

OPINION

Determining third-country trading venues for the purpose of position limits under MiFID II

1 Legal basis

1. ESMA's competence to deliver an opinion to competent authorities (CAs) is based on Article 29(1)(a) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)¹ (ESMA Regulation).
2. Pursuant to Article 29(1)(a) of the ESMA Regulation, ESMA shall provide opinions to CAs for the purpose of building a common supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union.

2 Background

3. Article 57(4) of Directive 2014/65/EU (MiFID II)² requires competent authorities to set limits on the position that a person can hold at any time in a contract in commodity derivatives traded on a trading venue. Those position limits include also economically equivalent OTC contracts. Based on Article 57(12) of MiFID II, Article 6 of Commission Delegated Regulation (EU) 2017/591³ (RTS 21) determines the criteria that have to be met in order for an OTC contract to be considered economically equivalent to a commodity derivative traded on a trading venue.
4. However, Article 57 of MiFID II does not provide any indication as to whether a contract in commodity derivatives traded on a third-country venue should be considered as traded OTC, and thereby whether such a contract could qualify as an economically equivalent OTC contract in accordance with Article 6 of RTS 21. The clarification of this issue is relevant in order to assess whether those contracts should be counted towards the EU position limit regime.

¹ OJ L 331, 15.12.2010, p. 48

² Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349)

³ Commission Delegated Regulation (EU) 2017/591 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives (OJ L 87, 31.3.2017, p. 479)

5. Market participants and CAs have therefore called upon ESMA to provide guidance on the treatment of contracts in commodity derivatives traded on third-country venues with regard to the MiFID II position limit regime.
6. ESMA is concerned that the lack of clarity regarding the treatment of the contracts in commodity derivatives traded on third-country venues is likely to result in different supervisory approaches across CAs in the application of position limits provisions under MiFID II and may undermine the establishment of a level playing field. ESMA therefore considers it necessary to provide guidance on the matter to prevent the development of inconsistent supervisory practices across CAs and, thereby, contribute to supervisory convergence and strengthen the legal certainty required in the application of MiFID II. As a result, ESMA has decided to publish this Opinion.

3 Opinion

7. To ensure that the objective of the position limit regime set out in MiFID II is achieved, ESMA believes that position limits should only apply to contracts in commodity derivatives traded on EU trading venues and to OTC contracts economically equivalent to such contracts.
8. Further, ESMA believes that contracts in commodity derivatives traded on a third-country facility, which is considered as a trading venue, should not be regarded as OTC and, hence, that the positions resulting from trading those contracts should not count towards the EU position limit regime.
9. In this context, ESMA is aware that the correct application of position limits under MiFID II would require the identification of third-country trading venues. ESMA believes that such third-country trading venues should have features similar to the features common to all EU trading venues.
10. Any identification of trading venues for the purposes of the consistent application of position limits provisions set out in MiFID II proposed by this Opinion does not in any way prejudice an equivalence assessment performed by the European Commission under MiFID II/MiFIR⁴ and, in particular any equivalence assessment of third-country trading venues for the purposes of the trading obligation for shares and derivatives, in accordance with Article 25(4)(a) of MiFID II and Article 28(4) of MiFIR.
11. ESMA considers that only a third-country trading facility that meets all the following objective criteria should be considered as a trading venue for the purposes of the MiFID II position limit regime:

⁴ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p.84)

- a. it operates a multilateral system, i.e. a system or facility in which multiple third-party buying and selling interests in financial instruments are able to interact;
 - b. it is subject to authorisation in accordance with the legal and supervisory framework of the third-country;
 - c. it is subject to supervision and enforcement on an ongoing basis in accordance with the legal and supervisory framework of the third-country by a competent authority that is a full signatory to the IOSCO Multilateral Memorandum of Understanding concerning Consultation and Cooperation and the Exchange of Information (MMoU)⁵.
12. Therefore, ESMA considers that for the purposes of Article 57 of MiFID II, and in particular paragraph (4) thereof, commodity derivatives traded on third-country trading venues that meet the criteria considered above should not be considered as OTC trades.
13. In order to ensure legal certainty and a high degree of supervisory convergence in the EU, ESMA will publish a list of trading venues that meet the criteria stated in paragraph 11 as well as a list of trading venues not meeting these criteria. Those lists will be published in an Annex to this Opinion and will be updated on an ongoing basis.
14. In order to contribute to the smooth implementation of MiFID II/MiFIR as of 3 January 2018 and to maintain a level playing field between third country trading venues, commodity derivative contracts traded on third country trading venues should not be considered economically equivalent OTC under Article 6 of RTS 21 pending the publication of the outcome of the assessment of the criteria stated in paragraph 11.

⁵ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf>