CMC EUROPE

# CMCE Bi-weekly Update (23 November 2018)

## 1. ACTIVE PRIORITIES

| Brexit | | | |
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| **CMCE priorities** | **Status / latest developments** | **Next steps** | **CMCE action** |
| **Transitional arrangements**<br><br>**Ancillary activity test** | On Thursday 22 November, EU negotiators and the UK reached an agreement on the political declaration on their future relationship. With regard to financial services issues, the text indicates that the EU and the UK should start assessing equivalence with respect to each other as soon as possible after the UK's withdrawal from the Union, endeavouring to conclude these assessments before the end of June 2020. The text also indicates that equivalence should be underpinned by a consultation process for awarding and withdrawing decisions. The text is not legally binding and still needs to be endorsed by the EU27 during the European Council that will take place on 25 November.<br><br>On the future relationship, member states have not yet decided on the EU negotiator and whether Michel Barnier will continue in this role, or whether this will be given to another arm of the European Commission.<br><br>The draft text of the Withdrawal Agreement was published on 14 November, with only small changes expected to include an extension of the transition period to 2021 or 2022.<br><br>The FCA published a second consultation on proposed changes to the Handbook and Binding Technical Standards given Brexit. The consultation period closes on 21 December 2018 and final rules are expected in Q1 2019. | **25 November** - The EU27 expected to endorse the Political Declaration during the extraordinary European Council<br><br>**7 December** – Close of FCA consultation on changes to handbook and technical standards<br><br>**10/12 December** – UK House of Commons will vote on the draft withdrawal agreement<br><br>**13 December** – European Council | A call of the Brexit WG will be scheduled to discuss follow-up after the discussions with the AMF, AFM and FCA at the CMCE AGM. |

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| | The German Ministry of Economy and Finance is also working on its own set of contingency measures. A draft law published provides for the creation of a parent act for BaFin in order to avoid disadvantages for the functioning and stability of the financial markets or in such supervisory areas that would be particularly affected by an unregulated Brexit such as insurance or banking. In case of a no deal scenario, BaFin may thus allow UK-based companies, on a transitional basis, to further make use of the rules on the European passport for branches or by way of cross-border services in the domestic territory.<br><br>A French draft law which would enable the French government to adopt contingency measures in the case of a no-deal scenario (see art.2(4°) has been adopted by the Senate and is expected to be adopted by the National Assembly in December or January. In the area of financial services, the contingency measures would seek to allow continued access by French firms to UK based clearing and settlement systems as well as the continuity of contracts concluded prior to Brexit. The aim is indeed to help address issues around contract continuity. | | |

## MiFID II

| CMCE priorities | Status / latest developments | CMCE action |
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| **AA exemption**<br><br>**Position limits**<br><br>**Reporting**<br><br>**Physical forwards** | During the CMCE AGM on 9 November, the AMF said that there are three options for revising the ancillary activity test after Brexit. Option 1 is to keep things largely as they are and to include UK data in the denominator for market size. This would be advantageous insofar as that is the simplest solution for the market but it does have its own legal challenges for ESMA to use data from the UK, but not from other third countries.<br><br>The second option would be to change the thresholds to adapt to what the EU27 market represents. However, some thresholds would change drastically and there are many questions to answer such as whether it makes sense for markets which are entirely in the UK (e.g oil, metals, coal) to have thresholds in the EU where those markets don't exist.<br><br>The third option is re-evaluate the framework in a more holistic way which would require more profound changes and a revision of the level 1 text. This would require a deeper look at EU markets. | On the work around the classification of physical forwards the advisory team is to circulate suggested standardised language for a short paragraph that Members can choose to include in the circle-out notification emails linked to the OSN contract. |

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| | The AA test is nevertheless not considered to be a cliff-edge issue because the first notification impacted would be in 2020 where the 2019 denominator would shrink for the last three quarters. The AMF commented that a review of the AA thresholds is included in MiFID II, so in any case this would have been reviewed even without the backdrop of Brexit. He also said that the solution could be a mix of the 3 options, and that they will absolutely take into consideration the fact that firms will need to know the framework in advance.<br><br>The FCA on their side confirmed that the UK has the intention to leave the AA test as it is and they do not wish for firms to have to recalculate because of Brexit. On the REMIT carve out the Statutory Instrument (SI) does not look like the EU one and the FCA is finalising an explanatory note on this. There will be no short-term change to the MiFID II / RAO definition of a financial instrument in the UK. The words may look different, but the intention is the same.<br><br>Also during the discussions with the AMF, they responded to a question that CMCE had asked on the scope of the French draft PACTE bill and whether it would include activities such as dealing on own account. The AMF representative responded that the branch requirement introduced in the PACTE law, in his view, only applies to the provision of financial services to a client and therefore does not include in scope third country firms dealing on own account on trading venues in France. | |

## EMIR REFIT

| CMCE priorities | Status / latest developments | Next steps | CMCE action |
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| **Reporting**<br><br>**Risk mitigation for uncleared trades**<br><br>**Calculation of NFCs positions** | Ahead of the next trilogue on EMIR REFIT, the Presidency has circulated a non-public paper to member states outlining suggested compromises for discussion with MS ahead of the next trilogue. On the areas of interest to CMCE members this includes:<br><br>On intragroup reporting exemption for NFCs: The Presidency suggests giving in to the EP position, which provides for a broader exemption than the Council - i.e. applying the IG exemption where one NFC or one third country counterparty which would be qualified as NFC is involved, as opposed to both parties having to be NFCs as per the Council position. | **27 November** – CWP to prepare for next trilogue<br><br>**28 November** – Trilogue | |

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| | This proposal would be made under the condition that EP is willing to waive its proposal to provide an exemption from application of risk-mitigation techniques concerning intragroup transactions where one of the counterparties is a NFC-.<br><br>On reporting of OTC transaction by NFC- / FCs: The Presidency compromise mixes elements of the Council and EP positions, but leans more heavily on the Council position. It suggests to keep the obligation for NFC- to report derivative contracts; although when dealing with FCs, the latter are to report on behalf of both counterparties (FC and NFC-) and the FC is responsible and legally liable for reporting. 'Optionality' is kept so NFC- may choose to report themselves, in this case they remain responsible and liable for reporting and the accuracy of the details reported.<br><br>NFC- are to be exempted from the reporting obligation if the transaction is with an entity established in a third country that would be a FC if established in the Union, but only in cases where the concerned third country legal regime for reporting has been deemed equivalent. The non-reporting NFC- shall provide the reporting FC with all the data needed to fulfil the reporting obligation which the FC cannot reasonably be expected to possess.<br><br>These issues will be discussed for the first time in the next trilogue. We understand that overall progress in the trilogues has not been as easy to achieve as expected by the negotiating parties and a number of issues still require discussion, but the Austrian Presidency still hopes to reach an agreement before the end of the year. | | |
| **Benchmarks** | | | |
| **CMCE priorities** | **Status / latest developments** | **Next steps** | **CMCE action** |
| **Commodity benchmarks**<br><br>**Critical benchmarks**<br><br>**Third country equivalence** | ***European Parliament***<br><br>On 19 November, the ECON Committee discussed the amendments to Neena Gill' draft report on low carbon benchmarks. The rapporteur (S&D, UK) acknowledged that requiring all benchmarks to align with the Paris agreement commitments by 2022 will not receive support from other political groups. She proposes thus to focus this requirement on | **European Parliament**<br>**3 December** – Vote on low carbon benchmarks in the ECON Committee<br><br>**10 December** – Vote in the ECON Committee on the ESAs review | CMCE will meet the FCA to discuss the CMCE letter on the implementation of BMR in the UK on 29 November.<br><br>A meeting with HM Treasury on the letter on Miscellaneous BM persons is also being scheduled. |

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| | critical and significant benchmarks. On the extension of the transition period for critical benchmarks, the rapporteur expressed her doubts as to the appropriateness of solving that problem within this file.<br><br>Sirpa Pietikäinen (EPP, Finland) and Paul Tang (S&D, Netherlands) called for including social and governance considerations into the scope of the regulation that should not only focus on environmental issues. The amendment tabled by French MEPs from the EPP (Anne Sander and Alain Lamassoure) on extending the transition period for critical benchmarks was heavily criticised by other MEPs.<br><br>Anne Sander (EPP, France) commented that not all benchmarks can be aligned with the Paris Agreement. She also asked members to look to the fact that today a number of administrators of third country benchmarks have not been registered in the EU, and called for the regulation to only apply once the level 2 measures have been published.<br><br>***Council***<br><br>The non-public compromise texts prepared by the Austrian Presidency on the low-carbon and positive carbon impact benchmarks proposals as well as the explanatory notes were circulated to the CMCE Benchmarks WG. This along with the Compromise text on the disclosure part of the Sustainable Finance package will be discussed during the Council Working Party that will take place on 26 November.<br><br>The Austrian Presidency has accelerated the pace of the negotiations following a letter from France, Germany, the Netherlands and Sweden asking it to prioritise these two legislative files in order to achieve swift progress towards an agreement by year end.<br><br>The Austrian Presidency included a number of changes on the proposal for a regulation on low-carbon impact benchmarks and positive carbon impact benchmarks. Firstly, on the extension of the transitional period for non-authorised critical benchmarks: The Presidency proposes to extend the period during which the existing range of critical benchmarks can be used without its administrators having obtained the necessary regulatory authorisations.<br><br>They also added a clarification on the deadlines for adaptation where existing benchmarks already meet the definition of a low carbon benchmark or a positive carbon impact benchmark. In the compromise, | **<u>European Commission</u>**<br>**November** - Adoption of delegated acts under the BMR by the European Commission | |

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| | the Presidency suggests that the requirements laid out in this regulation should apply to them by 30 April 2020.<br><br>Finally, in relation to the review clause in relation to the taxonomy proposal, the Presidency proposes to include in the review clause a possible connection of the two files. By 31 December 2023, the European Commission will review the methodology of the newly created benchmarks in order to reflect how the selection of the underlying assets may take into account environmentally sustainable investments as defined in Article 2 of the taxonomy proposal. | | |

## II. WATCHING BRIEF

| IFR | | |
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| **CMCE priorities** | **Status / latest developments** | **Next steps** |
| **Commodity dealer IF regime**<br><br>**Changes to MiFID II/MiFIR 3rd country regime** | ***Scope***<br><br>The Austrian Presidency has suggested to amend the scope of the IFR (Article 1(2) by lowering the threshold for firms to fall within Class 1 from Eur30 billion to Eur5 billion, which would mean that commodity dealer investment firms would need to apply the full CRR requirements if the total value of the consolidated assets of the investment firm exceeds EUR 5 billion.<br><br>The European Federation of Energy Traders (EFET) is advocating for an exemption to be included in this provision for commodity and emission allowance dealers, as has been suggested by the European Parliament and the original Commission proposal.<br><br>A message was sent to members of the Capital WG to encourage Members to actively support EFET's advocacy effort by raising this issue with their contacts in Member State Finance Ministries and industry peers as soon as possible, given that the Council will be discussing the | **<u>Council of the EU</u>:**<br>**28 November –** Council WP on the IFR/IFD<br><br>**10 December –** Council WP on IFR/IFD (pos.)<br><br>**19 December** – Coreper |

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| | compromise proposal at a possibly final Council working group meeting on 28 November following which a Council agreement could be signed off.<br><br>Our intelligence from contacts with the French Permanent Representation indicates that France has been clearly pushing for the EUR 5 billion threshold of consolidated assets for the new Class 1 for firms dealing on own account and firm underwriting. France has indicated that the final figure they could agree with is between 10 and 15.<br><br>***Equivalence / 3rd country***<br><br>On 15 November, a Council Working Party on the IFR met to discuss the draft Presidency proposals. On the whole, there was broad support for the Austrian proposal on the IFD (directive), but some pushback on a few points on the IFR (regulation).<br><br>On equivalence, the discussion focussed on recital 36 which requires the European Commission, when assessing equivalence for investment firms offering services in relation to shares covered by the trading obligation set out in Article 23 of MiFIR, to require that the investment firm undertakes trades in these shares on the venues designated as eligible for compliance with the trading obligation of article 23.<br><br>MiFID third country provisions remain a strong point of disagreement with some Member States led by France calling for them to be reviewed (Italy, Portugal, Belgium, Finland, Poland) and others opposed to any change (UK, Luxembourg, Ireland, Czech Republic, Denmark).<br><br>Our intelligence from contacts with the French Permanent Representation indicates that the French position on changes to the MiFID II / MiFIR 3rd country framework has evolved a lot since May and the non-paper. They admitted off the record that they have been overly harsh. However, they believe there is a need to enhance the access for regulators to data from 3rd country firms. Also, France is not happy with the position of the Commission that equivalence means no national regime. A goal of France is also to protect national regimes, particularly to activities that are very localised. On the scope, they maintain that activity (8) and (9) (operating MTF/OTF) cannot be done from a 3rd country under equivalence. For activity (6) (firm underwriting) they also have strong reservations, particularly if linked to (3) (dealing on own account). They clearly think that an equivalence decision should handle this very carefully. | |

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| | ***Next steps***<br><br>The next Council Working Party on the 28th of November will probably be with attaches only, meaning a political agreement is in sight. A number of Member States are however unhappy and feel some substantive technical need more discussion. The calculation by the Presidency and some Member States (France, Italy, Portugal) is that the UK and a number of market friendly Member States will have to compromise in order to get IFR completed during this mandate. Otherwise these negotiations will occur under the next mandate without the UK, and with many smaller Member States unlikely to see this as key political issue for them.<br><br>The aim seems to have a broad agreement on many issues on the 28th November, finalise through written procedure the open points and push for a formal agreement on the deal at the COREPER meeting of 19 December. | |
| **MAR** | | |
| **CMCE priorities** | **Status / latest developments** | **Next steps** |
| **Insider dealing**<br><br>**MM indicators** | On 15 November, ESMA published the 2018 edition of their annual report on administrative and criminal sanctions and other administrative measures under MAR. It also published its first annual report concerning administrative and criminal sanctions as well as other administrative measures issued by National Competent Authorities (NCAs) under MAR. | |
| **SFTR** | | |
| **CMCE priorities** | **Status / latest developments** | **Next steps** |

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| **Reporting Obligations** | There were no significant developments in the past 2 weeks. | **End of 2018** – Adoption of the SFTR Level 2 measures by the Commission |
| **Other international developments** | | |
| **IOSCO** | On 19 November, IOSCO published a report and cover note on IOSCO member compliance with the IOSCO Principles for the Regulation and Supervision of Commodity Derivatives Markets.<br><br>This is the third review conducted as a part of the monitoring which the G20 asked IOSCO to do on the IOSCO principles which aim to ensure that commodity derivatives markets are able to facilitate price discovery and hedging activity while avoiding manipulation and abusive trading.<br><br>This third edition of the report shows that IOSCO members have made substantial progress towards achieving full compliance and, in many cases, have strengthened their implementation of the Principles. For EU member states, the application of MiFID II / MiFIR, EMIR, MAR and REMIT have strengthened the application of the principles. IOSCO concludes that on the basis of the result of the third review, the aims of the original request by the G20 Leaders have been reached, and barring another request by the G20 for another review, this report would be the **final** implementation review.<br><br>The report contains a summary of the updated survey results and sets out the specific areas in which IOSCO members have achieved compliance through the implementation of regulatory reforms. | |