

Commodities

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COMMODITIES REGULATION BULLETIN



Welcome to the first edition of our Commodities Regulation Bulletin.

In this edition we cover December 2015 and several developments immediately before that. Around the world we see numerous new laws, regulations and official guidelines impacting commodities trading businesses. It's not just derivatives that are being affected. Increasingly financial and other regulation is targeting physical business and pushing out the boundaries of what regulation treats as a derivatives contract.

The EU is the source of many of the developments we report on in this edition and we expect that to continue for some time. There are some common themes running through these developments that we encounter in our regulatory practice. That is not surprising since many new regulations stem from agreements reached by G20 leaders or in international fora such as the Basel Committee on Banking Supervision (BCBS) or the International Organisation of Securities Commissions (IOSCO) which, despite its name, is addressing issues in commodity markets.

This bulletin aims to identify the key developments in jurisdictions across our network, in particular the UK, France, Switzerland, Dubai, Singapore, Hong Kong, Australia and China, but we may from time to time also report on developments elsewhere (such as in the US). We aim to provide you with a high level overview of each development so that you can decide whether you need to consider it further.

Should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact any of the contributors to this bulletin, or your usual contact at HFW.

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hfw Global regulators

Basel Committee for Banking Supervision (BCBS)/Bank for International Settlements (BIS)

■ **Guidance on credit risk and accounting for expected credit losses issued:** On 18 December 2015, and following guidance in February 2015, the BCBS issued "Guidance on credit risk and accounting for expected credit losses", replacing its 2006 guidance "Sound credit risk assessment and valuation for loans". The guidelines are intended to apply regardless of the applicable accounting standards.

■ **Capital requirements for market risk:** Following its November 2015 publication of the results of its interim impact analysis of proposed revisions to the market risk framework, in its "Fundamental review of the trading book", the BCBS is expected shortly to finalise the revised market risk framework.

Committee on Payments and Market Infrastructures (CPMI) and the International Organisation of Securities Commissions (IOSCO)

■ **Supervision of market infrastructures:** On 30 November 2015, the CPMI and IOSCO published their assessment of the implementation of the organisations' Principles for Financial Market Infrastructures (PFMI) across five infrastructure types (payment systems, central counterparties (CCPs), central securities depositories (CSDs), securities settlement systems, and trade repositories (TRs)). The report focuses on the extent to which authorities' in 28 leading jurisdictions had implemented key responsibilities set out in the Principles. Although most

jurisdictions had implemented the Principles, trade repositories were the infrastructure type in respect of which implementation of responsibilities most frequently fell short of a full rating.

■ **Unique Product Identifiers (UPIs):** On 17 December 2015, the CPMI and IOSCO published a consultative report entitled "Harmonisation of the Unique Product Identifiers", which makes proposals for the definition, format and usage of a harmonised global unique product identifier (UPI). The international standard would comprise a product classification system and related codes. Comments and suggestions are invited by 22 February 2016.

hfw European Union (EU) regulatory highlights

Markets in Financial Instruments Directive II (MiFID II)/Markets in Financial Instruments Regulation (MiFIR)

■ **MiFID II delay:** The European Parliament's MiFID II team of the European Parliament (EP) issued a statement on 27 November 2015 to the effect that they would accept a one year delay in the application of MiFID II if the European Commission (the Commission) took into account their considerations and moved quickly to implement the legislation. The Commission is expected to publish later in January 2016, or even February 2016, a formal proposal to defer the application date to 3 January 2018. Meanwhile there are delays in the Commission's adoptions of regulations (delegated acts and regulatory technical standards (RTS)) following the final reports sent to the Commission by the European Securities and Markets Authority (ESMA) in 2014 and 2015. These regulations, which will address such points as scope of commodity derivatives covered by MiFID II, the ancillary activities exemption and position limits, as well as governance, conduct and reporting issues, are not expected until February/March 2016.

■ **UK MiFID II implementation – FCA consultation:** On 15 December 2015, the UK's Financial Conduct Authority (FCA) launched the first of two consultation papers on changes to its Handbook of Rules and Guidance to reflect and implement MiFID II. This consultation focuses on markets, in other words FCA's regulation of the secondary trading of financial instruments, and will remain open



until 8 March 2016. It covers mainly trading venues (RMs, MTFs, OTFs, SIs), transparency, market data, and algorithmic and high frequency trading requirements, but also passporting and UK branches of non-EEA firms, extending more of the FCA's Principles for Businesses to business with eligible counterparties, and Perimeter Guidance, on scope issues.

■ **Position reporting requirements:**

On 11 December 2015, ESMA published another MiFID II Final Report covering, amongst other items, reporting (including commodity derivatives position reporting), cooperation and suspensions. The European Commission has three months, extendible by another month, to review this Final Report and decide whether it will endorse the draft implementing technical standards (ITS) contained in it. ESMA notes much work remains to be done to give market participants sufficient certainty to build their internal systems for position reporting, and intends to release additional guidance following publication of the relevant technical standard.

■ **Assessment of individual knowledge and competence:**

On 17 December, ESMA published its Final Report on guidelines for the assessment of knowledge and competence of individuals who on behalf of investment firms authorised under MiFID II will give investment advice to clients or provide information to them about financial instruments, investment services or ancillary services.

■ **Reporting and records:** On 23 December 2015, ESMA issued a consultation paper in respect of Level 3 guidance to complement and ensure consistent implementation of MiFIR technical

standards on transaction reporting, reference data, order record-keeping and clock synchronisation. The consultation is open for comment until 23 March 2016.

- **Indirect clearing:** See below under "EMIR" regarding ESMA's consultation on indirect clearing under MiFIR and EMIR.

■ **Market abuse**

- **MAR Delegated Act:** On 17 December 2015 the European Commission published a Delegated Regulation under the Market Abuse Regulation (MAR), based on technical advice from ESMA and supplementing MAR as regards indicators of market manipulation, minimum thresholds for exemption of certain participants in the emission allowance market from the requirement to publicly disclose inside information, the competent authority for notifying delays in disclosures, permission for trading during closed periods, types of notifiable managers' transactions and exemption from MAR for certain third countries public bodies and central banks. The Delegated Regulation will come into force along with MAR on 3 July 2016.

- **Disclosure of inside information:** Responses to the FCA's November 2015 Consultation Paper 15/38 on delaying disclosure of inside information under the FCA's Disclosure and Transparency Rules must be submitted by 20 February 2016. Following the recent case of *Ian Hannam v FCA*¹ the FCA proposes to amend guidance on when inside information disclosures can legitimately be delayed, in a manner which is consistent with current Market Abuse Directive and

with the Market Abuse Regulation, which comes into effect across the EU in July 2016.

■ **Handling of confidential and inside information:** On

10 December 2015, the FCA published Thematic Review TR15/13 entitled 'Flows of Confidential and Inside Information'. This is relevant to all firms providing financial services or performing financial activities, including those dealing in commodity derivatives. The FCA sets out its findings in three areas: Circumstances Posing Heightened Risk; Culture, Conduct and Responsibility; and Systems, Procedures and Infrastructures.

■ **UK MAR implementation – FCA consultation:** The FCA published a consultation entitled 'Policy

proposals and Handbook changes related to the implementation of the Market Abuse Regulation² in November 2015. The deadline to respond to this consultation is 4 February 2016.

■ **UK Government consultation on MAR implementation:** HM Treasury are consulting on a draft statutory instrument (SI), the

Financial Services and Markets Act 2000 (Market Abuse) Regulations 2016, which would change UK legislation to implement the Market Abuse Regulation. HM Treasury seek comments by 4 February 2016, although this draft SI will be subject to further policy and legal review and amendment before being finalised.

■ **AMF fine:** France's Autorité des Marchés Financiers handed

down a decision on 4 December 2015 fining Virtu Financial Europe (formerly Madison Tyler Europe)

1. [2014] UKUT 0233 (TCC)

2. 2014/596/EU



and Euronext Paris SA €5 million each, for market manipulation and breaching Euronext market rules, and for failing to operate with neutrality and impartiality, respectively. Euronext has since announced it will appeal this decision.

Regulatory capital

■ Commodity dealers exemption from capital requirements to be extended:

In a report published on 14 December 2015, the European Banking Authority (EBA) recommended that the exemptions for commodities dealers from the capital and large exposures provisions of the Capital Requirements Regulation (CRR) be extended until a new regulatory capital regime has been adopted, or at the latest until 31 December 2020. On 16 December, the European Commission announced its proposal, in the form of a draft Regulation, to extend the CRR exemptions until the end of 2020 for commodity dealers, unless an alternative regime for commodity dealers is put in place before then.

■ Transitional period for CCP exposures extended:

On 12 December 2015 the European Commission published a regulation extending for a further six months until 15 June 2016 the transitional period related to own funds requirements (under the CRR) for exposures to CCPs. This allows time for further progress to be made in the EU's recognition of third country CCPs without firms facing higher regulatory capital requirements in the interim where they clear through a non-EU recognised CCP. See below under "EMIR" regarding ESMA's consultation on the margin period of risk.

European Market Infrastructure Regulation (EMIR)

■ Margin on uncleared derivatives:

EU regulators are expected to finalise in January 2016 detailed rules setting out the application of initial and variation margin requirements, that will be phased in from September 2016. Similar collateral requirements in the US and certain other countries, based on the revised framework for margin requirements for non-centrally cleared derivatives adopted by the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) in March 2015, are also expected to be phased in from September 2016. See below under "USA" regarding implementation of this framework in the US.

Mandatory clearing: Following publication in the EU Official Journal on 1 December 2015 of the relevant technical standards, the EMIR clearing obligation will take effect in relation to certain OTC interest rate derivatives from 21 June 2016. The clearing obligation will be phased in so most non-financial counterparties will not need to clear these derivatives through qualifying CCPs until 21 December 2018.

■ Margin period of risk (MPOR):

On 14 December 2015, ESMA published a consultation paper reviewing Article 26 of Commission Delegated Regulation 153/2013, concerning time horizons for the liquidation period or "margin period of risk", with respect to client clearing accounts. This consultation closes on 1 February 2016.

■ Trade repository data: ESMA published on 11 December 2015 a consultation paper on access, aggregation and comparison of trade repository data. This consultation will close on 1 February 2016.

■ Indirect clearing – responses to ESMA consultation:

On 21 December 2015, ESMA published the responses received to its November 2015 consultation on indirect clearing under EMIR and MiFIR, which closed on 17 December.

Benchmark regulation

■ Approval of compromise text underway:

The European Institutions (Council, Commission and Parliament) have agreed a final consolidated text for the new EU regulation on indices used as benchmarks in financial instruments and financial contracts (the Benchmark Regulation). This compromise text was approved by the Permanent Representatives Committee (COREPER) on behalf of the European Council on 9 December 2015. The text will be submitted to a plenary session of the EP and to the Council for formal adoption. The Regulation will apply from late 2017/early 2018 - 18 months after publication in the EU's Official Journal, which is not expected before Q2 2016.

REMIT (Regulation on Energy Market Integrity and Transparency)

■ Updated REMIT Q&As,

30 November 2015: With the first phase of transaction reporting launched last October, the Agency for the Cooperation of Energy Regulators (ACER) has updated its Questions & Answers on REMIT. In its previous update for the 12th edition, ACER considered various



reporting matters including chains of delegation, allocation of reporting responsibilities and timing. On the same day ACER published updated lists of Organised Market Places (OMPs) and Standard Contracts. Note that (1) ACER FAQs on Transaction Reporting were updated on 16 November; and (2) the REMIT Q&As have been more recently updated on 8 January 2016.

- **Fines imposed for REMIT breaches:** Estonian and Spanish regulators have imposed fines respectively on Elering, the Estonian electricity transmission system operator (TSO), for failure to announce inside information in respect of an outage of the Estonia-Finland inter-connector and on Iberdrola for manipulating power prices in 2013. Both fines are being appealed.

UK: Additional developments

- **Recognised clearing houses - response to HM Treasury call for evidence:** The UK Government published this response in late November 2015. Going forward, in addition to considering the most appropriate regulatory treatment of Model B clearers and risk management companies providing margining and netting solutions, the Government address the issue of a new recognised body status for CSDs in the upcoming consultation on how to implement the EU CSD Regulation in the UK.

- **Outsourcing standards for regulated firms:** On 27 November 2015, the UK's Prudential Regulation Authority (PRA) announced that it had fined R. Raphael & Sons Plc £1,278,165 in respect of its failure to properly manage its outsourcing arrangements.

hfw Non-EU regulatory highlights

Australia

- **Implementation of global Principles for Financial Market Infrastructures:** On 17 December 2015, the CPMI and IOSCO published a report "Implementation monitoring of PFMI: Level 2 assessment report for Australia". This report looks at the extent to which the country's legal, regulatory and oversight frameworks for systemically important payment systems, CSDs, securities settlement systems, CCPs and trade repositories in Australia are in line with the PFMI (see under "Global Regulators", above). The organisations found that Australia has generally consistently adopted the PFMI across the various financial market infrastructure types.

- **Mandatory clearing of interest rate swaps:** On 14 December 2015, the Australian Securities and Investments Commission (ASIC) published rules implementing Australia's mandatory central clearing regime for OTC G4 (USD, EUR, GBP, JPY) and AUD interest rate derivatives between dealers. The clearing obligations will start from April 2016.

- **Australian Government proposes exposure draft legislation:** On 21 December 2015, the Australian Government released exposure draft legislation to amend the Payment Systems and Netting Act 1998 and certain regulations in order to enable Australian entities to enforce rights in respect of margin provided as security in connection with certain derivatives, clarify the operation of close-out rights and protect

the operation of financial market infrastructure. The Government also published a policy paper on "enhancing retail consumer protection for client monies" and are considering proposed reform with regards to wholesale clients. The submission period will close on 29 January 2016, with the Government seeking to introduce legislation early in 2016.

Hong Kong

- **Memorandum of Understanding with US CFTC:** On 23 December 2015, the Hong Kong Securities and Futures Commission (SFC) announced that it has entered into a memorandum of understanding (MoU) with the US Commodity Futures Trading Commission (CFTC) regarding cooperation and exchange of information in the supervision and oversight of regulated entities that operate on a cross-border basis in Hong Kong and the US. The MoU covers regulated markets and organised trading platforms, central counterparties, intermediaries, dealers and other market participants.

Switzerland

- **Derivatives reforms coming into force:** On 1 January 2016, the Financial Market Infrastructure Act (FMA) came into force. This is the framework act which introduces derivatives reforms broadly similar to many provisions in the EU's EMIR and MiFID II legislation (as well as the US Dodd-Frank Act). The Federal Council Ordinance and the Financial Market Infrastructure Ordinance of the Financial Market Supervisory Authority (FINMA) also came into force on 1 January 2016, and set out in more detail those FMA requirements that will apply to derivatives, such as trade reporting,



central clearing, and risk mitigation. Requirements will be phased in from July 2016 onwards or, in the case of reporting, once a trade repository has been authorised or recognised. Under the FMIA, the position limits regime and obligation to trade certain derivatives on regulated venues will not apply until later, at least until the EU and other jurisdictions adopt equivalent requirements.

■ FINMA bans former bank employees: On 17 December 2015 FINMA issued industry bans of between one and five years against the former global trading heads and four traders in UBS' foreign exchange and precious metals business. FINMA's investigations found the individuals had engaged in or encouraged improper behaviour, acted against the interest of clients and repeatedly attempted to manipulate foreign exchange benchmarks.

USA

■ Margin requirements for uncleared swaps: On 16 December 2015, the US Commodity Futures Trading Commission (CFTC) approved final rules on initial and variation margin requirements for certain uncleared swaps entered into by swap dealers and major swap participants not subject to regulation by US federal prudential regulators.

Initial margin requirements will be phased in from 1 September 2016 for larger swap participants through to 1 September 2020 for the smallest participants. Larger swap participants will need to comply with the variation margin requirements from 1 September 2016, with the smaller swap participants complying from 1 March 2017. The rules would not impose margin requirements on commercial end users.

■ Draft technical specifications for swap data elements: On 22 December 2015, the CFTC requested comment on draft technical standards for certain swap data elements that are reportable to swap data repositories and on certain swap data elements which are currently non-reportable but which the CFTC considers might assist them if they were reported. Comments are due by 22 February 2016.

hfw Conferences and events

Commodities Seminar: Trading in Troubled Waters

Tokyo Embassy, Japan
21 January 2016

Commodities Seminar: International Trade

HFW Dubai
26 January 2016
Presenting: Simon Cartwright, Peter Murphy and Damian Honey

Commodities Breakfast Seminar

HFW London
23 February 2016

Commodities Breakfast Seminar

HFW London
8 March 2016

Commodities Breakfast Seminar

HFW London
23 March 2016

There will be a regulatory presentation at each of the three Commodities Breakfast Seminars listed above.

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