

BI-WEEKLY UPDATE

CMC
EUROPE

EUROPEAN POLICY & REGULATORY DEVELOPMENTS FOR CMCE MEMBERS

25 May 2018

Section I: Active priorities

Brexit			
CMCE priorities	Status / latest developments	Next steps	CMCE action
AA exemption Position limits Reporting Physical forwards	The amendments to Brian Hayes' draft own-initiative report on equivalence were published and the first set of non-public compromise amendments were circulated. The compromises include a call for the European Parliament to have greater scrutiny over equivalence decisions and an active involvement in global standard-setting bodies in financial services (where the Union is currently represented by the Commission and Member States). They do not seem to include any new elements of particular interest to CMCE.	28 May – Consideration of Amendments in ECON June 6 - EU Ambassadors (Coreper) to discuss art. 50 12 June – European Parliament to vote on a resolution on the future relationship during their Plenary session	

	<p>At an event in Brussels which took place on 15 May in Brussels which was organised by the British Chamber of Commerce on equivalence in financial services, Danuta Hübner MEP discussed the EU equivalence framework in financial services. The discussion focused very much on the use of equivalence in the context of the future UK-EU relationship which the European Commission is advocating to be the form of market access for the UK to the EU after Brexit.</p> <p>Danuta Hübner said that when the UK leaves the EU, it will be a third-country unlike any other, and closer to the EU than any other, especially as the <i>acquis</i> will apply at least during the transition period. That being said, she still wants to see a review of the equivalence framework by the Commission. She also commented that the Commission is busy with work on the evaluation of equivalence decisions from the financial stability perspective, and the EP fully supports the work of the Commission to enhance equivalence decisions on a case-by-case basis. However, the EP is pushing the Commission to be more transparent with equivalence decisions. The EP will no longer push for an omnibus regulation to solve all equivalence issues, acknowledging that it is not possible to implement this type of framework and that equivalence has to stem from individual pieces of law.</p> <p>She also stated that it is important to ensure that any equivalence decision respects the principles of proportionality and if possible, any international standards. She noted that the own-initiative report of Brian Hayes is about achieving a system of mutual recognition for the UK and EU, but commented that the political sentiment in the EP is moving “away from mutual recognition for the UK, towards the Commission approach for equivalence being the basis for market access.”</p>	<p>18-19 June: Vote in ECON Committee on the report of Brian Hayes</p> <p>28 June – European Council summit to discuss Brexit</p> <p>October – Deadline for a compromise on the Withdrawal Agreement</p>	
MiFID II			
CMCE priorities	Status / latest developments	Next steps	CMCE action
AA exemption Position limits Reporting	<p>On 23 May, the FCA updated the aggregation table for position limits on commodity derivative contracts in order to include a number of new contracts which ICE Futures Europe launched this week. As these contracts are new, there is not a bespoke position limit which applies to any of the specific individual contracts, however some of them should be aggregated into existing <i>de minimis</i> or bespoke limits.</p>		<p>During the CMCE regular members call, it was agreed that CMCE will, for the time being, refrain from taking any action beyond gathering intelligence as regards the ESMA letter to VP Dombrovskis asking for guidance on the</p>

<p>Physical forwards</p>	<p>On 22 May, ESMA published its Opinion on FCA position limits on ICE Low Sulphur Gasoil 1st Line contracts, in which it concludes that the limits set comply with RTS 21 / MiFID II.</p> <p>On 9 May, BaFin published a guidance note specifying the scope of Art. 10 of Delegated Regulation (EU) 2017/565 in relation to the characteristics of an FX derivatives contract in order not to qualify as financial instrument within the meaning of MiFID2.</p> <p>According to the guidance, pursuant to Art. 10 of the Delegated Regulation, FX derivatives contracts used for the purpose of payment shall not qualify as financial instruments subject to further requirements. In particular, BaFin's guidance sets out that an FX derivative contract must:</p> <ul style="list-style-type: none"> - not contain any cash-settlement; and - be entered into in order to facilitate payment of identifiable goods, services or direct investments. <p>As the German version of Art. 10 of the Delegated Regulation (EU) 2017/565 does not contain the word 'identifiable', BaFin has clarified that, notwithstanding the German wording, the payment must be related to 'identifiable' goods, services or direct investments.</p> <p>With respect to the letter from ESMA to the Commission on the ancillary activity exemption, the request to ask the Commission for a clarification on the entity vs group level interpretation of the AA test seems to have come from Markus Ferber MEP and Kay Swinburne MEP.</p> <p>The MiFID II Rapporteur and Ms Swinburne made this request in follow-up to a note they had sent to ESMA at the time that RTS 20 was being finalised to raise their concerns that it was seen as going against the level 1 text and asking ESMA to reconsider the RTS. We were told that the MEPs decided to request ESMA to seek guidance from the Commission, given that ESMA could not make up its mind on which interpretation to support.</p> <p>A record of the March ESMA Board of Supervisors meeting that was published earlier this week indeed alludes to a letter to ESMA from MEPs.</p>		<p>entity vs group level interpretation of the AA.</p>
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EMIR REFIT			
CMCE priorities	Status / latest developments	Next steps	CMCE action
Reporting Risk mitigation for uncleared trades Calculation of NFCs positions	<p>The report of Werner Langen was voted through in the ECON Committee on 16 May, but the Committee did not vote to open trilogue negotiations with the Council just yet. The report will go to a vote in the plenary first in mid-June.</p> <p>The final version of the text is in line with the last set of compromise amendments. With respect to collateral requirements for uncleared OTC derivative trades, it contains relief for NFCs who are subject to the clearing obligation suggesting they should only have to post collateral in the asset classes where they have breached the clearing thresholds.</p> <p>The Chairs of the ESAs sent a letter to the European Commission, Parliament and Council of the EU to raise points on the RTS under EMIR Refit on risk mitigation techniques, specifically the initial margin model approval. The ESAs are suggesting that the EBA should lead the work on the RTS for non-centrally cleared derivatives. Secondly, they argue that the Commission should take a proportional approach in the RTS so that the model approval process can be adapted for the use by institutions that pose systemic risk and for those that do not. Finally, with respect to the timing of the submission of the proposal, they want a 24-month deadline instead of a 9-month deadline to submit the RTS.</p>	11 June – European Parliament to vote on EMIR Refit	
Benchmarks			
CMCE priorities	Status / latest developments	Next steps	CMCE action
Commodity benchmarks Critical benchmarks Third country equivalence	<p>On 24 May, ESMA updated its Q&A on the Benchmarks Regulation to include a question on whether prospectuses should include reference to the register of administrators and benchmarks. ESMA thinks that in relation to prospectuses approved on or after 1 January 2018, where the register already includes the relevant administrator by the time a prospectus is published, such prospectuses should include a reference to the fact that the administrator is listed in the register. If a prospectus does</p>		

	<p>not contain a relevant administrator by the time that the prospectus is published, it must contain an explanatory statement.</p> <p>The European Commission published its sustainable finance package on 24 May and it includes a part on low-carbon benchmarks, where the Commission has made a proposal for a regulation amending the Benchmark regulation and annex. This proposal aims to create 2 new categories of benchmarks are created; firstly, a low-carbon benchmark based on decarbonising a standard benchmark and a second, more ambitious positive-carbon impact benchmark aligned with the objective of the Paris agreement on climate change.</p> <p>According to the agenda and preparatory working documents for the Council working party on the ESA's review which took place on the 23 May, EU member state delegations discussed the Bulgarian Presidency non-papers on ESAs' tasks and powers, on ESAs' governance and on direct supervisory role for ESMA, including in the field of critical benchmarks.</p> <p>Member states were asked to indicate their preference between keeping the status quo under BMR and assigning ESMA with the powers to supervise administrators of EU critical benchmarks which are relevant for more than one EU member state.</p>		
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Section 2: Watching brief

IFR		
CMCE priorities	Status / latest developments	Next steps
Commodity dealer IF regime	<p>European Parliament</p> <p>On 16 May, Markus Ferber (EPP, DE) presented his draft report on IFR/IFD in the ECON Committee. Equivalence was by far the most discussed topic by MEPs. There was a strong disagreement between Pervenche Beres, who would like to postpone the deadline for tabling amendments and wait for the vote on Brian Hayes' report on equivalence on 18 June, and Markus Ferber, who prefers to stick to the initial timetable. There was a general consensus between the</p>	<p>European Parliament:</p> <p>18/19 June – Consideration of amendments</p> <p>24 September – Vote in ECON</p>

	<p>rapporteur and the shadow rapporteurs on the need to improve proportionality for small and medium sized investment firms.</p> <p>Council</p> <p>During a meeting of the Council Working Party on the IFR which took place on 17 May, member state delegations discussed a French non-paper on reviewing the wholesale third-country regime of MiFIR. The French non-paper is suggesting making a series of changes to the third-country framework of MiFID II for investment firms. It suggests making the following changes:</p> <ol style="list-style-type: none"> 1. Substituted compliance should be narrowed down to the rules on initial authorisation of third-country firms. 2. Third-country firms operating in the EU should be required to apply certain rules of MiFID II/MiFIR in those areas where the EU cannot defer to the third-country rules. 3. To ensure that third-country firms operate in the EU with a minimal presence, enabling the subset of EU applicable rules to be enforced on them, third-country firms should be required to set up a branch in the EU. 4. The operation of an MTF or an OTF should require the establishment of a subsidiary in the EU, with a MiFID II authorization and supervision. 5. Clarify the meaning of the level I in terms of the scope and conditions of article 42 of MiFIR on the provision of services at the exclusive initiative of the client, in line with the recent Q&As that ESMA has published. <p>This system seeks to place 3rd-country firms operating in the EU under the shared competence of ESMA and their 3rd-country supervisor, thus ensuring equal treatment of third-country firms with respect to EU investment firms (as the key provisions of MiFID II / MiFIR would be applied and enforced on them) and providing EU regulators with the information they need to ensure market integrity and investor protection.</p> <p>During the meeting, France emphasised that prudential rules should not be called into question. Nevertheless, in the context of the ESAs review, the window of opportunity should be used to establish a solid regime. While some member states endorsed the key messages of the paper, they asked for more time to assess its arguments and would seek some clarifications, stressing that the controversial MiFIR/MiFID II discussions should not be repeated and outlining that the regulatory regime has entered into application only recently; also, they outlined that ESMA's role should be solved in the ESAs review discussions. Member states agree that the issue of equivalence and the treatment third-country firms are of paramount importance in the context of Brexit.</p>	<p>Council of the EU: 25 June – Meeting of the Council WP on IFR</p>
MAR		
CMCE priorities	Status / latest developments	Next steps

Insider dealing MM indicators	There were no significant developments this week.	
SFTR		
CMCE priorities	Status / latest developments	Next steps
Reporting Obligations	There were no significant developments in the last week.	