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| **Input needed from other teams** |
| **Sign off needed from HoD**  |

**Overview of EU Financial Regulation of interest and/or relevance to the Agency**

***In summary, this note sets out:***

* **The main pieces of EU financial regulation** (either completed or under development) which are **of interest to the Agency** (and in many cases, NRAs, energy ministries and DG ENER).
* It then **lists the related secondary legislation or third level guidance** which is **drafted by ESMA** where **ACER should be consulted for input (or may wish to) and the timelines**.
* Finally, the note provides **an overview of the interactions the Agency has had to date with ESMA and national financial regulators[[1]](#footnote-1)**, and sets out a **series of simple steps to identify if and how we should increase that engagement and cooperation over the coming 6-12 months and beyond.**

**The annexes** provide content which may be useful **background reading or reference.**

**Objectives**

**The main objectives of the document are threefold:**

1. To be a **point of reference for** current and new **staff working on financial regulation**
2. To **document the main interactions** the Agency has **with ESMA and financial regulators** – to be **updated by MMD teams** as appropriate
3. To **outline an overall vision of what the Agency wants to achieve** when it comes to financial regulation and the impact/interactions with energy markets and energy market regulation **and how best to do that.**

**Objective 1** is addressed by sections 1 & 2 of the document as well as several of the annexes.

**Objective 2** is addressed by section 3

**Objective 3** is covered under section 4. Its main steps can be summarised as follows:

* to **ensure that the Agency is effective and proactive in inputting its views at the most strategic points** in the development of EU financial regulation (at Level 1, 2 and 3) **through regular contact with ESMA**
* that **the provisions of the ACER-ESMA MoU are followed more closely**, in particular with regard to formal deadlines and processes **when requesting an ACER/ESMA “view” or input**
* to **develop closer bilateral relations with national financial regulators** of importance to REMIT
* to **ensure NRAs develop** and maintain **good relations with their** counterpart **financial regulator** (and if possible finance ministry)

Background

EU financial regulation most obviously has interactions with and implications for REMIT in terms of scope, data reporting/collection, monitoring and enforcement/compliance as well as wider definitions/guidance on various concepts including inside information, taxonomies of market abuse etc. Energy derivatives trading is not (or will soon no longer be) within the scope of REMIT Article 3 and 5.

However as noted in REMIT (Recital 5) and MAR (Recital 20) price formation across energy (physical) and financial markets is interlinked, and it is highly likely ACER and NRAs will have to cooperate with ESMA and NCAs in cross-regime investigations where abuse takes place in one market to benefit a position in the other. Thus the need to cooperate will be both implicit in the nature of the investigation, and explicitly required under both REMIT (Art 16(3)) and MAR (Art 25 (3) and (5)).

EU financial regulation also impacts on the Agency’s role to ensure the internal energy market is completed – at least part of which entails well-functioning and liquid wholesale gas and electricity markets across the EU. Financial regulation could distort this objective by imposing extra costs and regulatory burden on firms trading derivatives which are Wholesale Energy Products. The impact is difficult to quantify ex-ante but there is the potential for major shifts in trading behaviour and altered incentives for firms of all sizes to optimise, hedge or speculate in both physical and financial gas and electricity contracts across the EU, including for example in Financial Transmission Rights (FTRs). With respect to liquidity in gas and power markets, it is difficult to quantify the potential impacts of these changes. However it is a fairly reasonable assumption that extra costs imposed on firms will be unlikely to improve the low levels of liquidity observed in some markets.

**Section 1. EU Financial Regulation of interest or direct relevance to the Agency – Level 1 texts only**

|  |  |  |  |
| --- | --- | --- | --- |
| **Title**  | **Date published / applies from** | **Main objectives** | **Of relevance/interest why?** |
| Market Abuse Directive (MAD) Dir 2003/6/EC | 28 Jan 2003 / 12 Oct 2004 | Reduce instances of market abuse and as a result protect the integrity of the financial markets and increase investor confidence. | Defines current scope of REMIT Art 3 and 5 as it is the mirror image of the MAD scope. |
| Market Abuse Regulation (MAR)Reg (EU) No 596/2014 | 16 Apr 2014 / 3 Jul 2016 & 3 Jan 2018[[2]](#footnote-2) | Extends scope of MAD to new trading platforms, includes inside information for spot commodities, new offence of attempted manipulation and benchmark manipulation, mechanisms for whistleblowers.  | Narrows scope of REMIT for Financial Instrument WEPs. Implications for inside information and other definitions. |
| Criminal Sanctions for Market Abuse Directive (CSMAD) Dir 2014/57/EU | 16 April 2014 / as per MAR | Introduces minimum rules for administrative measure, sanctions and fines, including mandatory criminal sanctions for those found guilty of market abuse and insider dealing across most of the EU (except UK, DK) | Lack of criminal powers for REMIT in all MS, and large differences in those MS which have powers. Experience of CSMAD of interest for any REMIT review? |
| Markets in Financial Instruments Directive (MiFID)Dir 2004/39/EC | 21 Apr 2004 / 1 Nov 2007[[3]](#footnote-3) | Improve the competitiveness of EU financial markets by creating a single market for investment services and activities, and ensuring a high degree of harmonised protection for investors in financial instruments, such as shares, bonds, derivatives and various structured products. | Defines the current delineation between a physical forward and a derivative contract.  |
| Markets in Financial Instruments Directive [Recast] (MiFID II)Dir 2014/65/EU | 15 May 2014 / 3 Jan 2018[[4]](#footnote-4)MiFID II delay text [here](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1034&from=DE) | Extends the scope of MiFID I considerably to cover more venues and products (updates list of Financial Instruments (FIIs)), reduces and narrows exemptions for commodity dealers, introduces a position limits and position reporting regime. | Defines the future definition of FIs and hence which WEPs will be covered by MAR market abuse provisions.Determines which REMIT MPs which are not currently MiFID investment firms can remain exempt under MiFID II after 2018. |
| Markets in Financial Instruments Regulation (MiFIR) Reg (EU) No 600/2014 | 15 May 2014 / 3 Jan 2018[[5]](#footnote-5)MiFIR delay text [here](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1033&from=EN) | MiFIR and MiFID II are linked, however the main provisions in MiFIR are around pre and post-trade transparency, transaction reporting (where additional information to MiFID I and EMIR must be reported to financial regulators). In addition the Trading Obligation (for derivatives contracts that are both cleared through a CCP and deemed sufficiently liquid to trade on a ‘trading venue’) will interact with EMIR. | To the extent that the trade reporting provisions interact with REMIT reporting – position reporting regime informs NCAs setting of position limitsThe Trading Obligation (i.e. you must trade on regulated venues, not OTC) will only apply to WEPs if the EMIR clearing obligation also applies – unlikely in the near term. |
| Regulation on OTC derivatives, central counterparties and trade repositories (**EMIR** – ‘European Market Infrastructure Regulation’) Reg (EU) 648/2012 | 4 Jul 2012 /16 Aug 2012[[6]](#footnote-6) Reporting to TRs already in place; a list of contracts subject to mandatory clearing is [here](https://www.esma.europa.eu/sites/default/files/library/public_register_for_the_clearing_obligation_under_emir.pdf) (no energy commodities yet, though many (on exchanges) are already cleared and notified to ESMA. | Improve transparency and reduce ‘systemic risk’ associated with the derivatives market as per G20 commitment. Specific requirements include:- report every derivative contract entered into to a trade repository (TR)- clear, via a Central Clearing Party (CCP), OTC derivatives subject to mandatory clearing- new risk management (operational processes and margining) for all bilateral (OTC) derivatives i.e. trades that are not cleared by a CCP | EMIR reporting of WEPs is considered sufficient for REMIT purposes. ACER will need to get data from Trade Repositories ([list](https://www.esma.europa.eu/supervision/trade-repositories/list-registered-trade-repositories)). If firms trading energy go over clearing thresholds they will be subject to mandatory clearing obligations, and will be treated as MiFID II ‘investment firms’ See Jan 2016 consultation on review of EMIR ([link](http://ec.europa.eu/finance/consultations/2015/emir-revision/index_en.htm)) & ACER, CEER, ESMA, and industry responses ([link](https://ec.europa.eu/eusurvey/publication/emir-revision-2015?language=en))EMIR review Commission legislative proposal expected summer 2017 |
| Capital Requirements Regulation (CRR) Reg (EU) No 575/2013 and Directive (CRD IV) Dir 2013/36/EU | 26 June 2013 / 1 Jan 2014[[7]](#footnote-7)  | 2 two legislative instruments: the CRR contains the ‘single rule book’ (basically the majority of Basel III prudential rules) and the CRD IV Directive introduces provisions covering: remuneration, governance, transparency and liquidity buffers. Will apply to all MiFID II ‘investment firms’. Commodity dealers had exemptions from the ‘own funds’ and ‘large exposures’ requirements until Dec 2017: Arts 493(1) & 498(1).  | The EC proposed an extension until 2020 ([link](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=COM:2015:648:FIN&rid=1)) to develop separate tailor made regime, as proposed by the European Banking Authority in Dec 2015 ([link](http://www.eba.europa.eu/-/eba-issues-recommendations-for-sound-prudential-regime-for-investment-firms)).**This has been the major worry for industry** in terms of falling under the scope of MiFID II or becoming a FC under EMIR. It is **an important issue for ACER to monitor.** |
| ‘Benchmarks Regulation’ or Regulation on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment fundsReg (EU) No 2016.2011 | 8 June 2016 / 18 months after entry into forceOJ text [here](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1011&qid=1474387163175&from=en) | To prohibit the use of unauthorised Benchmarks in the EU and to establish a common regulatory framework to restore confidence in their accuracy and integrity (after LIBOR, EURIBOR scandals). | Manipulation of benchmarks is not mentioned in REMIT (unlike MAR) but could fall within the scope of Art 5. From a market functioning point of view, anything which dissuades firms from giving their data/opinions to Price Reporting Agencies (PRAs) such as Herren, Argus etc. could impact on the usefulness of energy benchmarks widely used to price contracts in the EU.ACER may under REMIT make certain data publically available - possible interaction. |
| Securities Financing Transaction Regulation (SFTR)Reg (EU) No 2365/2015 | 25 Nov 2015 /12 Jan 2016 Certain specific provisions take effect from various dates in 2016 and 2017  | Improve the transparency and monitoring of non-bank alternative credit provision (shadow banking)Will requires counterparties (MiFID II firms, EMIR Financial Counterparties and Non-FCs etc.) established in the EU and EU branches of non-EU counterparties that are parties to securities financing transactions (SFTs) or a collateral arrangement to:- report SFTs to TRs or ESMA- keep a record of SFTs for five years after their conclusion, modification or termination- disclose the risks of reusing financial instruments obtained as collateral under collateral arrangements to, and obtain express consent from, the party that transferred the collateral | Unclear as of yet – industry has largely not paid attention to this Regulation. There are potential implications due to the additional reporting requirements and the fact that certain definitions under EMIR have changed as a result. |

***Visual aid*** *– note that there may be overlaps between certain regulations. The diagram is intended to show the overall goals of each regulation for the particular market (****energy*** *and/or* ***financial****)*

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**Visual aid for scope of REMIT versus EU financial regulation before and after 3 January 2018 \*\* this is still to be finalised and a common understanding agreed with NRAs and financial regulators.**

**Present situation until 2 January 2018**



**Situation from 3 January 2018 onwards**



(Insert link to PPT source for above tables)

**Section 2. Secondary legislation or third level Guidance drafted by ESMA of interest to the Agency**

ESMA is granted powers under the various pieces of legislation to adopt Level 2 (Technical Advice, Regulatory or Implementing Technical Standards) or Level 3 Guidance[[8]](#footnote-8). The following list is not exhaustive, but rather compiled by examining the Level 1 texts and the ESMA Work Programme for 2015 and 2016. It highlights the areas of ESMA work where ACER should focus its engagement – after consultation with ESMA, industry and the Commission.

**MiFID II**
*Completed measures*

|  |  |  |  |
| --- | --- | --- | --- |
| **Name and description** | **ESMA Action** | **ACER action** | **Timelines** |
| Level 2 Delegated Regulation (on definition of FIs and ‘REMIT carve-out’): **adopted by the Commission 25 April 2016**. Enters into force on application of MiFID II. | ESMA input over, though national interpretation by NCAs could be an issue | Continue to work on clarifying the definition of ‘physical forwards’ (need buy in of ESMA and NCAs) | EC adopted final text on 25 Apr 2016 ([link](http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-2398-EN-F1-1.PDF)). 3 month scrutiny period by EP/CCL until end-July 2016 |
| Level 2 Regulatory Technical Standards (RTS 21) governing **position limits**. Commission sent back original ESMA RTS for revision. | ESMA on 2 May 2016 has resubmitted technical standards to the Commission on position limits ([link](https://www.esma.europa.eu/press-news/esma-news/esma-amends-mifid-ii-standards-non-equity-transparency-and-position-limits))EC adopted final RTS on 1 Dec 2016. ([link](http://ec.europa.eu/finance/securities/docs/isd/mifid/rts/161201-rts-21_en.pdf)) | ESMA request for ACER assistance in categorising gas and elec contracts subject to position limits and reporting regime. Need ACER analysis and view on impacts of the regime for gas and elec market functioning. | 3/6 month EP/CCL scrutiny with rejection riskESMA/NCA/exchanges internal process ongoing, expect completion (and publication of limits) by summer 2017 (tbc) |
| Level 2 Regulatory Technical Standards (RTS 20) governing **ancillary business exemption.** Commission sent back original ESMA RTS for revision. | ESMA on 30 May 2016 has in effect refused to amend its original proposals as per the EC’s request, but has indicated ways in which the EC could change the test which is says are sub-optimal ([link](https://www.esma.europa.eu/press-news/esma-news/esma-issues-opinion-mifid-ii-standards-ancillary-activities))EC adopted final RTS on 1 Dec 2016. ([link](http://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/C-2016-7643-F1-EN-MAIN.PDF)) | Work with ESMA, NCAs and industry to understand potential impacts on trading behavior – see actions in Section 4. | 3/6 month EP/CCL scrutiny period – rejection unlikely. |

*Ongoing/pending measures*

|  |  |  |  |
| --- | --- | --- | --- |
| **Name and description** | **ESMA Action** | **ACER action** | **Timelines** |
| Not a Level 2 or Level 3 measure, though as part of the ancillary activity test, though not explicitly mandated, **ESMA has said it will put out a figure on the EU market size denominator** (presumably for each commodity asset class including gas and electricity). |  | ACER to offer expertise and potentially REMIT data to assist the calculation of gas and electricity market size. | Nothing written, but expect to ESMA put out the figure which addresses the first year of the calculation period expires (July 2015 – June 2016). Latest info is Mar 2017 (tbc). |

**MAR**

*Completed measures*

|  |  |  |  |
| --- | --- | --- | --- |
| **Name and description** | **ESMA Action** | **ACER action** | **Timelines** |
| Level 2 ESMA Final Report/Technical Advice to Commission on exemption for certain third countries public bodies and central banks, ***the indicators of market manipulation***, **the disclosure thresholds, the competent authority for notifications of delays**, the permission for trading during closed periods and types of notifiable managers' transactions indicators of manipulation*.*  | ESMA consulted and submitted Final Technical Advice to the Commission on 3 Feb 2015 ([link](https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-224.pdf)) | Analyse and look for read across and/or implications for REMIT | Commission adopted [Delegated Regulation 522/2016 17 Dec 2015](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1462191113480&uri=CELEX:32016R0522), published in OJ 5 April 2016 ([link](http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1462191113480&uri=CELEX:32016R0522)) |
| Level 2 ESMA Technical Advice **establishing a minimum threshold** of carbon dioxide equivalent and rated thermal input **when applying exemption from the obligation to disclose inside information** (under Article 17(2) of MAR) | As above | As above | As above |
| Level 2 ESMA Technical Advice **specifying** **to which competent authority notifications of delay of publication of inside information should be made** (under Article 17(3) of MAR) | As above | As above | As above |
| Level 2 Technical Standards on **notifications and list of financial instruments** (under Article 4(4) and 4(5) of MAR) | ESMA consulted and submitted its Final Report on draft Technical Standards for MAR on 28 Sep 2015 ([link](https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf)) | Analyse and look for read across and/or implications for REMIT – in particular there may be implications for data reporting? | EC adopted Delegated Regulation 1 Mar 2016 ([link](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0909&rid=1)) |
| Level 2 Technical Standards on **accepted market practices** (under Article 13(7) of MAR) – ***essentially these are being phased out.*** | ESMA consulted and submitted its Final Report on draft Technical Standards for MAR on 28 Sep 2015 ([link](https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf)) | Analyse for REMIT impacts or read across | Commission adopted Delegated Regulation on 26 Feb 2016 ([link](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0908&from=EN7-EN-F1-1.PDF)), text published in OJ 10 June 2016 |
| Level 2 Technical Standards **suspicious transaction and order reporting** (under Article 16(5) of MAR | As above | As above | Commission adopted Delegated Regulation on 9 Mar 2016 ([link](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0957&from=EN)), text published in OJ 17 June 2016 |
| Level 2 Technical Standards **technical means for public disclosure of inside information and delays** (under Article 17(10) of MAR) | As aboveThe Commission response ([link](http://ec.europa.eu/finance/securities/docs/abuse/160525-letter-esma_en.pdf)) relating to the REMIT overlap and the subsequent ESMA opinion ([link](https://www.esma.europa.eu/sites/default/files/library/2016-982_opinion_on_mar_its_on_public_disclosure.pdf)) are interim steps towards the final text. | ACER was lightly involved in discussions with ESMA at the drafting stage (participated via telco in a discussion on the topic in the MISC/MARWG but was not provided the draft documents).Subsequent to the public disagreement it was agreed with the Commission and NRAs at the June 2016 AMIT WG that ACER would ‘do something’ through Guidance or a Q&A to solve any outstanding doubts remaining after the final compromise text.Link to that ongoing work is [here](file://s-fs01.acer.local/ACERData/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/Sep%202016%20-%20Emission%20Allowances%20Inside%20Information). | Commission adopted Delegated Regulation on 29 June 2016 ([link](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R1055&from=EN)), text published in OJ 30 June 2016 |
| ESMA is required to develop **Guidelines** (Level 3**) on delays in the public disclosure of inside information** [Art 17(11) of MAR]. | ESMA consulted from 28 Jan – 31 Mar 2016 ([link](https://www.esma.europa.eu/sites/default/files/library/2016-162.pdf)). Responses ([link](https://www.esma.europa.eu/press-news/consultations/consultation-draft-guidelines-market-abuse-regulation)) | ESMA proposals. Discussed with NRAs at June MMSC. Action to analyse ESMA Guidelines (tbc) | ESMA published Guidelines on 13 July 2016 ([link](https://www.esma.europa.eu/sites/default/files/library/2016-1130_final_report_on_mar_guidelines.pdf)) |
| ESMA **Guidelines** (Level 3) on **information expected or required to be disclosed on commodity derivatives markets or related spot markets under MAR** | ESMA consulted from 30 Mar – 20 May 2016 ([link](https://www.esma.europa.eu/sites/default/files/library/2016-444_cp_on_mar_gl_on_information_on_commodities.pdf)). Responses ([link](https://www.esma.europa.eu/press-news/consultations/consultation-future-mar-list-information-regarding-commodity-and-spot#TODO)). ESMA presented to ACER and NRAs at May MMSC. | ACER and NRAs to input directly to ESMA if there are concerns. ACER provided limited comments on the guidelines before publication ([link](file://s-fs01.acer.local/ACERData/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/2016%20Exchanges%20on%20inside%20info%20guidelines%20for%20commodity%20derivatives)) | ESMA published the final Guidelines on 30 September 2016 ([link](https://www.esma.europa.eu/sites/default/files/library/2016-1412_final_report_on_mar_guidelines_on_commodities.pdf)). |

*Ongoing/pending measures*

|  |  |  |  |
| --- | --- | --- | --- |
| **Name and description** | **ESMA Action** | **ACER action** | **Timelines** |
| Level 2 Implementing Technical Standard (ITS) on **cooperation between ESMA/NCAs with ACER, NRAs and others** [Art 25 of MAR]. ESMA to submit draft ITS to Commission by 3 July 2016 | ESMA Paris and MISC working on proposals. Unlikely to consult publically on this issue. | Currently engaging with ESMA including presentation to ACER and NRAs at May 2016 MMSC ([link](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/3.REMIT%20policy/ESMA%20Guidance/MAR%20ITS%20on%20cooperation%20and%20info%20exchange)). Good progress but need to influence going forward if ESMA MISC submits different proposals to EC for adoption. Link to subsequent ACER involvement [here](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/MAR%20ITS%20on%20cooperation%20arrangements). | ESMA has missed 3 July deadline for submission to EC.Likely to be submitted Q4 2016. |
| As per Art 38 of MAR, the Commission shall by 3 July 2019 report to the EP/CCL on application of MAR | Informally, will probably draft the report. Formally will conduct an EU-wide mapping of admin & crim sanctions  | ACER and NRAs to monitor and influence appropriately. Could be a hook to ensure convergence at least between REMIT and MAR penalties per MS, if not at EU level. | Late 2018, early 2019 (tbc) |

**EMIR**

*Completed measures*

|  |  |  |  |
| --- | --- | --- | --- |
| **Name and description** | **ESMA Action** | **ACER action** | **Timelines** |
| The majority of Level 2 and Level 3 measures under EMIR have been implemented. These included provisions on: * Details of **the data to be reported to TRs**
* Details of the application for registration as a TR
* **Data to be published by trade TRs** and operational standards
* Colleges for CCPs
* General requirements and prudential requirements for CCPs
* **Clearing obligation, risk mitigation techniques and NFCs**

Overview with links [here](https://www.esma.europa.eu/regulation/post-trading#title-paragrah-3) | ESMA consulted on all of these, however it does not appear to have consulted on some Level 3 Guidance or the EMIR Q&As | Analyse and look for read across and/or implications for REMIT.Continue ongoing work with ESMA to improve data quality and reporting under EMIR for WEP OTC derivatives |  |
| Risk Mitigation techniques for uncleared OTC derivatives under EMIR. | The ESAs consulted in 2014 ([link](https://www.eba.europa.eu/documents/10180/655149/JC%2BCP%2B2014%2B03%2B%28CP%2Bon%2Brisk%2Bmitigation%2Bfor%2BOTC%2Bderivatives%29.pdf)) and 2015 ([link](http://www.eba.europa.eu/documents/10180/1106136/JC-CP-2015-002%2BJC%2BCP%2Bon%2BRisk%2BManagement%2BTechniques%2Bfor%2BOTC%2Bderivatives%2B.pdf)) before submitting the Final Draft RTS to the Commission on 8 Mar 2016 ([link](http://www.eba.europa.eu/documents/10180/1398349/RTS%2Bon%2BRisk%2BMitigation%2BTechniques%2Bfor%2BOTC%2Bcontracts%2B%28JC-2016-%2B18%29.pdf)). On 28 July 2016, EC sent RTS back for revision ([link](http://ec.europa.eu/finance/financial-markets/docs/derivatives/160728-letter-esas_en.pdf)). ESAs accepted some but not all EC requests ([link)](https://esas-joint-committee.europa.eu/Publications/Opinions/ESAs%202016%2062%20%28ESAs%20Opinion%20on%20RTS%20on%20OTC%20margins%20%20EMIR%2BRTS%29-PR.pdf) | There is a distinction between how these apply to NFCs and NFC+ or FC firms under EMIR. However some requirements apply regardless (timely confirmation, portfolio reconciliation and compression etc.) A topic for MMD and E/G Dept colleagues to be aware of. | Commission adopted Delegated Act on 4 Oct 2016 ([link](http://ec.europa.eu/finance/financial-markets/docs/derivatives/161004-delegated-act_en.pdf)) |
| RTS on Review of the technical standards on reporting under Article 9 of EMIR | ESMA consulted on 10 Nov 2014 ([link](https://www.esma.europa.eu/sites/default/files/library/2015/11/esma-2014-1352_consultation_paper_on_the_review_of_emir_reporting_standards_under_article_9_0.pdf)) and issued its Final Draft RTS on 13 Nov 2015 ([link](https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1645_-_final_report_emir_article_9_rts_its.pdf)) | Continue ongoing work with ESMA on EMIR data. | Commission adopted as Delegated Regulation on 19 Oct 2016 ([link](https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-6624-EN-F1-1.PDF)). Will apply 9 months after publication in OJ (tbc) |

*Ongoing/pending measures*

|  |  |  |  |
| --- | --- | --- | --- |
| **Name and description** | **ESMA Action** | **ACER action** | **Timelines** |
| RTS on access to data and aggregation andcomparison of data across TR under Article 81 of EMIR | ESMA consulted on 11 Dec 2015 ([link](https://www.esma.europa.eu/sites/default/files/library/esma-2015-1866_-_consultation_paper_on_access_aggregation_and_comparison_of_tr_data.pdf)) and issued Final Draft RTS on 5 April 2016 ([link](https://www.esma.europa.eu/sites/default/files/library/2016-422_final_report_rts_on_tr_data_under_art.81_emir.pdf)) | Impacts for ACER on access to EMIR data through TRACE project. | Awaiting adoption by Commission |

**Benchmarks Regulation**

*Ongoing/pending measures*

|  |  |  |  |
| --- | --- | --- | --- |
| **Name and description** | **ESMA Action** | **ACER action** | **Timelines** |
| ESMA Discussion Paper on future proposals on draft RegulatoryTechnical Standards andTechnical Advice to the Commission | ESMA consulted from 15 Feb to 31 Mar 2016 ([link](https://www.esma.europa.eu/sites/default/files/library/2016-288_discussion_paper_benchmarks_regulation.pdf))Responses ([link](https://www.esma.europa.eu/press-news/consultations/discussion-paper-benchmarks-regulation#TODO)) | Analyse and look for read across and/or implications for REMIT | Next step is Consultation Paper – see below |
| ESMA Consultation Paper on draft Technical Advice under the Benchmarks Regulation  | ESMA currently consulting from 27 May to 30 June 2016 ([link](https://www.esma.europa.eu/sites/default/files/library/2016-723_cp_benchmarks_regulation.pdf)) | Analyse and look for read across and/or implications for REMIT | ESMA aims to submit Technical Advice and  |
| ESMA Consultation Paper on draft Regulatory Technical Standards  | ESMA intend to consult in Q2/3 2016 | CEER WEM TF/ACER reviewed + agreed no need for response. |  |

**Capital Requirements Regulation and Directive (CRR/CRD IV)**

*Ongoing/pending measures*

|  |  |  |  |
| --- | --- | --- | --- |
| **Name and description** | **ESMA Action** | **ACER action** | **Timelines** |
| While not strictly a Level 2/3 measure, the European Parliament and Council have agreed with the Commission proposal to extend the exemptions for commodity dealers to 2020 ([link](https://ec.europa.eu/transparency/regdoc/rep/1/2015/EN/1-2015-648-EN-F1-1.PDF)). | Unclear as of yet, as the EBA will be in the lead. The EBA responded to the Commission’s Jun 2016 letter ([link](http://www.eba.europa.eu/documents/10180/1513482/Note%2Bto%2BA%2BEnria_CfA%2BInvestment%2Bfirms.pdf/a6192f56-725f-43da-bbfb-8e7fae5f6ec4)) with a Call for Advice and Data Collection exercise ([link](http://www.eba.europa.eu/documents/10180/1513482/CfA%2BInvestment%2Bfirms.pdf/ee3bb612-5124-47e8-8bba-8ec380afbb75)). On 19 Oct 2016 the EBA issued its first opinion on this work ([link](http://www.eba.europa.eu/documents/10180/1629027/Opinion%2Bof%2Bthe%2BEuropean%2BBanking%2BAuthority%2Bon%2Bthe%2BFirst%2BPart%2Bof%2Bthe%2BCall%2Bfor%2BAdvice%2Bon%2BInvestment%2BFirms%2B%28EBA-Op-2016-16%29.pdf/ece4f539-6ba5-4404-91b4-470f2b78dd0a)), but subsequent data collection may follow. Anecdotal evidence suggests the EBA are unhappy with the level of engagement of commodity firms. | Review proposals, Agency decision on whether/how to influence. Not a priority at present, but something for the Agency to engage with ESMA and industry on as situation develops. Links to view on systemic risk of energy firms. | The EBA plans to submit its final report by 30 Jun 2017 and a new regime should be in place before 31 Dec 2020. |

**Securities Financing Transaction Regulation (SFTR)**

*Ongoing/pending measures*

|  |  |  |  |
| --- | --- | --- | --- |
| **Name and description** | **ESMA Action** | **ACER action** | **Timelines** |
| ESMA Discussion Paper on draft ITS and RTS under the SFTR | ESMA consulted from 11 Mar to 22 Apr 2016 ([link](https://www.esma.europa.eu/sites/default/files/library/2016-356.pdf)) Responses ([link](https://www.esma.europa.eu/press-news/consultations/discussion-paper-draft-rts-and-its-under-securities-financing-transaction)) | None / review / influence |  |

**Section 3. ACER interactions with ESMA and financial regulators**

***Memorandum of Understanding - MoUs***

The **ACER-ESMA MoU** was signed in July 2013 and covers consultation, cooperation and exchange of information. The liaison officers are the HoD (Volker Zuleger) and the counterpart Head of Markets Division at ESMA (Rodrigo Buenaventura). The email addresses for the purposes of cooperation are volker.zuleger@acer.europa.eu and rodrigo.buenaventura@esma.europa.eu.

**Article 2 contains a review clause** stating that ACER and ESMA will periodically review the functioning and effectiveness of the cooperation arrangements with a view to, inter alia, expanding or altering the scope or operation. This has **not yet happened**, so may provide **a useful hook**, in addition to the increased cooperation required on the MAR Level 2 and Level 3 measures, **to initiate the discussions** about the state of the cooperation and relations between the two bodies.

As of March 2017 there is a view on our side to review the MoU to strengthen the cooperation and clarify the mechanisms involved. We will raise this at the High Level Meeting with ESMA on 10 March.

ACER has not concluded any MoUs with financial regulators but may wish to do so over the coming years to govern cooperation on data sharing, market monitoring and other issues (given the recent MAR ITS on cooperation, we may no longer need individual MoUs, but a common MoU – to be decided)

***Cooperation to date (ESMA)***

Discussions with members of the MM Department revealed that ACER staff have participated fairly regularly in meetings of relevant ESMA committees, working groups and task forces, but that in some teams this has dropped off over the last 6-12 months. The ESMA Director, Verena Ross, meets with Alberto probably twice a year, once in the context of the annual meeting of Directors of EU agencies.

**Annex 1 provides an overview of the various ESMA working groups** (Standing Committees and Task Forces) **and which ACER grouping and leads they most closely align with**. It also included details of the industry Consultative Working Groups (CWGs) which could prove useful as industry are naturally more clued in on the latest developments in financial regulation.

In terms of concrete meetings, Volker and Elio have attended the CDTF during the discussions on the definition of financial instruments and the so called ‘REMIT carve out’ under MiFID II. Unfortunately ACER’s views were not taken on board, and the experience resulted in many last minute requests for information. It is agreed within the MMD that the cooperation should not be so last minute and that ACER and ESMA need to work on being more systematic in their requests for assistance.

The then Market Conduct & Policy Team participated in one ESMA MISC and one MAR WG over the past year. In detail, Antonio attended the MISC of March 2016 and delivered a presentation on ACER, the similitudes and differences between REMIT and MAR, the cooperation obligations embodied in these two regulations and our revised Guidance on Article 15 of REMIT.

ESMA staff have also participated in the MMSC meetings. A joint MISC-MMSC workshop on market abuse is planned for the beginning of 2017. The MC team has been working with ESMA colleagues on three discreet topics – inside information disclosure, cooperation agreements and the ITS on PPAETs (under MAR) and was consulted by ESMA on each, though not always in a timely manner. ESMA shared with ACER the draft implementing technical standards on the obligations of persons professionally arranging and executing transactions (PPAETs), which were taken into account during the elaboration of ACER’s Guidance on the obligations of PPATs under Article 15 of REMIT.

The ESMA ITS on cooperation was worked on intermittently by Marie-Judith and Joe from July to October 2016 with the exchanges saved [here](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/MAR%20ITS%20on%20cooperation%20arrangements).

Elio met the Team Leaders in ESMA’s Trade Repositories supervision section to discuss the legal basis for ACER’s access to trade repository data on WEPs throughout 2014 and 2015. Letters have been written, although initially ESMA did not agree with our approach.

Elio has also had telcos with the TRs, inviting ESMA to join, to discuss some of the issues with data reporting and ACER access to TR data.

David Nadry from ESMA attended ACER’s IT TF on 25 July 2013 and Sofronis and Stefano Bracco attended ESMA’s IT Management & Governance Group on 10 Sep 2013.

Tomaz Z, together with Elio has had some informal communication on a technical level (limited to some emails and phone calls). Some technical specifications (e.g. XSD schemas, requirements for data collection, etc.) were shared with ESMA to understand better what solutions are already in place or planned. The reasons for this particular stream of cooperation is to assist ESMA with data quality and reporting issues under EMIR with TRs, so that ACER can receive OTC derivative WEP data in good time and of good quality.

*July 2016 onwards*

Most recently, Joseph Gildea (SNE, MMD) attended [ESMA Training on MiFID II](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Training%20Materials/ESMA_MiFID%20II%20and%20MiFIR%20Training) in late June, a [study visit](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Meetings/Study%20Visit%20July%202016) to ESMA in July and the Commodity Derivatives Task Force (CDTF) in early September 2016. He also dialed into the October CDTF and attended together with Patrick Luickx the November meeting. [Links](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Meetings/2016%2011%2021%20CDTF%20meeting)

Between July and September ACER has had two telcos with ESMA and exchanged emails to assist them with the position limits regime for gas and power (emails and documents saved [here](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/2016%20exchanges%20on%20position%20limits)). ESMA had asked for ACER’s input and advice on how to frame the position limits methodology for spot month and other month limits to take into account ‘cascading contracts’ as well as how to calculate deliverable supply. For the first issue, they presented two options and informally we suggested the second option was better, but that the exchanges would ultimately give the best advice on this topic.

For deliverable supply, we suggested to ESMA to use consumption figures from Eurostat and to adjust using churn factors which could be provided by the exchanges [it was later noted by MMD staff that exchanges may not have a clear picture of churn rates]. At the CDTF meeting on 5 September, NCAs and ESMA stated that they would rather have a large number revised down for political reasons. We stated that it was of course their choice how to calculate the number but the methodology they propose to use (generation, storage and interconnection all adjusted for actual usage) would be extremely difficult.

We provided links to the ENTSO-E SO&AF data sets which could be useful, but headed off any input on interconnection. At all times we were clear this was informal brainstorming and not an official ACER view or input. As of 12 October 2016, it looks likely ESMA may use the SO&AF data but it is unclear if they have approached ENTSO-E or not. They have decided not to use consumption as ACER suggested.

Following on from this, we provided informal input on where ESMA could source data for the calculation of deliverable supply for gas markets. In the margins of the November CDTF we highlighted to ESMA that they should consult and inform ENTSO-E that they plan to use the SOAF dataset for this purpose, at the very least so they could confirm its continued public availability.

In October 2016 ACER colleagues from the gas and electricity departments together with MMD colleagues had a telco with the ESMA CCP risk team. ESMA has requested ACER’s input in determining risk factors for gas and power markets. Details [here](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/Exchanges%20on%20CCP%20risk%20methodology).

On 10 March 2017, the Director met with ESMA’s Director, Verena Ross in Paris (link to agenda and briefing). Following on from this a technical meeting was held to discuss the Staff Working Document on Commodity Derivatives.

***Cooperation to date (national financial regulators)***

**Financial Conduct Authority (FCA) – *UK financial regulator*, *formerly the FSA*:** the Agency has had some contact with the Financial Conduct Authority (FCA) during the development of the TRUM and other guidance (Elio). The main contact there has been Alasdair Bell

The MSA team visited the FCA for a week in July 2015 and prepared a full report on their monitoring and surveillance practices ([link](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/FMAs/Meetings/FCA)). Tomaz Z and Stephen also visited the FCA in August 2013 to learng about their experiences with market monitoring [(link)](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/4.ARIS/5%20SMARTS/SMARTS%20%40%20FCA). The FCA followed up with some visits to ACER throughout 201? to see how the REMIT project was progressing. One visit was on 28 October 2015 when Patrick Spens (Head of the Market Monitoring Department at the FCA) and Brian Eyles (leading the Markets Business Intelligence Team in the FCA’s Market Monitoring Department) visited Ljubljana.

The MDR team (Elio) met the FCA numerous times during 2012-2014 to learn about their experiences of transaction reporting and share best practice. These visits played a large part in the development of the TRUM. [It was noted that the FCA suggested to ESMA that it cooperate and seek input from ACER on the development of reporting for EMIR and MiFID II/MiFIR]

**AFM – *the Dutch financial regulator***: In 2014 AFM staff visited ACER to learn about REMIT and the potential for cooperation and exchange of information. Presentations are saved [here](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/FSAs/Meetings/AFM). ACER staff (who?) had visited the Hague/Amsterdam previous to this for a 1 week study visit.

Antonio, Daniel and Stephen visited AFM in July 2014 (whilst in the Netherlands for the BWise/Nasdaq workshop). This was for a short status meeting to follow-up on the discussions that Antonio had coordinated in Ljubljana in April 2014.

**BaFin – Germany**: Volker had some contacts and visited Bafin in Frankfurt in 2012/13. More recently Elio had some contact on the commodity derivatives paper and, on a personal basis, colleagues from Bafin made some comments on the document.

**AMF – France**: **we have not had much contact with AMF** except through the ESMA CDTF. This is **something we should address** as they have been pushing quite hard to capture more energy firms under financial regulation and it is **not clear that the relations between CRE and AMF are working well** (although they apparently meet at least quarterly to discuss policy developments as per their MoU)

However Volker was invited to a G20 Technical Meeting in Paris where he gave a presentation on REMIT and energy markets to attendees including DG MARKET (now DG FISMA)

**Consob – Italy** – we have had some contact with Consob in the margins of an AMIT WG meeting held in Italy in 2015. Details can be found here (link). It has been noted that the Consob Chair of ESMA’s MISC was not receptive to NRAs views expressed during this meeting which she attended. Nor have ACER been invited to attend the full MISC meeting yet (only a specific slot) despite the reciprocal offer having been made and the provisions of the ACER-ESMA MoU suggesting that this should be possible.

|  |
| --- |
| **Input needed from other teams** |
| **Sign off needed from Volker**  |

**Section 4. ACER’s objectives in cooperating with ESMA and FMAs and how to achieve them**

Overall ACER’s objectives are derived from the tasks and functions it is set under applicable regulation (Third Package, TEN-E, REMIT etc.). Its overall mission is to complement and coordinate the work of NRAs at EU level, to work towards the completion of the IEM and enhance competition. ACER should work towards market integration, monitor network development plans, gas and power markets, and in the case of REMIT through monitoring detect and deter abuse in those markets in cooperation with NRAs.

Given the interactions financial regulation has with those objectives, ACER should seek to influence the development of financial regulation, including the implementation of existing regulation, to minimise any negative impacts on the functioning of REMIT and the progress towards liquid wholesale energy markets. The [ACER Recommendation on physical forwards in 2015](http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Recommendations/ACER%20Recommendation%2001-2015.pdf) and the specific recommendations on page 82-83 of the [2016 REMIT Annual Report](http://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Publication/REMIT%20Annual%20Report%202016.pdf) are actions in this direction.

**More specifically the Agency should work on:**

* **Definitions:** ensure a common understanding of the various definitions in financial regulation that impact on REMIT (scope and reporting) as well as the goals of the Third Package/Energy Union. Specifically, we should seek to clarify which WEPs are derivatives and which are not, and crucially why there are not. This understanding should be universally accepted, public and understood by industry and regulators alike. Related follow on from this to examine whether specific products are covered by financial regulation or not – e.g. PTRs/FTRs, physical forwards, Guarantees of Origin, Capacity Payments as part of a CRM etc.
* **Impact of parallel regulation:** work with ESMA, the Commission (involving potentially external consultants) to determine where the objectives of financial regulation align with the objectives of the Third Package/Energy Union. This would be a large piece of work aimed at providing the perspective of energy and financial regulators back to policy makers to inform future legislative developments (e.g. revisions of MiFID II, EMIR, CRD IV, REMIT, Third Package).
* **Systemic risk:** arrive at a view on whether energy firms (those with physical assets and/or customers) pose systemic risk to the energy system and/or financial markets/broader economy. This would entail an examination of past failures of firms in the energy market (ENRON, British Energy, TEPCO, small suppliers, banks etc.) as well as external shocks (economic, financial, political, climactic, natural disasters, terrorist attacks, sudden market dysfunction etc.).

**As secondary objectives, and in order to achieve any of the above we should ensure:**

* **that the Agency is effective and proactive in inputting its views at the most strategic points** in the development of EU financial regulation (at Level 1, 2 and 3) **through regular contact with ESMA**
* that **the provisions of the ACER-ESMA MoU are followed more closely**, in particular with regard to formal deadlines and processes **when requesting an ACER/ESMA “view” or input**, **and defining ‘consultation’ further to achieve this. This may require a revision to the MoU.**
* that we **develop closer bilateral relations with national financial regulators** of importance to REMIT
* that **NRAs develop** and maintain **good relations with their** counterpart **financial regulator** (and if possible finance ministry). ACER and ESMA can facilitate this happening through EU-level initiatives.

**Next steps (Dec 2016/Jan 2017)**

* Need to agree on Agency and MIT/MSC approach **[by early 2017 - agreed]**
* Kick off meeting with ESMA (at Head of Department or Director level) to set out vision for cooperation over next 6-18 months including: **[Scheduled for March 2017]**
	+ Overview of work and areas for cooperation this year (in context of MoU)
	+ Increased joint working/meetings between relevant WGs/TFs/SCs
	+ Expect more proactive engagement from ACER with ESMA Paris staff
	+ Study visit by ACER staff has happened, when do we offer ESMA – Q1/2 2017?
	+ To include some actions from CEER seminar [WEM TF/AMIT WG follow up]
	+ ACER possible assistance to ESMA (on data quality for example)
	+ Where would we like assistance/inputs from ESMA?
	+ Draft agenda attached [here.](file://s-fs01.acer.local/ACERData/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Meetings/High%20level%20meeting%20Dec%202016)
	+ ACER involvement/consultation for Level 3 texts of relevance to energy industry?
	+ Overall to reaffirm our respective objectives, understand where the legislator has set conflicting objectives and work together to resolve those.
* Insist on following formal letter/emails for requests for input/cooperation as per MoU
* MoU with ESMA – revision? **[TBD]**
* Potential to involve gas and electricity department colleagues – **this is crucially important for liquidity concerns [ACTION – presentation to Gas/Elec colleagues - completed]**

***Timeline for ACER inputs***

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **ACER input** | **Legal requirement?** | **ACER lead** | **Deadlines** | **Status** |
| **Ongoing actions** |
| Yearly reminder emails to ESMA contacts – identify areas of interest and deadlines to input in ESMA work. Imp to follow up if info (agendas, minutes, docs etc.) are not forthcoming. | No, but necessary to make sure ACER is engaging/influencing at the most effective point. | Joe – CDTFAntonio – MMSCElio – PTSC Tomaz/Iztok or Elio? – MDSC | Check upcoming list of ESMA meetings [here](file://s-fs01.acer.local/ACERData/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Meetings/Study%20Visit%20July%202016/ESMA%20Meetings%20of%20interest.docx). |  Ongoing |
| Engage with industry experts and EC to gauge important issues and gather intelligence | No, common sense to inform Agency view. Need to decide whether to use Expert Groups & Roundtables. | All relevant MMD team members -  | Ongoing | Ongoing |
| **Short term** |
| Discuss with ESMA possible joint/aligned Q&A to clarify ‘relevant media’ for EAMP II disclosure | No, but will be necessary to prevent confusion on interpretation of EC Delegated Act | Joe (support from Michal, Patrick) | Delegated act published on 29 Jun 2016 so depends on ESMA position to issue further guidance or not. | [Telco](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/Sep%202016%20-%20Emission%20Allowances%20Inside%20Information) with ESMA on 7 Sep.Proposed Q&A for late Sep meeting with NRAs. Email exchanges and further work saved [here](file://s-fs01.acer.local/ACERData/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/Sep%202016%20onwards%20-%20Emission%20Allowances%20Inside%20Information).Email from Volker sent 29 Nov. Waiting on ESMA. One follow up email sent. Q&A published December 2016 |
| Work with ESMA on data quality issues for EMIR and TRs and access to TR data (from TRs or via paid ESMA platform?) | No, but critical to ensure REMIT data received via ESMA/TRs is of adequate quality | Elio and Iztok | No hard deadlines (?) but proposed to begin Sep. | ??? |
| Organise joint MMSC-MISC meeting- should provide impetus for more joint meetings between NCAs & NRAs (as MMSC-MISC meetings) | No, but ESMA have expressed interest and already discussed by MMSC | Antonio, support from Joe | 15 Mar 2017 | Antonio agreed dates with ESMA.Link here |
| Examine Non-MTF & OTF issue | No, but linked to definitions and view on OTC vs OMP | Joe, support from Patrick | Q4 2016 | Scoping |
| Examine PTR/FTR interactions with financial regulation  | No, but linked to FCA GL and CACM GL | Joe, support from Elio >> working with Elec Dept (Christophe Cesson lead) and | Q4 2016/Q1 2017 | Paper [drafted](file://s-fs01.acer.local/ACERData/ACER%20Departments/Market%20Monitoring%20Dept/3.REMIT%20policy/Ad%20Hoc%20requests/Long%20Term%20Transmission%20Rights) – need VZ sign off on approach:1. Share with Depts and E/G2. Present summary to NRAs (REMIT, E, G)3. Engage with NCAs and ESMA after Commodities Paper has been shared.4. To present summary slides at AMIT or REMIT CG April/May 2017. |
| Commodity Derivatives Paper | No. Possibility to link it to one of the Agency’s formal responsibilities under the Third Package or REMIT. | Elio (support from Joe) | Need to think carefully about if/how to release this publically, especially if REMIT carve out is seen to be working.Also need to scope potential impacts | Second meeting Nov 2016.Paper finalised Jan 2017. Presented to NRAs at AMIT 20 Feb.Next steps 1. Present bilaterally to ESMA 10 March2. Present to FCA, Bafin etc.(tbc)3. ESMA CDTF presentation (April or later?)4. Publication as ACER SWD Q2 2017 (tbc) |
| Organise High Level Meeting with ESMA at Director/HoD level | No, but linked to ongoing cooperation with ESMA and potential MoU revision | Joe, support from Volker, all team leaders | 10 March 2017, ESMA, Paris | Folder here.Follow up tbc. |
| **Long term** |  |
| Separate workshop with ESMA and NCAs on MiFID II, definitions, systemic risk, impacts on energy firms | No, but linked to ACER objectives and Recommendations from Annual Report | Joe, support from various leads.Work with CEER WEM TF | Q2/3 2017 | Proposal still under discussion. |
| Joint research on trading shifts between different platforms post MiFID II | No, but useful for MMR as well as REMIT Annual Report to have clear picture on where trading is happening and why. | MSA team?Linking of non-MTFs to OMPs opens the field for new cross - venue manipulation schemes.MSA has to produce an assessment of the new risks.  | Q3/4 2018 | Longer term |
| ACER to provide input to ESMA and/or EC on the impact on energy prices of extending the EMIR clearing obligation to C6 derivatives. | Yes – MiFID II Art 90(4) – ACER should be consulted | Tbc, likely Policy Team. | Deadline in text is by 1 Jan 2018 so expect input 2017 at earliest. | Longer term |
| Organise ACER-led seminar on enforcement possibly involving competition authorities) | No, suggestion from Volker | Tbc | 2017? | TbcPartly covered by MISC-MMSC meeting on 15 Mar 2017? |
| ACER to provide input on what’s a liquid contract in the EU when ESMA needs to determine this for Transparency and Trading Obligations under MiFID II | No, but important that ESMA gets it right as this judgement may be used for other purposes also. | Joe, support from leads | 2017 | Tbc |
| **Completed** |  |
| Provide input to ESMA on how to frame cascading contracts and calculate deliverable supply within position limits regime. | No, but good to provide support to ESMA in context of MiFID II implementation relevant to energy markets | Joe (support fr Matthias, Patrick, E/G Dept colleagues) | Q3/4 2016 | Provided informal assistance to ESMA on position limits, deliverable supply etc.([link](file://s-fs01.acer.local/ACERData/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/2016%20exchanges%20on%20position%20limits))Decision to stop ACER informal input as was being misrepresented to industry. |
| Provide ESMA CCP risk team with input for gas and power markets | No.  | Joe (support from Gas/Elec colleagues) | Sep 2016 | Telco took place in Oct 2016. Note and emails saved [here](file://s-fs01.acer.local/ACERData/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Communications/Exchanges%20on%20CCP%20risk%20methodology). |
|  |  |  |  |  |

**Annex 1 – ESMA Standing Committees and Task Forces of interest[[9]](#footnote-9) (list** [**here**](https://www.esma.europa.eu/about-esma/working-methods/standing-committees)**)**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| ESMA Standing Committee or Task Force | Chair (NCA) and relevant ESMA staff | Focus areas | Actual/potential contacts Consultative Working Group  | Related ACER WG/SC/TF | Chair (ACER/NRA) and relevant ACER staff; Primary (P) & secondary (S) contacts |
| 1. Market Integrity Standing Committee (MISC) | Guiseppe Vegas,CONSOB, Italy (in reality it is chaired by Nicoletta Giusto).Christophe Polliset, Teresa Rodriguez (ESMA) | - work on issues relating to market surveillance, enforcement of securities laws, facilitation of co-operation of national authorities and exchange of information in market abuse investigations.- develop technical standards, preparing advice to the EC or developing guidelines and recommendations on issues relating to the integrity of markets on issues such as market abuse or short-selling. | No CWG for MISC | MMSC, WMS TF | Antonio Santos (P) Tomaz Vizintin (S)Patrick Luickx (S)Marcel Vochem (S) |
| 2. Commodity Derivatives Task Force (CDTF) | Edwin Schooling-Latter,FCA, UKCarsten Ostermann (ESMA) | - monitoring and analysing regulatory and industry developments in the field of commodity financial markets- participating in the European legislative process in the commodity derivatives field and promoting supervisory convergence- managing the co-operation between financial regulators/ESMA and other regulatory and supervisory authorities such as the Agency for the Cooperation of Energy Regulators (“ACER”) and national energy regulators. | Daniel Smith - TrayportKarl-Peter Horstmann - RWEKatarzyna Swarc - Intercontinental ExchangeWolfgang von Rintelen - EEX | REMIT Coordination Group, AMIT WG | Volker Zuleger, Elio Zammutto, Patrick Luickx, Joseph Gildea, Marcel Vochem (tbc) |
| 3. Post-Trading Standing Committee (PTSC) | Guiseppe Vegas,CONSOB, Italy | - work relating to clearing and settlement of transactions in financial instruments.- develop technical standards, preparing advice to the EC or developing guidelines and recommendations relating to EMIR | Wesley Betsill - COO, CMEPaul Symons - Head of Public Affairs, Euroclear | MDR SC | Elio Zamutto (P)Tomaz Zaplotnik (S) |
| 4. Market Data Standing Committee (MDSC) | David Lawton,FCA, UKFabrizio Planta (Team Leader – Post-Trading Unit) Lukasz Popko (ICT Officer) | - work on issues relating to reporting of transactions, positions, record-keeping of orders and instrument reference data. The objectives of this group are to enhance the quality of the market data reported to EU National Authorities and Trade Repositories and to foster supervisory convergence among the national authorities in its area of competence.- elaborating technical standards, guidelines and Q&As relating to the review and implementation of reporting requirements resulting from two important markets legislations: the European Market Infrastructure Regulation (EMIR) and the second iteration of the Markets in Financial Instruments Directive (MiFID II). The aim is to foster consistency, to the maximum extent, by avoiding reporting conflicts between the two regimes. | Matthew Hill - Director and chief executive, CME European Trade RepositoryJoerg Sperling - Head of banking and regulation, RWE-Supply & Trading | RISIG, MDR SC | Elio Zammutto (P) Tomaz Zaplotnik (S) |
| Groups of secondary importance – unlikely to be directly relevant for ACER (does not include all ESMA groups) |
| 5. Secondary Markets Standing Committee (SMSC) | Elisabeth Roegele,Bafin | - work on structure, transparency and efficiency of secondary markets for financial instruments, including trading platforms, OTC markets (such as regulated markets, MTFs, systematic internalisers or other platforms.- develop technical standards and guidelines, preparing advice to the EC relating to the MiFID. | Godfried de Vidts - Director of European Affairs, ICAP |  | Volker Zuleger, Elio Zammutto. Patrick Luickx, Joseph Gildea, Marcel Vochem(tbc) |
| 6. Committee of Economic and Markets’ Analysis  | Misu Negritoiu,ASF, Romania | - financial markets monitoring and analysis- identification, monitoring, and assessment of trends, potential risks and vulnerabilities in financial markets across borders and sectors, including a thorough focus on financial innovations and incentives related to market practices both at the wholesale and retail level. |  | None | Antonio SantosTomaz VizintinPatrick LuickxMarcel Vochem(tbc) |

**Annex 2 – ESMA structures and governance**



 [Link to detailed ESMA Markets Department Organigram](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Meetings/Study%20Visit%20July%202016)

Note Rodrigo leaving ESMA Q1 2017, temporarily replaced by Fabrizio Planta (Acting HoD)

**Annex 3 – Lamfalussy and ESMA Regulation processes**

The EU legislative process for financial regulation is framed by the ‘Lamfalussy’ approach to financial regulation. Adopted by the EU in 2001, it characterises legislation in the financial sphere as following a ‘hierarchy of norms’ approach which distinguishes between high-level primary measures and technical secondary measures. Accordingly, and with respect to binding financial regulation, the EU legislative process produces ‘Level 1’ and ‘Level 2’ measures.

**Level 1 measures** (equivalent to national primary legislation) are, in theory, designed to take the form of framework principles and to reflect high level political decisions on core elements of financial regulation. These measures take the form of directives or regulations and are adopted by the co-legislators.

**Level 2 measures** (equivalent to national secondary legislation) are designed to take the form of technical, delegated rules and typically take the form of regulations. They are adopted by the Commission (the European Parliament and Council can only exercise veto powers) and are based on the specific mandates for delegated rule-making contained in the relevant Level 1 measures adopted by the co-legislators. Level 2 measures fall into two broad types: ‘delegated’ Level 2 measures which have a quasi-legislative nature and which are designed to supplement or amend non-essential elements of Level 1 measures; and ‘implementing’ Level 2 measures, which are of a more technical nature and which are designed to support uniform implementation conditions. **A particular form of Level 2 measure, *Binding Technical Standards*, follow a distinct procedural route in that they are proposed by the ESAs and adopted by the Commission.** **With respect to other Level 2 measures, the ESAs provide *Technical Advice* to the Commission.**

In principle, the revision of Level 1 measures through Level 1 amendments engages the Treaty co-decision procedure and its related complexities. **Revisions to Level 2 measures through the Level 2 process should be somewhat quicker, while Level 2 may also provide a means of amending non-essential elements of Level 1 measures.**

**The ESMA Regulation (Article 10 – 16) sets out how this process applies for ESMA.**

**This diagram may be a useful visual aid. Of importance is to note that the Commission (DG FISMA) appears to be monitoring closely the Level 3 Guidance or Q&As that ESMA is producing for MiFID II, highlighting its increased importance in the new regulatory framework.**

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Annex 4 – Useful links

[S Drive link to ESMA Cooperation](file:///S%3A/ACER%20Departments/Market%20Monitoring%20Dept/6.Cooperation/ESMA/Meetings/Study%20Visit%20July%202016)

***Legislation***

[Eurlex](http://eur-lex.europa.eu/homepage.html)

[Legislative Observatory](http://www.europarl.europa.eu/oeil/home/home.do) – useful to monitor Level 1 proposals through Parliament

Explanations of Level 1, 2, 3 processes ([Slaughter and May overview](https://www.slaughterandmay.com/media/1934583/introduction-to-the-legislative-processes-for-european-union-directives-and-regulations-on-financial-services-matters.pdf))

***Analysis of legislation***

[Emissions-EUETS](http://www.emissions-euets.com/) – Polish law firm site

Simmons & Simmons MAR legislative tracker ([link](http://www.elexica.com/~/media/Files/Articles/2015/Asset%20management/Legislative%20trackers/MAR%20Legislative%20Tracker.pdf)), other trackers/issues available ([MiFID II](http://www.elexica.com/~/media/Files/Articles/2015/Asset%20management/Legislative%20trackers/MiFID2%20Legislative%20Tracker.pdf), [EMIR](http://www.elexica.com/~/media/Files/Articles/2015/Asset%20management/Legislative%20trackers/EMIR%20Legislative%20Tracker.pdf))

[Norton Rose Fulbright](http://www.nortonrosefulbright.com/)

[Dentons](http://www.dentons.com/en.aspx) – [Fin Reg tracker site](http://www.financialregulatory.com/eu-legislation-tracker)

[Linklaters](http://www.linklaters.com/Insights/MiFIDII/Pages/MiFIDII.aspx)

***Official bodies***

ESMA – [News](https://www.esma.europa.eu/press-news/esma-news), incl consultations, [Key dates](https://www.esma.europa.eu/press-news/key-dates) (useful) [MiFID II](https://www.esma.europa.eu/policy-rules/mifid-ii-and-mifir), [Market Abuse](https://www.esma.europa.eu/regulation/trading/market-abuse), [EMIR Trade Reporting](https://www.esma.europa.eu/policy-rules/post-trading/trade-reporting), [EMIR clearing](https://www.esma.europa.eu/regulation/post-trading/otc-derivatives-and-clearing-obligation),

European Commission – [DG FISMA](http://ec.europa.eu/dgs/finance/index_en.htm), [MIFID II](http://ec.europa.eu/finance/securities/isd/mifid2/index_en.htm), etc.

European Parliament – [ECON Committee](http://www.europarl.europa.eu/committees/en/econ/home.html)

FCA – [MifID II](https://www.the-fca.org.uk/markets/mifid-ii), [EMIR](https://www.the-fca.org.uk/markets/emir), [MAR](https://www.the-fca.org.uk/markets/market-abuse/regulation), [Benchmarks](https://www.the-fca.org.uk/markets/benchmarks), [Commodities](https://www.the-fca.org.uk/markets/commodity-markets)

CFTC – [Glossary](http://www.cftc.gov/ConsumerProtection/EducationCenter/CFTCGlossary/index.htm)

***Industry associations and blogs***

[Energy Trading Regulation](https://energytradingregulation.com/)

[Regulation Tomorrow](http://www.regulationtomorrow.com/) – Norton Rose Fullbright

[Cordium](http://www.cordium.com/knowledge-area/regulatory-briefings/) – Regulatory Briefings

[Energy risk](http://www.risk.net/energy-risk) (subscription) [Glossary of terminology](http://www.risk.net/glossary)

[EFET](http://www.efet.org/) ([MiFID II lobbying site](http://www.keepeuenergycompetitive.eu/))

[FIA](https://fia.org/key-issues) (Futures & Options Organisation, formerly FIA Europe)

[Europex](http://www.europex.org/)

[CME Webinar on MiFID II](http://www.cmegroup.com/education/regulatory-reporting-mifid-ii.html)

***Other links***

Commission consultation regulatory framework for EU fin services ([link](http://ec.europa.eu/finance/consultations/2015/financial-regulatory-framework-review/index_en.htm)). CEER/ACER letter saved here.

Annex 5 – Glossary (not exhaustive)

**CCL – Council of the European Union**

**EP – European Parliament**

**ESMA – European Securities and Markets Authority**

**FC – Financial Counterparty** *(under EMIR)*

**FTRs – Financial Transmission Rights**

**II – Inside Information**

**NFC – Non Financial Counterparty** *(under EMIR)*

**TRs – Trade Repositories**

**Annex 6 – references to ACER, NRAs, energy, and emission allowances in EU Financial Regulation as well as review clauses, reports and EC/ESMA empowerments in Level 1 texts \*\***

**\*\* These lists may not be exhaustive – you should still double check with the relevant legislation.**

***MAR***

Recital 18: Legal certainty for market participants should be enhanced through a closer definition of two of the elements essential to the definition of inside information, namely the precise nature of that information and the significance of its potential effect on the prices of the financial instruments, the related spot commodity contracts, or the auctioned products based on the emission allowances. **For derivatives which are wholesale energy products, information required to be disclosed in accordance with Regulation (EU) No 1227/2011 of the European Parliament and of the Council (5) should, in particular, be considered as inside information.**

R20: Spot markets and related derivative markets are highly interconnected and global, and market abuse may take place across markets as well as across borders which can lead to significant systemic risks. This is true for both insider dealing and market manipulation. **In particular, inside information from a spot market can benefit a person trading on a financial market. Inside information in relation to a derivative of a commodity should be defined as information which both meets the general definition of inside information in relation to financial markets and which is required to be made public in accordance with legal or regulatory provisions at the Union or national level, market rules, contracts or customs on the relevant commodity derivative or spot market.** **Notable examples of such rules include Regulation (EU) No 1227/2011 for the energy market** and the Joint Organisations Database Initiative (JODI) database for oil. Such information may serve as the basis of market participants’ decisions to enter into commodity derivatives or the related spot commodity contracts and should therefore constitute inside information required to be made public, where it is likely to have a significant effect on the prices of such derivatives or related spot commodity contracts.

Moreover, manipulative strategies can also extend across spot and derivatives markets. Trading in financial instruments, including commodity derivatives, can be used to manipulate related spot commodity contracts and spot commodity contracts can be used to manipulate related financial instruments. The prohibition of market manipulation should capture these inter-linkages. However, it is not appropriate or practicable to extend the scope of this Regulation to behaviour that does not involve financial instruments, for example, to trading in spot commodity contracts that only affects the spot market. **In the specific case of wholesale energy products, the competent authorities should take into account the specific characteristics of the definitions of Regulation (EU) No 1227/2011 when they apply the definitions of inside information, insider dealing and market manipulation under this Regulation to financial instruments related to wholesale energy products.**

R44: Many financial instruments are priced by reference to benchmarks. The **actual or attempted manipulation of benchmarks**, including interbank offer rates, can have a serious impact on market confidence and may result in significant losses to investors or distort the real economy. Therefore, specific provisions in relation to benchmarks are required in order to preserve the integrity of the markets and ensure that competent authorities can enforce a clear prohibition of the manipulation of benchmarks. Those provisions should cover all published benchmarks including those accessible through the internet whether free of charge or not such as CDS benchmarks and indices of indices. It is necessary to complement the general prohibition of market manipulation by prohibiting the manipulation of the benchmark itself and the transmission of false or misleading information, provision of false or misleading inputs, or any other action that manipulates the calculation of a benchmark, where that calculation is broadly defined to include the receipt and evaluation of all data which relates to the calculation of that benchmark and include in particular trimmed data, and including the benchmark’s methodology, whether algorithmic or judgement-based in whole or in part. **Those rules are in addition to Regulation (EU) No 1227/2011 which prohibits the deliberate provision of false information to undertakings which provide price assessments or market reports on wholesale energy products with the effect of misleading market participants acting on the basis of those price assessments or market reports.**

R51: Moreover, the requirement to disclose inside information needs to be addressed to the participants in the emission allowance market. In order to avoid exposing the market to reporting that is not useful and to maintain cost-efficiency of the measure foreseen, it appears necessary to limit the regulatory impact of that requirement to only those EU ETS operators which, by virtue of their size and activity, can reasonably be expected to be able to have a significant effect on the price of emission allowances, of auctioned products based thereon, or of derivative financial instruments relating thereto and for bidding in the auctions pursuant to Regulation (EU) No 1031/2010. The Commission should adopt measures establishing a minimum threshold for the purposes of application of that exemption by means of a delegated act. The information to be disclosed should concern the physical operations of the disclosing party and not own plans or strategies for trading emission allowances, auctioned products based thereon, or derivative financial instruments relating thereto. **Where emission allowance market participants already comply with equivalent inside information disclosure requirements, notably pursuant to Regulation (EU) No 1227/2011, the obligation to disclose inside information concerning emission allowances should not lead to the duplication of mandatory disclosures with substantially the same content. In the case of participants in the emission allowance market with aggregate emissions or rated thermal input at or below the threshold set, since the information about their physical operations is deemed to be non-material for the purposes of disclosure, it should also be deemed not to have a significant effect on the price of emission allowances, of auctioned products based thereon, or of the derivative financial instruments relating thereto. Such participants in the emission allowance market should nevertheless be covered by the prohibition of insider dealing in relation to any other information they have access to and which is inside information.**

**Article 3 (15) [definitions]:** ‘spot commodity contract’ means a contract for the supply of a commodity traded on a spot market which is promptly delivered when the transaction is settled, and a contract for the supply of a commodity that is not a financial instrument, including a physically settled forward contract;

**Article 7 (Inside Information): all of relevance** in so far as it refers to ‘related spot commodity contracts’

**Art 12 (Market manipulation): all of relevance** in so far as it refers to ‘related spot commodity products’ and ‘auctioned products based on emissions allowances’

Art 13: [on Accepted Market Practices] ESMA has a public list of AMPs submitted to it by NCAs [here](https://www.esma.europa.eu/databases-library/esma-library/%2522Accepted%2520Market%2520practices%2522) as permitted under MAR. At first glance, none appear relevant for ACER, however it could be something to be aware of and review/monitor.

Art 14 (prohibition of insider dealing and unlawful disclosure of inside information)

Art 15 (prohibition of market manipulation)

Art 16 (Prevention and detection of market abuse): Art 16(2) refers to PPAETs similar to PPATs under REMIT.

Art 17 (Public disclosure of inside information): all of relevance as it encompasses FI WEPs and emission allowances.

Art 25 (3): [Obligation to cooperate] **Competent authorities and ESMA shall cooperate with the Agency for the Cooperation of Energy Regulators (ACER), established under Regulation (EC) No 713/2009 of the European Parliament and of the Council (27), and the national regulatory authorities of the Member States to ensure that a coordinated approach is taken to the enforcement of the relevant rules where transactions, orders to trade or other actions or behaviours relate to one or more financial instruments to which this Regulation applies and also to one or more wholesale energy products to which Article 3, 4 and 5 of Regulation (EU) No 1227/2011 apply. Competent authorities shall consider the specific characteristics of the definitions of Article 2 of Regulation (EU) No 1227/2011 and the provisions of Article 3, 4 and 5 of Regulation (EU) No 1227/2011 when they apply Articles 7, 8 and 12 of this Regulation to financial instruments related to wholesale energy products.**

Art 25 (5) Where a **competent authority** is convinced that acts contrary to the provisions of this Regulation are being, or have been, carried out on the territory of another Member State or that acts are affecting financial instruments traded on a trading venue situated in another Member State**, it shall give notice of that fact in as specific a manner as possible to the competent authority of the other Member State and to ESMA and, in relation to wholesale energy products, to ACER**. The competent authorities of the various Member States involved shall consult each other and ESMA **and, in relation to wholesale energy products, ACER, on the appropriate action to take and inform each other of significant interim developments. They shall coordinate their action, in order to avoid possible duplication and overlap when applying administrative sanctions and other administrative measures to those cross-border cases in accordance with Articles 30 and 31, and shall assist each other in the enforcement of their decisions.**

R84: The Commission should be empowered to adopt the draft regulatory technical standards developed by ESMA to specify the content of notifications that will have to be made by the operators of regulated markets, MTFs and OTFs concerning the financial instruments that are admitted to trading, traded, or for which a request for admission to trading on their trading venue has been made; the manner and conditions of compilation, publication and maintenance of the list of those instruments by ESMA; the conditions that buy-back programmes and stabilisation measures must meet including conditions for trading, time and volume restrictions, disclosure and reporting obligations and price conditions for the stabilisation; in relation to procedures and arrangements, systems for trading venues aimed at preventing and detecting market abuse and of systems and templates to be used by persons in order to detect and notify suspicious orders and transactions; appropriate arrangements, procedures and record-keeping requirements in the process of market soundings; and in respect of technical arrangements for categories of persons for objective presentation of information recommending an investment strategy and for disclosure of particular interests or indications of conflicts of interest by means of delegated acts pursuant to Article 290 TFEU and in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council (16). It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.

R85: The Commission should also be empowered to adopt implementing technical standards by means of implementing acts pursuant to Article 291 TFEU and in accordance with Article 15 of Regulation (EU) No 1093/2010. ESMA should be entrusted with drafting implementing technical standards for submission to the Commission with regard to public disclosure of inside information, formats of insider lists and formats and procedures for the cooperation and exchange of information of competent authorities among themselves and with ESMA.

Art 7(1) For the purposes of this Regulation, inside information shall comprise the following types of information:

(b) in relation to commodity derivatives, information of a precise nature, which has not been made public, relating, directly or indirectly to one or more such derivatives or relating directly to the related spot commodity contract, and which, if it were made public, would be likely to have a significant effect on the prices of such derivatives or related spot commodity contracts, and where this is information which is reasonably expected to be disclosed or is required to be disclosed in accordance with legal or regulatory provisions at the Union or national level, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets;

- Art 11 (9, 10 & 11): [on ‘market soundings’ also applicable to Emission Allowance Market Participants (EAMPs) - ESMA to draft respectively RTS, ITS and Guidelines by 3 July 2015]

- Art 12 (5): [on market manipulation] The Commission shall be empowered to adopt delegated acts in accordance with Article 35 specifying the indicators laid down in Annex I, in order to clarify their elements and to take into account technical developments on financial markets.

Art 7(5): **ESMA shall issue guidelines** to establish a **non-exhaustive indicative list of information which is reasonably expected or is required to be disclosed** in accordance with legal or regulatory provisions in Union or national law, market rules, contract, practice or custom, on the relevant commodity derivatives markets or spot markets as referred to in point **(b) of paragraph 1**. **ESMA shall duly take into account specificities of those markets.**

Art 16 (5): [prevention and detection of market abuse] 5. In order to ensure consistent harmonisation of this Article, ESMA shall develop draft regulatory technical standards to determine:

(a) appropriate arrangements, systems and procedures for persons to comply with the requirements established in paragraphs 1 and 2; and

(b )the notification templates to be used by persons to comply with the requirements established in paragraphs 1 and 2.

ESMA shall submit those draft regulatory technical standards to the Commission by 3 July 2016.

Art 25 (9): [Obligation to cooperate] In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine the procedures and forms for exchange of information and assistance as referred to in this Article.

ESMA shall submit those draft implementing technical standards to the Commission by 3 July 2016.

Art 38 (report): **By 3 July 2019, the Commission shall submit a report to the European Parliament and to the Council on the application of this Regulation, together with a legislative proposal to amend it if appropriate**. That report shall assess, inter alia:

(a) **the appropriateness of introducing common rules on the need for all Member States to provide for administrative sanctions for insider dealing and market manipulation;**

(b) **whether the definition of inside information is sufficient to cover all information relevant for competent authorities to effectively combat market abuse;**

(c) the appropriateness of the conditions under which the prohibition on trading is mandated in accordance with Article 19(11) with a view to identifying whether there are any further circumstances under which the prohibition should apply;

(d) **the possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse, including recommendations for such a framework**; and

(e) **the scope of the application of the benchmark provisions**.

**For the purposes of point (a) of the first subparagraph, ESMA shall undertake a mapping exercise of the application of administrative sanctions and**, where Member States have decided, pursuant to the second subparagraph of Article 30(1), to lay down criminal sanctions as referred to therein for infringements of this Regulation, of **the application of such criminal sanctions within Member States.** That exercise shall also include any data made available under Article 33(1) and (2).

***CSMAD***

**Article 12:** By 4 July 2018, **the Commission shall report** to the European Parliament and to the Council **on the functioning of this Directive and, if necessary, on the need to amend it, including with regard to the interpretation of serious cases as referred to in Article 3(1), Article 4(1) and Article 5(1), the level of sanctions provided for by Member States** and the extent to which the optional elements referred to in this Directive have been adopted. **The Commission’s report shall, if appropriate, be accompanied by a legislative proposal.**

Article 3(1): **Member States shall take the necessary measures to ensure that insider dealing**, recommending or inducing another person to engage in insider dealing as referred to in paragraphs 2 to 8, **constitute criminal offences at least in serious cases and when committed intentionally**

Article 4 (1): **Member States shall take the necessary measures to ensure that unlawful disclosure of inside information** as referred to in paragraphs 2 to 5 **constitutes a criminal offence at least in serious cases and when committed intentionally.**

Article 5(1): **Member States shall take the necessary measures** **to ensure that market manipulation** as referred to in paragraph 2 **constitutes a criminal offence at least in serious cases and when committed intentionally.**

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| **Key points of interest** |
| * Recital 44 illustrates the overlap with REMIT for manipulation of benchmarks
* Definition of ‘spot commodity contract’ is of importance
* Article 16 (similar to REMIT Art 15) also requires PPAETs to ‘detect’ market abuse
* Obligation to cooperate has been elaborated on by ESMA in an ITS
 |

***Benchmarks Regulation***

Recital 2: … **Regulation (EU) No 1227/2011** of the European Parliament and of the Council **contains certain provisions which prohibit the manipulation of benchmarks that are used for wholesale energy products.** **However,** those legislative acts **only cover certain aspects of certain benchmarks and they neither address all the vulnerabilities in the provision of all benchmarks, nor do they cover all uses of financial benchmarks in the financial industry.**

**Recital 64:** **In cases where this Regulation captures or potentially captures supervised entities and markets covered by Regulation (EU) No 1227/2011, the Agency for the Cooperation of Energy Regulators (ACER) would need to be consulted by ESMA in order to draw upon ACER's expertise in energy markets and to mitigate any dual regulation.**

|  |
| --- |
| **Key points of interest** |
| * Expectation that ACER is to be consulted by ESMA for energy benchmarks
 |

***MiFID II \****

***\* MiFID II/MiFIR’s date of application has moved to 3 Jan 2018, therefore some, but not all, of the other dates have also changed. These are updated in the text below, but still better to doublecheck.***

Recital 9: **The scope of financial instruments will include physically settled energy contracts traded on an organised trading facility (OTF), except for those already regulated under Regulation (EU) No 1227/2011** of the European Parliament and the Council (2). **Several measures have been taken to mitigate the impact of such an inclusion on firms trading those products. Those firms are today exempt from own funds requirements under Regulation (EU) No 575/2013** of the European Parliament and of the Council (3) and **that exemption will be the subject of a review under Article 493(1) of that Regulation before it expires at the latest at the end of 2017 [now extended until 2020]**. **Those contracts being financial instruments, financial markets law requirements would apply from the onset, thus position limits, transaction reporting and market abuse requirements would apply as from the date of entry into application of this Directive and of Regulation (EU) No 600/2014.** H**owever a phasing-in period of 42 months is provided for the application of the clearing obligation and the margining requirements set out in Regulation (EU) No 648/2012** of the European Parliament and of the Council (4).

Recital 11: **A range of fraudulent practices have occurred in spot secondary markets in emission allowances** (EUA) **which could undermine trust in the emissions trading scheme**, set up by Directive 2003/87/EC of the European Parliament and of the Council (1), and measures are being taken to strengthen the system of EUA registries and conditions for opening an account to trade EUAs. I**n order to reinforce the integrity and safeguard the efficient functioning of those markets**, including comprehensive supervision of trading activity, **it is appropriate to** complement measures taken under Directive 2003/87/EC by **bringing emission allowances fully into the scope** of this Directive and of Regulation (EU) No 600/2014 of the European Parliament and of the Council (2), **by classifying them as financial instruments.** [MiFIR Recital 45 repeats this, and includes a reference to MAR Reg No 596/2014]

Recital 20: **Persons who deal on own account, including market makers, in commodity derivatives, emission allowances or derivatives thereof**, excluding persons who deal on own account when executing client orders, or who provide investment services in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business should not be covered by the scope of this Directive, **provided that that activity is an ancillary activity to their main business on a group basis, and that main business is neither the provision of investment services** within the meaning of this Directive **nor of banking activities** within the meaning of Directive 2013/36/EU of the European Parliament and of the Council (1), nor market making in commodity derivatives, **and those persons do not apply a high-frequency algorithmic trading technique**. **Technical criteria for when an activity is ancillary to such a main business should be clarified in regulatory technical standards,** taking into account the criteria specified in this Directive.

**Those criteria should ensure that non-financial firms dealing in financial instruments in a disproportionate manner compared with the level of investment in the main business are covered by the scope of this Directive**. In doing so, **those criteria should take at least into consideration, the need for ancillary activities to constitute a minority of activities at group level and the size of their trading activity compared to the overall market trading activity in that asset class**. It is appropriate **that where the obligation to provide liquidity on a venue is required by regulatory authorities in accordance with Union or national laws, regulations and administrative provisions or by trading venues, the transactions entered into to meet such an obligation should be excluded in the assessment of whether the activity is ancillary**

Recital 21: For the purposes of this Directive and of Regulation (EU) No 600/2014, which regulate both OTC and exchange traded derivatives within the meaning of Regulation (EU) No 600/2014, **activities that are deemed to be objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity and intragroup transactions should be considered in a consistent way with Regulation (EU) No 648/2012.**

Recital 22: Persons that deal in commodity derivatives, emission allowance and derivatives thereof may also deal in other financial instruments as part of their commercial treasury risk management activities to protect themselves against risks, such as exchange rate risks. Therefore, it is important to clarify that exemptions apply cumulatively. For example, the exemption in point (j) of Article 2(1) can be used in conjunction with the exemption in point (d) of Article 2(1).

Recital 29: Some local energy utilities and some operators of industrial installations covered by the EU Emissions Trading Scheme bundle and out-source their trading activities for hedging commercial risks to non-consolidated subsidiaries**.** Those joint venture companies do not provide any other services and perform exactly the same function as the persons referred to in Recital 28. In order to ensure a level playing field, it should also be possible to exclude joint venture companies from the scope of this Directive if they are jointly held by local energy utilities or operators falling within point (f) of Article 3 of Directive 2003/87/EC who do not provide any services other than investment services for local energy utilities or operators falling within point (f) of Article 3 of Directive 2003/87/EC, and provided that those local energy utilities or those operators will be exempt under point (j) of Article 2(1) should they carry out those investment services themselves. However, in order to ensure that the appropriate safeguards are in place and that investors are adequately protected, Member States that choose to exempt such joint ventures should subject them to requirements at least analogous to the ones laid down in this Directive, in particular during the phase of authorisation, in the assessment of their reputation and experience and of the suitability of any shareholders, in the review of the conditions for initial authorisation and on-going supervision as well as on conduct of business obligations.

Recital 129: **Trading venues should publish an aggregated weekly breakdown of the positions held by different categories of persons for the different commodity derivative contracts, emission allowances and derivatives thereof traded on their platforms**. A comprehensive and detailed breakdown of the positions held by all persons should be made available to the competent authority at least daily. **Arrangement for reporting under this Directive should take into account, where applicable, reporting requirements already imposed under Article 8 of Regulation (EU) No 1227/2011.**

Recital 160: **By 1 January 2018, the Commission should prepare a report assessing the potential impact on energy prices and the functioning of the energy market of the expiry of the transitional period provided for the application of the clearing obligation and the margining requirements set out in Regulation (EU) No 648/2012. If appropriate, the Commission should submit a legislative proposal to establish or amend the relevant law, including specific sectoral legislation such as Regulation (EU) No 1227/2011**

Art 2(1)(j):

**[This Directive shall not apply to]**

(e) **operators with compliance obligations under Directive 2003/87/EC who, when dealing in emission allowances**, do not execute client orders and who do not provide any investment services or perform any investment activities other than dealing on own account, **provided that those persons do not apply a high-frequency algorithmic trading technique;**

(j) persons:

**(i) dealing on own account, including market makers, in commodity derivatives or emission allowances or derivatives thereof, excluding persons who deal on own account when executing client orders; or**

(ii) **providing investment services, other than dealing on own account, in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business; provided that:**

— for each of those cases individually and on an aggregate basis this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking activities under Directive 2013/36/EU, or acting as a market-maker in relation to commodity derivatives,

— those persons do not apply a high-frequency algorithmic trading technique; and

— those persons notify annually the relevant competent authority that they make use of this exemption and upon request report to the competent authority the basis on which they consider that their activity under points (i) and (ii) is ancillary to their main business;

(n) **transmission system operators** as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC **when carrying out their tasks under those Directives, under Regulation (EC) No 714/2009, under Regulation (EC) No 715/2009 or under network codes or guidelines adopted pursuant to those Regulations**, **any persons acting as service providers on their behalf to carry out their task** under those legislative acts or under network codes or guidelines adopted pursuant to those Regulations, **and any operator or administrator of an energy balancing mechanism, pipeline network or system to keep in balance the supplies and uses of energy when carrying out such tasks**. That exemption shall **apply to persons engaged in the activities set out in this point only where they perform investment activities or provide investment services relating to commodity derivatives in order to carry out those activities. That exemption shall not apply with regard to the operation of a secondary market, including a platform for secondary trading in financial transmission rights;**

Article 3 [Optional Exemptions]

1. **Member States may choose not to apply this Directive to any persons for which they are the home Member State, provided that the activities of those persons are authorised and regulated at national level and those persons:**

(d) **provide investment services exclusively in commodities, emission allowances and/or derivatives thereof for the sole purpose of hedging the commercial risks of their clients, where those clients are exclusively local electricity undertakings** as defined in Article 2(35) of Directive 2009/72/EC and/or natural gas undertakings as defined in Article 2(1) of Directive 2009/73/EC, **and provided that those clients jointly hold 100 % of the capital or of the voting rights of those persons, exercise joint control and are exempt under point (j) of Article 2(1) of this Directive if they carry out those investment services themselves**; or

Article 4(1)(2): [definitions] ‘investment services and activities’ means any of the services and activities listed in Section A of Annex I relating to any of the instruments listed in Section C of Annex I.

**The Commission shall adopt delegated acts** in accordance with Article 89 measures specifying:

(a) the **derivative contracts referred to in Section C.6 of Annex I that have the characteristics of wholesale energy products that must be physically settled and C.6 energy derivative contracts;**

(b) **the derivative contracts referred to in Section C.7 of Annex I that have the characteristics of other derivative financial instruments;**

(c) **the derivative contracts referred to in Section C.10 of Annex I that have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, an MTF or an OTF;**

(21) ‘**regulated market’** means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive;

(22) ‘**multilateral trading facility’ or ‘MTF’** means a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Title II of this Directive;

(23) ‘**organised trading facility’ or ‘OTF’** means a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of this Directive;

Article 4(1)(16): ‘**C6 energy derivative contracts’ means options, futures, swaps, and any other derivative contracts mentioned in Section C.6 of Annex I relating to coal or oil that are traded on an OTF and must be physically settled;**

Article 4(1)(58): ‘wholesale energy product’ means wholesale energy products as defined in point (4) of Article 2 of Regulation (EU) No 1227/2011;

Article 48 [Position reporting]:

1. **Member States shall ensure that an investment firm or a market operator operating a trading venue** **which trades commodity derivatives or emission allowances or derivatives thereof:**

(a) **make public a weekly report with the aggregate positions held by the different categories of persons for the different commodity derivatives or emission allowances or derivatives thereof** traded on their trading venue, specifying the number of long and short positions by such categories, changes thereto since the previous report, the percentage of the total open interest represented by each category and the number of persons holding a position in each category in accordance with paragraph 4 and **communicate that report to the competent authority and to ESMA; ESMA shall proceed to a centralised publication of the information included in those reports;**

(b) **provide the competent authority with a complete breakdown of the positions held by all persons, including the members or participants and the clients thereof, on that trading venue, at least on a daily** **basis**. The obligation laid down in point (a) shall only apply when both the number of persons and their open positions exceed minimum thresholds.

2. **Member States shall ensure that investment firms trading** in commodity derivatives or emission allowances or derivatives thereof **outside a trading venue provide the competent authority of the trading venue** where the commodity derivatives or emission allowances or derivatives thereof are traded **or the central competent authority** where the commodity derivatives or emission allowances or derivatives thereof are traded in significant volumes on trading venues in more than one jurisdiction at least **on a daily basis with a complete breakdown of their positions taken in commodity derivatives or emission allowances or derivatives** **thereof traded on a trading venue and economically equivalent OTC contracts, as well as of those of their clients and the clients of those clients until the end client is reached, in accordance with Article 26 of Regulation (EU) No 600/2014 and, where applicable, of Article 8 of Regulation (EU) No 1227/2011.**

Article 79 (5): 5. Without prejudice to paragraphs 1 and 4, **competent authorities shall notify ESMA and other competent authorities of the details of:**

**(a) any requests to reduce the size of a position or exposure pursuant to point (o) of Article 69(2);**

**(b) any limits on the ability of persons to enter into a commodity derivative pursuant to point (p) of Article 69(2).**

….

**When an action under points (a) or (b) of the first subparagraph of this paragraph relates to wholesale energy products, the competent authority shall also notify the Agency for the Cooperation of Energy Regulators (ACER) established under Regulation (EC) No 713/2009.**

Article 90 (4): 4. **By 1 January 2018 the Commission shall prepare a report, after consulting ESMA and ACER, assessing the potential impact on energy prices and on the functioning of the energy market** as **well as the feasibility and the benefits in terms of reducing counterparty and systemic risks and the direct costs of C6 energy derivative contracts being made subject to the clearing obligation** set out in Article 4 of Regulation (EU) No 648/2012, **the risk mitigation techniques** set out in Article 11(3) thereof **and their inclusion in calculating the clearing threshold** pursuant to Article 10 thereof.

Article 95(1) [Transitional Provisions]: Until 3 July 2020 [now 2021]:

(**a) the clearing obligation set out in Article 4 of Regulation (EU) No 648/2012 and the risk mitigation techniques set out in Article 11(3) thereof shall not apply to C6 energy derivative contracts entered into by non-financial counterparties that meet the conditions in Article 10(1) of Regulation (EU) No 648/2012 or by non-financial counterparties that shall be authorised for the first time as investment firms as from 3 January 2017; and**

**(b) such C6 energy derivative contracts shall not be considered to be OTC derivative contracts for the purposes of the clearing threshold set out in Article 10 of Regulation (EU) No 648/2012.**

**C6 energy derivative contracts benefiting from the transitional regime set out in the first subparagraph shall be subject to all other requirements laid down in Regulation (EU) No 648/2012.**

2. **The exemption referred to in paragraph 1 shall be granted by the relevant competent authority. The competent authority shall notify ESMA of the C6 energy derivative contracts which have been granted an exemption in accordance with paragraph 1 and ESMA shall publish on its website a list of those C6 energy derivative contracts.**

**Annex I Section C – Financial Instruments**

(4) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures which may be settled physically or in cash;

(5) Options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;

(**6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled;**

**(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;**

(8) Derivative instruments for the transfer of credit risk;

(9) Financial contracts for differences;

(**10) Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF;**

(**11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme).**

Article 90 (1) [Reports and review]: **Before 3 March 2019 the Commission shall, after consulting ESMA, present a report** to the European Parliament and the Council on:

(a) **the functioning of OTFs**, including their specific use of matched principal trading, taking into account supervisory experience acquired by competent authorities, the number of OTFs authorised in the Union and their market share and in particular examining whether any adjustments are needed to the definition of an OTF and **whether the range of financial instruments covered by the OTF category remains appropriate;**

(c) the impact of requirements regarding algorithmic trading including high-frequency algorithmic trading;

(e) **the application of the administrative and criminal sanctions and in particular the need to further harmonise the administrative sanctions set out for the infringement of the requirements set out in this Directive and in Regulation (EU) No 600/2014;**

(f) **the impact of the application of position limits and position management on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives markets;**

(g) the development in prices for pre and post trade transparency data from regulated markets, MTFs, OTFs and APAs;

**4. By 1 January 2018 the Commission shall prepare a report, after consulting ESMA and ACER, assessing the potential impact on energy prices and on the functioning of the energy market as well as the feasibility and the benefits in terms of reducing counterparty and systemic risks and the direct costs of C6 energy derivative contracts being made subject to the clearing obligation set out in Article 4 of Regulation (EU) No 648/2012, the risk mitigation techniques set out in Article 11(3) thereof and their inclusion in calculating the clearing threshold pursuant to Article 10 thereof.**

**If the Commission considers that it would not be feasible and beneficial to include those contracts, it shall submit, if appropriate, a legislative proposal to the European Parliament and the Council.** The Commission shall be empowered to adopt delegated acts in accordance with Article 89 of this Directive to extend the 42-month period referred to in Article 95(1) of this Directive once by two years and a further time by one year.

***MiFIR***

Recital 52: **Article 95 of Directive 2014/65/EU provides for a transitional exemption for certain C6 energy derivative contracts. It is therefore necessary that the technical standards specifying the clearing obligation developed by ESMA in accordance with Article 5(2)(b) of Regulation (EU) No 648/2012 take that into account and do not impose a clearing obligation on derivative contracts which would subsequently be subject to the transitional exemption for C6 energy derivative contracts.**

**Article 45 [Position management powers]:**

3. **When taking measures referred to in paragraph 1 ESMA shall ensure that the measure:**

[…] **ESMA shall consult the Agency for the Cooperation of Energy Regulators established under Regulation (EC) No 713/2009 of the European Parliament and of the Council ( 1 ) before taking any measures related to wholesale energy products**.

Article 52 (4) [Reports and Review]: **By 3 March 2019, the Commission shall,** after consulting ESMA, **submit a report** to the European Parliament and to the Council **on the functioning of Article 26 [Obligation to report transactions], including whether the content and format of transaction reports received and exchanged between competent authorities comprehensively enable to monitor the activities of investment firms in accordance with Article 26(1)**. The Commission may make any appropriate proposals, including providing for transactions to be reported to a system appointed by ESMA instead of to competent authorities, which allows relevant competent authorities to access all the information reported pursuant to this Article for the purposes of this Regulation and of Directive 2014/65/EU and the detection of insider dealing and market abuse in accordance with Regulation (EU) No 596/2014.

5. **By 3 March 2019, the Commission shall, after consulting ESMA, submit a report to the European Parliament and to the Council on appropriate solutions to reduce information asymmetries between market participants as well as tools for regulators to better monitor quotation activities on trading venues. That report shall at least assess the feasibility of developing a European best bid and offer system for consolidated quotes to fulfil those objectives.**

6. **By 3 March 2019, the Commission shall, after consulting ESMA, submit a report to the European** Parliament and to the Council **on the progress made in moving trading in standardised OTC derivatives to exchanges or electronic trading platforms pursuant to Articles 25 [records obligation] and 28 [trading obligation].**

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| **Key points of interest** |
| * C6 WEP derivative contracts traded on an OTF are out of scope – the ‘REMIT carve out’
* The ancillary exemption is key for energy firms to stay out of MiFID II
* TSOs (and their agents) have an exemption for derivatives on FTRs\*, but not on a secondary platform
* National financial regulators using their position management powers must notify ACER; if ESMA uses its position management powers it must ‘consult’ ACER
* The Commission has to consult ESMA and ACER before preparing a report on whether C6 energy derivatives should be made subject to the clearing obligation and other EMIR obligations.
* Other reports of interest mandated by MiFID II and MiFIR include the functioning of OTFs and the products traded on them (i.e. REMIT carve out), the impact of position limits on liquidity and market abuse, the progress in shifting trading away from pure OTC bilateral, and transaction reporting under MiFID II/MiFIR

*\* see separate note on this* |

***EMIR***

Recital 29: Where appropriate, rules applicable to financial counterparties, should also apply to non-financial counterparties. It is recognised that non-financial counterparties use OTC derivative contracts in order to cover themselves against commercial risks directly linked to their commercial or treasury financing activities. Consequently, **in determining whether a non-financial counterparty should be subject to the clearing obligation,** consideration should be given to the purpose for which that non-financial counterparty uses OTC derivative contracts and to the size of the exposures that it has in those instruments. In order to ensure that non-financial institutions have the opportunity to state their views on the clearing thresholds, **ESMA should, when preparing the relevant regulatory technical standards, conduct an open public consultation ensuring the participation of non-financial institutions. ESMA should also consult all relevant authorities, for example the Agency for the Cooperation of Energy Regulators, in order to ensure that the particularities of those sectors are fully taken into account.** Moreover, **by 17 August 2015, the Commission should assess the systemic importance of the transactions of nonfinancial firms in OTC derivative contracts in different sectors, including in the energy sector.**

Recital 45: Counterparties and CCPs that conclude, modify, or terminate a derivative contract should ensure that the details of that contract are reported to a trade repository. They should be able to delegate the reporting of the contract to another entity. An entity or its employees that report the details of a derivative contract to a trade repository on behalf of a counterparty, in accordance with this Regulation, should not be in breach of any restriction on disclosure. **When preparing the draft regulatory technical standards regarding reporting, ESMA should take into account the progress made in the development of a unique contract identifier and the list of required reporting data in Annex I, Table 1 of Commission Regulation (EC) No 1287/2006 (1) implementing Directive 2004/39/EC** **and consult other relevant authorities such as the Agency for the Cooperation of Energy Regulators.**

**R58:** It is necessary to reinforce provisions on exchange of information between competent authorities, ESMA and other relevant authorities and to strengthen the duties of assistance and cooperation between them. Due to increasing cross-border activity, those authorities should provide each other with the relevant information for the exercise of their functions so as to ensure the effective enforcement of this Regulation, including in situations where infringements or suspected infringements may be of concern to authorities in two or more Member States. **For the exchange of information, strict professional secrecy is needed. It is essential, due to the wide impact of OTC derivative contracts, that other relevant authorities, such as tax authorities and energy regulators, have access to information necessary to the exercise of their functions.**

Article 81(3) [ Transparency and data availability]:

3. A trade repository shall make the necessary information available to the following entities to enable them to fulfil their respective responsibilities and mandates:

(j) the Agency for the Cooperation of Energy Regulators.

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| **Key points of interest** |
| * Surprisingly little of direct relevance from the Level 1, but as noted in Section 2 there are lots of Level 2 provisions of interest for ACER and the EMIR review has already taken place at the end of 2015.
* Several recitals suggest ACER should have been consulted when ESMA drafted the RTS for EMIR reporting – did this actually happen? [Question for Ellio?]
* Although Article 81(3) only refers to ACER, Recital 58 seems to imply that energy regulators would have access to EMIR data [question for Michal]
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***Capital Requirements Regulation (CRR)***

Article 493 [Large exposures, own funds requirements, leverage and the Basel I floor]:

1. The provisions on large exposures as laid down in Articles 387 to 403 shall not apply to investment firms whose main business consists exclusively of the provision of investment services or activities in relation to the financial instruments set out in points 5, 6, 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC and to whom Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (1) did not apply on 31 December 2006.

This exemption is available until 31 December 2017 or the date of entry into force of any amendments pursuant to paragraph 2 of this Article, whichever is the earlier. [now amended and extended to 31 Dec 2020]

2. By 31 December 2015, the Commission shall, on the basis of public consultations and in the light of discussions with the competent authorities, report to the European Parliament and the Council on:

(a) an appropriate regime for the prudential supervision of investment firms whose main business consists exclusively of the provision of investment services or activities in relation to the commodity derivatives or derivatives contracts set out in points 5, 6, 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC;

(b) the desirability of amending Directive 2004/39/EC to create a further category of investment firm whose main business consists exclusively of the provision of investment services or activities in relation to the financial instruments set out in points 5, 6, 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC relating to energy supplies.

On the basis of this report, the Commission may submit proposals for amendments to this Regulation

Article 498 [Exemption for Commodity dealers]:

1. The provisions on own funds requirements as set out in this Regulation shall not apply to investment firms whose main business consists exclusively of the provision of investment services or activities in relation to the financial instruments set out in points 5, 6, 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC and to whom Directive 93/22/EEC did not apply on 31 December 2006.

This exemption shall apply until 31 December 2017 or the date of entry into force of any amendments pursuant to paragraphs 2 and 3, whichever is the earlier. [now amended and extended to 31 Dec 2020]

2. By 31 December 2015, the Commission shall, on the basis of public consultations and in the light of discussions with the competent authorities, report to the European Parliament and the Council on:

(a) an appropriate regime for the prudential supervision of investment firms whose main business consists exclusively of the provision of investment services or activities in relation to the commodity derivatives or derivatives contracts set out in points 5, 6, 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC;

(b) the desirability of amending Directive 2004/39/EC to create a further category of investment firm whose main business consists exclusively of the provision of investment services or activities in relation to the financial instruments set out in points 5, 6, 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC relating to energy supplies, including electricity, coal, gas and oil. 3.

On the basis of the report referred to in paragraph 2, the Commission may submit proposals for amendments to this Regulation.

Article 505 [Review of long-term financing]:

By 31 December 2014, the Commission shall report to the European Parliament and to the Council, together with any appropriate proposals, about the appropriateness of the requirements of this Regulation in light of the need to ensure adequate levels of funding for all forms of long-term financing for the economy, including critical infrastructure projects in the Union in the field of transport, energy and communications.

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| **Key points of interest** |
| * Nothing of direct relevance for REMIT or MMD, but Gas/Elec colleagues should be aware of the implications of these exemptions being removed/altered. The sums involved to meet these capital requirements would be potentially crippling for many large utilities across the EU.
* As noted in Section 2, the bespoke regime that is to be proposed and supported by the EBA report is something the Agency should monitor developments on.
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1. MAD refers to Competent Financial Authorities (CFAs), MAR to Competent Authorities (CAs) and MiFID to National Competent Authorities (NCAs). They should be seen as interchangeable terms referring to national financial regulators, also referred to as Financial Market Authorities (FMAs) (e.g. the FCA, Bafin, AMF, Consob etc.) [↑](#footnote-ref-1)
2. Some MAR provisions are dependent on MiFID II application date, including the scope vis-à-vis REMIT [↑](#footnote-ref-2)
3. The transposition and other deadlines for MiFID were extended through a Commission amending Directive in 2006 [↑](#footnote-ref-3)
4. Recently extended by 1 year from original application date of 3 Jan 2017 [↑](#footnote-ref-4)
5. Ibid [↑](#footnote-ref-5)
6. Much of the requirements stem from Level 2 regulation in place or under development. A good overview is [here](http://www.elexica.com/en/legal-topics/asset-management/08-emir-an-overview). [↑](#footnote-ref-6)
7. A few articles apply from 1 Jan 2015 and 1 Jan 2016 [↑](#footnote-ref-7)
8. Further detail on the Level 2/3 process can be found in Annex 3 [↑](#footnote-ref-8)
9. Ranked by likely relevance / importance to the MM Department and the Agency overall [↑](#footnote-ref-9)