a list of what firms should do next.

The FCA says that it is co-ordinating its intelligence and supervisory activities on pension scams and unsuitable advice, and will take action as necessary. All authorised firms should report to the FCA instances of where they have been approached, or been subject to inappropriate influence.

1.5 Advising on pension transfers: the FCA's expectations

On 24 January 2017, the FCA published an alert highlighting its requirements when firms provide advice on pension transfers, including advice in particular circumstances.

The FCA says that it is aware that some firms have been advising on pension transfers or switches without considering the assets in which their client's funds will be invested. It is concerned that consumers receiving this advice are at risk of transferring into unsuitable investments or, worse, being scammed.

The FCA says that transferring pension benefits is usually irreversible. The merits or otherwise of the transfer may only become apparent years into the future. So it is particularly important that firms advising on pension transfers ensure that their clients understand fully the implications of a proposed transfer before deciding whether or not to proceed.

The FCA expects a firm advising on a pension transfer from a defined benefit (DB) scheme or other scheme with safeguarded benefits to consider the assets in which the client's funds will be invested as well as the specific receiving scheme. It is the responsibility of the firm advising on the transfer to take into account the characteristics of these assets.

The FCA's rules set out what a firm must do in preparing and providing a transfer analysis. In particular, Conduct of Business sourcebook (COBS) 19.1.2R(1) requires a comparison between the benefits likely (on reasonable assumptions) to be paid under a DB scheme or other scheme with safeguarded benefits and the benefits afforded by a personal pension scheme, stakeholder scheme or other pension scheme with flexible benefits.

The comparison should explain the rates of return that would have to be achieved to replicate the benefits being given up and should be illustrated on rates of return which take into account the likely expected returns of the assets in which the client's funds will be invested. Unless the advice has taken into account the likely expected returns of the assets, as well as the associated risks and all costs and charges that will be borne by the client, it is unlikely that the advice will meet the FCA's expectations (see guidance at COBS 19.1.2 and 19.1.6-19.1.8).

The FCA says that a firm advising on a pension transfer should not undertake a comparison using generic assumptions for hypothetical receiving schemes. The firm must take into account the likely expected returns of the assets in which the client's funds will be invested as well as the specific receiving scheme.

The FCA also gives details of other important considerations for firms providing pension transfer advice in specific circumstances. These include section 48 (of the Pensions Schemes Act 2015) advice, recommendations based solely on critical yield, permission and responsibility for the advice, insistent clients, advice on pension transfers to overseas schemes, personal recommendations, advice on pension switches, and pension scams.

1.6 Pension scheme operators and scams: FCA alert

On 24 January 2017, the FCA published an alert highlighting some of the risks arising from authorised firms failing to carry out appropriate due diligence on investment offerings. While aimed primarily at pension scheme operators, the FCA says the alert will also be of interest to financial advisers and those providing discretionary fund management.

The FCA says that it wants firms to be aware of the current threats and it encourages them to review the effectiveness of their systems and controls.

In a July 2014 Dear CEO letter, the FCA raised concerns about the due diligence processes that self-invested personal pensions (SIPP) operators used to assess non-standard investments, and how well firms were complying with the relevant prudential rules. The FCA's new liquid capital requirement, imposed by Interim Prudential sourcebook for Investment Businesses (IPRU(INV)) 5.9.1R, means these two concerns are now inseparable for personal pension scheme operators subject to this requirement.

The FCA's rules say that a standard asset must appear on the list of standard assets, and "must be capable of being accurately and fairly valued on an ongoing basis and readily realisable within 30 days, whenever required." A failure to understand which assets are non-standard may leave a firm vulnerable to exploitation by third parties and the FCA re-emphasises the need for firms to conduct, and retain, appropriate and sufficient due diligence. The FCA says that it has long advocated a financial crime risk assessment for newly introduced investment products as good practice.

For those personal pension scheme operators which are subject to a liquid capital requirement where their schemes do not consist entirely of standard assets, failing to identify non-standard assets risks a capital shortfall. Other scheme operators may wish to consider whether their holding non-standard assets merits additional capital provision.

The FCA says that assessing realisability has its own challenges. Despite this there can be signs that an asset appearing on the standard asset list may nevertheless be non-standard, and the FCA gives examples of questions which might be asked in relation to securities admitted to trading on a regulated venue, and fixed interest stocks.

The FCA says that if firms' due diligence processes, both initial and ongoing, are not robust, there is a risk they may become involved in an illegal scheme. Firms should contact the FCA to report concerns about investments offered to, or taken up, by scheme members. The FCA's intelligence and supervisory activities on pension scams are co-ordinated with its Project Bloom partners and other agencies, and it will take action as necessary.

1.7 FCA and HMRC: memorandum of understanding

On 25 January 2017, the FCA published the text of a memorandum of understanding (MoU) between itself and HM Revenue & Customs (HMRC).

The MoU, which is dated November 2016, sets out the high level agreement between the two organisations that governs the exchange of information needed to better deliver their respective businesses. It relates to the overall exchange of information between HMRC and the FCA and does not replace or supersede those "process level" MoUs that cover agreements relating to one or more specific information exchanges. These include, but may not be limited to, those listed at annex 2 to the MoU. These include the MoU for the exchange of information and conducting of joint visits under the Money Laundering Regulations 2007 and Payment Services Regulations 2009.

1.8 Practical implications of US law on EU practice: speech by Mark Steward

On 20 January 2017, the FCA published a speech given by its Director of Enforcement and Market Oversight, Mark Steward, at the Practising Law Institute's annual seminar on securities regulation in Europe, which was held on 19 January 2017.

In his speech Mr Steward discussed financial penalties, the senior managers regime (SMR) and the different dynamic created by the SMR. Among other things, he said that:

- the SMR has introduced a new and challenging dynamic;
- the FCA expects actions against senior managers will be harder to resolve by agreement;
- the challenge of responsibility and suppressing the instinct to evade responsibility is a cultural one;
- there is a significant public interest in resolving cases as early as possible and the FCA will continue to do so following thorough and fair investigations;
- while early resolution is important, the FCA wants to make early detection of misconduct its primary virtue;
- the FCA is proposing a change to the dispute process for those who agree the facts but wish to dispute the proposed sanction.

1.9 Fees: PSR clarification on timetable

On 26 January 2017, the Payment Systems Regulator (PSR) published a note clarifying an inconsistency between the fees rules, as set out in the Fees Manual of the FCA Handbook (FEES 9.2.2R), and the timetable for collecting fees that the PSR published in its November 2016 consultation paper CP16/35 on PSR regulatory fees 2017/18.

FEES 9.2.2R requires that on-account payments from payment service providers (PSPs) to payment system operators are due on 15 March 2017, with operators to pay the collected fees on to the PSR by 1 April 2017. The PSR says that in CP16/35 it incorrectly indicated in the timeline that the payment date for on-account fees for PSPs would be 15 April 2017, with operators to pass on the fees collected by 30 April 2017.

To clarify, the due date for on-account fees remains 15 March 2017 as specified in the fees rules, with operators to pay the collected fees on to the PSR by 1 April 2017. An updated fees timetable is included in the note.

2. Bank of England and Prudential Regulation Authority

2.1 The promise of FinTech - something new under the sun?: speech by Mark Carney

On 25 January 2017, the Governor of the Bank of England, Mark Carney, in his capacity as Chair of the Financial Stability Board (FSB), gave a speech entitled "The promise of FinTech - something new under the sun?".

While recognising FinTech's huge potential for making the financial system more inclusive, efficient, effective and resilient, Dr Carney also considered the challenge for financial stability policymakers: to ensure that FinTech develops in a way that maximises these opportunities and minimises risks for society. With regard to the broader public policy issues he said that various conduct issues must be addressed including client suitability, anti-money laundering and combating the financing of terrorism, Other things that should be considered were fundamental rights such as privacy and practical constraints and such things as the costs of storing and handling and data protection issues.

He continued by setting out how the FSB is approaching the challenge of managing FinTech's impact on financial stability so that its full potential can be realised. The FSB is assessing how FinTech developments are affecting the resilience of the system, by identifying the risks associated with new and existing financial institutions and activities, and the supporting financial market infrastructure.

Dr Carney concluded by saying that as systemic risks emerge, authorities can be expected to pursue a more intense focus on the regulatory perimeter, more dynamic settings of prudential requirements, a broader commitment to resolution regimes, and a more disciplined management of operational and cyber risks. They will also be alert to potential impacts on the existing core of the financial system, including through business model analysis and market impact assessments.

Dr Carney was speaking at the Deutsche Bundesbank G20 conference on "Digitising finance, financial inclusion and financial literacy". A speech on digital finance given at the same conference by the Deutsche Bundesbank President and Chair of the Bank for International Settlements, Jens Weidmann, has also been published.

2.2 Supervising building societies' treasury and lending activities: PRA updates SS20/15

On 23 January 2017, the Prudential Regulation Authority (PRA) published an updated version of Supervisory Statement (SS) 20/15 on supervising building societies' treasury and lending activities.

SS20/15 has been updated to provide additional clarification and corrections following the PRA's publication in December 2016 of policy statement PS34/16. Appendix 7 to the supervisory statement sets out the changes that have been made.

The purpose of the supervisory statement is to set out the PRA's approach to its supervision of building societies' lending and treasury activities. It aims to build on the principle that the risk appetites of building societies should be properly aligned to their risk capacity, in order to promote the safety and soundness of building societies as deposit-taking institutions.

3. Banking

3.1 Bank of England and Financial Services Act 2016 (Commencement No 4 and Saving Provision) Regulations 2017

The above Regulations, SI 2017/43, which were made on 20 January 2017, have been published.

Regulation 2 brings into force the following provisions of the Bank of England and Financial Services Act 2016 (the Act) on 1 March 2017:

- section 1 (membership of court of directors), in so far as not already in force;
- section 11 (examinations and reviews), in so far as not already in force;
- section 12 (the Bank of England to act as the Prudential Regulation Authority (PRA)):
- section 13 (Prudential Regulation Committee) and Schedule 1;
- section 14 (accounts relating to the Bank of England's functions as the PRA);
- section 15 (transfer of property etc. to the Bank of England);
- section 16 (amendments relating to Part 1) for the purpose of introducing Schedule 2 to the Act, in so far as not already in force, except for paragraph 50(6) of that Schedule;
- section 17 (saving and transitional provision relating to Part 1), for the purpose of introducing Schedule 3 to the Act, in so far as not already in force.

Regulation 3(1) brings section 16 (amendments relating to Part 1) of the Act into force on 1 March 2017 for the purpose of introducing paragraph 50(6) of Schedule 2 to the Act. This is subject to a saving provision in Regulation 3(2), which provides that the repeal of paragraphs 22 and 23 of Schedule 1ZB to the Financial Services and Markets Act 2000 by paragraph 50(6) of Schedule 2 to the Act does not apply for the purpose of:

- preparing, sending and laying the accounts of the PRA for the accounting period ending 28 February 2017, or such other date as the directors may determine; and
- the examination, certification and report on those accounts by the Comptroller and Auditor General.

3.2 Market risk capital requirements: Basel Committee publishes FAQs

On 26 January 2017, the Basel Committee on Banking Supervision published a set of frequently asked questions (FAQs) on the standard minimum capital requirements for market risk. The FAQs include clarifications both to the standardised approach (section 1 of the document) and the internal models approach (section 2 of the document).

In order to promote consistent global implementation of those requirements, the Basel Committee has agreed to periodically review the FAQs and publish answers along with any technical elaboration of the standards text and interpretative guidance that may be necessary.

3.3 ICE LIBOR evolution: ICE Benchmark Administration report and further consultation

On 24 January 2017, ICE Benchmark Administration (IBA) published a summary of the evolution of the London Interbank Offered Rate (LIBOR) (also known as ICE LIBOR).

IBA has also published an additional consultation relating to LIBOR evolution, which seeks input on one aspect of the roadmap methodology being implemented by LIBOR panel banks over the coming months. In line with the testing results and following further analysis, IBA proposes to refine the output statement by adjusting Level 2 (transaction-derived data) of the waterfall. Level 2.3 relates to parallel shift, this is where, if a bank has no transactions in one tenor but one neighbouring tenor has a transaction-based rate, a rate could be constructed by the bank using the day-on-day change in value of the transaction-based tenor.

Banks' testing has shown that, in the current interest rate environment, the use of parallel shift can on occasion produce results that may be unrepresentative depending on a bank's transactions and funding mix. Accordingly, IBA proposes to remove this level of the waterfall but to allow parallel shift to be used at Level 3 (expert judgement).

In order to give banks enough time to make their necessary checks, in particular, to be able to provide their Level 3 submissions as at 11.00, IBA will move the scheduled publication time of LIBOR from 11.45 to 11.55 London time, with effect from 27 March 2017.

IBA's proposed changes to the Output Statement can be found in Annex 2 of the LIBOR Code of Conduct, a marked-up version of which is attached to the consultation. Proposed new wording is shown underlined and deletions are struck through.

Comments are requested by 15 February 2017. After that date IBA will publish issue 4 of the LIBOR Code of Conduct, together with a summary of the consultation responses received and its response to those comments.

4. Brexit

4.1 European Union (Notification of Withdrawal) Bill introduced

On 26 January 2017, the European Union (Notification of Withdrawal) Bill was introduced to the House of Commons and given its First Reading. A related set of explanatory notes has also been published.

The Bill would give the Prime Minister power to notify the European Council of the UK's intention to withdraw from the EU. The Bill is expected to have its Second Reading on 31 January 2017 and to conclude its stages in the Commons on 8 February 2017, before being passed to the House of Lords. The Government intends that the Bill will receive Royal Assent and be enacted prior to 31 March 2017.

4.2 The EU's third country regimes and alternatives to passporting: Hogan Lovells and the International Regulatory Strategy Group report

On 23 January 2017, Hogan Lovells, in collaboration with TheCityUK and the City of London Corporation's International Regulation Strategy Group published a report on the EU's third country regimes and alternatives to passporting. A executive summary of the report has also been published.

The report examines the EU's existing third country regime (TCRs) and equivalence provisions as a solution for allowing the whole UK-based financial services industry cross-border access to EU-markets following Brexit.

Among other things, the report finds that:

- given their limited coverage, uncertainty of availability and the lack of key safeguards associated with them, the EU's current TCRs do not provide a long-term sustainable solution for the UK-based industry as a whole to access EU markets post-Brexit;
- current alternatives to passporting and TCRs for UK-based financial services firms are subject to limitations or are significantly less efficient than existing arrangements. A mutual access arrangement could be put in place as part of the bespoke agreement with mutual market access being granted on the basis that the respective regimes are recognised as being broadly consistent, but the UK should avoid trying to have access rights tied to the EU's existing concept of equivalence. Access rights under a mutual access arrangement should also seek to cover as broad a scope of activities as are currently covered under the passporting regime;
- arrangements should include robust processes and procedures that provide legal certainty;
- the transition into the new arrangements should allow for continuous access to products and services for firms and customers. The arrangement should also be designed to preserve continuity of operation for UK-based entities regulated at an EU level;
- when the criteria for mutual access have been agreed, the UK and the EU should seek immediate mutual recognition that the other party meets the relevant criteria based on their regimes matching as at Brexit;
- regulatory cooperation and collaboration between respective regulatory authorities will be essential;
- a mutual access arrangement could be used by the UK as the basis for its relationships with other third countries ongoing. It may also offer the EU a new way of dealing with other third countries.

5. European Union

5.1 EMIR reporting requirement: European Commission Delegated and Implementing Regulations published in the Official Journal

On 21 January 2017, the following regulations relating to technical standards on data reporting under Article 9 of the Regulation on over-the-counter derivatives, central counterparties and trade repositories (known as EMIR), were published in the Official Journal of the European Union:

- Commission Delegated Regulation (EU) 2017/104 of 19 October 2016 amending Delegated Regulation (EU) No 148/2013 supplementing EMIR with regard to regulatory technical standards on the minimum details of the data to be reported to trade repositories;
- Commission Implementing Regulation (EU) 2017/105 of 19 October 2016 amending Implementing Regulation (EU) No 1247/2012 laying down implementing technical standards with regard to the format and frequency of trade reports to trade repositories according to EMIR.

The Regulations will enter into force on the twentieth day following that of their publication in the Official Journal. They will apply from 1 November 2017, with the exception of Article 1(5) of the Implementing Regulation, which will apply from the date of entry into force.

5.2 CRD IV corrigenda published in the Official Journal

On 25 January 2017, the following corrigenda were published in the Official Journal of the European Union:

- corrigendum to the CRD IV Directive;
- corrigendum to the Capital Requirements Regulation (CRR).

The corrigenda make a number of minor technical amendments to the text of the CRD IV Directive and the CRR.

5.3 EMIR: European Commission adopts Delegated Regulation amending Delegated Regulation on risk mitigation techniques for uncleared OTC derivative contracts

On 20 January 2017, the European Commission adopted a Delegated Regulation correcting Delegated Regulation (EU) 2016/2251 of 4 October 2016, which supplemented the Regulation on over-the-counter (OTC) derivatives, central counterparties and trade repositories (known as EMIR) with regard to regulatory technical standards (RTS) for risk mitigation techniques for OTC derivative contracts not cleared by a central counterparty.

Commission Delegated Regulation (EU) 2016/2251 contains an error in Article 37 which should contain a phase-in provision on variation margin requirements to intra-group transactions in a way analogous to initial margin requirements. A Delegated Regulation correcting Delegated Regulation (EU) 2016/2251 therefore needs to be adopted.

The draft RTS on which Delegated Regulation (EU) 2016/2251 is based, submitted by the European Supervisory Authorities to the Commission on 8 March 2016, included the same phase-in period for both initial and variation margins. The need for the correction is due to a technical error in the process leading to the adoption of Delegated Regulation (EU) 2016/2251 where the inclusion of the two paragraphs on the phase-in of the variation margin requirements to intra-group transactions was omitted.

This new Delegated Regulation corrects the Delegated Regulation (EU) 2016/2251 by adding two new paragraphs to Article 37, which is the Article specifying the phase-in schedule for variation margin requirements. These paragraphs are analogous to the existing Articles 36(2) and 36(3), with the result that where an intragroup transaction takes place between a Union entity and a third country entity, the exchange of variation margin will not be required until three years after entry into force of the Regulation where there is no equivalence decision for that third country. Where there is an equivalence decision, the requirements will apply either four months after the entry into force of the equivalence decision, or according to the general timeline, whichever is later.

The Council of the European Union and the European Parliament must now consider the Delegated Regulation. If neither of them objects to it, it will be published in the Official Journal of the European Union and enter into force on the day of its publication. It will apply from 4 January 2017.

5.4 Capital markets union action plan: European Commission consultation

On 20 January 2017, the European Commission published a consultation paper on the planned capital markets union (CMU) mid-term review, which the Commission is planning to publish in June 2017. The Commission published the CMU action plan in September 2015 and the aim of the consultation paper is to seek feedback on how the current programme can be updated and completed in order to provide a strong policy framework for the development of capital markets, building on the initiatives that the Commission has presented so far. A set of frequently asked questions has also been published.

The consultation paper looks at the state of play of implementation of the action plan with regard to the following topics and also looks at the associated key trends and challenges:

- financing for innovation, start-ups and non-listed companies;
- making it easier for companies and enter and raise capital on public markets;
- investing for long term infrastructure and sustainable investment;
- fostering retail investment and innovation;
- strengthening banking capacity to support the wider economy;
- facilitating cross-border investment.

Comments are requested by 17 March 2017.The Commission will evaluate the responses and produce a summary feedback statement. It will also hold more focused roundtable discussions on small and medium enterprise access to finance, retail investor engagement and institutional investment.

5.5 TIPS service: ECB questionnaire on expected volumes

On 23 January 2017, the European Central Bank (ECB) published a questionnaire on expected volumes in the proposed TARGET instant payment settlement (TIPS) service.

TIPS will offer instant settlement services to its participants when an originator instructs the transfer of funds to a beneficiary. The primary aim is to offer settlement of instant payments in euro, although it could also support settlement in non-euro central bank money.

Completed questionnaires should be submitted by 24 February 2017.

6. Financial crime

6.1 Trade finance principles updated

On 24 January 2017, the Wolfsberg Group, the Banking Commission of the International Chamber of Commerce and the Bankers Association for Finance and Trade published an updated version of the trade finance principles.

The document updates the Wolfsberg Group's trade finance principles which were last revised in 2011. This broader industry edition now addresses the due diligence required by global and regional financial institutions of all sizes in the financing of international trade. The document has been updated to reflect the growing regulatory expectations, as well as the more stringent application of existing regulations faced by the industry today.

The Wolfsberg Group is an association of thirteen global banks which aims to develop frameworks and guidance for the management of financial crime risks, particularly with respect to know your customer, anti-money laundering and counter terrorist financing policies.

7. Financial regulation

7.1 Duty of care for financial services providers: FSCP position paper

On 26 January 2017, the Financial Services Consumer Panel (FSCP) published a position paper which proposes that the Financial Services & Markets Act 2000 (FSMA) should be amended to require the Financial Conduct Authority (FCA) to make rules specifying what constitutes a "reasonable" duty of care that financial services providers should owe towards their customers.

The FSCP says that it is not proposing a fiduciary duty, but a duty of care that would oblige providers of financial services to avoid conflicts of interest and act in the best interests of their customers. A similar duty already exists for other sectors, for example, for legal and medical professionals through the Solicitors Regulation Authority's Principles or the General Medical Council's Good Medical Practice Guide.

The FSCP says that whilst a duty of care of the type it is proposing would ultimately give consumers a legal right to take financial services providers to court, this is not its reason for suggesting it. The primary purpose of the duty of care would be to operate as a preventative measure, in particular by removing conflicts of interest. The FSCP would expect disputes to continue to be settled by the Financial Ombudsman Service and recourse to the courts, bearing in mind its prohibitive cost, would only be a last resort.

The FSCP's proposed amendment of FSMA would require the FCA to make rules on a duty of care, but the exact scope would be for the FCA to decide, subject to its normal consultation procedures. The FSCP envisages that the rules would be flexible, and depend on the complexity and the risk of the product being sold. The more complex or risky the product, the more stringent the duty would be on the provider to ensure the product was suitable and that the customer understood what they were buying, and the risks involved.

8. Securities markets

8.1 Re-hypothecation of client assets and collateral re-use: FSB reports

On 25 January 2017, the Financial Stability Board (FSB) published two reports on transforming shadow banking into resilient market-based finance:

- Re-hypothecation and collateral re-use: potential financial stability issues, market evolution and regulatory approaches: this report describes potential financial stability issues associated with, and explains the evolution of market practices and current regulatory approaches relating to, re-hypothecation of client assets and collateral re-use. It examines the possible arguments for and challenges of harmonising regulatory approaches to re-hypothecation of client assets, and also describes possible residual financial stability risks associated with collateral re-use;
- Non-cash collateral re-use: measure and metrics: this report incorporates input from the FSB's February 2016 consultation and finalises the measure and metrics of non-cash collateral re-use in securities financing transactions that authorities will monitor for financial stability purposes. The FSB will collect from FSB members national aggregated data related to the measure and metrics from January 2020 as part of its global securities financing data standards.

8.2 Proposed Prospectus Regulation: House of Commons written statement

On 24 January 2017, in a House of Commons written statement, the Economic Secretary to the Treasury said that the Government has decided not to opt in to a provision of Article 31(1) of the proposed new Prospectus Regulation.

Article 31(1) of the proposal requires that where Member States have chosen to pursue a criminal sanctions regime for breaches of elements of the proposals, those Member States must ensure that information can be shared between competent authorities across the EU. As the provision requires co-operation involving law enforcement bodies, the Government believes these are Justice and Home Affairs (JHA) obligations and therefore the UK's JHA opt-in is triggered. The Government will inform the Council of the European Union of its decision not to exercise its right to opt in to the relevant provision.

The statement says that the Government has decided not to opt in to these provisions as there are no significant benefits to be gained from doing so. The obligation to share information will fall on Member States who have a relevant criminal sanctions regime, and UK competent authorities will be in a position to access this data irrespective of the decision to opt in. The Government has no intention to introduce a criminal sanctions regime in a way that would lead to this regulation imposing an obligation on the UK or on its competent authorities.

8.3 MiFID II: AFME exchange questionnaire

On 20 January 2017, the Association for Financial Markets in Europe (AFME) published version 1.0 of a questionnaire the purpose of which is to provide a standardised set of questions which can be sent from investment firms to exchanges that fall under the scope of MiFID II.

The questionnaire is to be sent bilaterally from investment firms to their exchange counterparts. AFME says that the information provided in response to the questionnaire by exchanges to investment firms is strictly confidential and for the benefit of the recipient firm and its affiliates only. Furthermore, the information provided is valid at the point in time when it is provided. The liability regime for the questionnaire is established by the disclaimer included in annex I, which is provided by the responding exchange.

A footnote to the questionnaire gives the information that it has been shared with, but not necessarily endorsed by, individual exchanges as well as the Federation of European Securities Exchanges and the Futures Industry Association.

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