



## Commodity Markets Council - Europe

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### Summary of key highlights and actions CMCE All Members' Meeting, Geneva, 12 September 2018

#### 1. Chair's welcome

The Chair, Samina Anwar (Cargill) opened the meeting by welcoming CMCE members. She explained that this meeting was organised as a result of feedback from members hoping for more face to face interaction during the interviews with the Exco. and the advisory team in the first quarter of 2018. Following this first meeting the usefulness of this format will be reviewed to decide whether more of these meetings should be organised in the future.

The Chair also drew attention to and encouraged Members to take part in the CMCE Annual General Meeting which will take place on 9 November in London and the CMC State of the Industry conference which will take place in Miami from January 27-29 2019.

#### 2. CMCE Brexit working group

From previous discussions of the Brexit WG, it was clear that CMCE should focus on specific commodities issues only. The **ancillary activity test** in RTS 20 under MiFID II ('AA test') and possible changes to it as a result of Brexit was so far identified as the key priority.

The advisors recapped on the issues linked to the AA test and Brexit. As the AA exemption is framed by a reference to thresholds for market size *in the Union*, for both the numerator and denominator of the calculation, there would be a step change in both these figures after the UK leaves the EU. Further, for some commodity derivatives markets (metals, for example) it is not clear to what extent there is really a market within the EU.

It is currently unclear how the EU authorities will continue to calculate the market size, whether this will be done on the basis of the current test but just on the basis of the EU27 market size or whether the UK will remain as a part of that calculation in one way or another. It nevertheless seems clear that the test will need to be amended in one way or another as a result of Brexit.

Some key considerations arise as regards:

**The definition of financial instruments** (Annex I, MiFID II): Both the numerator and denominator are calculated on the basis of trading in financial instruments. The **'REMIT carve-out'** under Annex I C6 will no longer apply in respect of gas and power trades deliverable within the UK (e.g. NBP and GTMA trades and LNG trades for delivery at South Hook) because these will no longer be in the scope of the REMIT definition of 'wholesale energy products' (WEP). UK brokers will cease to be

OTFs so that no WEPs traded on their platforms would be eligible for the Remit exemption (although some may establish OTFs in another EU Member State).

**Calculation of 3-year rolling average under RTS 20:** In the first year after Brexit, figures for the preceding 3 years will be on the basis of the EU28 market size; in year 2, the data will be sourced from two years of EU28 data and one year of EU27 data. That could give rise to a step-change in the threshold assessments for some firms. This model is arguably not fit for purpose and will have to be revised.

#### *State of play*

Intelligence gathered by the advisory team indicates that some NCAs are starting to ask questions on this and are in the early stages of thinking of how the AA test could be changed. The French regulator has said in informal conversation that questions could be asked about the validity of the entire approach following the UK's exit.

However, the European Commission is keeping its thoughts and any preparatory work extremely close to its chest and given the high risk of documents leaking to the UK if circulated to the Member States, no documents are circulating in Brussels. The Commission's general approach to industry questions on Brexit has been to listen only and provide very little by way of response. There is no indication at this stage of whether revisions to RTS 20 are being considered by the Commission.

On broader financial services issues, the UK has taken steps to prepare legal arrangements so that firms can expect to operate in the UK post-Brexit in the event of a no-deal Brexit. The Commission and other EU authorities have taken a different approach and have given no public indications of following a similar approach on the EU's side. Intelligence from sources in the German Finance Ministry nevertheless indicates that they expect the EU to adopt a corresponding approach in the case of a no-deal outcome with a number of equivalence decisions adopted quickly for UK operators; however, no public commitment should be expected before the outcome of the negotiations is clear. Other more political issues are high on the list of the negotiators' priorities in this area, e.g. CCPs; whereas the AA test is seen as a more marginal issue and therefore risks not being properly dealt with ahead of Brexit day given more pressing issues.

#### *Key points from the discussion with Members*

- It is unlikely that RTS 20 will be revised ahead of 29 March 2019 and even if there was willingness to revise it, there would be little time to go through the legislative process. Discussions are ongoing amongst policy-makers and regulators more generally on how necessary changes to EU law could be made quickly in the case of a no-deal Brexit.
- Even if no solution on RTS 20 is found ahead of 29 March 2019, the timetable for making notifications could give some more time for a solution to be found. Depending on the approach taken in the relevant Member State, notifications including 2019 data may not be required until Q1 2020.
- One member commented that they had to date only notified to the regulator in the UK and enquired about the process for notifying to another regulator in the EU27. A member of the advisory team commented that third-country firms will have to notify any regulator where they would want to benefit from the exemption, i.e. up to 27 national regulators. (This is in line with ESMA Q&A, Commodity Derivatives , Question 5.<sup>1</sup>)

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<sup>1</sup> "Question 5: To which competent authority should a person provide notification that it makes use of the ancillary activity exemption? Answer 5: The relevant competent authority will be the national competent authority to which the person would need to apply for authorisation if it were unable to make use of the ancillary activity exemption."

- Brexit may have a positive impact on Swiss firms who have only been in scope of the requirements because of trading taking place in the UK, depending on the future UK regime.
- The AMF has been asking firms to tell them how Brexit will impact on their calculations on the AA test. One member noted that they had been asked about how the AA thresholds would be impacted in the sphere of agricultural commodities. It may be worth interested CMCE members aligning their responses to such requests.
- CMCE engagement with the Commission and NCAs and the possibility of a CMCE position paper or issues paper on Brexit was debated. The advisors noted that it was not advisable to meet with the European Commission before having clarity on what CMCE's position is, what the key concerns are and any suggested solutions. A less focused and more intellectual discussion may be possible with NCAs.
- A member suggested that the process of trying to come up with as much of a position as possible could in itself be helpful. Given that Members are likely to have different asks and perspectives, it may be more appropriate to work on a paper describing the questions that arise with Brexit to inform policy-makers and regulators of these, rather than seeking to form a CMCE position.

### ***Follow-up actions***

- It was agreed that the CMCE Brexit WG should be formalised. An email will be circulated to members asking them to name individuals to be included on the distribution list for the group.
- It was agreed that the process of putting together a CMCE issues paper on Brexit should be launched. The paper could be used to inform regulators of the questions and uncertainties that the industry has and seeking guidance on the likely approach(es) to be taken by regulators.
- The advisory team will seek an informal conversation with the AFM to seek to confirm the process and individuals involved in a possible revision of RTS 20.

## **3. CMCE 2018 Stakeholder engagement**

The advisory team gave a presentation covering context & objectives of CMCE stakeholder engagement, the plan for 2018, the state of play on actions and preparations carried out to date and next steps. All Members interested to take part or input into this work were encouraged to get in touch with the advisory team.

The aim is to organise a small roundtable in December 2018 with approximately 10-20 key Commission staff in attendance. Ahead of that, CMCE should organise a programme of bilateral meetings in Brussels with the aim of finding end-user partner organisations for the roundtable. These meetings should take place between the end of September and mid-October if the roundtable is to be organised this year. A stakeholder engagement steering group consisting of CMCE Exco Members has been formed to discuss the engagement plan and messaging. Work on messaging has been split into two sub-groups, one dealing with Ags and softs and the other with Energy. Please refer to the presentation for more details.

The following suggestions were made in discussion with Members:

- The CMCE presentation to policy-makers should not be overly focused on derivatives, but should explain the derivative markets as part of the ecosystem facilitating physical transactions.
- CMCE should be ready to answer any difficult questions from policy-makers on issues that we would choose not to cover in the presentation.

- Instead of a roundtable, a more detailed training session could be organised with the Brussels-based organisations that represent the entire supply chain, i.e. Coceral and FoodDrinkEurope on the ags side. Some Members responded to this suggestion that it may be difficult to get policy-makers to commit the time given that they do not know CMCE as an organisation, while a shorter event could be more manageable. One of the objectives is also to raise awareness of CMCE as the commodity industry representative body.
- A member said that from experience in the US, having an interesting external speaker or high-level participation of Members (e.g. at CEO level) could be helpful for attracting policy-makers. It could also be useful to provide an opportunity for policy-makers to network with each other.
- On end-user involvement, a member noted that partners should include end-users both on the ags and the energy side.

#### **Follow-up actions**

- Members interested to be involved or provide input into CMCE stakeholder engagement activities should contact the advisory team.
- The Exco. and the advisors will reflect on the feedback received from Members and the best way to take the engagement plan forward and will report back to the membership.

#### **4. Presentation of the Swiss Chapter of CMCE**

Martin Liebi, the advisor to the Swiss Chapter, gave a presentation on the Chapter and its work as per the presentation circulated to Members. The Swiss Chapter was created in December 2017 as a separate group under the CMCE umbrella. The Swiss group commenced operations at the beginning of 2018 with the aim of shaping regulatory developments in Switzerland that could affect commodities trading firms active in Switzerland. This has mostly concerned the implementation of derivatives legislation which stems from EU legislation such MiFID II and EMIR.

During this time, there have been 8 meetings within the Swiss Chapter. The Swiss Chapter of CMCE has interacted with Swiss policy makers at many levels and its actions have contributed to successes for the commodities industry, including initiating a Refit review of the FMIA that will take in 2019, securing a postponement of the reporting requirement for NFC- under the FMIA for 1 to 2 years.

#### **5. CMCE MiFID II working group**

The discussion focused on the classification of certain physical forward contracts as financial instruments (or otherwise) under MiFID II, following from previous MiFID WG discussions.

The issue under consideration concerned the regulatory characterisation of book-outs/circle outs carried out under the procedures set out for them in market standard physical master agreements, and in particular whether they would be “financial instruments” under MiFID II Annex I C5. The consideration of this issue had been initiated by a member who found it problematic that there is not a coherent acceptance across the market on how certain contracts should be classified.

The last call of the WG discussed some sample contracts (forward part of the Brent contract, SUKO 90 and Open Spec Naphtha) which include circle-out or book-out conventions. The discussion focussed on the OSN contract, which contained a procedure (drafted somewhat unclearly) for obtaining the consent or agreement of all parties to a circle-out. Under that procedure a notice is expected to be sent to the various parties seeking that consent. It was agreed that clarificatory wording could be developed for use with such notifications to make it clear and to evidence that cash-

settlement only occurs with such consent and without any fetter on the parties' ability to decline to cash-settle. The key aim is to clarify that such circle-outs take effect only after a separate agreement, not as of right under the existing OSN agreement between the parties.

The advisory team now suggests that it will circulate suggested standard language to Members of the group, on the basis of the two examples that were received from Members to date.

One member commented that this approach was similar to US market practice and it would therefore be helpful if consistent language could be agreed across the jurisdictions. Another member noted its support to the approach suggested by the advisors.

#### ***Follow-up actions***

- The advisory team will circulate suggested standardised language for a short paragraph that Members can choose to include in the notification emails that clarify that counterparties are asked for their agreement to cash settle, following the examples provided by two members.

### **6. CMCE EMIR working group**

The advisory team provided an update on CMCE activity on the EMIR REFIT legislative process in 2018. The negotiations are expected to conclude soon, possibly already in October. The second political trilogue is scheduled for 27 September and a potentially final trilogue for mid-October. At this stage, no further CMCE action is foreseen apart from monitoring the finalisation of the negotiations.

Currently the expectation is that:

- The status quo will prevail for reporting of exchange traded derivative (ETD) transactions, with a review clause providing for a Commission assessment based on an ESMA report on potential duplication between the EMIR and MiFIR reporting requirements for ETDs. This review could happen quite soon, as the Parliament and Council have requested ESMA reports by 6-9 months after entry into force already, and if negotiations conclude as soon as expected the text of EMIR Refit could be published in the EU Official Journal already early next year.
- Delegated reporting by financial counterparties on behalf of NFC-.
- The "Breach one, clear all" rule will be scrapped, so clearing only required across asset classes where the thresholds have been breached.
- The collateral requirement for uncleared OTC trades will be maintained.

The advisory team also noted that under the UK's EU Withdrawal Act, legislation deriving from the EU 'so far as operative' on exit day (i.e. 29 March 2019) will become a part of UK law. This implies that in a no-deal scenario, EMIR Refit would not automatically become part of UK law if it will not have become 'operative' ahead of Brexit day.

#### ***Follow-up actions***

- The advisory team will monitor and report to the EMIR WG on the conclusion of the trilogue negotiations.

### **7. CMCE Benchmarks Working Group**

Discussion focussed on the implementation of the BMR in the UK and the draft CMCE letter to the FCA on this topic.

The advisory team explained that the proportionate outcome that had been successfully negotiated during the BMR LI legislative review process for commodity benchmarks was not clearly reflected in the UK approach to implementing the BMR.

Under BMR, certain commodity benchmarks (“Annex II Benchmarks”) are exempt from the Title II requirements (which includes the more burdensome requirements such as suspicious activity reporting and the requirement to ensure adherence to a “code of conduct”).

Annex II Benchmarks are commodity benchmarks<sup>2</sup> the majority of whose contributors are not “supervised entities”; in other words, commodity benchmarks which can show their contributors are mostly from unregulated firms.

A change in the population of a benchmark contributors can flip it from the Annex II regime (which is on a par with the IOSCO Oil PRA Principles), to the Title II regime (which is very different and not tailored for commodity markets).

One key concern among the members was that FCA’s BMR implementing rules were sometimes expressed in a way which could – misleadingly – suggest that contributors to Annex II benchmarks carried greater regulatory exposure than was in fact the case. There was a concern this could put off contributors from some benchmarks (risking a “flip” into Title II).

Another key issue was that PRAs, as media organisations, had sought comfort from FCA that their status as media organisations would be recognised, and that the rulebook would be applied without breaching the right to freedom of expression. FCA gave some such comfort, but only in the Policy Statement – not in the Handbook Text.

In the UK, 8 BMs were already regulated before BMR –and this likely shaped the FCA’s approach to the treatment of other benchmarks in the FCA Handbook.

Simultaneously, HM Treasury surprised everyone by coming up with a Statutory Instrument that provides the FCA with the power to impose “requirements” on “miscellaneous benchmark persons”. This is very widely defined and would apply not only to contributors but to those ‘involved’ in the contribution of data. As an example, if a firm trades in a window, it might not regard itself as “contributing” to a BM but it would be hard to argue that it is not ‘involved’ in the process of contributing to BMs. On that reading, FCA could potentially impose “requirements” on such entities.

This unhelpful approach by the UK could have a potential chilling effect on contributions to commodity benchmarks.

As a result, the BMR WG had decided that CMCE should draft a letter to the FCA asking for the helpful language in the notice to the Handbook to be reflected in the text of the Handbook itself. A revised version of the letter had been circulated to the WG ahead of the meeting and members were now asked to provide any final comments before it is sent.

One member indicated they would be providing some additional comments. Another member said they were happy with the letter to be circulated in its current form.

A member asked what the likelihood of the FCA accepting CMCE’s ask was. The advisors responded that while this was not a given it was nevertheless possible that CMCE’s request would be addressed in one way or another. A member stressed the importance of this letter being sent by the CMCE as an organisation also representing contributors to commodity BMs who may risk ceasing their contributions if the requirements were seen as too onerous.

### ***Follow-up actions***

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<sup>2</sup> Other than “critical” benchmarks on gold, silver or platinum.

- Members are to provide any final comments on the letter to the FCA which has been circulated to the BMR WG via email.
- The advisory team will put together and circulate a draft letter to HM Treasury on the issue of 'miscellaneous BM persons' to the BMR WG for their comments. Members are asked to send any input they want to provide to the advisors.

#### **8. The Chair's concluding remarks**

The Chair thanked members for their active participation and is looking for feedback on the meeting which will be used to assess the value of organising such meetings in the future.

She asked the advisory team to circulate information on the existing working groups to CMCE members so that Members can review their involvement in WGs. She also informed members that Chair and the advisory team are working with the colleagues at CMC US to upgrade the CMC website and include a members-only area where documents on WGs could be centralised.

Members were also asked for their feedback on the CMCE Stakeholder engagement program.

## Annex I - List of participants present in person

Name	Organisation
1. Marco Goehns	ADM
2. Bambina Forciniti	Argus
3. Jonathan Hill	BP
4. Samina Anwar	Cargill
5. Marta Zuluaga Zilbermann	Cargill
6. Evelien Van Den Arend	CME group
7. Manda Goodwin	Conoco Phillips
8. Monique Kennedy	Engelhart Commodities Trading Partners (ECTP)
9. Oliver Haynes	Gunvor
10. Gavin Hunter	Hartree Partners
11. Anna-Maria Karjalainen	Hume Brophy, CMCE advisory team
12. Laurent Texier	LDC
13. Martin Liebi	PwC, CMCE Swiss Chapter advisor
14. Chris Borg	Reed Smith, CMCE advisory team
15. Pierre Davis	S&P Global
16. Caroline Ashton	TOTSA
17. Claude Casset	TOTSA
18. Alex Beales	Trafigura