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Additional Information

Level 1 Regulation

Markets in Financial Instruments Directive II (MiFID II) Directive 2014/65/EU- Secondary Markets

Topic

Position limits

Additional Legal Reference

Art 57(1) and 58(1) of MiFID II

Subject Matter

Securitised derivatives

Question

Are securitised derivatives considered to be commodity derivatives under MiFID II? How does ESMA differentiate between ETCs and securitised derivatives?

ESMA Answer

23-09-2022

Original language

[ESMA70-872942901-36 Commodity derivatives, position limits Q&A 7]

“Securitized derivatives” are transferable securities whose value is based upon underlying assets. However, neither MiFID I (incl. level 2 thereof), nor MiFID II/MiFIR contain a specific definition of these instruments.

Where the underlying asset of securitized derivatives is one or more commodities, these instruments are caught by the definition of “transferable securities” in Article 4(1)(44)(c) of MiFID II and are commodity derivatives under Article 2(1)(30) of MiFIR.

Exchange traded commodities (ETCs) are debt instruments which are within the scope of Article 4(1)(44)(b) of MiFID II and are classified as such in RTS 2. Therefore, they are outside the definition of commodity derivatives in Article 2(1)(30) of MiFIR and the position limits regime does not apply to them.

ESMA is aware that market practices in differentiating between ETCs and securitized derivatives are neither clear nor uniform and presents the following guidance to allow for a correct classification of instruments in practice.

In RTS 2 ETCs are described as debt instruments issued against a direct investment by the issuer in commodities or commodity derivative contracts. The price of an ETC is directly or indirectly linked to the performance of the underlying. An ETC passively tracks the performance of the commodity or the commodity indices to which it refers.

In addition, ESMA considers that ETCs typically have the following features:

- a primary market exists which is accessible only to authorised market participants permitting the creation and redemption of securities on a daily basis at the price set by the issuer;
- they are not UCITS and therefore unlike an ETF can have an exposure profile not in compliance with the UCITS diversification requirements;
- they are traded on- and off-venue in significant volumes;
- the price is aligned, or multiplied by a fixed leverage of the price of the underlying commodity;
- a management fee is charged by the issuer;
- they may be issued by non-banking institutions;
- they do not have an expiry date;
- they may have a strict regime of capital segregation, usually through the use of special purpose vehicles;
- they are often aimed at professional investors.

In comparison, the term 'securitised derivatives' describes a much wider set of financial instruments that can have a large variety of features among them the following typical features:

- they can have commodities as underlying but also many financial instruments or they can be linked to strategies, indices or baskets of instruments;

- they can passively track the performance of the underlying but they can typically also apply leverage, can have an option structure or also have a lower risk profile than the underlying by, for example, offering capital protection;
- they are traded on venue or OTC by the issuer directly or via intermediaries;
- the issuers' costs and compensation are factored into their price;
- they have an expiration date;
- they provide an issuer credit risk exposure;
- they are often aimed at retail clients.

Please note that under Article 57(1) and 58(1) of MiFID II, securitised derivatives are no longer subject to position limits and position reporting respectively.