

European Commission

DG for Financial Stability, Financial
Services and Capital Markets Union

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DEPARTMENT
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(To be quoted in further correspondence)

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Austrian FMA's contribution to the European Commission's targeted consultation on a "Review of the functioning of commodity derivatives markets and certain aspects relating to spot energy markets"

Dear Sir or Madam,

having regard to the European Commission's targeted consultation on a "Review of the functioning of commodity derivatives markets and certain aspects relating to spot energy markets" we would like to provide you with the following official contribution of the Austrian Financial Market Authority (FMA), limited to individual questions.

- Regarding question 12, which reads:
The exception under Article 2(1), point (d), of MiFID sets out the conditions, under which entities that deal on own account in financial instruments other than commodity derivatives are exempted from a MiFID license. In particular, this exemption does not require that this activity is ancillary to the entity's main business, unlike what is required for entities dealing on own account in commodity derivatives under point (j) of the same Article. However, the exemption under Article 2(1), point (d), is subject to different limitations. Do you believe persons dealing on own account in commodity derivatives should be treated the same way, with a view to benefit from a MiFID exemption, as persons dealing on own account in other financial instruments, in particular in not requiring that trading activities are ancillary to a main business?

If the exemptions under point (d) and point (j) are compared, their special features should be considered. It is not consistent with such approach if, in a kind of regulatory downward spiral, the requirements that specifically go beyond point (d) are deleted in point (j), but at the same time the requirements that specifically go beyond point (j) in point (d) continue to be

disregarded in point (j). Under point (d), the entity acts in principle like any other financial market participant and should not be exempted, if it acts in a manner typical of financial markets with the corresponding risk profile, i.e. engages in market making or is a member of a regulated market or participant in an MTF and does not merely engage in liquidity management and hedging. However, there are specialized MTFs for commodity futures markets, which help wholesalers to facilitate the spot markets, especially for energy derivatives, and which in turn are dependent on market-making by energy wholesalers, who can also physically fulfil the derivative contracts through their connection to the spot markets. On the one hand, this strong link to the spot markets justifies the simplifications in point (j) compared to point (d), but also requires a corresponding safeguard against circumventing constructions, in that trading in commodity derivatives must remain a secondary activity to the main activity. We are therefore critical of any softening of the ancillary activity criterion in point (j).

- Regarding question 13, which reads:

Under Article 2(1), point j of MiFID, an entity can provide investment services other than dealing on own account in commodity derivatives or emission allowances or derivatives thereof to its customers or suppliers of its main business without a MiFID authorisation, provided that the provision of such investment services is ancillary to its main activity. Do you believe that this exemption as regards the provision of investment services to customers or suppliers is fit for purpose, and why? If not, how would you propose to amend this?

Both the group exemption in point (b) and the commodity derivatives trading exemption in point (j) allow a consolidated view of an entire group of companies. However, the example of purchasing groups, in particular, in which local energy supply companies join forces, shows players with a similar market presence to consolidated groups of companies, but without consolidation. In order to equate such so-called 'inverted group structures', however, transactions for customers and suppliers must also be exempted. This also makes sense, because financial market regulation should not influence the structures of spot markets. We therefore also consider this exemption fit for purpose.

- Regarding question 17, which reads:

What is the most effective and efficient method to ensure that supervisors can monitor compliance with the requirements of the Ancillary Activities Exemption (AAE)? In particular, do you believe the abolishment of systematic (annual) notification from beneficiaries of the AAE to NCAs should be maintained or should these notifications be re-introduced? Please explain. Could you quantify costs, if they were to be reintroduced?

Regular, i.e. annual, notifications to NCAs from beneficiaries of the AAE are the only way to effectively prevent a dark area of unauthorized business operations and to enable NCAs to enforce the requirements of the AEE. Otherwise, an unlevel playing field between unjustified unlicensed commodity derivatives traders and other financial market participants subject to licensing, who cannot hide behind a connection to the real economy, would be tolerated. The more stringent, albeit undesirable, approach would then be to grant commodity derivative traders an exemption without any further, in particular, quantitative conditions.

- Regarding question 18, which reads:

In general, do you believe that the existing AAE criteria are fit for purpose and allow to adequately identify, when a trading activity in the commodity derivatives markets is ancillary to another activity (i.e., allows to bring the right type of entities into the MiFID regulatory perimeter)?

We see the exemption options under the de minimis test, the trading test and the capital employed test as a good compromise of the regulatory framework over the past few years. Their on-going evaluation is based primarily on the scepticism expressed partially during the last revisions as to whether a quantitative criterion is suitable at all. However, as experience with the legal situation prior to MiFID II has shown, purely qualitative approaches to the ancillary activity exemption, which are not substantiated in any way by a quantitative approach, can hardly be implemented with legal certainty. We therefore remain committed to the current AAE criteria.

The contribution has also been entered into the ECAS EU Survey Tool using the link on the page https://finance.ec.europa.eu/regulation-and-supervision/consultations-0/targeted-consultation-review-functioning-commodity-derivatives-markets-and-certain-aspects-relating_en for easier processing.

We kindly ask you to take our contribution into consideration.

Financial Market Authority
On behalf of the Executive Board

Lukas Eder

Christoph Seggermann

signed electronically

