Indicative CMCE Brexit-related questions and issues provided to the AMF, AFM and FCA ahead of the CMCE AGM discussions on Brexit and the impact on commodity derivative markets on 9 November 2018

These questions were compiled on the basis of input from members in writing and on the CMCE Brexit WG call on 2 November 2018.

Indicative questions to the AMF and AFM:

1. General questions

How are member state regulators and ESMA Commodities Task Force members organised to deal with Brexit? What kind of interaction is there with the Commission's Article 50 task force? Is there interaction with other relevant EU bodies, like ACER?

To what extent do you expect a migration of UK investment firms to your jurisdiction? How are you gearing up for that challenge?

2. MiFID II ancillary activity exemption

How do you envisage the ancillary activity exemption working after Brexit?

Issues with the current framework: To determine whether a firm's activity in commodity derivatives and emission allowances can be considered "ancillary" to its main business under MiFID II, a firm must assess the level of its trading activity in "financial instruments" relative to that of the "overall market size" in the Union in each relevant commodity asset class.

i. With the UK's exit from the EU, the size of the overall market for certain asset classes will be drastically reduced, especially given the dominant position of the UK in certain commodity asset classes, such as oil and metals. Do you believe this requires changes to the way the market size test is currently set out in RTS 20?

ii. The definition of "financial instrument" under MiFID II excludes wholesale energy products traded on an OTF that must be physically settled under Annex I, C6, MiFID II. With the UK's exit from the EU, physical power and gas contracts traded on UK OTFs would no longer benefit from this exemption and would become financial instruments under MiFID II. How do you expect to treat open gas / power trades on UK OTFs, which are not yet in delivery as at the date of the UK's exit?

iii. The thresholds set under RTS20 take effect on volumes averaged over the previous three years. When the first year (or part-year) of post-Brexit volumes is included, this could create a step-change effect in the figures, with 2 years of EU28 volumes and 1 year of EU27 volume. What provision can be made to help smooth that transition for market participants and avoid disruption?

iv. Will the retrospective 3-year averaging continue to operate, so that in the first year of Brexit firms will be able to work on the basis of the previous 3 years of EU28 data?

Potential alternative framework: If any new framework is being developed or is under discussion, would this be achieved through a revision of RTS20? How long could the market expect to have to implement any new framework? Market participants will need considerable implementation time if

any material changes are made to the framework, especially if the new framework also operates on the basis of retrospective data sets.

3. The EMIR framework and access to trading infrastructure

What key changes to the EMIR framework (and equivalence framework) do you envisage in connection with Brexit? In particular:

i. Continued cross-border access to trading venues, trade repositories and clearing house members between the EU and the UK is important for the continued operation of the commodity derivative markets following the UK's exit. CMCE Members welcome the recent statements from the Commission, indicating that swift recognition of UK CCPs as equivalent under EMIR is envisaged in the case that no transitional period is in place as of 29 March 2019. How do you expect that continued access to UK trade repositories and trading venues by EU market participants will be facilitated?

ii. With the UK's exit, derivatives traded on UK exchanges will become OTC Derivatives under EMIR, unless equivalence is granted to UK trading venues. Do you foresee any changes to the EMIR clearing threshold(s) to take account of this?

iii. Under Article 11(7) EMIR, intragroup transactions by non-financial counterparties (NFCs) belonging to the same group in different member states can benefit from an exemption from the requirement to exchange collateral for uncleared OTC derivative transactions. With the UK's exit, UK NFCs in the group will become third country NFCs, which means that an application would need to be made under Article 11(9) EMIR for new transactions. Do you foresee grandfathering of existing exemptions under Article 11(7), to avoid a burdensome re-application process by NFCs?

4. Third country access to EU markets under MiFID II / MiFIR

Continuity of access to EU markets by third country firms under MIFID II is generally under review, both at EU Level and at national level in some jurisdictions. What considerations are being taken into account as the EU reviews its approach to third country access (especially for wholesale market activity)? What considerations do you think are relevant for your national regime on this question?

Is the guiding principle that EU regulation should apply equally to all firms conducting the same activity regardless of whether they are operating outside the EU or not? Will third country firms which are exempt from MiFID II, need to concern themselves with the proposed changes to the third country access regime? To what extent is the likely impact on exchange-traded volumes in Member States being considered in this context?

5. The Benchmark Regulation

Given that many commodity benchmarks are operated by UK administrators, who will become third country administrators, do you anticipate any review of third country benchmark provider provisions under the Benchmark Regulation? Could another transitional period be advisable?

Additional question to the AMF:

The French National Assembly recently adopted the PACTE bill, which we understand would establish a requirement for third country investment firms which provide investment services and activities to eligible counterparties and per se professional clients in France, to set up a branch in

French territory, if no EU equivalence decision has been adopted for the third country in question. The scope of Article 23(16°) of the PACTE bill seems unclear as regards investment activities. Could you clarify whether the intention is to include activities, such as dealing on own account, in the scope of the proposed branch requirement?

Indicative questions to the FCA:

1. What have been the guiding principles behind the FCA/HMT's approach to the "onshoring" of EU regulation?

2. Have there been any sticky issues on the commodity aspects?

3. We can see there has been a flurry of activity, with FCA's CPs 18/28 and 18/29 and with HMT's series of draft SIs (including the draft MiFID (Amendment) (EU Exit) Regulations, which will update the RAO). How much more is there still to do and what is the likely timing on the rest of the FCA's output?

    a. We note that BTS on the transparency regime are awaited, for example.

    b. How will "systematic internaliser" thresholds be set under the UK MIFID 2 regime?

    c. What is the likely approach to the onshoring of CRR/CRDIV (we are interested mostly in the retention of the specialist commodity exemptions under art 493/498 and on the approach to the remuneration code regime)?

    d. What will be the approach to onshoring EMIR? We welcome the approach taken to provide for temporary recognition of EU CCPs. Other questions arise:
        i. Treatment of intra-group trades, will there be a need to reapply? Will IGT exemptions already granted/notified be grandfathered over?
        ii. It is likely the UK notion of a "financial instrument" under MIFID2 will vary from the notion under EU MiFID 2. This could take effect over time (through divergence) or just because the definitions apply differently on day 1 (e.g. with respect to commodity forwards on OTFs/MTFs and the treatment of "wholesale energy products" under para C6 of Annex I MiFID II. If so this will drive different reporting treatment under EMIR and – perhaps confusingly for some – different margining treatment. Is this under consideration?

    e. To what extent is FCA engaging with BEIS/Ofgem to address the interaction between financial regulation and REMIT – particularly around the product definitions?

4. We note that FCA does not plan to reissue ESMA Q&A level 3 guidance as part of the "onshored" package of retained EU law. What, if any, comfort will be given to firms which rely on that guidance (where FCA is otherwise silent): (a) as at Exit Date, (b) as time goes by thereafter?

5. On RTS20/BTS20 is the intention to create a threshold calculation which operates seamlessly at the transition – so there ought to be no change (at least on the UK side)? Do the references in the draft BTS 20 to MiFID2 and terms defined under it (e.g., financial instruments, OTFs, MTFs) refer to those terms as they will apply *immediately before* Exit Day or to them as they apply on/after Exit Day?

6. What are your expectations as regards anticipated information-sharing and co-operation between FCA and EU NCAs going forward after Brexit?

7. If the UK's policy post-Brexit is to maintain equivalence with the EU financial services regulatory regime, how would this affect FCA's approach to rule-making and the giving of guidance, especially individual guidance on matters of "retained EU law"?