

REGULATORY, INVESTIGATIONS & FINANCIAL CRIME IN THE UK – HORIZON SCAN: TOP 10 TOPICS FOR 2020

In this briefing we highlight some of the key areas of focus for firms in 2020 concerning financial services regulation, investigations and financial crime.

For the latest global trends, risks and developments in regulatory, investigations and financial crime visit our Regulatory Investigations and Financial Crime [blog](#).

New Directive places treatment of Whistleblowers under the microscope

The provisions of the [Whistleblowing: Directive \(EU\) 2019/1937 on the protection of persons who report breaches of Union law](#) (the **Directive**) come into force on 17 December 2021 introducing measures to: ensure retaliatory or recriminatory action cannot be taken against whistleblowers, and; a ‘three tier’ reporting mechanism.

All firms that fall under the scope of the proposed Directive will need to create clearly demarcated protection mechanisms to ensure the confidentiality and protection of any potential whistleblower, and prevent retaliation against whistle-blowers with the burden of proof now on the employer to demonstrate that they did not act in retaliation.

FCA whistleblowing review

The FCA will perform its own review as it responds to criticisms in a [report](#) by the All-Party Parliamentary Group on ‘*Whistleblowing – the Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring It*’ (the **Report**).

Whilst the Report is only a recommendation, it seems strongly to point in the direction of new legislation and an eventual increase in the number of disclosures to the FCA.

Contact: Cheryl Jones

Environmental, Social and Governance issues (ESG)

Firms will need to raise their ethical awareness as sustainable finance is set to be hot on the regulatory agenda in 2020, with an increasing focus on non-financial risks and how firms’ define their ‘company purpose’.

Of note is the FRC’s [UK Stewardship Code](#), applicable from 1 January, which makes explicit reference to ESG and climate change as “*material issues for investors to consider*” in their decision-making and expects signatories to “*systematically integrate*” ESG factors when fulfilling their stewardship responsibilities.

Likewise, the PRA's Supervisory Statement [SS3/19](#) of April 2019 on enhancing banks' and insurers' approaches to managing the financial risks from climate change, includes a requirement for firms to nominate a Senior Manager responsible for identifying and managing these risks. In its feedback Statement [FS19/6](#) of October 2019, the FCA also announced a consultation in early 2020 on proposals for new mandatory climate-related disclosure obligations for certain listed issuers, on a 'comply or explain' basis.

For more on ESG issues see our [ESG Issues for Corporates Risks and Opportunities](#) blog post.

Contact: Kelwin Nicholls, Emily Goddard

Proposed new regulatory rules for Operational Resilience and Outsourcing risk

Wide-ranging rules on operational resilience and outsourcing will require firms to identify and document arrangements in place with respect to business activities that, if disrupted, would pose a risk to consumers and market participants, a firm's safety and soundness and the wider stability and integrity of the UK financial sector.

On 5 December 2019, the FCA, PRA and Bank of England (**BoE**) published a [shared policy summary](#) and coordinated Consultation Papers [FCA CP32/19](#), [PRA CP29/19](#), and BoE paper [Operational resilience of FMI's](#) on new requirements to strengthen operational resilience within financial institutions. These include identifying important business services, setting specific impact tolerances for disruption events and mapping all people, processes and technology associated with each service. Firms will be required to prepare and maintain self-assessments of their operational resilience and assign specific senior manager accountability. Following the consultation, a joint policy statement will be published in H2 2020.

In addition, the PRA's Consultation Paper CP30/19 [Outsourcing and third party risk](#) proposes new rules to address the expanding use of outsourcing, particularly within the digital economy. Firms must compile an Outsourcing Register of all of their outsourcing arrangements in line with the European Banking Authority's (**EBA**) [Guidelines on outsourcing arrangements](#). Furthermore, legislation such as the draft [EIOPA guidelines on outsourcing to cloud service providers](#) will require institutions to review and amend existing cloud outsourcing arrangements.

Firms must be compliant with the proposed EIOPA Guidelines by 1 July 2022 and the EBA Guidance on Outsourcing Registers by 31 December 2021.

For more on the lessons from regulatory findings on outsourcing and operational resilience see our [Regulatory Investigations and Financial Crime Insights](#) blog post.

Contact: Nicholas Grafton-Green

Fifth Money Laundering Directive extends regime to Cryptoasset firms

On 10 January 2020, the Fifth Money Laundering Directive (EU)2018/43 (**5MLD**) came into force and the FCA took up the role of the anti-money laundering and counter terrorist financing supervisor for cryptoasset businesses.

5MLD amends Article 2 of 4MLD, by extending anti-money laundering requirements to cryptoasset exchanges and custodian wallet providers and providing some additional requirements to those already subject to the requirements.

New cryptoasset firms intending to carry on cryptoasset activity after 10 January 2020 must be registered before they can carry on the activity.

Existing cryptoasset firms carrying out cryptoasset activity before 10 January 2020 must have registered by 10 January 2021 or stop all cryptoasset activity.

Firms will need to assess their money laundering and terrorist financing risks and ensure they have processes in place to fulfil their customer due diligence and other AML obligations.

For more on our key takeaways from 5MLD implementation in the UK see our recent [Regulatory Investigations and Financial Crime Insights](#) blog post.

Contact: Michael Lyons, Ellen Lake

DPAs: a get out of jail free card?

2019 was a mixed year for Deferred Prosecution Agreements (**DPA's**) with failures by the SFO to establish individual involvement in the conduct covered by the DPAs.

In January 2019, the SFO released the terms of a DPA reached in 2017 with Tesco Stores Limited, who agreed to pay a GDP129m fine and GDP3m investigation costs. However, following the earlier collapse of the trial and acquittal of two defendants in the case, the SFO offered no evidence against the remaining defendant who was similarly acquitted of all charges.

In July 2019, a DPA was completed with Serco Geografix Ltd. In October 2019, a DPA was completed with Güralp Systems Ltd under which Güralp agreed to pay over GBP 2m for disgorgement of gross profits and to review and maintain its controls for compliance with the Bribery Act 2010. However, in December 2019, three associated individuals were acquitted of conspiracy to make corrupt payments.

We expect to see the use of DPAs as a carrot for self-reporting continue during 2020 and further discussion about how to address concerns that have been raised that DPAs are becoming a soft option for companies that should be prosecuted for serious crimes, including the continuance of calls for reform of the corporate criminal liability framework.

For more on the calls for reform of Corporate Criminal Liability in the UK see our [Regulatory Investigations and Financial Crime Insights](#) blog post.

Contact: Luke Tolaini, Ellen Lake, Matt Lee

Culture and governance to focus on psychological safety

Culture and Governance remains a key priority in 2020 as the FCA expands on the themes of its 2018 [Transforming Culture Discussion Paper](#).

The FCA confirmed in its [2019/20 Business Plan](#) that it will hold a second ‘Transforming Culture Conference’ in March 2020 to share and discuss the outputs that flowed from its first [Transforming Culture Conference](#), which included a focus on ‘psychological safety’.

The FCA has identified psychological safety as central to a fear-free speak-up culture in firms and will hold senior managers accountable for the psychological safety and mental health of employees. The FCA will consider the mental well-being of employees when assessing whether a senior manager is suitable under the Senior Managers and Certification Regime and it is imperative that senior managers take account of the environment in which their employees work. We also expect the FCA to continue to analyse the links between culture, business models and corporate purpose.

Contact: Carlos Conceicao, Oliver Pegden, Emily Goddard

A new Regulatory Duty of Care

In a [speech](#) by Christopher Woolard on 21 October 2019, the FCA indicated it intends to further consult on the duty of care in 2020.

On 29 October 2019, the [Financial Services Duty of Care Bill 2019/20](#) (the **Bill**) had its first reading in the House of Lords and is highly likely to be debated in early 2020.

The Bill follows an initiative by the FCA throughout 2018/19 and publication of its July 2018 [Discussion Paper on a Duty of Care](#) (DP18/5) and 23 April 2019 [Feedback statement](#) (FS19/2) setting out the FCA’s two areas of focus:

- a review of how it applies the current regulatory framework, particularly the Principles for Businesses (the **Principles**); and
- new or revised Principles to strengthen firm’s duties towards customers and the consideration of the merits of a private right of action for any breaches of those Principles by firms.

Any changes to the Principles will impact on a firm’s management, culture and governance, as a new duty is likely to impose higher standard and strengthen and clarify firms’ duties to consumers and the way they conduct business.

Contact: Cheryl Jones

Closing the gaps on Individual Accountability

In December 2020, the SMCR will be extended to benchmark administrators, as set out in FCA [CP19/31](#). In its [second report on IT failures in the financial services sector](#), the Treasury Committee has also called for its extension to financial market infrastructure firms, including payment systems, to improve accountability among service providers whose operational failures could cause significant consumer harm.

2020 will also mark the launch of the FCA's new public financial services [Directory](#), which goes live for banking firms and insurers on 9 March 2020, and for FCA solo-regulated firms on 9 December 2020.

The FCA has instigated nineteen investigations under the SMCR since it came into force and nine remain open as at August 2019. However, as the transition to the extended regime settles and the FCA shifts its attention from implementation to enforcement, we expect an increase in action against Senior Managers in 2020.

Contact: Dorian Drew, Emily Goddard

Extension of the regulatory perimeter to Cryptoassets and allocation of risk in Artificial Intelligence (AI)

Cryptoassets

Following the findings in the [final report](#) of the joint HM Treasury/FCA/Bank of England Cryptoassets Taskforce, HM Treasury is expected to publish its consultation on the extension of the regulatory perimeter to those cryptoassets with comparable features to specified investments and examine how exchange tokens and related firms, such as crypto exchanges and wallet providers, could be regulated effectively.

In early 2020, the FCA is due to publish final rules that will amend existing, and introduce new, product intervention measures to its Conduct of Business Sourcebook (COBS) 22, following proposals in its July 2019 [consultation paper](#) (CP19/22) to ban the sale to retail clients of derivatives and exchange traded notes referencing certain types of unregulated, transferable cryptoassets.

Extension of the regulatory perimeter will see the FCA taking supervisory and enforcement action against cryptoasset firms that fail to comply with the new rules.

AI

Whilst AI remains in a nascent stage in terms of development and regulatory treatment, it is interesting to note that in mid-2020, the English civil courts will consider the question of where liability lies when an investor suffers substantial losses at the hands of an AI-powered trading or investment system in *Tyndaris v WWM*. To date, the accuracy of AI systems and the allocation of risk has had limited scrutiny, but in the recent civil case of *B2C2 Ltd v Quoine Pte Ltd*, the Singapore International Commercial court considered where responsibility lay when the entity said to have made the mistake was an algorithmic trading system. The judge held that because the system in question was “largely deterministic...regard should be had to the state of mind of the programmer of the software of that program at the time the relevant part of the program was written”.

Contact: Sam Ward, Ellen Lake

Further ICO Enforcement actions

During 2020, firms must not take their eye off their ongoing data protection obligations, as we anticipate further investigations by the Information Commissioners Office (the **ICO**) and for the ICO to look for ways to use not only its non-criminal enforcement powers, but also its criminal prosecution and audit powers. We expect to see the ICO using its extensive powers to search for evidence to support suspicions of misconduct under the General Data Protection Regulations 2018 (**GDPR**), including making visits to businesses to do so.

While the ICO has so far issued only one enforcement decision under the new regime with a fine, announced in December 2019, of GBP275,000 on Doorstep Dispensaree Ltd, in 2020 we expect to see more action taken under the new regime and far bigger penalties imposed.

In particular, we have already seen in July 2019 the ICO issuing notices of intention to impose record-breaking fines against British Airways Plc and Marriott International. Inc for infringements of the GDPR in the amounts of GBP183.4m and GBP99.2m respectively. The ICO has not yet issued its final decisions in respect of British Airways and Marriott, but these are expected at the end of the first quarter of 2020 (the ICO having indicated that it has agreed extensions in both cases). Both companies have already stated their intention to make representations to the ICO in order to contest the findings and sanctions.

Contact: Sam Ward, Ellen Lake

Key Dates in 2020

Key Date	Event
2019/20	PRA to begin an <u>evaluation</u> of the effectiveness of the SMCR and remuneration policies for banks and insurers as set out in its <u>Business plan 2019/20</u> .
10 January 2020	The FCA commences role as the anti-money laundering and counter terrorist financing supervisor for crypto-asset businesses as set out in the government <u>Economic Crime Plan 2019-22</u> .
10 January 2020	Member States to bring into force laws, regulations and administrative provisions necessary to comply with <u>5MLD</u> .
10 January 2020	All UK crypto-asset businesses carrying out activities within scope of the Money Laundering Regulations 2017 to <u>register</u> with the FCA from 10 January 2020.
15 January 2020	Deadline for responses to the FCA 's guidance consultation ' <u>GC19/5: Primary Market Bulletin No. 25</u> ' on inside information under the Market Abuse Regulations (MAR).
30 January 2020	Date by which FCA extended the date by which firms and funds should notify it for entry into the <u>temporary permissions regime</u> (TPR) to 30 January 2020, following the Brexit delay.
Q1 2020	FCA publish final rules to amend existing, and introduce new, product intervention measures to COBS 22 , following proposals <u>CP19/22</u> .
January 2020	HMRC to <u>remove</u> the one-off application charge from January 2020, as part of wider changes to its anti-money laundering supervision fees.
Early 2020	FSB expected to consult on draft toolkit of effective practices relating to a financial institution's response to, and recovery from, a cyber incident.
6 February 2020	Deadline for responses to the BCBS's <u>consultation</u> on proposed amendments to its guidance on the sound management of AML/CFT risks.
February 2020	Financial Action Task Force expected to publish final version of guidance on application of its standards on customer due diligence (CDD) in a digital ID context.
28 February 2020	Deadline for responses to FCA <u>consultation paper CP19/31</u> on proposals for applying the SMR to benchmark administrators that do not carry out any other regulated activities. Final rules due during 2020.
9 March 2020	Banking and insurance firms can start to submit data on Directory Persons using FCA Connect.
9 March 2020	<u>Deadline</u> for Banks, building societies, credit unions and insurance companies to submit all data on Directory Persons to the FCA Directory.
16 March 2020	Deadline for responses to the European Commission's consultation on ' <u>Digital operational resilience framework for financial services: Making the EU financial sector more secure</u> '.
19 March 2020	Deadline for responses to the European Commissions' consultation on ' <u>an EU framework for markets in crypto-assets</u> '.
March 2020	FCA will <u>hold</u> a second Transforming Culture conference in March 2020 to discuss its work on remuneration and incentives, and firms' assessment of culture.
March 2020	The UK Government will <u>review</u> barriers to information-sharing within corporate groups and <u>develop</u> a sustainable resourcing model for economic crime reform by March 2020.

Key Date	Event
March 2020	The FCA <u>Directory</u> goes live for SMCR banking and insurance firms in March 2020.
Q1 2020	The FCA is expected to <u>publish</u> its final report in relation to PPI complaints. The report will provide a definitive review of the overall impact of the FCA's measures and draw the PPI issue to a close.
Q1 2020	ESMA <u>intends</u> to submit a final report, following its consultation on the provisions MAR .
End of Q1 2020	The ICO is expected to issue final decisions in respect of its investigation into the British Airways and Marriott data breaches.
3 April 2020	Deadline for responses to the BoE , PRA and FCA co-ordinated consultation papers on new requirements to strengthen operational resilience in the financial services sector is 3 April 2020.
April 2020	Feedback on FCA <u>CP19/29</u> on proposals for recovering costs of supervising crypto-asset firms under Money Laundering Regulations 2017 due. Final rules by June 2020.
May 2020	The Financial Action Task Force (FATF) supervisors' forum to <u>hold</u> a meeting.
30 June 2020	The European Banking Authority (EBA) guidelines on ICT and security risk management come into <u>force</u> .
June 2020	As part of its Economic Crime Plan the UK Government will <u>investigate</u> the creation of new powers to block listings on national security grounds.
10 July 2020	Member States to apply Article 12(3) of 4MLD (as amended by <u>5MLD</u>) which relates to anonymous prepaid cards.
July 2020	<p>UK Government Economic Crime Plan:</p> <ul style="list-style-type: none"> • <u>expects</u> to resolve evidence gaps in its threat and performance metrics through a long-term research strategy, and put in place a <u>fully</u> operational performance system to measure what works in combatting economic crime • <u>conduct</u> new National Risk Assessments on money laundering, terrorist financing and proliferation financing • <u>expand</u> and enhance public-private information-sharing through the Joint Money Laundering Intelligence Taskforce (JMLIT); and • <u>consider</u> the introduction of tactical targeting orders and clarify sanctions supervision powers.
10 September 2020	Deadline for Member States to establish centralised automated mechanisms identifying holders of bank and payment account and safe deposit boxes under 4MLD (as amended by <u>5MLD</u>).
29 October 2020	The English Court of Appeal will <u>hear</u> the case of <i>N v Royal Bank of Scotland</i> by 29 October 2019 concerning the Bank's decisions to terminate the banking relationship without notice on the basis that it suspected the proceeds of crime.
October 2020	Date by which a new Money Laundering <u>Directive</u> is to be transposed into national law. The Directive will introduce new criminal law provisions to disrupt and block access by criminals to financial resources, including those used for terrorist activities.
7 December 2020	Date on which the FCA SMCR is <u>extended</u> to benchmark firms (Approved Persons Regime (APR) will continue to apply in full to benchmark administrators until this date).

Key Date	Event
December 2020	The FCA Directory goes live for SMCR solo-regulated firms.
December 2020	<p>As part of its Economic Crime Plan, the UK Government will</p> <ul style="list-style-type: none"> • <u>enhance</u> the promotion of information sharing in relation to fraud by December 2020 by revising and updating, both, the list of Specified Anti-Fraud Organisations (SAFOs), with whom public authorities are allowed to share information in accordance with the <u>Serious Crime Act 2007</u> and the statutory Code of Practice on data sharing with SAFOs, considering the latest ICO recommendations on information-sharing between public and private sectors for the purposes of preventing fraud, and • <u>deliver</u> the first tranche of suspicious activity reports (SARs) IT transformation and design the target operating model for the future of the SARs regime.
Q4 2020	FCA to report on the outcome of the combined <u>Financial Advice Market Review</u> and Retail Distribution Review (RDR) post-implementation review.

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