



## Commodity Markets Council - Europe

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### Summary of key highlights and actions CMCE All Members' Meeting, Geneva, 28 June 2019

*These minutes should be read in conjunction with the slides that were used by the Exco., the advisors and other presenters, as circulated together with this document.*

#### **I. Chair's welcome & Exco. update on its activities**

The Chair, Samina Anwar (Cargill) opened the meeting by welcoming CMCE members. She then introduced the role and activities of the CMCE Exco., together with other Exco. members. The Exco. has a governance role across CMCE operations. It holds formal meetings in London every quarter, with half of the meeting allocated to an internal Exco. discussion and half of it for a meeting with the CMCE advisors, Hume Brophy and Reed Smith. The Chair is also in regular contact with CMC in the US and is a Member of the CMC Board, on her request, to make sure that CMCE is represented.

The Exco. is governed by a set of bylaws which are available on the CMCE members' only website, together with the terms of Exco. members. The Chair explained that if a member wishes to join the Exco., they can make a request to the Exco. at any time and this will be considered by the Exco. in Q4 for next year.

Exco. members introduced the main responsibilities and activities of the Exco:

On housekeeping and working with the advisors, Jonathan Hill (BP) explained that beyond the formal quarterly meetings, the Chair and the Exco. have frequent informal interaction with the advisors to take decisions on different issues; so a lot more goes on in the side lines than meets the eye. The Exco. has a good working relationship with the advisors.

Laurent Texier (Louis Dreyfus Company) presented on the CMCE Budget. Over the last 3 years, income has exceeded expenses which included the advisors' fees, set fees for CMC in the US, travel expenses, operating expenses (phone calls, website). In 2019, the advisors' fees were increased and there were large expenses for development of the CMCE website. Any excess money is kept in a pot by CMC in the US. For 2019, the surplus is expected to be used given that two members left CMCE in 2018, which was not reflected in the numbers shown.

On communication to and meetings with CMCE Members, Odile Roy De Puyfontaine (Vitol) noted that the Exco. is planning some new initiatives, notably the organisation of know how/lessons learnt type compliance meetings for member as well as issuing more guidance/fact sheets to communicate with members and external audiences.

The Chair mentioned that the Exco. is also leading the efforts for CMCE to further engage with stakeholders to help them understand the commodity markets and the importance of the derivative markets, with a dedicated session on this topic later in the day.

The Chair mentioned that she was in discussions with a number of potential new CMCE members.

## **2. Market abuse enforcement trends and outlook**

Chris Borg (Reed Smith) of the advisory team introduced the discussion. CMCE does not currently have a MAR working group and the objective of the session was to have a freeform discussion on recent developments and trends of interest to members, and based on that to assess whether some further CMCE activity in this area would be useful.

### *Enforcement trends*

Chris Borg noted that market abuse investigation and enforcement activity is becoming a priority again among NCAs and NRAs.

One example of this was the FCA mini-thematic review on monitoring/surveillance among commodity firms. Based on his understanding, these were mainly FCA authorised commodity traders; although the list of firms has not been shared publicly. From this review the FCA would have seen a wide spectrum of approaches to surveillance. On monitoring of suspicious orders and transactions, the FCA's expectations seemed to be rather high in terms of the sophistication of solutions. The FCA is expected to be active in this area in the coming months.

The FCA Market Watch 59 (on transaction reporting) indicates that the FCA wants to improve data quality to improve monitoring and enforcement. There is a risk of a blurring of boundaries between the standard for evidence on which to base an enforcement action and surveillance exceptions merely warranting further enquiry.

A Member noted that the FCA was looking for firms having appropriate systems in place for their size of activities, and agreed there would be more action on this in coming months.

### *ACER guidance on REMIT implementation - layering and spoofing in wholesale energy markets*

Chris Borg noted that the REMIT guidance has potential to influence how financial regulators approach these issues (as it is expressed to restate *financial* regulatory notions of spoofing). A concern was raised with the guidance: that it could be taken to be somewhat prescriptive for NRAs providing a formula for the assessment of orders as non-genuine, which underplays the need for judgement and further enquiry by an NRA.

The guidance provides a list of factors which "generally" make an order non-genuine. These factors look like the kind of items which would result as exceptions from an automated surveillance system and the guidance does not sufficiently stress the need to examine the market, circumstance or trading intention.

It does indicate (in a short paragraph) a list of potentially "legitimate" reasons for a firm trading with this order pattern. But those legitimate reasons do not include speculative trading (arbitraging out short term volatility by buying low and selling high) other than where it occurs as part of a market making service.

They also include the situation where a firm trades to cover two different trading requirements from different parts of its business. But – without justification from the text of REMIT – ACER suggests this is acceptable only where the trading activity occurs on either side of an information barrier, so that e.g. the speculative trading desk does not know what the commercial hedging function is doing.

It was suggested that the guidance would encourage NRAs (and enforcement tribunals) to rely solely on data from surveillance systems without sufficient additional evidence showing a manipulative intent or effect. This is not helpful because monitoring and evidence should be two different things, otherwise this would effectively lower the standard of proof for the prosecuting authority so far that it would in practice reverse the burden of proof.

A Member made the point that the ACER guidance touches on 28 markets that operate very differently with different participants. This means that the same activity will be considered differently in one member state than in another. It is not ACER, but national regulators who are in charge of pursuing suspicions about market activity. They also noted that for the firm in question it was the first time they needed to use machine learning to lead their monitoring. They had dissected the ACER guidance and said that through a detailed analysis it was possible to see which trading patterns ACER is looking at.

Chris Borg acknowledged that in many ways the ACER guidance is helpful particularly as a tool for designing internal monitoring systems or compliance officers engaging with traders. He felt, the downside is that it is likely to be used, and referred to, as if it were law by NRAs and tribunals, unless moderated or challenged in some way.

The Chair said that the question seemed to be whether as CMCE, members wanted to do something about this or if it would be enough to just monitor how the discussions evolve. She noted that members were in different stages along the journey in terms of these issues and the Exco. believed it would be helpful to facilitate sharing some of this experience.

A Member agreed that it would be helpful to share thoughts on this in a working group. They believed there was a need to raise with ACER the need for it to consult industry in advance of publishing similar guidance.

It was generally understood that the chances of persuading ACER to restate its guidance were not high. Members considered possible approaches CMCE could take. These included creating a document of its own, with examples, to show how patterns which might appear non-genuine under the guidance, are sometimes in fact genuine.

A member considered this would be a difficult and complex exercise, as one would need to display how complexities on supply and demand operate in gas and power markets, taking into account factors like storage, weather forecasts, LNG shipments, interconnector activity and so forth, as well as explaining how each hub/market is subject to a different supply/demand matrix.

It was suggested it would be better to engage on the principles with NRAs rather than to try to put together a complex document covering these issues.

Another member said that educating 27 NRAs in itself would be difficult and very resource intensive.

Given the importance of the issue and the difficulties noted, it was suggested that CMCE put a working group together to decide what the best course of action may be.

#### *European Commission review of MAR application*

Chris Borg summarised the relevant issues that ESMA has been asked to look at in its input to the Commission review of MAR application, notably including the definition of inside information. Lucie Binová (Hume Brophy) noted that ESMA was expected to publish a consultation on its technical advice in the second half of the year and this would be a good first opportunity to engage on this topic. The Chair noted that CMCE would want to respond to the consultation when it comes.

#### **Follow-up:**

- A member agreed to check internally on what insight they could share based on their detailed analysis of the ACER guidance. It was concluded that in the first instance, a CMCE members' only informal discussion forum should be set up. A working group could be set up in due course if the need for that emerged from these discussions.

### 3. Brexit working group

Lucie Binová outlined that the first quarter was characterized by intense regulatory activity to prepare for a potential no-deal Brexit, both on the UK side and the EU member states' side. That has quieted down as policy-makers and regulators wait to see what decisions get taken at political level in the UK. As long as that is unclear, no major policy/regulatory developments should be expected. The advisory team will keep monitoring developments and reporting back and members are encouraged to continue raising specific issues they may want to discuss at CMCE.

Chris Borg noted that on the UK side, the legislation to prepare for a no-deal scenario has been made or is in draft form and finalised. At this point it is worth firms planning on the basis that the UK will not get equivalence on exit day. This means that firms may need to rely more when dealing cross-border in the EU27 on the argument that their activities are outside the territorial scope of the local MiFID2 implementation law.

Each Member State has its own approach to this (it is still a matter of national discretion), although clearly there is pressure to close loopholes. CMCE members may wish to focus attention on this market access question by monitoring the approach taken by key Member States. (A multi-jurisdictional survey could be conducted, but this would require a specific budget.)

Martin Liebi (PwC) commented that for Switzerland it is clear that the EU is playing hardball on equivalence. The equivalence decision for Swiss trading venues is not being prolonged.

### 4. MiFID working group

Anna-Maria Karjalainen (Hume Brophy) summarised CMCE's recent work around the ESMA amended MiFID II Q&A on commodities topics which included a new Q14 regarding **third country firms and ancillary activity notification**. Following the advisors' engagement with the AMF and BaFin to clarify the implications of the Q&A, it was clear that there were different approaches at member state level with Germany still requiring notifications to be made to benefit of the ancillary activity exemption under German law. She concluded that while the Q&A is helpful, it would be risky to rely on it given that member states have the competence to decide whether they want notifications to be made or not.

On **MiFID II review**, she noted that the timeline has been delayed but the review is still expected sometime towards the end of next year. The aspects on which MiFID II / MiFIR mandate a review include position limits, the exemption for C6 energy derivatives from the EMIR clearing and risk mitigation obligations, and the trading obligation. However, the Commission can touch on any other issues where it sees potential need for revision. While there currently seems to be no appetite at the Commission for major changes to regime, this could potentially change following the political changes with the recent European elections. In terms of key issues for commodity firms, CMCE will need to watch out for potential action by NGOs / activist MEPs on position limits. There is also the possibility that the ancillary activity exemption is looked at in context of the review. In this respect, it is interesting that in the ESMA Call for Evidence on position limits, ESMA touches on the need to revise the ancillary activity 'quantitative approach' in the level I text.

She went on to introduce the **CMCE draft response to the ESMA Call for Evidence on position limits** and encouraged members to provide further feedback in particular on questions 11 regarding the consequences from Brexit on the commodity derivatives regime under MiFID II and 16 regarding whether there is a need to review the MiFID II position limit exemptions. A detailed discussion followed on the CMCE draft response, following which the advisors were instructed to update it for circulation.

On the **ancillary activity exemption**, Anna-Maria Karjalainen noted that based on a recent discussion with the AMF, there had been no activity at ESMA looking at this since their initial

assessment of potential impacts of a no-deal Brexit in the commodity derivative markets at the end of 2018. ESMA and NCAs are waiting for clarity on Brexit before further work is pursued. It could be helpful for CMCE to meet with the AFM and BaFIN in the second half of the year in order to establish relationships and facilitate exchanges with these key regulators ahead of possible changes to ancillary activity exemption and MiFID II review. Two members expressed support for this suggestion.

#### **Follow-up:**

- The advisors will circulate a revised CMCE response to the call for evidence on position limits (*note: this response was finalised and submitted on 5 July*)
- Meetings should be organised with the AFM and BaFIN in the second half of the year in order to establish relationships and facilitate exchanges with these key regulators ahead of possible changes to ancillary activity exemption and MiFID II review

### **5. Regulatory capital working group**

Lucie Binová drew attention to a note that had been sent to the members, summarizing the key points of the agreement on the Investment Firms Regulation and Directive. Several aspects should be of interest, such as concentration risk or remuneration. The IFR also contains amendments to the third-country access provisions of MiFIR. The objective is to strengthen the equivalence regime that would apply to third-country firms offering MiFID services or undertaking MiFID activities in the EU. That is particularly relevant in the context of Brexit, but will also impact on other jurisdictions (e.g. US, Switzerland). These provisions turned out to be the most controversial point in the political negotiations in Brussels. The European Commission (in cooperation with ESMA) will specify in its implementing legislation the circumstances under which the scale and scope of the services provided, and activities performed by third-country firms in the EU following the adoption of an equivalence decision are likely to be of systemic importance for the Union.

Chris Borg added that we can expect to see similar rethinking of third country provisions in other relevant pieces of EU legislation. Firms relying on third country access provisions now have a reporting obligation to ESMA, which will provide visibility to ESMA on the activities of firms in third countries and potentially systemic jurisdictions. For jurisdictions deemed of systemic importance to the EU, the Commission must make “detailed and granular assessments” (of the regulatory and tax environment) before granting equivalence. This is likely to give the EU substantial leverage in post-Brexit discussions with the UK as well as with other third countries.

### **6. Update on the activities of the CMCE Swiss Chapter**

Martin Liebi, the advisor to the Swiss Chapter, gave a presentation on the Chapter and its work as per the presentation circulated with these minutes. The Swiss chapter’s work in the last year has focused on the Swiss Financial Services Act, the Financial Institutions Act, the Financial Market Infrastructure Act and the potential Swiss version of the Securities Finance Transaction Regulation. Generally speaking, there is no intention on the side of Swiss policy-makers to regulate commodity traders; however reality is not always so simple as in some instances they might do so without intending to given a lack of knowledge about the activity of commodity firms.

It was noted that the Swiss Financial Services Act does not apply to commodities traders that trade on their own behalf in commodity derivatives for hedging or directional purposes, because they are not trading for clients. However, it may apply to firms that provide hedging solutions by means of OTC derivatives for third parties that are clients. While most CMCE Swiss Chapter members would not be in scope, some activities may fall in, so it is important to understand to what extent members may be in scope.

The Financial Institutions Act was advertised as not changing anything compared to the prior regime. This is however not entirely true given that it removes the threshold above which proprietary traders

in securities having their main activity in the financial markets and being a member to a trading venue need to be licensed.

The Swiss authorities are also considering a Swiss 'EMIR Refit' and potentially a Swiss SFTR. The Swiss Chapter is closely following developments around both.

To date the Swiss Chapter has had a successful engagement with the Swiss authorities and successes have included securing the postponement of the reporting requirement for NFC- under the FMIA for 4 years to 2024.

## **7. Update on the European elections**

Lucie Binová provided some highlights on the outcome of the recent European elections and the implications for decision-making in the Parliament, given increased fragmentation of the political landscape. Sustainability was highlighted as a topic that will be prominent on the new Parliament's agenda.

Responding to members' questions, it was explained that if the Parliament is more fragmented, its position may be weakened in the political negotiations and the legislative process vis-à-vis the Council. The advisors outlined that while the priorities of the future European Commission are broadly known, the programme will be formally set after the new Commissioners begin their mandate as of 1 November.

## **8. Stakeholder engagement**

Anna-Maria Karjalainen provided a brief update on CMCE participation at a QED event on EU agricultural commodities markets in March in Brussels. CMCE was represented by Marta Zuluaga Zilbermann, Director of Policy & Government Relations at Cargill. This was a good opportunity to give some visibility to CMCE and to test messaging on how the commodity markets work, what the role of commodities firms is and why properly functioning derivative markets are important. The Chair thanked Simon Turek at the CME Group for having enabled CMCE participation on the panel through their membership of QED.

Anna-Maria Karjalainen informed members that a meeting with DG FISMA's securities markets team was being organised to introduce CMCE and build a relationship with the team, as well as discussing some relevant policy issues at high level. She summarised the main messaging for this meeting around Brexit, the MiFID II review and third country access/equivalence, as per a note circulated earlier to members in the MiFID and Brexit working groups, asking if members had any feedback or comments. No specific comments on the messaging was provided, but three members said they believed it was important for CMCE to pursue stakeholder engagement, in particular now as a new Commission / European Parliament mandates were starting. Members were also offered the possibility to participate in the meeting with DG FISMA and two members said they may be interested to participate depending on the timing of the meeting.

### **Follow-up:**

- The advisors will revert with the confirmation of the date for the stakeholder engagement meeting with DG FISMA.

## **9. EMIR working group**

Lucie Binová introduced the session, noting that EMIR Refit had entered into force on 17 June and following this a revised EMIR Q&A as well as an ESMA letter on the application of the EMIR hedging exemption to FCs in non-financial groups had been published. Members were asked if there were any implementation issues that they wished to raise and discuss.

Chris Borg noted the new process for counterparties to assess and notify whether they exceed the clearing thresholds now required more detail to be provided to the regulators and ESMA, albeit only once a year.

One potential consequence from that is that regulators will have visibility over notified volume changes. Where these result in a firm coming below a threshold, the regulator may be better placed to ask “why”. If the answer is that a firm changed its hedging policy, this could prompt an examination of that policy.

A Member asked whether any other members were concerned by the introduction of initial margin requirements in September 2020.

## Annex I - List of participants

Name	Organisation
1. Benjamin Jakob*	ADM
2. Jim Nicholson	Argus
3. Jonathan Hill	BP
4. Samina Anwar	Cargill
5. Mike Halbach	Cargill
6. Kevin Booth	Cargill
7. Simon Turek	CME group
8. Silvi Tahiri	Gunvor
9. Gavin Hunter*	Hartree Partners
10. Anna-Maria Karjalainen*	Hume Brophy, CMCE advisory team
11. Lucie Binová	Hume Brophy, CMCE advisory team
12. Laurent Texier	LDC
13. Chris Valentine*	Phillips66
14. Martin Liebi	PwC, CMCE Swiss Chapter advisor
15. Chris Borg	Reed Smith, CMCE advisory team
16. Gerfried Kromer*	Shell
17. Pierre Davis*	S&P Global
18. Claude Casset	TOTSA
19. Francois Dumont	TOTSA
20. Ben Cooper	Trafigura
21. Alex Beales	Trafigura
22. Odile Roy de Puyfontaine	Vitol

\* Participation through conference line