Excluded FS entities

We intend to provide that new s.233B(3) and (4) do not apply to the following types of FS firm whether it is the supplier or recipient of services under a contract:

- Insurance companies (effects or carries out contracts of insurance under FSMA)
- Banks (with permission under Part 4A to accept deposits)
- Investment firms (s.258A of the Banking Act 2009, but disapply effect of SI 2014/1832 made under s.258A(2)(b) so that investment firms with €125k initial investment fall within the definition for these purposes)
- Investment banks (s.232 Banking Act 2009)
- Infrastructure companies (s.112 of Financial Services (Banking Reform) Act 2013)
- Recognised clearing house (s.285(1)(b) FSMA)
- [Merchant acquirers (para. 13A of Sch 23 Finance Act 2011)]
- Recognised investment exchanges (s 285(1) FSMA)
- Regulated markets (MIFID II)
- Recognised overseas investment exchanges (s292 FSMA)
- EEA central counterparties (s 286 FSMA)
- Third country central counterparties (s285 FSMA)
- Recognised overseas clearing houses (s292 FSMA)

The exclusion would apply to any supply contract to which an excluded firm is counterparty, irrespective of whether the counterparties are Excluded FS firms.

Excluded FS contracts

We intend to provide that new s.233B(3) and (4) do not apply (if they otherwise would) to the agreements listed below, therefore set off or netting arrangements in the listed agreements will be excluded from the new provisions. The agreements will be excluded irrespective of whether either of the counterparties are an Excluded FS firm:

- financial arrangement: means
  (a) a financial contract (see further below) as defined in Art 2(1)(100) of BRRD;
  (b) a contract for delivery on an intra-day basis which would be a financial contract if it were for delivery on a future date ("spot commodity contract");
  (c) a contract that would be a financial contract or a spot commodity contract, if the term “commodity” in the definition of “financial contract” also included any (1) emissions allowance or credit or (2) other renewable energy or green certificate, permit, credit or allowance;
  (d) a derivative contract, other than any contract already covered in (a)-(c) above, as defined in article 2(5) of the European Market Infrastructure Regulation (648/2012/EU);
  (e) a securities financing transaction as defined in Art 3(11) of SFTR, a commodity leasing transaction, or a similar transaction to any of them, including a similar transaction with respect to any (1) emissions allowance or credit or (2) other renewable energy or green certificate, permit, credit or allowance; or
(f) a master agreement in so far as it relates to any of the contracts or agreements referred to in points (a) to (e):

- market contract (same meaning as in Part 7 of the Companies Act 1989);
- market charge (same meaning as in Part 7 of the Companies Act 1989);
- system charge (same meaning as in the Financial Markets and Insolvency Regulations 1996 (S.I. 1996/1469));
- collateral security charge (same meaning as in the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979));
- financial collateral arrangement (same meaning as in the Financial Collateral (No. 2) Regulations 2003 (SI 2003/3226));
- an agreement which is or forms part of a capital market arrangement as defined in [cross refer to new moratorium in Insolvency Bill] [i.e. see existing Sch A1, paras 4D to 4F. The exclusion for this purpose would apply to all capital market arrangements not only those where a debt of at least £10 million has been incurred (para 4A of Sch A1)];
- an agreement which is or forms part of a public private partnership as defined in [cross refer to new moratorium in Insolvency Bill] [i.e. see existing para 4I of Sch A1];
- a set-off arrangement as defined in Section 48(1)(c) of the Banking Act 2009 or a netting arrangement as defined in Section 48(1)(d) of the Banking Act 2009; and
- any agreement regulating the relationship between creditors.

Financial contract includes the following contracts and agreements (this list is based on Art 2(1)(100) of BRRD1):

a) securities contracts, including:
   i. contracts for the purchase, sale or loan of a security, a group or index of securities;
   ii. options on a security or group or index of securities;
   iii. repurchase or reverse repurchase transactions on any such security, group or index;

b) commodities contracts, including:
   i. contracts for the purchase, sale or loan of a commodity or group or index of commodities for future delivery;
   ii. options on a commodity or group or index of commodities;
   iii. repurchase or reverse repurchase transactions on any such commodity, group or index;

c) futures and forwards contracts, including contracts (other than a commodities contract) for the purchase, sale or transfer of a commodity or property of any other description, service, right or interest for a specified price at a future date;

d) swap agreements, including:
   i. swaps and options relating to interest rates; spot or other foreign exchange agreements; currency; an equity index or equity; a debt index or debt; commodity indexes or commodities; weather; emissions or inflation;
   ii. total return, credit spread or credit swaps;
   iii. any agreements or transactions that are similar to an agreement referred to in point (i) or (ii) which is the subject of recurrent dealing in the swaps or derivatives markets;

e) inter-bank borrowing agreements where the term of the borrowing is three months or less;

f) master agreements for any of the contracts or agreements referred to in points (a) to (e).

[In this definition commodity means any goods of a fungible nature that are capable of being delivered, including metals and their ores and alloys, agricultural products and energy such as electricity [This definition of “commodity” is from Art 2(6) of Commission Delegated Regulation (EU) 2017/565 which supplements MiFID 2 2014/65/EU]}

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