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Communication on the implementation of MiFID II: ancillary activity exemption and position limits in commodity derivatives

Scope:

Articles 2 (1) (j), 57 and 58 of Directive 2014/65/EU ('MiFID II')

Summary/Objectives:

This Communication by the FSMA details the procedure to be followed by entities whose trading activity is ancillary to their main business and that wish to be exempted from the obligation to hold an authorization as an investment firm. It also sets out certain aspects of the position limits regime introduced pursuant to MiFID II and that applies to commodity derivatives. The method for setting position limits is laid down in Commission Delegated Regulation 2017/591 ('RTS 21').

Structure:

1. Introduction
2. Exemption from the obligation to be authorized as an investment firm for persons or companies for whom trading in commodity derivatives, emission allowances or derivatives thereof constitutes an ancillary activity
3. Position limits
4. Useful links

1. Introduction

Directive 2014/65/EU on markets in financial instruments ('MiFID II'), which enters into force on 3 January 2018, provides for a regime of exemptions for persons who deal on own account or who provide investment services in specific cases, including where their activity is ancillary to their main business, provided that certain criteria are met.

Articles 57 and 58 of that Directive introduce new rules in the area of commodity derivatives. They establish, at European level, a regime of position limits and new reporting requirements. The method for setting position limits is laid down at European level by Commission Delegated Regulation 2017/591 (hereinafter 'RTS 21').

2. Exemption from the obligation to be authorized as an investment firm for persons or companies for whom trading in commodity derivatives, emission allowances or derivatives thereof constitutes an ancillary activity

Non-financial entities that deal on own account or that provide investment services relating to commodity derivatives, emission allowances or derivatives thereof to the customers or suppliers of their main business (considered at group level) can be exempted from the obligation to be authorized as an investment firm, provided the said activities are ancillary to the main business at group level¹, and that these entities do not apply a high-frequency algorithmic trading technique. In the past, such entities were presumed to be exempt from requiring authorization as an investment firm. Henceforth, they will have to notify the FSMA annually that they make use of this exemption.

The European Commission has, in its Delegated Regulation 2017/592 ('RTS 20'), designed another method that allows non-financial entities to determine whether their trading activity is ancillary to their main business. This method consists of two tests. The first test (market share test) compares the size of an entity's speculative trading activity to the total trading activity in the European Union on an asset class basis, to determine that entity's market share. The second test (ancillary activity test on group basis) compares the size of the speculative trading activity, with all asset classes included, to the total trading activity in financial instruments by the entity at group level. There is an alternative form of the second test, which consists of comparing the estimated capital used for the speculative trading activity to the actual amount of capital used at group level for the main business. If one of the thresholds set by RTS 20 has been exceeded, the entity must apply for authorization as an investment firm.

Articles 57 and 58 of MiFID II continue to apply to entities that are exempted from the requirement to be authorized as an investment firm (see below).

In order to be eligible for the exemption from authorization as an investment firm, the entities in question must notify the FSMA annually by completing **the form in annex** and sending it to mifid2exemption@fsma.be.

¹ Moreover, that main business should not be the provision of investment services or banking activities, or acting as a market-maker in relation to commodity derivatives.

3. **Position limits**

The national competent authorities are tasked with setting the position limits for commodity derivatives traded on trading venues operated in their country. The position limits also apply to economically equivalent OTC contracts. The method for establishing position limits is laid down at European level by RTS 21.

For securitized derivatives (such as warrants) with a commodity as its underlying, where the total number of securities in issue does not exceed 10 million over a period of three consecutive months, the limit is set, pursuant to Article 15 (1) (c) of RTS 21, at 2.5 million securities.

No other category of commodity derivatives than securitized derivatives is traded on Euronext Brussels. These securitized commodity derivatives do not apply to food products. As regards instruments traded on a venue based in another Member State, the position limits set by that other Member State should be followed for the instruments concerned².

It should be noted that these limits do not apply to positions held by non-financial entities where the position is held with the objective of reducing risks directly relating to their commercial activities. The exemption criteria are laid down in Article 8 of RTS 21.

We wish to draw attention to Article 58 of MiFID II, which imposes new requirements as regards the reporting of positions in commodity derivatives, emission allowances or derivatives thereof. However, as stated in the Q&A published by ESMA³, the obligations referred to in Article 58 (1) (a) do not apply to securitized derivatives such as those traded on Euronext Brussels. ESMA is likewise of the opinion that the obligations referred to in Article 58 (1) (b) and (2) do not apply to securitized derivatives with a total number of securities in issue not exceeding 2.5 million⁴.

² Where the same commodity derivative is traded in significant volumes on trading venues in more than one State, the competent authority of the trading venue where the largest volume of trading takes place (the central competent authority) sets the single position limit to be applied to all trading in that instrument.

³ See ESMA Q&A: https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-28_cdtf_gas.pdf

⁴ Euronext Brussels has announced that it decided no longer to admit to trading volumes above 2.5 million units, as a result of which these obligations will no longer apply (see the Euronext Info-Flash of 20 September 2017; ISSUE/LISTING/ADMISSION-TO-TRADING SIZE LIMITATION ON COMMODITY SECURITISED DERIVATIVES, available on https://www.euronext.com/sites/www.euronext.com/files/if20170920_ca_issue_size_limit_on_commodity_secured_derivatives.pdf).

4. Useful links

- [Directive 2014/65/EU \('MiFID II'\)](#)
- [Commission Delegated Regulation 2017/591 \('RTS 21'\)](#)
- [Commission Delegated Regulation 2017/592 \('RTS 20'\)](#)
- [ESMA Q&A on commodity derivatives](#)
- [ESMA Opinion on ancillary activity - market size calculation](#)

Annex:

- [FSMA 2017 22-1 / Form: Notification of ancillary activity exemption under MiFID II](#)