CMCE Bi-weekly Update (9 October 2020)

Key highlights from the last two weeks:

EU Commissioners. On 7 October, Mairead McGuinness was confirmed as the Commissioner for Financial Services, Financial Stability & Capital Markets Union (CMU) by the European Parliament. She won the backing of 583 MEPs, with only 75 voting against her appointment and a further 37 abstaining. Valdis Dombrovskis was also confirmed in his new position as Commissioner for Trade with MEPs voting 515 in favour and 110 against with 70 abstentions.

MiFID II quick-fix. The DE Presidency circulated its most recent draft Council compromise text on the MiFID II 'quick fix' on 5 October, including the most recent amendments to commodity markets rules. The Council's most recent text specifies that the criterion for determining critical or significant contracts of 300,000 lots of open interest should be stipulated in the Level 1 text. ESMA should therefore only consider the number and size of market participants and the commodity underlying the derivative concerned when elaborating additional criteria. Notably, the Council text does not make substantive changes to the proposed qualitative ancillary activity test.

***ESMA final report on MiFIR non-equity transparency*.** On 29 September, ESMA published its final review report on the MiFIR non-equity transparency regime. The ESMA report concludes that the transparency regime for non-equity instruments contained in MiFIR is convoluted and overly complex. Ultimately, this is to the detriment of meaningful transparency in non-equity markets. Accordingly, ESMA makes a number of proposals to simplify and improve the transparency requirements for non-equity instruments.

Council compromise text on BMR. On 7 October, the Council agreed upon its compromise text and negotiating mandate on the Commission's BMR reform proposal. The Council position envisages the introduction of an additional exemption for spot foreign exchange benchmarks with a review of the exemption's use to be undertaken in 2027. The Council also broadens the powers of the Commission to designate replacement reference rates beyond critical financial benchmarks. The Council also favours enabling EU supervised entities to continue using third-country benchmarks until 2025 as opposed to 2021 thus allowing for a smoother transition.

ESMA draft technical standards on third-country investment firms under IFR/IFD. On 28 September, ESMA submitted draft technical standards to the Commission elaborating additional information requirements for the registration and annual reporting of third-country investment firms. The Commission has a period of three months to adopt the technical standards with or without amendments. Thereafter, they will be submitted to the co-legislators in accordance with the correct non-objection procedure.

1. ACTIVE PRIORITIES

Brexit	
CMCE priorities: Ancillary activity test, access to UK and EU trading venues, CCPs and TRs	
Latest developments & CMCE action	**Next steps**
The 9th round of negotiations on the EU-UK future relationship were concluded last week. Talks have been intensifying in the interest of finding an agreement in enough time to allow for ratification by both parties before the end of the year. The 9th round of negotiations were constructive with the UK submitting several negotiating papers on the most difficult outstanding issues yet to be resolved - namely the level-playing field & state aid, fisheries, law enforcement & judicial cooperation and social security cooperation. While there has been progress, the negotiations are not yet at a stage where they can enter the so-called "tunnel" or "submarine" phase – a period of highly intensive and sensitive talks that typically result in negotiators arriving at a final agreement. According to press reports, it is unlikely that negotiations will enter the "tunnel" until after the EU leaders summit on 15 and 16 October. Despite progress in negotiations, on 1 October, the European Commission sent a letter of formal notice to the UK concerning the Internal Market Bill. The EU reiterates its concerns that the Internal Market Bill constitutes a breach of the Withdrawal Agreement. The letter of formal notice represents the first step in initiating an infringement procedure. Also on 1 October, the FCA announced that it would use its Temporary Transitional Power (TTP) on a broad basis from the end of the transition period (1 January 2021) until the 31 March 2022. In practical terms this means that firms and other regulated entities will not need to comply with changes to their UK regulatory obligations brought about by the onshoring of EU legislation until 31 March 2022 in several cases. **CMCE action** On 25 September, CMCE submitted a response to the FCA Discussion Paper on prudential requirements for investment firms (DP20/2), following a discussion of the Regulatory Capital WG on 17 September. The DP sets out the FCA's approach to adapting the EU IFR/IFD framework for the UK market following Brexit.	**31 December 2020** – Expiry of transition period

MiFID II

CMCE priorities: AA exemption, position limits, reporting, physical forwards

Latest developments & CMCE action	Next steps
On 5 October, the DE Presidency circulated the most recent version of the Council compromise text on the MiFID II 'quick fix'. The Council's draft compromise text includes a number of amendments to the Commission's proposals to reform the position limits regime. ▪ The Council compromise text specifies that the criterion for determining critical or significant contracts – to which position limits will apply – of 300,000 lots of open interest should be stipulated in the Level 1 text. Accordingly, this is not a criterion that ESMA will have discretion to disregard when developing technical standards to further outline the characteristics of critical or significant contracts. ▪ When developing technical standards to further elaborate the criteria to qualify significant or critical contracts ESMA should take into account; (i) the number of market participants, and; (ii) the commodity underlying the derivative concerned. ▪ ESMA will be empowered to create a list of commodity contracts, including derivatives where the underlying is food for human consumption, to which position limits apply. ▪ In cases where commodity derivatives that share the same underlying are traded in significant volumes in more than one jurisdiction, the relevant competent authorities can agree that the baseline limit for setting position limits on said contracts can be derived from the trading venue where the highest open interest is traded. Otherwise - apart from minor editorial changes - the substance of the Commission's initial proposal on the ancillary activity test remains largely unamended by the Council at this juncture. On 1 October, ESMA has issued a public statement regarding the impact of Brexit on the application of certain MiFID II/MiFIR provisions. In particular, ESMA addresses the post-Brexit application of; ▪ The C(6) carve-out; ▪ The ESMA opinions on third-country trading venues for the purpose of post-trade	*MiFID II quick-fix:* **mid-October 2020 -** Vote in ECON Committee on Ferber report **November** – Trilogue *ESMA consultation on MiFIR transaction reporting:* **20 November 2020** – Deadline for responses to ESMA consultation **Q1 2021** – Estimated submission of ESMA final report to EC

transparency; and,

- The position limits regime and post-trade transparency for OTC transactions.

On 29 September, ESMA published its final review report on the MiFIR non-equity transparency regime. The ESMA report concludes that the transparency regime for non-equity instruments contained in MiFIR is convoluted and overly complex to the detriment of meaningful transparency in non-equity markets. The report contains a variety of recommendations to the Commission as to how the regime could be improved. These include;

- ESMA recommends removing both the waiver and the deferral for orders and transactions above the size-specific to the instrument threshold;
- ESMA proposes introducing a streamlined deferral regime through the creation of a simplified system with an emphasis on volume masking. According to the new system full publication of transaction details would be required after two weeks with no further possibility for supplementary deferrals being granted by NCAs;
- ESMA recommends that the possibility to suspend the DTO at short notice be introduced;
- ESMA also argues in favour of specifying further criteria used to grant equivalence to third-country trading venues for the purposes of the DTO.

CMCE action

A MiFID WG took place on 23 September to discuss how CMCE should engage in the MiFID II quick fix legislative process to seek more legal certainty around how the ancillary activity exemption will work under the revised regime.

The advisors engaged with EFET, FIA and ISDA to seek to coordinate actions on the AAE. Members are consulted on suggested next steps, including a CMCE email to Markus Ferber MEP, noting the need for clarifications on the AAE to be provided in the L1 text, as opposed to RTS drafted by ESMA.

EMIR

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

Latest developments & CMCE action	Next steps
On 28 September, ESMA published updated Q&As on EMIR data reporting issues, dealing in particular with practical matters relevant to Trade Repositories such as specifying valid entries in various data fields when reporting transactions. On 21 September, the European Commission adopted a time-limited implementing decision providing for equivalence for UK CCPs. The decision will apply from 1 January 2021 to 30 June 2022. **EMIR Refit** 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. **CMCE action** A letter highlighting the concerns of CMCE regarding a possible intention to restrict availability of the exemption from reporting requirements for intragroup transactions for groups based outside of the EU was sent to both ESMA and the European Commission on 4 September.	**1 September 2021** – Initial Margin requirements to apply to counterparties with an AANA of uncleared derivatives above EUR 50 billion. **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
On 7 October, the Council agreed upon its compromise text and negotiating mandate on the Commission's BMR reform proposal. The Council position envisages the introduction of an additional exemption for spot foreign exchange benchmarks with a review of the exemption's use to be undertaken in 2027. The Council also broadens the powers of the Commission to designate replacement reference rates beyond critical financial benchmarks. The Council also favours enabling EU supervised entities to continue using third-country benchmarks until 2025 as opposed to 2021 thus allowing for a smoother transition.	The European Parliament is yet to agree upon a negotiating mandate on BMR reform. Once the Parliament has done so, trilogues with the Council can commence. **7 December 2020** – Application of the SM&CR regime to benchmark administrators.

On 1 October, ESMA issued a public statement regarding the impact of Brexit on the application Benchmark Regulation (BMR) to UK benchmarks after the end of the transition period. On 25 September, ESMA launched a consultation on fees for benchmarks administrators under the BMR. The aim of the Consultation Paper is to advise the European Commission (EC) on fees to be paid by the benchmark administrators that will be supervised by ESMA starting in January 2022.	

11. WATCHING BRIEF

IFR	
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 28 September, ESMA submitted draft technical standards to the Commission elaborating additional information requirements for the registration and annual reporting of third-country investment firms that provide investment services or engage in investment activities in the EU. The Commission has a period of three months to adopt the technical standards with or without amendments. Thereafter, they will be submitted to the co-legislators in accordance with the correct non-objection procedure. **CMCE action** On 25 September, CMCE submitted a response to the FCA Discussion Paper on prudential requirements for investment firms (DP20/2), following a discussion of the Regulatory Capital WG on 17 September. The DP sets out the FCA's approach to adapting the EU IFR/IFD framework for the UK market following Brexit.	**26 June 2021** – Application of IFR

MAR
CMCE priorities: Insider dealing, MM indicators

Latest developments & CMCE action	Next steps
On 24 September, ESMA published its final report on MAR Review, which provides technical advice to the Commission on a number of areas under MAR. The report sets out recommendations in a number of areas, including the treatment of spot FX contracts, the definition of inside information, the EU framework for cross-market order book surveillance and the scope of application of the MAR benchmarks provisions. The Report is submitted to the European Commission and is expected to feed into their review of MAR. **CMCE action** 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.	

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 **11January 2021** – Reporting obligation for non-financial counterparties

European Green Deal

CMCE priorities: monitoring developments

Latest developments & CMCE action	Next steps
The European Commission released its plan on how to achieve emissions reductions of at least 55 per cent by 2030, in order to become climate neutral by 2050. The Commission's	The European Parliament had adopted its negotiating mandate. Negotiations between Member States in the Council are continuing in

	proposal is based on a thorough impact assessment and confirms that reducing emissions by at least 55% by 2030 is a realistic and feasible course of action. On 7 October, the European Parliament adopted its negotiating mandate on the EU Climate Law that reflects greater ambition than the initial Commission proposal. MEPs would like emission reductions of 60% by 2030 and a legally binding obligation placed on all Member States to be carbon neutral by 2050. The Parliament's negotiating mandate received the backing of 392 MEPs, with 161 voting against and a further 142 abstaining. 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.	order to agree upon a compromise text.
Other relevant developments		
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.	