# CMCE Bi-weekly Update (31 July 2020)

## MiFID II/MiFIR

On 24 July, the European Commission published the COVID-19 securities markets recovery package, encompassing targeted amendments to the MiFID II rules governing commodity markets. As anticipated the Commission MiFID II 'quick fix' proposal limits the application of position limits regime to commodity derivative contracts that qualify as critical or significant and agricultural commodities. ESMA will be granted a mandate to elaborate the criteria that will qualify contracts as critical or significant. In addition, the ancillary activity test will be simplified by the removal of quantitative thresholds and the exclusive use of qualitative criteria. Targeted exemptions have been introduced for financial counterparties that belong to predominantly commercial groups and both financial and non-financial counterparties that are subject to mandatory liquidity provision obligations. ESMA will be empowered to set out the methodology by which firms will qualify for these exemptions.

## BMR

On 24 July, in addition to the amendments to MiFID II, the Commission published the BMR Review proposal. The Commission has introduced new provisions to minimise disruption arising from the cessation of critical financial benchmarks. The proposal also introduces a new exemption for third-country spot FX benchmarks provided they satisfy certain conditions.

## EMIR

ESMA is understood to be consulting NCAs informally in relation to a redefinition of the eligibility requirements for the exemption from reporting requirements for intragroup transactions. ESMA is said to be intent on limiting access to the exemption to groups that have their headquarters or parent undertaking in Europe thereby excluding groups with their parent undertaking in a non-EU jurisdiction.

## CSDR

On 28 July, ESMA announced that it would delay the application of the settlement discipline regime laid down in Commission Delegated Regulation (EU) 2018/1229 (RTS on settlement discipline) until 1 February 2022. ESMA will prepare a proposal amending the requirements to reflect the new application deadline.

## OFAC guidance

The US Department of State, the Office of Foreign Assets Control (OFAC) and the US Coast Guard have issued guidance to address illicit shipping and sanctions evasion. The guidance is relevant for commodity traders as, in the event of a shipping related sanctions breach, the implementation of the guidance will be regarded as a mitigating factor by US authorities. CMCE is exploring the possibility of establishing an ad-hoc working group to develop common standards for the application of the OFAC guidance by industry.

# I. ACTIVE PRIORITIES

| Brexit | |
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| *CMCE priorities: Ancillary activity test, access to UK and EU trading venues, CCPs and TRs* | |
| **Latest developments & CMCE action** | **Next steps** |
| Negotiations on the future EU-UK relationship have intensified over the course of July. Following the conclusion of the most recent, 6th round of negotiations – the EU's chief negotiator published a statement outlining the progression of the talks.<br><br>As agreed at the high-level meeting between Prime Minister Boris Johnson and Commission President Ursula von der Leyen, there will be no extension to the transition period. That necessitates an agreement being found prior to 31 December 2020.<br><br>The UK has been emphatic that it will not accept any role for the ECJ in the UK. In addition, any future agreement must allow the UK to preserve regulatory autonomy and an arrangement on fisheries that reflects the UK's interests.<br><br>While progress has been made in the areas of transport, energy, social security coordination, police and judicial cooperation and conceiving a governance framework for the agreement – divergences remain with regard to the level-playing field, particularly in relation to provisions on state aid. Fisheries also remains a contentious issue. | **31 December 2020** – Expiry of transition period |

| MiFID II | |
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| *CMCE priorities: AA exemption, position limits, reporting, physical forwards* | |
| **Latest developments & CMCE action** | **Next steps** |
| On 24 July, the European Commission published the COVID-19 securities markets recovery package, encompassing targeted amendments to the MiFID II rules governing commodity markets. As anticipated the Commission MiFID II 'quick fix' proposal limits the application of the position limits regime to commodity derivative contracts that qualify as critical or significant and agricultural commodities. ESMA will be granted a mandate to elaborate the criteria that will qualify contracts as critical or significant. In addition, the ancillary activity test will be simplified by the removal of the quantitative test set out in RTS 20 and the exclusive use of qualitative criteria. Targeted exemptions have been | **September 2020** – Negotiations on the MiFID II 'quick fix' proposal will commence |

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| introduced for financial counterparties that belong to predominantly commercial groups and both financial and non-financial counterparties that are subject to mandatory liquidity provision obligations. ESMA will be empowered to set out the methodology by which firms will qualify for these exemptions.<br><br>The Commission and the German Presidency aim to have negotiations on the proposal finalised by the end of the year.<br><br>A more detailed summary of the proposals was circulated to Members in the MiFID II working group.<br><br>**CMCE action**<br><br>A first discussion on the MiFID II quick fix proposal took place on the regular members' call on 28 July. Members were broadly welcoming of the proposal. | |
| **EMIR** | |
| *CMCE priorities: reporting, risk mitigation for uncleared trades, calculation of NFC's positions* | |
| **Latest developments & CMCE action** | **Next steps** |
| **EMIR Refit**<br><br>ESMA is understood to be consulting NCAs informally in relation to a redefinition of the eligibility requirements for the exemption from reporting requirements for intragroup transactions. ESMA is said to be intent on limiting access to the exemption to groups that have their headquarters or parent undertaking in Europe thereby excluding groups with their parent undertaking in a non-EU jurisdiction.<br><br>**CMCE action**<br><br>Members raised the above developments on the EMIR intragroup reporting exemption on the regular call on 28 July as being of concern. The advisors will follow-up with the EMIR working group on a possible CMCE letter to engage ESMA/NCAs on this matter. | **1 September 2021** – Initial Margin requirements to apply to counterparties with an AANA of uncleared derivatives above EUR 50 billion.<br><br>**1 September 2022** – Final implementation phase covering entities with an AANA of uncleared derivatives greater than EUR 8 billion. |
| **Benchmarks** | |
| *CMCE priorities: commodity benchmarks, critical benchmarks, third-country equivalence* | |

| Latest developments & CMCE action | Next steps |
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| On 24 July, the European Commission adopted a legislative proposal introducing targeted amendments to the Benchmarks Regulation (BMR). The amendments to the BMR were published alongside the broader COVID-19 securities recovery package.<br><br>The amendments introduced by the Commission are primarily intended to mitigate the risk of financial instability arising due to the cessation of critical benchmarks. They also include new exemptions for third-country spot FX benchmarks.<br><br>Please find an overview of the proposed amendments to the BMR outlined below.<br><br>**Orderly cessation of a financial benchmark**<br><br>In the event that the cessation of a critical benchmark poses risks to financial stability, the Commission will be granted the power to designate a statutory replacement rate that would replace all references to the 'benchmark in cessation' included in existing contracts. In addition to minimising disruption to financial markets these new powers should prevent contract frustration resulting in costly litigation involving EU supervised entities.<br><br>**Exemption of specific foreign exchange benchmarks**<br><br>The Commission proposes exempting specified third-country spot foreign exchange benchmarks from the scope of the BMR where they fulfil certain conditions.<br><br>The exemptions to the BMR listed in Article 2 would be expanded to include spot foreign exchange benchmarks designated by the Commission.<br><br>In order for spot FX benchmarks to qualify for exemption, they must:<br><br>(i). measure the spot exchange rate of a third-country currency that is not freely convertible and;<br><br>(ii). be used by EU supervised entities, on a frequent, systematic and regular basis as a settlement rate to calculate the pay-oout under a currency forward or swap contract.<br><br>On 17 July, the European Commission adopted the Delegated Acts specifying how ESG considerations should be taken into account by Benchmark Administrators (BMs) and NCAs. The Delegated Acts consist of; (i) the Delegated Regulation clarifying requirements in relation to the explanation of how ESG factors are reflected in each benchmark provided; (ii) the Delegated Regulation outlining the minimum content of the explanation of how ESG factors are reflected in the benchmark methodology, and; (iii) the Delegated Regulation elaborating the minimum standards for EU Climate Transition Benchmarks and EU Paris-aligned Benchmarks. The formal adoption of the final Delegated Acts by the Commission initiates the three-month period during which the European Parliament and the Council can scrutinise and object to the Commission's drafting. In the absence of an objection from either of the co-legislators, the Delegated Acts will be published in the | **September 2020 –** Negotiations on the BMR Review proposal to commence<br><br>**1 October 2020** – Deadline for the Commission to adopt the draft RTS on governance arrangements, methodology, oversight functions and the power of competent authorities in the context of benchmark transition or cessation.<br><br>**7 December 2020** – Application of the SM&CR regime to benchmark administrators. |

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| Official Journal of the EU in mid-October and enter into force 20 days thereafter. | |

## II. WATCHING BRIEF

| IFR | |
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| *CMCE priorities: commodity dealer IF regime, scope of class 1, changes to MiFID II/MiFIR third-country regime* | |
| **Latest developments & CMCE action** | **Next steps** |
| On 4 June, the EBA opened a consultation on draft Regulatory Technical Standards (RTS) related to the implementation of a new prudential regime for investment firms with respect to the reclassification of investment firms as credit institutions under Article 8a(6) of the CRD, the prudential requirements for investment firms under Articles 7(5), 9(4), 13(4), point (a) to (c) of Article 15(5) and Article 23(3) of the IFR, and prudential requirements for investment firms under Article 5(6) of the IFD. The consultation will close on 4 September 2020. Following the conclusion of the consultation process, the EBA will submit the draft RTS to the European Commission for endorsement. Following their endorsement by the European Commission the RTS will be transmitted to the Council and the European Parliament for a scrutiny period. The technical standards will apply as of June 2021.<br><br>The IFR/IFD texts were published on 5 December 2019 in the EU Official Journal. IFR will apply from 26 June 2021, except points (2) and (3) of Article 63 on tick sizes and systematic internalisers, which will apply from 26 March 2020, and point 30 of Article 62 on which will apply from 25 December 2019. Concerning IFD, Member States shall adopt the national transposition measures by 26 June 2021. | **3 September 2020** – Deadline for EBA consultation on draft RTS for prudential requirements for investment firms<br><br>**26 June 2021** – Application of IFR |

| MAR | |
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| *CMCE priorities: Insider dealing, MM indicators* | |
| **Latest developments & CMCE action** | **Next steps** |

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| There were no significant developments in the past 2 weeks.<br>**CMCE action**<br>CMCE submitted its response to the ESMA consultation on MAR review on 28 November 2019. ESMA published on 13 December 2019 the responses received to this consultation. | **Spring 2020** – ESMA to submit the final report providing technical advice to the European |
| **SFTR** | |
| *CMCE priorities: reporting obligations* | |
| **Latest developments & CMCE action** | **Next steps** |
| On 9 July, ESMA opened a consultation on draft Guidelines on the calculation of SFT positions by trade repositories (TRs) under the SFTR. ESMA intends to issue final Guidelines upon the receipt of feedback to the consultation in the interest of ensuring consistency in how positions are calculated by TRs under the SFTR. ESMA underlines the importance of high-quality data on SFT positions to enable a proper assessment of systemic risks. The deadline for the submission of responses is the 15 September 2020. | **15 September 2020** – Deadline for ESMA consultation on draft Guidelines for SFT position calculation methodologies<br>**11January 2021** – Reporting obligation for non-financial counterparties |
| **European Green Deal** | |
| *CMCE priorities: monitoring developments* | |
| **Latest developments** | **Next steps** |
| **UK ETS -** In July, the UK Government published draft legislation on the UK's Emissions Trading Scheme (ETS) which should be operational by 1 January 2021. The UK ETS is intended to encourage cost-effective emission reductions that will contribute to the attainment of the UK's emission reduction targets. Another key aim of the draft legislation is to ensure continuity with the EU ETS and facilitate the linking of the two schemes in future.<br>**EU Carbon Border Adjustment Mechanism** – On 22 July, the Commission published a consultation on a Carbon Border Adjustment Mechanism. As part of the EU Green Deal, the flagship initiative of this Commission for making the EU carbon neutral by | **1 September 2020** – Deadline for the Joint ESAs consultation on draft Regulatory Technical Standards under the Sustainability-related disclosures regulation. |

2050, the Commission has said that it will look at the establishment of such a mechanism to avoid carbon leakage, i.e. companies moving production from the EU to third countries with less stringent climate standards. This could take the shape of a tax/levy on imports of products into the EU and would be targeted at the sectors where the risk of carbon leakage is the greatest.

The consultation seeks input on whether and how such a mechanism should be set up and is open for feedback until 28 October

**ESAs Joint letter to EC on SFDR implementation -** On 8 May, The ESAs sent a joint letter to DG FISMA requesting that the Commission revisit the date of application for disclosures under the Regulation on sustainability-related disclosures in the financial sector (SFDR).

The current date of application foreseen in the Regulation is 10 March 2021, at which point entities in the scope of the SFDR will have to start disclosing if and how they take into account Principal Adverse Impacts (PAI) on sustainability factors.

The ESAs believe that the process of developing the regulatory technical standards needed to implement the Regulation will take longer than initially anticipated, in large part due to the disruption caused by the COVID-19 pandemic. This, in turn, will necessitate a later date of application.

The ESAs opened a consultation on the draft RTS on 23 April 2020. In view of the challenging circumstances for many potential respondents, the ESAs decided to have a longer than usual consultation period. Accordingly, the deadline for responses was set for 1 September 2020.

The prolonged consultation period will have an impact on the ESAs capacity to deliver the finalised RTS by 30 December 2020, as stipulated in the SFDR. As a consequence, the ESAs have indicated that they intend to deliver the final RTS by the end of January 2021.

This would in turn leave insufficient time for the Commission to review the RTS, adopt them and to allow the co-legislators (European Parliament and Council) to scrutinise these RTS. Therefore, the letter asks for a delay of the SFDR while not mentioning any specific new timeline.

**Other relevant developments**

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| **International role of the euro** | There were no significant development in the past 2 weeks. | |
| **REMIT** | There were no significant development in the past 2 weeks. | |