CMC EUROPE

CMCE Weekly Report (13 April 2018)

This week's highlights include:

- **MiFID:** ESMA sent a letter to Commissioner Dombrovskis asking the Commission to clarify whether the ancillary activity test under MiFID II is applied at group or entity level. ESMA also published 3 positive opinions on position limits (feed wheat, jet kerosene and gasoline). The FCA's 2018 business plan makes reference to the FCA's plans to enhance their supervision of transaction reporting of commodity derivatives following their expansion of powers under MiFID.
- **EMIR Refit:** The non-public compromise amendments prepared by the office of Werner Langen MEP were circulated to the CMCE EMIR Working Group. In general, the compromise amendments are favourable to CMCE with the exception that delegated reporting by CCPs has been removed and a review clause is included to provide for a review of the application of the reporting regime 12 months following entry into force, looking in particular at whether the regime creates duplication for ETDs with MiFIR obligations, and whether the ETD reporting obligation could be reduced in particular for NFC-. Also of note is also the amendment on collateral which Langen suggests that NFC+ "may not apply" exchange of collateral for OTC contracts "in the asset class or asset classes for which the clearing threshold has not been exceeded". These compromise amendments are the result of discussions between the Rapporteur and Shadows and they may be subject to revision following further discussion.
- **Brexit:** In a meeting with Brexit Coordinators of member states, the Commission explained that in order to prepare for a worst-case scenario, they are planning to publish sector specific legislative proposals (including for financial services) in the coming months to prevent a legal cliff-edge. In general, the Commission is disappointed by the lack of progress in the negotiations with the UK, and expressed that the UK needs to provide clarity on its proposals on the Irish border question, which is causing a political stalemate.
- **ESAs review:** The last Council Working Party had a discussion on critical benchmarks, and member states are in favour of the Commission proposal.
- **Regulatory capital:** Rapporteur Markus Ferber has published his draft report on IFD. Overall, Ferber broadly supports the Commission draft, to which he has tabled just 13 amendments. On the other hand, he indicates in the explanatory statement that more amendments are to be expected for the regulation (IFR), which has not been published yet.

MiFID II			
CMCE priorities	**Status / latest developments**	**Next steps**	**CMCE action**
AA exemption **Position limits** **Reporting** **Physical forwards**	ESMA published a letter that was sent from Stephen Maijoor to European Commission Vice-President Dombrovskis dated 5 April, asking the Commission to provide clarification on the group vs. entity level interpretation of the ancillary activity test under MiFID II. In the letter ESMA notes that "Based on the Level 1 and 2 texts, there are strong indications that those tests should be performed at a group level. However, in the context of some drafting amendments that were introduced to RTS 20 by the Commission, it has also been argued that the ancillary activity tests should be performed at a single entity level." As this is a matter of interpretation related to the scope of the Level 1 text, and related amendments of the Level 2 text introduced by the Commission, in ESMA's view it is not appropriate to address this issue through an ESMA Q&A. As a result, ESMA is asking the Commission to provide "guidance on how the ancillary activity criteria set out in Article 2(4) of MiFID II, and further specified in RTS 20, are to be interpreted and implemented, and more specifically at which level the tests should be performed". ESMA published an opinion on 3 position limits under MiFID II (Feed wheat, Jet kerosene and Gasoline). ESMA found that the proposed position limits from NCAs are consistent with the objectives established in MiFID II and with the methodology developed for setting those limits. In its 2018-2019 business plan, the FCA stated that as MiFID II has modified the transaction reporting regime, and significantly expanded across new instruments and asset classes, providing more information on transactions, the FCA will enhance its work on monitoring, detection and investigation of potential abuse in these markets. Supervision monitoring will be focused on the fixed income, commodity and non-standard derivative markets.		The advisory team is reaching out to Euronext and EEX to seek intelligence on the thinking of NCAs on the potential changes to the ancillary activity exemption due to Brexit.

EMIR			
CMCE priorities	**Status / latest developments**	**Next steps**	**CMCE action**
EMIR REFIT	The non-public compromise amendments prepared by the office of Werner Langen MEP were circulated to the CMCE EMIR Working Group. These compromise amendments are the result of discussions between the Rapporteur and Shadows and we expect these first compromises to be subject to revision following further discussion. In general, the compromise amendments are favourable to CMCE with the exception that delegated reporting by CCPs has been removed and a review clause is included to provide for a review of the application of the reporting regime 12 months following entry into force, looking in particular at whether the regime creates duplication for ETDs with MiFIR obligations, and whether the ETD reporting obligation could be reduced in particular for NFC-. Also of note is also the amendment on collateral which Langen suggests that NFC+ "may not apply" exchange of collateral for OTC contracts "in the asset class or asset classes for which the clearing threshold has not been exceeded". These compromise amendments are the result of discussions between the Rapporteur and Shadows and they may be subject to revision following further discussion. A full analysis, the revised letter to ECON MEPs and the summary of the call of the EMIR WG were circulated to the CMCE EMIR working group.	**16 April** - Meeting of the rapporteur and shadow rapporteurs **24 April** - Vote in ECON (tentative) **28 May** - Vote in EP Plenary (tentative, subjective to the progress of the negotiating team)	The advisory team circulated an updated version of the letter to ECON MEPs to the WG for comments by **Tuesday 17 April**.
EMIR implementation	There were no significant developments this week.		
EMIR II.2 – CCP supervision	The non-public agenda of the next working party on EMIR CCP Supervision indicates that delegations will discuss the Bulgarian Presidency compromise proposal on third-country CCPs as well as well as the ECB non-paper on CBI requirements for third-country CCPs in exceptional situations and a Commission non-paper on EU CCP Supervision.	**19 April –** Council Working Party on EMIR CCP Supervision **23-24 April** - Consideration of amendments in the ECON Committee **16-17 May** - Vote in the ECON Committee	

CRR II & Regulatory Capital			
CMCE priorities	**Status / latest developments**	**Next steps**	**CMCE action**
IFR & IFD	The draft report of Markus Ferber (EPP, DE) was published. Overall, Ferber broadly supports the Commission draft, to which he has just tabled 13 amendments. On the other hand, he indicates in the explanatory statement that more amendments are to be expected for the regulation (IFR), which has not been published yet. During the Council WP which took place on 27 March, the regulation, including the K-Factors were discussed. Many Member States are clearly still forming their position or have little interest in the file. The UK, Czech Republic, Netherlands and Germany are most active in advocating a more proportionate approach. They see a few areas for improvement but are broadly happy with the proposal. France, Italy and Portugal want to reintroduce in the proposal many elements of CRD/CRR, including counterparty credit risk and CVA risk. The UK, Czech Republic, Netherlands and Germany want to review the NPR, particularly with the delay in FRTB existing for banks in the context of the CRR 2 negotiations. Germany and Czech Republic are pushing for more proportionality in the form of a standardised simplified approached. The Netherlands is pushing for the Risk-to-Market (RtM) to be the K-NPR or K-CMG rather than the higher of both, but for now there seems to be little traction. The scope of the Classes of firms is not up for discussion – for now, no Member State feels the need to change it. DE/UK are more in favour of making some of the obligations of Class 2 regime more proportionate to smaller Class 2 firms than changing the scope/criteria for Class 3 firms.	**16/17 May** – presentation of draft report in ECON **24 May** – Deadline for amendments **18/19 June** – Consideration of amendments **24 September** – Vote in ECON	A draft letter to the European Commission will be circulated to the Reg. Cap. WG for comments.

Benchmarks			
CMCE priorities	**Status / latest developments**	**Next steps**	**CMCE action**
Commodity benchmarks **Critical benchmarks** **Third country equivalence**	There were no significant developments this week.		

ESAs review			
CMCE priorities	**Status / latest developments**	**Next steps**	**CMCE action**
Critical benchmarks **Supervision**	With respect to progress made in the Council, they have now reviewed the entire Commission proposal, and during the last Council Working Party meeting on the ESAs review which took place on 12 April, the Commission proposals in this area were met with a generally negative reaction by Member States, apart from in relation to critical benchmarks. Although the Commission has indicated that it will help the Bulgarian presidency to draft compromises, these are yet to be forthcoming. Austria is currently gathering member state views on the proposal, as part of their preparation for the presidency. The general impression is that member states are going into the CWGs knowing that they do not agree with the EC's proposal, and are becoming weary of this. In addition, the only compromise drafting discussed was prepared by the Italians, and focused on article 31 (coordination function).	**18-19 June** - Presentation of draft report in the ECON Committee **9 July** - Deadline for amendments in the ECON Committee **3 September** - Consideration of amendments in the ECON Committee **24 September** – Vote in the ECON Committee	The advisory team will put together a draft list of potential CMCE key messages and arguments to the co-legislators.

Brexit		
Latest developments	**Next steps**	**CMCE action**
During a meeting of the Council ad hoc working party on art.50, the Commission explained that after issuing approximately 60 industry specific notices for industry, to be prepared in the event of no agreement, they will submit legislative proposals (either at level 1, a delegated act, or an implementing act) to prepare for the worst-case scenario to prevent a cliff edge situation. Currently, they foresee 30 to 40 such proposals in fields such as qualifications, transport, financial services etc, which will be issued as of May 2018, the last should be hopefully published in autumn 2018. MSs have asked that this point is regularly kept on the agenda. With respect to the upcoming negotiation with the UK, there are 5 rounds which are planned until the June European Council meeting on art.50. The agenda of these meetings will be set to discuss (i) remaining questions, (ii) Ireland, (iii) future relationship, these elements will be solved hand in hand, nothing will be left behind. The Commission clarified that the discussion on the future relationship should lead to a joint declaration with the UK, not the agreement on future relationship as such, which they see as something which can only be negotiated after the UK becomes a third-country. With respect to the situation in Ireland, which is broadly considered to be the most politically sensitive issue, as a result of the the four rounds of discussion since March European Council on art.50, the Commission commented that the UK raised the points of highly streamlined customs arrangement and new customs partnership, but it failed to propose any draft text. The Commission is disappointed in the level of detail presented by the UK. Given the current situation, the Commission deems it necessary to work on some backstop solution. The ESAs also published a joint report on risks and vulnerabilities in the EU financial system, which focuses on the pricing of risk premia, risks related to Brexit (also addressing the topic of continuity of contracts), to cyber-attacks and to climate change.	**April** - Union negotiator to begin negotiations with the UK on the overall understanding on the framework for the future relationship **October –** EU target timeline for reaching final deal on withdrawal agreement	

European Parliament INI Report on EU-third country relationships in regulation and supervision		
Latest developments	**Next steps**	**CMCE action**
There were no significant developments this week.	**23 April -** Presentation of draft INI report **2 May -** Deadline for Amendments **28 May -** Consideration of Amendments in ECON **18-19 June -** ECON vote	

CCP RR		
CMCE priorities	**Status / latest developments**	**Next steps**
Resolution Tools	There were no significant developments this week. The Bulgarian Presidency has indicated that this will not be on the agenda of the Council before May 2018 at the very earliest.	

SFTR		
CMCE priorities	**Status / latest developments**	**Next steps**
Reporting obligations	There were no significant developments this week.	**April/May –** Adoption of SFTR Level 2 measures **Q3/Q4 -** Publication in Official Journal