



Brussels, 16 August 2006

## **CALL FOR TECHNICAL ADVICE (No.6) FROM THE COMMITTEE OF EUROPEAN BANKING SUPERVISORS (CEBS)**

### ***Review of commodities business under Article 48 of Directive 2006/49/EC***

#### **Section A: Background**

1. Article 48(2) of Directive 2006/49/EC requires the Commission to consider the question of an appropriate prudential regime for certain firms carrying on business in relation to commodities derivatives and certain other derivatives contracts.
2. MiFID<sup>1</sup> includes a number of exemptions, for firms carrying out commodities business, from the EU rules in that Directive and, as a consequence, from the application to those firms of the rules in the Capital Requirements Directive<sup>2</sup>. These exemptions are to be reviewed under Article 65 of MiFID and the issue of an appropriate prudential regime for such firms is also relevant to that work.
3. Following agreement in the European Banking Committee, CEBS is asked to provide technical advice to assist the Commission services in carrying out the review in relation to the two areas outlined in Section C below. At this stage, CEBS is specifically not asked to make proposals on the elements that could constitute an appropriate prudential regime for these firms and this business.
4. In order to produce the assessments set out above, and because of the interaction with the reviews under MiFID, it will be necessary to cooperate closely with CESR.
5. It is the intention of the Commission services to produce one report covering both the review under Article 48 of Directive 2006/49/EC and the review under Article 65 of MiFID.

#### **Section B: Scope**

6. The contracts listed in MiFID, Annex I, Section C, points 5, 6, 7, 9<sup>3</sup> and 10 (herein: commodities business). Note should be taken of the elaboration of points 7 and 10 proposed in the MiFID Level 2 implementing regulation<sup>4,5</sup>

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<sup>1</sup> [Directive 2004/39/EC on Markets in Financial Instruments](#).

<sup>2</sup> Directive recasting Directives 2000/12/EC and 93/6/EEC, which become Directive 2006/48/EC and 2006/49/EC respectively. See [http://ec.europa.eu/internal\\_market/bank/regcapital/index\\_en.htm#directive](http://ec.europa.eu/internal_market/bank/regcapital/index_en.htm#directive).

<sup>3</sup> Insofar as contracts for differences relate to commodity underlyings (including commodity derivatives) they should be included in the scope of the review. Contracts for differences relating to other financial underlyings and markets, such as equities, should not be included in the scope of the review.

<sup>4</sup> See [http://ec.europa.eu/internal\\_market/securities/isd/mifid2\\_en.htm](http://ec.europa.eu/internal_market/securities/isd/mifid2_en.htm).

7. Firms carrying out commodities business who are in any of the following categories:
  - a) subject to the CRD or ISD;
  - b) subject to EU level regulation for the first time as a consequence of the extension of MiFID to include commodity business as compared to the ISD<sup>6</sup> and who cannot make use of any exemption within MiFID;
  - c) exempt from MiFID under Articles 2(1), (b), (d), (i) or (k); or
  - d) exempt from the capital regime under Article 48(1) of Directive 2006/49/EC.
8. The scope in terms of firms covered is intentionally broader than just those firms affected by the MiFID exemptions, or by the exemption in Article 48(1) of Directive 2006/49/EC. For the purposes of the analysis set out in the following sections, broad coverage is essential.

## **Section C: Specific Call for Technical Advice**

### **(i) Current situation**

9. A review of current prudential supervisory practices for commodities business and firms carrying out commodities business. This should include an analysis of the national prudential supervisory regimes currently in place in EU Member States to address the risks arising from commodities business in terms of:
  - a) scope of the regime; i.e., which firms are covered and in particular are all the types of firms set out in paragraph 7 covered;
  - b) coverage of risks: a description of the particular risks that the national regimes seek to address and the methodologies used to address such risks. To the extent there are different treatments for the types of firms set out in paragraph 7, this should be highlighted; and
  - c) the analysis should in particular comment on the way in which national supervisory regimes deal with firms and commodities business carried out within financial or non-financial groups.
10. The review should also include an assessment of the prudential supervisory regimes (if any) in place in major third country financial services markets, assessing the methods by which those regimes seek to address the relevant risks.

### **(ii) Fundamental analysis**

11. An assessment of the prudential risks that arise from the conduct of commodities business. This should include for each underlying product:
  - a) the nature of the market (e.g., market participants, size, liquidity, exchanges, use of derivatives, legal framework, settlement in cash or physical form);
  - b) systemic risk externalities (e.g., impact of failures on the operation of the commodities market. This should include the interaction with physical markets and other markets);

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<sup>5</sup> The scope of contracts as set out in paragraph 4 is not intended to imply any conclusion about the treatment of other contracts that are relevant to commodity firms.

<sup>6</sup> [Directive 93/22/EEC on investment services in the securities field.](#)

- c) consumer related externalities (e.g., impact on counterparties for that product of problems in the market related to failure, extent of retail consumer participation);
  - d) episodes in commodities markets due to market/regulatory failure; and
  - e) an assessment of the existing regulatory and market-based mitigants to any prudential risks.
12. An assessment of the prudential risks that arise from the activities of firms carrying out commodities business. This should include:
- a) nature of activities that firms carry out (proprietary trading, intermediation, hedging, supply management, etc.);
  - b) systemic risk externalities (e.g., financial stability of firms, systemic risks, impact of a firm's failure on the wider financial markets and the wider economy);
  - c) consumer related externalities (e.g., impact on counterparties of a firm's failure, extent of impact on retail consumers);
  - d) whether the nature of the risks arising from the commodities business are dependent on the other business carried out by the firm; and
  - e) an assessment of the existing regulatory and market-based mitigants to any prudential risks.
13. The above assessments should comment in particular on commonalities and differences between firms falling into categories 7a), b), c) and d).
14. An assessment of the ways, if any, in which these risks differ from the risks addressed by the prudential regime set out in the CRD.
15. An assessment of the extent, if any, to which these risks differ from the risks addressed by the prudential regime set out in the CRD.
16. An assessment of the possible implications of:
- a) differentiated treatment of firms in categories 7a), b), c) and d);
  - b) applying the same treatment to firms in categories 7a), b), c) and d).

#### **Section D: Other points**

17. This work will need to take into account developments in the review under MiFID Article 65 of the exemptions currently in place under Article 2 of that Directive.
18. This work will also need to take into account developments in the review (under Article 119 of Directive 2006/48/EC and Article 28(3) of Directive 2006/49/EC) of the exemptions currently in place under Article 45 of Directive 2006/49/EC.
19. Similarly, in order to ensure an appropriate understanding of some of the full range of markets relevant to commodities business, it will be necessary to consider cooperation with regulators in other fields (e.g., energy).
20. To ensure an appropriate understanding of the firms carrying out this business, CEBS will need to consult with industry. CEBS will need to ensure that it consults with a sufficiently broad

spectrum of firms, of all sizes. Consultation will also need to include market infrastructure providers such as exchanges, MTFs and clearing houses, and also with firms on the 'buy' side of some commodities markets, such as corporate clients. Particular outputs of consultation with the industry would include:

- a) current industry practices on risk measurement and management, including (internal) capital; and
- b) other mitigants to prudential risks that exist in the markets (e.g., role of exchanges).

These outputs should be factored into the analysis under Section C as appropriate.

### **Section E: Timetable**

- 21. The Commission services would welcome the provision of:
  - a) the technical advice under Section C(i) by 31 December 2006; and
  - b) the technical advice under Section C(ii) by 30 April 2007.