



CMCE Bi-weekly Update (7 June 2019)

I. ACTIVE PRIORITIES

Brexit	
<i>CMCE priorities: Ancillary activity test, access to UK and EU trading venues, CCPs and TRs</i>	
Latest developments & CMCE action	Next steps
<p>CMCE will organise a meeting with DG FISMA's Securities team in charge of MiFID II, MAR and BMR, to introduce CMCE and build a relationship with the new team in the unit rather than to discuss specific regulatory issues related to MiFID II, MAR and BMR. CMCE will also take the opportunity to provide some context on commodity markets, the role of commodity firms and the importance of properly functioning derivative markets; as well as to touch on some broad policy issues of interest, namely Brexit and third country access/equivalence.</p> <p>Members in the Brexit WG will be consulted on the CMCE messaging to DG FISMA on messaging regarding Brexit and equivalence as well as on their interest to participate in the meeting. CMCE members beyond the Brexit WG are encouraged to let the advisory team know if they are interested in participating.</p>	<p>20/21 June – European Council summit to discuss progress on Withdrawal Agreement in the UK</p> <p>31 October – Deadline for UK to adopt Withdrawal Agreement, subject to a further extension</p>
MiFID II	
<i>CMCE priorities: AA exemption, position limits, reporting, physical forwards</i>	
Latest developments & CMCE action	Next steps
<p>Following the publication of the ESMA call for evidence on 24 May on position limits and position management in commodity derivatives, the CMCE MiFID WG will hold a call next week to discuss a potential CMCE response to the call for evidence.</p>	<p>12 June – CMCE MiFID WG call at 11:00 AM UK time/12:00 CET</p> <p>5 July – Deadline for responding to the ESMA consultation</p>

On 5 June, ESMA published [guidelines](#) addressed to NCAs and investment firms on the application of C6 and C7 of Annex I of MiFID II which have been amended in comparison to the first version published in October 2015 following the entry into force of MiFID II.

ESMA considers that definition C6 of Annex I of MiFID II applies in the following way:

- a. C6 has a broad application, encompassing all commodity derivative contracts, including forwards but excluding wholesale energy products traded on an OTF that must be physically settled, providing that:
 - they can or must be physically settled; and
 - they are traded on a regulated market, an MTF and/or an OTF.
- b. “Physically settled” incorporates a broad range of delivery methods and includes:
 - physical delivery of the relevant commodities themselves;
 - delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned (such as a bill of lading or a warehouse warrant); or
 - another method of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of commodities without physically delivering them (including notification, scheduling or nomination to the operator of an energy supply network) that entitles the recipient to the relevant quantity of the commodities.

ESMA considers that definition C7 of Annex I of MiFID II applies in the following way:

- a. C7 forms a category that is distinct from C6 and encompasses commodity derivative contracts that can be physically settled which are not traded on a regulated market, an MTF or an OTF providing that the commodity derivative contract:
 - is not a spot contract as defined under Article 7(2) of Regulation (EU) 2017/565;
 - is not for the commercial purposes described under Article 7(4) of Regulation (EU) 2017/565; and
 - meets one of the three criteria under Article 7(1)(a) and also the separate criteria under Article 7(1)(b) of Regulation (EU) 2017/565.
- b. “Physically settled” incorporates a broad range of delivery methods and includes:
 - physical delivery of the relevant commodities themselves;
 - delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned (such as a bill of lading or a warehouse warrant); or,
 - another method of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of commodities without physically delivering them (including notification, scheduling or nomination to the operator of an energy supply network) that entitles the recipient to the relevant quantity of the commodities.

ESMA adds that physically settled commodity derivatives which do not fall within the definition of C6, i.e. are not traded on a Regulated Market, an MTF or an OTF, may fall within the definition of C7 and

5 August – Entry into force of guidelines on application of C6 and C7 instruments

the definitions of C6 and C7 form two distinct categories as C7 applies to commodity derivatives “that can be physically settled not otherwise mentioned in C6”. The other characteristics of commodity derivatives under C7 - “not being for commercial purposes, which have the characteristics of other derivative financial instruments” - are further defined under Article 7 of [Regulation \(EU\) 2017/565](#). ESMA notes that the conditions defined in Article 7 of [Regulation 2017/565](#), are to be applied cumulatively.

On 3 June ESMA published a [supervisory briefing](#) for NCAs regarding the MiFIR requirements for pre-trade transparency for commodity derivatives. Under the current rules, NCAs have the right to waive certain pre-trade requirements from market operators and trading venues regarding publicising current bid and offer prices and the depth of trading interests at those prices. Specifically, NCAs can waive pre-trade transparency requirements for formalising negotiated trades in equities, but there are no ones for non-equities particularly for commodity derivatives. An existing ESMA [Q&A](#) clarifies when negotiated trades in non-equities can be undertaken if they meet the conditions subject to specific waivers from pre-trade transparency i.e. the Large in scale (LIS) waiver or the illiquid market waiver (ILQ), the exchange for physical (EFP) or the package order waiver.

ESMA sees that MiFIR provisions on pre-trade transparency for non-equity instruments in commodity derivatives are not implemented consistently across the EU for commodity derivatives as some TVs formalise negotiated trades in commodity derivatives either without being subject to a waiver from pre-trade transparency or under waivers that ESMA considers non-compliant. ESMA is considering changing RTS 2 to determine whether some of the concerns in respect of negotiated trades could be addressed.

ESMA aims for trading to be pre-transparent and/or that formalised negotiated trades given that they meet the conditions for the waivers from pre-trade transparency for non-equities.

ESMA would like to see NCAs ensure that TVs do not operate trading functionalities which would allow negotiated trades on non-equities to be formalised in the absence of a waiver. This specifically means that if a system formalises negotiated trades under the LIS or ILQ waiver, all negotiated trades below the LIS thresholds or in liquid instruments should be rejected. ESMA wants to ensure that venues trading commodity derivatives and other non-equities should comply with MiFIR pre-trade transparency requirements.

ESMA has asked NCAs to identify non-compliant TVs and now move to ensure that they operate under a compliant pre-trade waiver or are fully pre-trade transparent.

EMIR

CMCE priorities: reporting, risk mitigation for uncleared trades, calculation of NFC's positions

Latest developments & CMCE action

Next steps

On 28 May, the text of EMIR Refit was published in the EU Official Journal, and will enter into force on the 20 th day following publication i.e. 17 June. Following the publication, ESMA also updated the Q&A on EMIR to amend the questions on the clearing obligation for FCs and NFCs as well as the procedure for notifying when a counterparty exceeds or ceases to exceed the clearing thresholds to reflect the changes made by EMIR Refit.	17 June - Entry into force (20 days after publication)
Benchmarks	
<i>CMCE priorities: commodity benchmarks, critical benchmarks, third-country equivalence</i>	
Latest developments & CMCE action	Next steps
There were no significant developments in the past week.	<p>24 June – Commission Expert Group on Sustainable Finance to publish report on carbon benchmarks</p> <p>ESAs review & low-carbon benchmarks: July or September plenaries – Plenary vote in new Parliament</p> <p>21 October - Signature of Council President and EP President (earliest possible date)</p> <p>Mid-November - Publication in the EU Official Journal (tentative timeline)</p> <p>December - Entry into force (20 days after publication)</p>

II. WATCHING BRIEF

IFR	
<i>CMCE priorities: commodity dealer IF regime, scope of class I, changes to MiFID II/MiFIR third-country regime</i>	
Latest developments & CMCE action	Next steps

There were no significant developments in the past two weeks.	July or September plenaries – Plenary vote in new Parliament 21 October - Signature of Council President and EP President (earliest possible date) Mid-November - Publication in the EU Official Journal (tentative timeline) December - Entry into force (20 days after publication)
MAR	
<i>CMCE priorities: Insider dealing, MM indicators</i>	
Latest developments & CMCE action	Next steps
There were no significant developments in the past two weeks.	31 December 2019 – Deadline for ESMA to provide technical advice on the MAR review
SFTR	
<i>CMCE priorities: reporting obligations</i>	
Latest developments & CMCE action	Next steps
<p>On 27 May, ESMA published a consultation on the guidelines for reporting under art.4 and 12 of the SFTR on the reporting obligation and safeguarding in respect of SFTs.</p> <p>The guidelines provide clarity and a harmonised implementation on the number of reportable SFTs, the population of reporting fields for different types of SFTs, the approach used to link SFT collateral with SFT loans, the population of reporting fields for margin data, the population of reporting fields for reuse, reinvestment and funding sources data, the management by counterparties of feedback from TRs, namely in the case of rejection of reported data and of reconciliation breaks and the provision of access to data to authorities by TRs.</p>	<p>29 July - close of consultation</p> <p>Q4 2019 - ESMA to publish a final report on the guidelines on reporting under SFTR.</p>

Other relevant developments

International role of the euro	There were no significant developments in the past 2 weeks.	Summer 2019 – European Commission to report on the results of the consultation on the international role of the euro
IOSCO report on market fragmentation	<p>On 4 June, IOSCO published a report on regulatory driven market fragmentation and how cross-border cooperation can be enhanced. According to IOSCO's research, largely found that issues in market fragmentation mostly concern the trading and clearing of derivatives which it says are fragmented across jurisdictional lines e.g. US SEF and MiFIR. It also points to margin requirements stating that some NCAs have varying approaches to the BCBS/IOSCO standards on margin requirements for non-centrally cleared derivatives i.e. some jurisdictions define entity scope by type of entity while others look at the role of the entity in the derivatives market</p> <p>IOSCO also states that trade reporting requirements have been implemented in different ways or at different pace in national jurisdictions. The report refers to research done by the FCA which pointed to differences between jurisdictions on the scope of reporting (data fields, timing of reporting i.e. T+1 or otherwise) as well as the scope of reporting entities i.e. single or dual sided reporting.</p>	