THE COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Ref.: CESR/07-673

CESR Response to the Commission's request for initial assistance on commodity and exotic derivatives and related business

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11-13 avenue de Friedland - 75008 PARIS - FRANCE - Tel. : 33. (0).1.58.36.43.21 - Fax: 33. (0).1.58.36.43.30
Web site: www.cesr.eu

Background

1. This paper covers the second tranche of CESR's response to the Commission's request for assistance on commodity and exotic derivatives and related business. In broad terms, the Commission is undertaking a review of the commodities and exotic derivatives markets that aims to determine:

   - Which relevant entities, activities and instrument should be covered by the scope of EU financial markets regulation in these areas?

   - Whether current regulation needs be adapted to take into account the specificities of the commodities and commodity derivatives markets?

2. In particular, this document covers questions 7 to 10 of the Commission request for initial assistance to CESR. This second tranche aims to determine how Member States intends to apply and interpret MiFID exceptions under Articles 2(1) (i) and (k) and Article 38 of MiFID Implementing Regulation.

Work undertaken

3. Given the nature and hierarchy in the Commission questions, CESR has followed a two step-approach to develop its work. In a First Stage, a fact-finding exercise was conducted to determine how each Member State has implemented the provisions and how they intend to interpret them. As a Second Stage, CESR has aggregated and highlighted the common understandings of the exceptions, and where differences in interpretation have been identified attempts have been made to explain them.

4. Within the **First stage** CESR has developed an extended questionnaire based on Questions 7, 8 & 10. The questionnaire directed CESR Members to state their views on the key issues identified as well as explaining the rationale for the approach taken. In particular, to better understand CESR Members views, questions regarding implementation have been distinguished from those regarding interpretation. The interpretation questions are important as they ought to help to understand how the specified provisions are to be applied in practice by each CESR Member. **A total of 22 CESR Members have responded to the questionnaire.**

5. Based upon the responses received, in the **Second stage**, CESR developed the answer to question 9, outlining the areas where interpretation exists and sets out areas where differences on the practical applications of MiFID exceptions under Articles 2(1) (i) and (k) and Article 38 of MiFID Implementing Regulation exist.

Further work

6. The Commission envisages that a subsequent common call for advice to CESR and CEBS will be issued at a later stage of the review. This mandate is likely to focus on transparency of derivatives in contracts for energy, electricity and gas markets. CESR stands ready to further contribute on this issue. For further information concerning the timeline for this work, please refer to page 24 of the Commission's feedback statement, published on 14 August 2007.

Structure of this Paper

7. CESR response to the second tranche have been structured as follows:

   - A high level summary of the member states responses to the questionnaire together with the elaboration of question 9 are included in **Chapter 1** (p4-11)

- **Chapter 2** (p12-39) contains the detailed list of respondents and the individual responses from Member States to the questionnaire

- A detailed copy of the questionnaire sent to CESR Members is enclosed in **Appendix 1** (p40-42)

European Commission's request for initial assistance on commodity and exotic derivatives and related business

(Question 1-6 are covered in Ref. CESR/07-429)

(1) Overview of the applicable market, CoB and organisational requirements, regulatory regimes relating to commodities, commodity and exotic derivatives, nature of regulation, rationale for the existence of the regulation, various competent authorities involved in the regulation and supervision;

(2) the list of organised trading venues in the different Member States that provide trading services in the markets for the products mentioned above as well as the list of the products they trade;

(3) Brief description of the current regulatory status of the trading venues mentioned in point (2) (i.e. whether they are partly or wholly subject to regulation by financial markets competent authorities, any other competent authorities , both or none) as well as their expected regulatory status following MiFID implementation;

(4) Brief description of the trading venues':

- main trading methods
- membership regulation
- levels of trading transparency
- capital requirements
- clearing and settlement arrangements

(5)

- Please describe to what extent commodity markets are subject to rules that prohibit the use of inside information or market manipulation in your jurisdiction.
- To what extent do these rules differ, if at all, from those currently imposed by the MAD?
- Please specify, where possible, whether there have been any cases of insider dealing or market manipulation in those markets.

(6) For the markets described in Section 6.1 of the Commission Call for evidence (Agriculture, Metals, Energy, Exotic derivatives) please specify the major information sources available to and used by market participants (excluding any pre- and post-trade information) and please specify to what extent the availability of such information is mandated by law or is available from other sources and on what basis (e.g. published by governments or provided by commercial data vendors).

(7) Please explain how CESR members intend to apply the exceptions under Article 2(1) (i) and (k) of MiFID

(8) Please explain how CESR members intend to apply Article 38 of the Implementing Regulation.

(9) Is there a common CESR understanding as to the practical application of the exemptions under Articles 2(1) (i) and (k) of MiFID and of Article 38 of the MiFID implementing Regulation? If yes, please describe the view. If no, please outline the points of disagreement, describing the main competing interpretations.

(10) Please clarify to what extent there will exist regulation of entities which are exempt under 2(1) (i) and (k) in different Members States. Please describe the nature and the rationales of any such regulation.

Chapter 1 - Summary of responses to Questions 7,8 & 10 and elaboration of Q9.

This document includes the response received from:

1. Austria
2. Belgium
3. Bulgaria
4. Cyprus
5. Denmark
6. Finland
7. France
8. Germany
9. Greece
10. Hungary
11. Ireland
12. Italy
13. Luxembourg
14. Malta
15. Netherlands
16. Norway
17. Poland
18. Portugal
19. Romania
20. Spain
21. Sweden
22. United Kingdom

Total: 22 Responses received

Question 7: Please explain how CESR members intend to apply the exceptions under Article 2(1) (i) and (k) of MiFID

Implementation:

7.1 *Is your jurisdiction going to conduct a straight copy out of the exceptions under Articles 2(1)(i) and (k) of MiFID? If not, what amendments are you making? Please explain the rationale for the approach taken and for the intended amendments.*

Eighteen jurisdictions will conduct a straight copy out of the exemptions under articles 2(1)(i) and 2(1)(k).

Some member stressed the importance of this straight copy out in all jurisdictions, considering the specific characteristics of (the players active in) the commodity derivatives markets.

Germany has made slight changes to 2(1)(i) with a view to making the provision more readable. For the sake of clarity, a phrase has been added to stress that the investment services to be provided to clients of the main business must relate in substance to the main business. Furthermore, the German legislator has interpreted the first exemption (dealing on own account) as transacting solely without a client. This is because otherwise dealing on own account with clients would be permitted in financial instruments in general rather than just in the derivatives mentioned in the second exemption. This is in contrast to UK interpretative guidance (see 7.2 below). With regard to 2(1)(k) Germany made one exception: investment services provided by the undertaking alongside their main business of dealing on own account in commodities or commodity derivatives are not exempted However, they may fall under another exemption.

Hungary is not going to conduct a straight copy out of the exceptions under Articles 2(1)(i) and (k) of MiFID, since the Act aiming to implement the MiFID provisions simultaneously contains provisions for the regulation of the commodity service providers. The Act therefore does not explicitly exclude all commodity related activities mentioned in Articles 2(1)(i) and (k) of MiFID from its scope.

Bulgaria indicated that the derivatives' trade will be abided in Bulgaria by the Law of markets in financial instruments, which will be enacted from 1st November 2007. Until now commodity derivatives as a financial instrument have not been traded on the Bulgarian stock exchange. The derivatives trade now is realized from investment intermediaries, who are dealing under arrangement with foreign introducing broker. According to this they have not answered the individual question of the questionnaire

Interpretation: Art 2 (1)(i) Exemption

7.2 *What publicly available guidance, if any, have you produced, or do you intend to produce, on the interpretation of the 2(1)(i) exemption?*

Seventeen members indicated they had not published any guidance on the interpretation of the 2(1)(i) exemption, nor had they any intention at the moment to do so in the future.

The UK has published a Policy Statement (PS 07/5) which explains its understanding of the exemption in article 2(1)(i). Re the meaning of "dealing on own account" this provides that it "is trading against proprietary capital resulting in the conclusion of transactions in one or more MiFID financial instruments…[it] involves position-taking which includes proprietary trading and positions arising from market-making. It can also include positions arising from client servicing, for example where a firm acts as a systematic internaliser or executes an order by taking a market or 'unmatched principal' position on its books."

Norway has published a circular which address the interpretation of the exemption (Circular 24/2007)

Spain is currently undertaking the development of further guidance on certain MiFID related topics and does not rule out that guidance on the 2(1)(i) exemption will be produced.

Italy and Sweden will consider issuing, if needed, guidance after the entry into force of MIFID implementing provisions.

7.3 *Do you agree that Art 2(1)(i) comprises two exemptions (one relating to dealing on own account, the other to providing services in commodity and exotic derivatives) and that the phrase starting with "provided this…" applies to both of them?*

All respondents agreed that Art. 2 (1)(i) comprises two exemptions (one relating to dealing on own account, the other to providing services in commodity and exotic derivatives).

Nineteen members agreed that the phrase starting with "provided this…" applies to both exemptions, whereas Denmark's and Italy's opinion is that it only applies to providing investment services in commodity derivatives or derivative contracts.

The German legislator has adopted a narrow interpretation of the "dealing on own account" exemption in that it does not apply to all financial instruments. The legal materials, however, do not specify which ones. The rationale behind this narrow interpretation of the first exemption is to confine the exemption to allow commodity producers and commodity traders to hedge themselves against risks arising from their main business. The second exemption is aimed at providing investment services to clients of the main business.

Similarly, France interprets "dealing on own account" in Article 2(1)(i) as referring to dealing only in commodity and exotic derivatives.

In addition, Italy interprets that "dealing on own account" in Article 2(1)(i) should be interpreted in conjunction with Article 2(1)(d) and recitals 8 and 25. A coordinated reading of the provisions mentioned above, which are all related to "persons dealing on own account" will avoid any inconsistency between the two exemptions in Article 2(1)(d) and 2(1)(i) and will specify that the exemption in Article 2(1)(i) refers only to "persons administering their own assets" as provided for in Recital 8.

7.4 *Please explain how you intend to interpret the terms 'clients of their main business', 'ancillary', 'on a group basis'.*

Most members offered their own interpretation for the terms 'clients of their main business', 'ancillary' and 'on a group basis', often based on the applicable laws (e.g. company, banking or accounting law) in their jurisdiction. This has the potential to create divergences in interpretation.

The UK published formal guidance in its Policy Statement 07/5.

Cyprus indicated it will wait for guidance from the European Commission.

Interpretation: Art 2(1)(k) Exemption

7.5 *What publicly available guidance, if any, have you produced, or do you intend to produce, on the interpretation of the Article 2(1)(k) exemption?*

Sixteen members indicated they had not published any guidance on the interpretation of the 2(1)(k) exemption, nor had they any intention at the moment to do so in the future.

The UK published Policy Statement (PS 07/5) explaining its understanding of the article 2(1)(k) exemption.

Norway has published a circular which address the interpretation of the exemption (Circular 24/2007)

Spain is currently undertaking the development of further guidance on certain MiFID related topics and does not rule out that guidance on the 2(1)(k) exemption will be produced.

Italy and Sweden will consider issuing, if needed, guidance after the entry into force of MIFID implementing provisions.

7.6 *Do you give 'main business' reference under Art 2(1)(k) the same meaning as under Art 2(1)(i). If not, please explain the differences.*

Nineteen respondents indicated that they will give '*main business*' reference under Art 2(1)(k) the same meaning as under Art 2(1)(i).

Luxembourg and Romania indicated that no definitive interpretation have been determined

The UK, France and Norway indicated that the first reference to '*main business*' in Art 2(1)(k) is determined on an entity (stand alone) basis and not on a group basis, unlike the second reference to '*main business*' in Art 2(1)(k) and both references in Article 2(1)(i).

7.7 *Please explain how you intend to interpret being 'part of a group' for the purpose of Art 2(1)(k)*

Thirteen members offered an interpretation for the term 'part of a group' often based on the applicable laws (e.g. company or accounting law) in their jurisdiction, often in line with their interpretation of "on a group basis" in question 7.4.

The UK stated that they have not published formal guidance, but that they have seen European Commission's answer to Question 59 on its Q&A database which relates to this issue.

Cyprus indicated is has copied the definition from Directive 2006/73.

Spain, Hungary, Belgium and Italy referred to undertakings which are required to prepare consolidated accounts with another undertaking in accordance with Directive 83/349/EEC.

Luxembourg and Romania indicated that no definitive interpretation have been determined

Greece did not answer this question.

Additional questions

7.8 *In practice what types of firm are likely to be caught by Art 2(1)(i) and (k)? e.g. do you agree that, as indicated in Recital 22 MiFID Implementing Regulation, Art 2(1)(i) and (k) "exclude significant numbers of commercial producers and consumers of energy and other commodities, including energy suppliers, commodity merchants and their subsidiaries"?*

Most respondent indicated that they expect certain commodity merchants and their trading subsidiaries to be excluded from MiFID as a result of the operation of Art 2(1)(i) and (k).

The UK indicated that it is worth noting that some trading subsidiaries of commodity firms appear to be ensuring that their business model is such that the exemptions do not apply and they are therefore able to "passport" their services across the EU.

Belgium stated that they have knowledge of an energy provider who wants to offer the service developed as ancillary service for the main clients as well to other interested parties. They will no longer benefit of the exemption.

In Sweden, many Energy suppliers indicated that that they don't fall under the exemption and that they would need to have the MiFID-license.

7.9 *In practice are there any types of firm caught by the first exemption in Art 2(1)(i) (i.e. the dealing on own account in financial instruments limb) that are not also caught by the Article 2(1)(d) exemption? If so what types of firms are these?*

Most respondent indicated that it may be possible that there may be some firms who may not be able to rely on 2(1)(d), but could rely on 2(1)(i). In general, the exemptions under (i) and (k) have much wider scopes of application and also apply to the entities specifically excluded from the scope of the exemption under (d), such as market makers

Spain considers that, for instance, some industrial entities that have trading subsidiaries acting as market makers in commodities derivatives would be excluded by lit (i) and not by lit (d)

The Netherlands and Belgium indicated that they cannot think of practical examples of companies that are caught by the exemption in 2(1)(i) (regarding the dealing on own account in financial instruments) that are not also caught by the exemption in 2(1)(d).

Germany indicated that they regard the first alternative of lit. i as virtually redundant.

Italy and Portugal are of the opinion that the firms caught by the two exemptions are of the same type.

7.10 *In practice are there any types of firms caught by the Art 2(1)(k) exemption that are not also caught by the Article 2(1)(d) exemption? If so what types of firms are these?*

Most respondent indicated that it may be possible that there may be some firms who may not be able to rely on 2(1)(d), but could rely on 2(1)(k), for example firms whose main MiFID business is dealing on own account in commodities / commodity derivatives (and thus fall within the article 2(1)(k) exemption) but also do some other MiFID business (and as a result article 2(1)(d) would not apply).

Germany indicated that this will clearly depend on the substantive scope of lit d). However, it is estimated that an abolition of the lit. k exemption would affect approximately ten undertakings in Germany whereby it should be born in mind that according to the German transposition act dealing on own account for clients is not covered by the first alternative of lit. i), but merely by lit. k).

The Netherlands, Spain, Hungary, Italy, France and Sweden indicated that, as a practical example, a market maker in commodity derivatives is caught by the exemption in 2(1)(k) but not by the exemption in 2(1)(d).

Belgium do not see appropriate examples caught by the Art 2(1)(k) exemption that are not also caught by the Article 2(1)(d) exemption.

Portugal is of the opinion that the firms caught by the two exemptions are of the same type.

Question 8: Please explain how CESR members intend to apply Article 38 of the Implementing Regulation

Interpretation: Art 38 (1) and (2) (Commodity derivatives)

8.1 What publicly available guidance, if any, have you produced or do you intend to produce on the interpretation of article 38.

Fifteen members indicated they had not published any guidance on the interpretation of Article 38, nor had they any intention at the moment to do so in the future.

The UK published guidance in Policy Statement 07/5, which summarizes which commodity derivatives it considers fall within MiFID, including those covered by article 38.

Spain is currently undertaking the development of further guidance on certain MiFID related topics and does not rule out that guidance on the interpretation of article 38 will be produced.

Italy and Sweden will consider issuing, if needed, guidance after the entry into force of MIFID implementing provisions.

8.2 Please explain how you will assess whether an entity is a 'third country facility that performs similar functions to a regulated market or MTF' or an 'other entity carrying out the same functions as a central counterparty'

Fiveteen members indicated that this will be determined on a case-by-case basis, using the definitions of regulated markets and MTFs contained within MiFID.

Germany will draw up a list of third country market places carrying out the same functions as a central counterparty.

France stated that the first of the phrase "is quite likely …[to] cover, for example, the US trading venues such as the commodity derivatives markets and ECNs currently regulated by the US CFTC" and the second might cover "situations on MTFs, where credit institutions could provide a central netting and margining facility that would include novation of the relevant contracts."

Italy indicated that third country facilities will be subject to an equivalence assessment aiming at evaluating if the rules governing them are equivalent to those applicable in accordance with relevant community legislation. Greece and Denmark did not answer this question.

Greece and Denmark did not answer this question.

Romania has not issued official guidance yet.

Interpretation: Art 38 (3) (Exotic Derivatives)

8.3 *Are you giving the same meaning to the conditions under Art 38(1) for the purpose of commodity derivative and for the purpose of exotic derivatives?*

Fourteen members stated that they will give the same meaning to the conditions under Art. 38(1) for purpose of commodity derivatives and for the purpose of exotic derivatives.

Poland suggested the fulfillment of the prerequisites under art. 38(3)(c) of Commission Regulation 1287/2006.

Finland indicated that this issue was still under discussion.

Austria, Denmark, France, Greece, Sweden and Romania did not answer this question.

8.4 *Do you have any additional views on the criteria to determine which commodity and exotic derivatives should be considered financial instruments for the purpose of MiFID?*

None of the respondents indicated they had additional views on this matter

Question 9: Is there a common CESR understanding as to the practical application of the exemptions under Articles 2(1) (i) and (k) of MiFID and of Article 38 of the MiFID implementing Regulation? If yes, please describe the view. If no, please outline the points of disagreement, describing the main competing interpretations

Article 2(1)(i) of MiFID

Areas of agreement

There is unanimous agreement that Art. 2(1)(i) comprises two exemptions: one relating to dealing on own account; the other relating to providing services in commodity and exotic derivatives.

In addition, all but two of the members agree that the requisites listed for Art. 2(1)(i) (*the phrase starting with "provided this…"*) applies to both of these exemptions. However, Denmark and Italy considers that those requisites apply only to the second exemption ("providing services in commodity and exotic derivatives").

Competing interpretations

There are some issues that should be highlighted because of different interpretations:

- The question arises whether the 'dealing on own account' exemption applies when a firm transacts with a client. This is an important matter in regards to investor protection. (i)The UK's view is yes; (ii) Germany's is no, unless the second exemptions (providing investment services) applies. (iii) Spain considers that the current wording refers to both, dealing on own account to take proprietary positions and dealing on own account with clients. However, Spain thinks it may be worth considering in the review the commission is carrying out, the distinction between firms that deal on their own behalf and for their own account, and firms that deal on own account with clients.

- Another issue is whether the 'dealing on own account' exemption applies to all "financial instruments". (i) Germany and France are of the view that it does not, restricting the exemption to commodity and exotic

derivatives. (ii) Spain is of the opinion that it does apply (in line with the interpretation of Commission on Question 32.1 on its Q&A database)

- Italy considers that the dealing on own account exemption should be interpreted in conjunction with Article 2(1)(d) and recitals 8 and 25. Italy is of the opinion that a coordinated reading of these provisions will specify that the exemption in Article 2(1)(i) refers only to "persons administering their own assets".

- Most members offered their own interpretation for the terms 'clients of their main business', 'ancillary' and 'on a group basis', often based on the applicable laws (e.g. company, banking or accounting law) in their jurisdiction. This may also create potential divergences in interpretation.

Article 2(1)(k) of MiFID

The exemption under Art. 2(1)(k) appears less open to competing interpretations and most members will conduct a straight copy-out without additional guidance.

Again, the term that appears likely to generate competing interpretations is "part of a group" as members are looking to differing sources (e.g. company or accounting law) to aid interpretation.

Article 38 of the Implementing Regulation

The consensus view is that the application of Art 38(1) will be determined on a case-by-case basis using the definitions of regulated markets and MTFs contained within MiFID. Whilst there appears to be a common high-level test there may be inter-member divergence in the application of the tests.

All members appear to agree with the Commission's analysis of which commodity and exotic derivatives should be considered financial instruments for the purpose of MiFID, since none raised any additional issues.

Question 10: Please clarify to what extent there will exist regulation of entities which are exempt under 2(1)(i) and (k) in different Members States. Please describe the nature and the rationales of any such regulation.

<u>Implementation:</u>

10.1 Please describe if there is any intended regulation of entities exempt under art 2 (1) (i) (k) and the nature and rationale for any such regulation.

Thirteen members have no intention for additional regulation of entities exempt under Art. 2(1)(i) and (k).

Three members will have a national regime for these entities. The UK stated that there are no equivalent exemptions to 2(1)(i) and (k) to carve out specialist commodity firms from regulation (although authorized firms who meet the criteria in the MiFID exemptions will obviously not be MiFID firms). The UK indicated that it currently takes an activities based approach to the regulation of commodity business. Regulated non-MiFID firms face one of two conduct of business regimes and potentially a capital regime as well. Certain firms (energy and oil market participants with no retail clients) face a regime which disapplies certain conduct of business rules and can gain derogations from capital regime standards. Austria indicated that these entities will need a national license. Belgium indicated that under Belgian law there exists since 2004 a specific license for derivative brokers acting exclusively for their own account. It's rather a light regime.

Germany indicated it is contemplating to take steps in order to improve the detection and prosecution of insider dealing and market manipulation on electricity markets.

Italy indicated that sector specific regulations may apply to such entities in relation to the commodities traded, however those regulations will not be related to MIFID implementation. In case such entities become members of regulated markets where commodity and exotic derivatives are traded, they will be subject to markets regulations approved by Consob.

Poland, Portugal and Romania did not answer this question.

10.2 Please describe if there is any intended regulation of commodity or exotic derivatives not covered by sections C(5) to C(7) and C(10) of Annex I to MiFID and articles 38 and 39 of the implementing regulation and the nature and rationale for any such regulation.

Fifteen members indicated that they do not intend any regulation of commodity or exotic derivatives not covered by sections c(5) and c(10) of Annex I to MiFID and articles 38 and 39 of the implementing regulation.

The UK indicated that all physically-settled options on precious metals[1] will be inside the scope of UK regulation, whether or not they meet the requirements of paragraphs 5, 6, 7 or 10 of Section C of Annex 1 to MiFID. Furthermore, physically settled futures are currently regulated in the UK where a contract is deemed to be for investment purposes. According to the UK "it is conceivable, although generally unlikely, that a physically settled contract which does not meet the requirements of paragraphs 5, 6, 7 or 10 of Section C of Annex I to MiFID would be regarded as being for investment purposes. The UK decided not to narrow its existing regulatory boundaries to align them with MiFID, because of uncertainties related to the article 65 review, and intends to revisit the issue in the light of the review's conclusions.

Italy stated that the Italian legislation, in certain cases, covers all types of financial products, i.e. financial instruments and whichever form of investment of a financial nature except bank or postal deposits without the issue of financial instruments and including financial products issued by insurance companies, i.e. unit linked life polices and capital redemption operations.

Austria, Poland, Portugal and Romania did not answer this question.

[1] Palladium, platinum, gold and silver

Chapter 2 - Compilation of Responses from CESR members to questions 7, 8 and 10.

Following is a compilation of the responses from CESR members to the questionnaire on commodities and exotic derivatives, relating to the European Commission's Call for Advice on commodities and exotic derivatives and related business.

The compilation of the answers to questions 7, 8 and 10 of the Call for Advice can be regarded as the first stage of a two-step-approach. In this stage CESR members are asked how they intend to apply the current MiFID provisions on each subject.

In its questionnaire the drafting group has distinguished between implementation and interpretation of the different provisions from MiFID.

This chapter includes the response to questions 7, 8 and 10 from:

1. Austria
2. Belgium
3. Bulgaria
4. Cyprus
5. Denmark
6. Finland
7. France
8. Germany
9. Greece
10. Hungary
11. Ireland
12. Italy
13. Luxembourg
14. Malta
15. Netherlands
16. Norway
17. Poland
18. Portugal
19. Romania
20. Spain
21. Sweden
22. United Kingdom

Total: 22 Responses received

Austria

Question 7.1
Yes. The exceptions under Article 2 (1) (i) and (k) are copied out and had been implemented in the draft of the Austrian security supervision act (Wertpapieraufsichtsgesetz 2007) in § 2 (1) (11) and (13).

Question 7.2
Commodity derivatives respectively commodity markets are new subjects to supervision of the Financial Market Authority (FMA). Due to the lack of practical experience the FMA hasn´t produced publicly available guidance till now.

Question 7.3
Yes.

Question 7.4
Due to the fact that the FMA is still developing practical experiences in the supervision of commodity and exotic derivatives no definitive interpretations have been determined.

Question 7.5
We refer to answer 7.2. above.

Question 7.6
Yes.

Question 7.7
We refer to answer 7.4. above.

Question 8.1
We refer to answer 7.2. above. In our opinion the established criteria in Article 38 (1) and (2) are sufficient. No further criteria are needed.

Question 8.2
In our opinion this question has to be proved in each in each individual case. Due to the lack of practical experience no further criteria still exist.

Question 8.3
~

Question 8.4
In our opinion the criteria are sufficient. If more experience are gained maybe additional criteria have to be established.

Question 10.1
These entities need a license (on national basis) to provide the business described in Article 2 (1) (i) und (k).

Question 10.2
~

Bulgaria:

Question 7.1

The derivatives trade will be abided in Bulgaria by the Law of markets in financial instruments, which will be enacted from 1th November 2007. Till now the commodity derivatives as a financial instrument have not been traded on the Bulgarian stock exchange. The derivatives trade now is realized from investment intermediaries, who are dealing under arrangement with foreign introducing broker.

According to the above mentioned and the absence of practice in this area at this moment we can not indicate particular types of firms, which are not caught by the Art. 2 (1) (d), (i) and (k) exemptions. But we are expecting potential participants in derivatives trade to be commodity producers (metal producers, grain producers, energy producers and etc.), who will try to hedge against the volatility of international commodities' markets prices.

Belgium

Question 7.1
Yes, Belgium has conducted a straight copy of the exceptions under art. 2 (1) (i) and (k) of MiFID.

Question 7.2
There is no guidance produced

Question 7.3
Yes

Question 7.4
"Clients of their main business"

Neither the law itself nor the legal materials define the concept of main business. We consider that main business is a principal business that is another business than the provision of investment services.

"Ancillary"

There is no definition of "ancillary". A clear example is the situation of a firm or a group selling energy or other commodities while it's offering its clients as an ancillary service the possibility to hedge its positions in these commodities via commodity derivatives.

"On a group basis"

We will use the definition of a group according to article 12 of the European Directive 83/349/EC

Question 7.5
There is no guidance produced

Question 7.6
Yes.

Question 7.7
We will use the definition of a group according to article 12 of the European Directive 83/349/EC

Question 7.8
We have knowledge of an energy provider who wants to offer the service developed as ancillary service for the main clients as well to other interested parties. They will no longer benefit of the exemption.

Question 7.9
We don't see appropriate examples of firms caught by the first exemption in Art 2(1)(i) that are not also caught by the Article 2(1)(d) exemption.

Question 7.10
We don't see appropriate examples caught by the Art 2(1)(k) exemption that are not also caught by the Article 2(1)(d) exemption.

Question 8.1
There is no guidance produced and we have no intention to do so.

Question 8.2
It will be considered on a case-by-case approach. Important guidelines are the definitions of regulated market and MTF (article 4 Level 1 Directive)

Question 8.3
We will have the same approach for both exotic and commodity derivatives

Question 8.4
No

Question 10.1

There is no intention to modify the actual regulation. Under Belgian law there exists since 2004 a specific license for derivative brokers acting exclusively for their own account. It's rather a light regime.

Question 10.2
No

Cyprus

Question 7.1
Yes, we are going to conduct a straight copy out of the above exceptions.

Question 7.2
At the moment we do not intend to issue any guidance.

Question 7.3

- We agree that Art. 2(1)(i) comprises of two exemptions.
- We understand that the phrase starting with 'provided that …' applies to both exemptions since the second exemption is separated, with comma, from the phrase 'provided that …'.

Question 7.4
At the moment we do not intend to interpret the above terms. We expect guidelines by the Commission.

Question 7.5
At the moment we do not intend to issue any guidance.

Question 7.6
Yes.

Question 7.7
We have copied out the definition given in the implementing directive 2006/73.

Question 8.1
At the moment we do not intend to issue any guidance.

Question 8.2
We will consider whether it is regulated by a Competent Authority and follows equivalent rules to those followed by Cypriot entities. We have not yet determined the exact way of their assessment.

Question 8.3
Yes.

Question 8.4
No at the moment.

Question 10.1
No intended regulation.

Question 10.2
No intended regulation.

Denmark

Question 7.1
Denmark has conducted a straight copy of the exceptions under art. 2 (1)(i) and (k) of MiFID.

Question 7.2
Denmark has not produced any guidance on the interpretation of art. 2 (1) (i) exemption and has not any intention of producing it at the moment.

Question 7.3
Denmark finds two exemptions in art. 2 (1) (i), one is related to dealing on own account and the other to providing investment services in commodity derivatives or derivative contracts. It is Denmark's opinion that the text "provided this is an ancillary activity to their main business" only applies to providing investment services in commodity derivatives or derivative contracts.

Question 7.4
"clients of their main business"
In Denmark's opinion a company can have as its main business to produce and sell energy as a generic concept, i.e. it shall not be limited to the one product that is its main product (e.g. electricity) if it also produces or sells other enegy products (e.g. gas, coal, oil, etc.). This means it can provide investment services with derivatives of all the energy products it produces or sells.

"ancillary"
An ancillary activity to the main business of a company has to be understood as an activity which is associated to or has a connection to the company's main business. This implies that a company whose main business is to sell energy, can have as ancillary activity to sell derivatives of oil.

"on a group basis"
The term "on a group basis" in our opinion has to be understood as a company structure with a parent undertaking and its subsidiary undertakings. In art. 2 (1) (i) it means that the investment services can be provided in any of the undertakings in the group.

Question 7.5
Denmark has not produced any guidance on the interpretation of art. 2 (1) (k) exemption and has not any intention of producing it at the moment.

Question 7.6
Art. 2 (1) (k) and art. 2 (1) (i) refers to different activities, but "main business" must be understood in the same way in both exemptions.

Question 7.7
The term "part of a group" will be interpreted as explained in question 7.4. A company is a part of a group when it is a parent undertaking and has subsidiary undertakings. A subsidiary undertaking is an undertaking with which a parent undertaking, directly or indirectly, has one of the links specified in the Danish Financial Business Act art. 5 (7).
A parent undertaking is an undertaking that:
a) holds the majority of the voting rights of an undertaking,
b) holds shares or other interests in the own funds of an undertaking (is a shareholder) and is entitled to appoint or remove a majority of the board of directors, board of management or similar management organ of the undertaking,
c) participates in the undertaking and is entitled to exercise a controlling influence on the undertaking under the articles of association or other agreements with said undertaking,
d) participates in the undertaking and commands the majority of the voting rights within the undertaking under agreements with other shareholders or owners of shares of the own funds within said undertaking, or
holds equity investments in an undertaking and exercises a controlling influence on said undertaking.

Question 8.1

Question 8.2

Question 8.3

Question 8.4

Question 10.1

Denmark has no intention of regulating entities exempt under at 2 (1) (i) (k).

Question 10.2

Denmark has no intention of regulating commodity or exotic derivatives that are not covered by MiFID.

Finland

Question 7.1
Yes, our jurisdiction is going to conduct a straight copy out of the exceptions under Articles 2(1)(i) and (k) of MiFID.

Question 7.2
No

Question 7.3
Yes

Question 7.4
On a group basis: This is defined in the Finnish Accounting Act, which is based on the Council Directives 78/6660/EEC and 83/349/EECon the annual accounts of certain types of companies and consolidated accounts.

Ancillary: This is under discussion.

Clients of their main business: Relationship with the client should be actual and active.

Question 7.5
Further guidance will be considered if there is a need for it.

Question 7.6
Yes.

Question 7.7
Group is defined in the Finnish Accounting Act, which is based on the Council Directives 78/6660/EEC and 83/349/EECon the annual accounts of certain types of companies and consolidated accounts.

Question 7.8
Yes, we agree. It would cover mainly energy suppliers.

Question 7.9
Not aware of any.

Question 7.10
Not aware of any.

Question 8.1
There are currently no plans to produce interpretation of article 38.

Question 8.2
This will be assessed if/when required.

Question 8.3
This is under discussion.

Question 8.4
-

Question 10.1
No such regulation intended.

Question 10.2
No such regulation intended.

France

Question 7.1
Yes, the articles 2(1)(i) and (k) of MIFID have been transposed with no amendments.

Question 7.2
No guidance has been produced on this exemption and none is planned. If questions are raised we will attempt to answer them, together with the banking authorities, after consultation with the relevant trade associations.

The current French legal regime (French monetary and financial code articles L531-2 §2 h) and i)) introduced in 2003 already provides for somewhat similar exemptions for which guidance has been produced.

Question 7.3
Yes, we agree with this interpretation[2] and think and this article must be read in conjunction with article 2 (1)(d).

Question 7.4
clients of their main business: typically, clients buying and selling commodities from/to these persons

ancillary: the envisaged approach is to consider the ancillary nature based on the annual turnover. The actual amount that would define the ancillary character is still under discussion. Ancillary is also understood mean that the ancillary business is related to the main business.

on a group basis: the French text transposing Art 2(1)(i) of MiFID (French monetary and financial code article L 531-2 §2 j)) refers to a specific legislative definition of "group" which includes entities in which 20% of the equity is held.

Question 7.5
Same answer as for question 7.2

Question 7.6
Yes. It should be pointed out however that there are two references to "main business" in Art 2(1)(k), one referring to the individual entity ("person") and the other referring to a "group".

Question 7.7
Same answer as for question 7.4

Question 7.8
A certain number of specialist commodity firms/commodity merchants and their trading subsidiaries are likely to fall within one of the two MiFID exemptions.

Question 7.9
Art 2(1)(i) appears to catch a larger number of firms than Art 2(1)(d) because the latter exemption only applies to dealing on own account and excludes market makers.

Question 7.10
Same response as to the previous question. Art 2(1)(k) is clearly wider than Art 2(1)(d) because of the reference to "main business

Question 8.1

Same answer as for questions 7.2 and 7.5.

Question 8.2
Third country facility that performs similar functions to a regulated market or MTF: no official guidance has been issued yet, however as a practical basis it is quite likely that this concept will cover, for example, the US trading venues such as the commodity derivatives markets and ECNs currently regulated by the US CFTC.

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[2] It may be pointed that, unlike the English language version of the text, there is no comma after « dealing on own account in financial instruments » in the French version of the text, and the French text goes on to say (when translated) « or providing investment services *concerning* commodity derivatives » which leads one to understand « dealing on own account »in Article 2(1)(i) as referring to dealing only in commodity and exotic derivatives. Article 2(1) (d) of course exempts, subject to certain conditions, dealing on own account in all financial instruments. Therefore the French text of (i) appears to be focused on commodity and exotic derivatives. Finally, the "or" in (i) would appear to need to be read as "and/or" in our opinion, at least in the French version. We would like to know if there is agreement on these various interpretative issues.

Other entity carrying out the same functions as a central counterparty: no official guidance has been issued yet, however we may anticipate situations on MTFs, where credit institutions could provide a central netting and margining facility that would include novation of the relevant contracts

Question 8.3

Question 8.4

Question 10.1

As a perpetuation of the current exemption philosophy existing in the French legal framework, it is not intended to regulate exempted entities under art 2 (1) (i) and (k). Of course, non financial regulation may apply to such entities, for example in the energy or agricultural markets.

Question 10.2

No such regulation is intended[3].

[3] It may be pointed out that a slightly broader definition of derivatives will apply for close-out netting purposes: contracts that are either recorded by a recognised clearing house or that give rise to periodic margin calls.

Germany

Question 7.1
Art. 2 (1) lit. i MiFID is transposed by § 2a (1) no. 9 Securities Trading Act (Wertapapierhandelsgesetz, "WpHG"). The wording of the directive has been copied with slide changes with a view to making the provision more readable. For the sake of clarity, a phrase has been added to stress that the investment services to be provided to clients of the main business must relate in substance to the main business. Furthermore, the German legislator has interpreted the first exemption (dealing on own account) as transacting solely without a client. This is because otherwise dealing on own account with clients would be permitted in financial instruments in general rather than just in the derivatives mentioned in the second exemption.

Art. 2 (1) lit. k MiFID has been transposed by § 2a (1) no. 12 WpHG. This provision virtually duplicates the wording of the MiFID, with one exception: Investment services provided by the undertaking alongside with their main business of dealing on own account in commodities or commodity derivatives are not exempted under no. 12. However, they may fall under another exemption.

Question 7.2
None.

Question 7.3
Yes. However, it is worth noting that the German legislator has adopted a narrow interpretation of the "dealing on own account" exemption in that it does not apply to all financial instruments. The legal materials, however, do not specify which ones. The rationale behind the narrow interpretation of the first exemption is to confine the exemption to allow commodity producers and commodity traders to hedge themselves against risks arising from their main business. The second exemption is aimed at providing investment services to clients of the main business.

Question 7.4
"clients of their main businesses":
Neither the law itself nor the legal materials define the concept of main business. However, the legal materials contain some indications. With regard to energy providers the production of energy, the operation and maintenance of the grid infrastructure (to the extent permitted under energy regulation), and the procurement of the public with energy are considered as main businesses for purposes of the exemptions.

As mentioned above (Qn. 7.1), the dealing on own account or the investment services must be substantively related to the main business which is understood as being remote from capital markets. Hence, neither the undertaking claiming one of the exemptions nor the group it forms part of may put an emphasis on banking or investment services.

"ancillary":
There is no definition of "ancillary". The legal materials merely clarify that in order for an activity to be ancillary to the main business, both must be sufficiently linked together in substance. Again, taking the example of energy providers, the sale and purchose of energy, the operation and maintenance of a grid infrastructure and the offer of services to clients of these activities aimed at hedging them against risks arising therefrom is deemed to fulfil the aforementioned condition. Taking the parallel situation under the Banking Act as a model, it can further be assumed that there must be a relationship to clients concerning contracts for physical delivery. Moreover, the size of the particular financial instrument may not be higher than the size of the related physical contract. And both contracts must correspond to each other so that the financial instrument can serve as a hedge for the physical trade.

"on a group basis"
This criterion is meant to exclude cases in which the various businesses conducted by undertakings forming part of the group, alongside with exempted investment services and related main business, puts an emphasis on other banking or investment services. While the legal materials are formally not very strict in this regard, it can be assumed that the offering of other banking or investment services by any group member on a commercial basis deprives the relevant group undertaking of the benefits of the exemptions. Hence, the person claiming the exemption does need to be licensed for the respective investment services.

Question 7.5
None

Question 7.6
The legal materials do not suggest any differences in the interpretation of "main business" in Art. 2 (1) lit. I and k MiFID.

Question 7.7
The term is interpreted in the same way as in Art. 2 (1) lit. I MiFID.

Question 7.8

In practice what types of firm are likely to be caught by Art 2(1)(i) and (k)? e.g. do you agree that, as indicated in Recital 22 MiFID Implementing Regulation, Art 2(1)(i) and (k) "exclude significant numbers of commercial producers and consumers of energy and other commodities, including energy suppliers, commodity merchants and their subsidiaries"?

The majority of exempted entities will be commodity merchants that are subsidiaries of energy producers or joint ventures of municipal energy suppliers.

Question 7.9
In practice are there any types of firm caught by the first exemption in Art 2(1)(i) (i.e. the dealing on own account in financial instruments limb) that are not also caught by the Article 2(1)(d) exemption? If so what types of firms are these?

We regard the first alternative of lit. i as virtually redundant.

Question 7.10
In practice are there any types of firms caught by the Art 2(1)(k) exemption that are not also caught by the Article 2(1)(d) exemption? If so what types of firms are these?

This will clearly depend on the substantive scope of lit d). However, it is estimated that an abolition of the lit. k exemption would affect approx ten undertakings in Germany whereby it should be born in mind that according to the German transposition act dealing on own account for clients is not covered by the first alternative of lit. i), but merely by lit. k).

Question 8.1
None

Question 8.2
The BaFin will draw up a list of third country market places *carrying out the same functions as a central counterparty*.

Question 8.3
Yes

Question 8.4
No

Question 10.1
Apart from the EU-driven legislation concerning energy markets there is currently no other legal instrument in place. The German government is, however, contemplating to take steps in order to improve the detection and prosecution of insider dealing and market manipulation on electricity markets.

Question 10.2
At present, no such regulation is intended.

Greece

As a general remark we would like to inform you that in Greek Law the regulation of providing services in commodities derivatives has applied quite recently, and no regulation exists concerning exotic derivatives. Bearing that in mind, on the following we state our reflections on some of the questions posed.

Question 7.1
In the transposition there will be no amendments concerning Article 2 (1)(i) and (k).

Question 7.2
In this point there is no intention of issuing any specific guidance. We intend to wait for the reactions and questions that would probably be raised by the interested parts and afterwards issue if necessary the most appropriate guidance.

Our position is affirmative concerning the above mentioned question.
~
Same perception as in question 7.2.
Both in Art 2(1) (k) and (i) "main business" has the same meaning.
~
Same perception as in question 7.2.
~
Question 7.8
No such type of firms operate in Greece

Question 7.9
Not aware of any firm operating now

Question 7.10
Not aware of any firm operating now

Question 8.3
~

Question 8.4
There are no additional views.
On present there is no intention for additional regulation.
Same perception as in question 7.2.

Hungary

First of all, we would like to note that the Ministry of Finance is responsible for the implementation of MiFID.

Question 7.1
Our jurisdiction is not going to conduct a straight copy out of the exceptions under Articles 2(1)(i) and (k) of MiFID, since the Act aiming to implement the MiFID provisions simultaneously contains the regulation of the commodity service providers. The Act therefore does not explicitly exclude all commodity related activities mentioned in Articles 2(1)(i) and (k) of MiFID from its scope.

Question 7.2
According to the relevant legal provisions the HFSA is allowed to publish non- compulsory recommendation containing guidelines of applied judicial principles. Regarding that the implementation of MiFID is still a pending issue the HFSA has not produced any guidance on this topic. The HFSA has not published any guidance on the interpretation of the 2(1)(i) exemption, nor has it any intention at the moment to do so in the future.

Question 7.3
We agree that Art 2(1)(i) comprises two exemptions. According to our understanding the following phrase applies to both of them: "in commodity derivatives or derivative contracts included in Annex I, Section C 10 to the clients of their main business, provided this is an ancillary activity to their main business, when considered on a group basis, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2000/12/EC.

This interpretation is supported by Recital (18) of the implementing regulation which states that the exemptions in Directive 2004/39/EC that relate to dealing on own account or to dealing or providing other investment services in relation to commodity derivatives covered by Sections C(5), C(6) and C(7) of Annex I to that Directive or derivatives covered by Section C(10) of that Annex I could be expected to exclude significant numbers of commercial producers and consumers of energy and other commodities, including energy suppliers, commodity merchants and their subsidiaries from the scope of that Directive, and therefore such participants will not be required to apply the tests in this Regulation to determine if the contracts they deal in are financial instruments.

Question 7.4
Main business is those activities that are specified as such in the deed of foundation. Ancillary activity is always relating to a main activity, ancillary activities could not stand alone, which means that it assists in a main business activity. The phrase of group basis refers to the ancillary activity: e.g. one group member is engaged in this kind of activity to assist to an activity carried out by other member of the group.

Question 7.5
According to the relevant legal provisions the HFSA is allowed to publish non- compulsory recommendation containing guidelines of applied judicial principles. Regarding that the implementation of MiFID is still pending issue the HFSA has not produced any guidance on this topic. The HFSA has not published any guidance on the interpretation of the 2(1)(k) exemption, nor has it any intention at the moment to do so in the future.

Question 7.6
Yes, we do.

Question 7.7
According to the level two directive group in relation to an investment firm, means the group of which that firm forms a part, consisting of a parent undertaking, its subsidiaries and the entities in which the parent undertaking or its subsidiaries hold a participation, as well as undertakings linked to each other by a relationship within the meaning of Article 12(1) of Council Directive 83/349/EEC on consolidated accounts. This definition should prevail when interpreting the phrase "part of a group".

Question 7.8
Commodity service providers authorized by HFSA are likely to be caught by Art 2(1)(i) and (k). The number of these entities is not significant, namely fourteen as of 31st August 2007.

Question 7.9
Yes, firms which are „market makers or deal on own account outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;" (Exemptions from exemption specified by Article 2(1)(d), which are simultaneously caught by the first limb of Art. 2 (1) (i))

Question 7.10

Yes, firms which are „market makers in commodities and/or commodity derivatives or deal on own account in commodities and/or commodity derivatives outside a regulated market or an MTF on an organised, frequent and systematic basis by providing a system accessible to third parties in order to engage in dealings with them;" (Exemptions from exemption specified by Article 2(1)(d) in commodities and/or commodity derivatives, which are simultaneously caught by Art. 2 (1) (k)).

Question 8.1
According to the relevant legal provisions the HFSA is allowed to publish non- compulsory recommendation containing guidelines of applied judicial principles. Regarding that the implementation of MiFID is still a pending issue the HFSA has not produced any guidance on this topic. The HFSA has not published any guidance on the interpretation of Article 38, nor has it any intention at the moment to do so in the future.

Question 8.2
When assessing weather a third country entity performs similar functions as RMs and MTFs the elements of the definition included in MiFID should be considered:

- if it brings together or facilitates bringing together multiple third party buying or selling interests;
- if it operates on the base of non discretionary rules.

In case of assessing entities carrying out the same functions as a central counterparty, the current domestic practice should govern meaning that the entity is question should be able to carry out those functions as the domestic CCP.

Question 8.3
As Article 38 (3)(c) of the implementing regulation refers to 38 (1), the same meaning should be given.

Question 8.4
-

Question 10.1
We have no information on this issue.

Question 10.2
We are not aware of any intention to regulate commodity or exotic derivatives not covered by sections C(5) to C(7) and C(10) of Annex I.

Ireland

Question 7.1
In Ireland the implementing legislation has conducted a straight copy out of Article 2(1)(i) and (k) of the MiFID.

Question 7.2
No formal guidance has been issued to date.

Question 7.3
We would agree that the Article comprises two exemptions and we would also agree that the phase starting with " provided that" would apply to both.

Question 7.4
Clients of their main business
We would consider this to mean that the client must be availing of unregulated activities/services provided by the firm in order to avail of the services on derivatives contracts and clients could not seek the services only in respect of derivative contracts from the firm, without also availing of other services provided by the firm. To avail of this exemption persons can only provide investment services in commodity derivatives to individuals that are clients of the main business and clients of the main business include those that avail of services from that part of the business that is not considered ancillary.

Ancillary
We would consider that in order for a firm to qualify as providing investment services "in an incidental manner" it will be necessary for us to be satisfied that:

the main activities of the firm are the provision of professional services other than investment business and
the provision of the investment services is not isolated from the other activities of the firm so that it is in effect a separate business.

The test at (i) is measurable in quantitative terms: if less that 20 percent of total turnover on an annual basis comes from investment business, the quantitative test is satisfied.

On a Group Basis
We would consider that this to mean the total services provided by the Group to which the firm belongs including the exempted services. We would envisage using group–consolidated accounts to assist in determining what services represent a level of services that are considered to be ancillary.

Question 7.5
We have not produced any guidance on the interpretation of the above article.

Question 7.6
We would consider that the same should be applied.

Question 7.7
We would consider this to mean the linkage of the firm to other entities in group, tests to be used would include where there is a parent undertaking and subsidiary undertakings and the firm is a subsidiary undertaking or a group of undertakings linked to each other by a common relationship, common shareholders. We would not consider associate relationships to fall within this definition.

Question 8.1
We have not or do not plan to produce any guidance on Article 38.

Question 8.2
In assessing whether an entity meets the criteria noted above, we would need for the entity to demonstrate that it is subject to equivalent criteria to that noted in Title III of the MiFID. We would also give consideration to recognition where the facility has been accepted by another competent authority. We would also seek evidence of the existence of rules and procedures in relation to trading and execution.

Question 8.3
Yes

Question 8.4
No

Question 10.1
There is no planned regulation of the entities exempted under the above article.

Question 10.2
There is no planned specific regulation of any such commodity or exotic derivatives.

Italy

Question 7.1
In Italy the provision of investment services or activities to the public on a professional basis is reserved to investment firms, banks and other authorized financial intermediaries.

Financial intermediaries authorized to provide the services of acquiring holdings, granting loans in whatever form, trading in foreign exchange, may be authorized to provide to the public on a professional basis the investment services of dealing on own account and execution of order on behalf of clients exclusively in derivative financial instruments and subject to the condition that those investment services are correlated with the principal financial activity performed. In the performance of investment services or activities such financial intermediaries are subject to the same provisions of investment firms and banks.

Entities which are not meeting the above mentioned preconditions (i.e. provision on a professional basis to the public of activity subject to legal reserve) fall outside the remit of securities regulation.

The Minister for the Economy and Finance, in a regulation adopted after consulting the Bank of Italy and Consob may issue rules implementing and integrating the reservations of activities in compliance with the provisions of Community law.

Question 7.2
No specific guidances are available at this stage.

Consob will issue, if needed, guidance after the entry into force of MIFID implementing provisions.

Question 7.3
Yes we do agree that Article 2(1)(i) comprises two exemptions one relating to the dealing on own account and the other to the provision of services in commodity and exotic derivatives, however we believe that the sentence starting with "provided that..." it is applicable only to the second exemption. This reading is quite clear from the Italian version of the Directive, furthermore we believe that the first exemption (dealing on own account) should be interpreted in conjunction with Article 2(1)(d) and recitals 8 and 25. A coordinated reading of the provisions mentioned above, which are all related to "persons dealing on own account" will avoid any inconsistency between the two exemptions in Article 2(1)(d) and 2(1)(i) and will specify that the exemption in Article 2(1)(i) refers only to "persons administering their own assets" as provided for in Recital 8.

Question 7.4
"Client of their main business" means clients that have business relations with respect to the core business performed by the exempt person and must be different from the dealing in commodity or exotic derivatives.

"Ancillary" means that it should be helpful with respect to the provision of the core service. Moreover the revenues generated by the provision of investment services in commodity and exotic derivatives compared to those generated by the provision of the main services should be negligible.

"On a group basis" means that the revenues generated by the provision of investment services in commodity and exotic derivatives by all the entities of the groups should be negligible in respect to the whole revenues of the group.

Question 7.5
See answer 7.2.

Question 7.6
Yes.

Question 7.7
We refer to the entities listed in Article 1, para 1 and 2, of Directive 83/349/EEC.

Question 7.8
We believe that those two exemptions clarify that commercial producers and consumers of energy and other commodities are excluded from the scope of the directive.

Question 7.9
In our opinion the firms caught by the two exemptions are of the same type.

Question 7.10

Yes. We believe that art 2(1)(k) refers to firms whose main business is dealing on own account in commodities and/or commodities derivatives and whose activity is linked to the activity in commodities and commodity derivatives as market maker.

Question 8.1

See answer 7.2.

Question 8.2

Third country facilities will be subject to an equivalence assessment aiming at evaluating if the rules governing them are equivalent to those applicable in accordance with relevant community legislation.

Question 8.3

Yes.

Question 8.4

Presently we do not plan to introduce additional criteria.

Question 10.1

No special regime is foreseen at this stage.

Sector specific regulations may apply to such entities in relation to the commodities traded, however those regulations will not be related to MIFID implementation.
In case such entities become members of regulated markets where commodity and exotic derivatives are traded, they will be subject to markets regulations approved by Consob.

Question 10.2

Italian legislation in certain cases covers all types of financial products, i.e. financial instruments and whichever form of investment of a financial nature except bank or postal deposits without the issue of financial instruments and including financial products issued by insurance companies, i.e. unit linked life polices and capital redemption operations.

Malta

Background
In Malta there are only a few investment firms which are authorised to provide services in relation to derivatives which could include commodity or exotic derivatives. There are no derivatives traded on the Malta Stock Exchange which is Malta's only regulated market.

In the light of the above, Malta will be conducting a straight copy out of all the relevant references to derivatives (including commodity or exotic derivatives) found in the MiFiD. The nature and size of the local market, at this point in time does not warrant the issue of further guidance.

Question 7.1
Malta will conduct a straight copy out of the exceptions in Artiicles 2(1)(i) and (k) of the MiFiD.

Question 7.2
MFSA does not plan to issue any guidance in this regard.

Question 7.3
We agree with this interpretation.

Question 7.4
With respect to the term:

(a) *"on a group basis":* The relevant Maltese secondary legislation which transposes Article 2 of the MiFiD contains the following definition of the term "*in the same group*":

"*in the same group*", in relation to any company, means any body corporate which is that company's subsidiary or parent company, or a subsidiary of that company's parent company;
Moreover a parent company is defined as being a company which:

(i) has a majority of the members' voting rights in another undertaking (a subsidiary); or
(ii) has the right to appoint or remove a majority of the members of the board of directors or persons entrusted with the administration of another undertaking (a subsidiary) and is at the same time a member of that undertaking;

(b) "ancillary" : We would consider an activity to be 'ancillary' for these purposes, if it is both directly related and subordinate to the main business of the group.

(c) "clients of their main business" : We would interpret this term in the context of the main business of the group such that the exemption will only apply if the activity in question is ancillary to the main business of the group (and such main business must be neither investment services nor banking services).

Question 7.5
Reference is made to our comments under "background" above. In the light of the local scenario, no publicly available guidance has been issued and no such guidance is envisaged to be produced for the time being.

Question 7.6
We would give the term "main business" in Art 2(1)(k) the same meaning as under Art 2(1)(i).

Question 7.7
Please refer to the reply we provided to Question 7.4 above.

Question 8.1
Please refer to our comments in reply to Q. 7.5 above.

Question 8.2
In carrying out such assessment MFSA will probably look at the operations of the entity in question and compare them with the normal functions of a regulated market, MTF or central counterparty as necessary.

Question 8.3
Yes.

Question 8.4
No.

Question 10.1
In the light of our comments under 'Background' above there is no intended regulation of entities exempt under article 2(1)(i) and (k) of the MiFiD.

Question 10.2
In the light of our comments under 'Background' above there is no intended regulation of commodity or exotic derivatives not covered by sections C(5) to C(7) and C(10) of Annex I to MiFID and articles 38 and 39 of the implementing regulation.

Luxembourg

Question 7.1
Yes. A straight copy-out of the exemptions has been included within the law of 13th July 2007 transposing the L1 framework directive.

Question 7.2
The CSSF did not produce any guidance regarding the exemption.

Question 7.3
We would agree that the article comprises two exemptions and that the phrase starting with "provided that" would apply to both[4].

Question 7.4
No definite interpretations have been determined.

Question 7.5
The CSSF did not produce any guidance regarding the exemption.

Question 7.6
No definite interpretation has been determined.

Question 7.7
No definite interpretation has been determined.

Question 8.1
The CSSF did not produce any guidance on this matter.

Question 8.2
The assessment will be performed on a case by case basis.

Question 8.3
Yes

Question 8.4
We do not have additional views on this.

Question 10.1
There is not intended regulation of these entities.

Question 10.2
There is no such regulation intended.

[4] Article 72 of the law of the 13th of July 2007 modifying article 13 (2) (l) of the law of 1993 pertaining to the financial sector reads as follows : [Le présent chapitre ne s'applique pas] "aux personnes négociant des instruments financiers pour compte propre ou fournissant des services d'investissement portant sur des instruments dérivés sur matières premières ou des contrats sur instruments dérivés visés à l'annexe II, section B, point 10 aux clients de leur activité principale à condition que ces prestations soient, au niveau du groupe, accessoires par rapport à leur activité principale et que cette dernière ne consiste pas dans la fourniture de services d'investissement visés aux sections A et C de l'annexe II ou l'exercice de l'une ou plusieurs des activités visées à l'annexe I ».

The Netherlands

Question 7.1
Yes, in the Netherlands the exceptions under Articles 2(1)(i) and (k) will be copied out one-on-one from the MiFID. In our opinion it is also very important that all member states implement these exemptions in exactly the same way (straight copy out). This guarantees a level playing field for firms trading in commodity derivatives. Furthermore the exemptions take into account the specific characteristics of the commodity derivatives market.

Question 7.2
At this moment the AFM has not produced and has no intention yet to produce any guidance on the interpretation of the 2(1)(i) exemption. However, we have spoken to several entities active on the energy market and explained them our point of view (outlined in our answer to question 7.1) on this topic.

Question 7.3
Yes, in our opinion 2(1)(i) comprises two exemptions, one relating to dealing on own account and the other to providing investment services in commodities and exotic derivatives. In line with the exception in the exemption in Article 2(1)(k) the phrase starting with "provided that…" does apply to both exemptions and not just to the second exemption.

Question 7.4
When considering the company as a whole (including subsidiaries) providing investment services or performing investment activities as defined by MiFID should not be the main activity of the group, but an extra 'service' to clients of the main business of the group. For example offering investment services to clients of an energy producer who buys electricity or gas from that producer.

Question 7.5
At this moment we have not produced and have no intention yet to produce any guidance on the interpretation of the 2(1)(i) exemption. However, we have spoken to several entities active on the energy market and explained them our point of view (outlined in our answer to question 7.1) on this topic.

Question 7.6
Yes, we give "main business' the same meaning as under Article 2(1)(i). However, the first reference to "main business" under Art. 2(1)(k) is determined on an entity basis and not on an group basis, unlike the second reference to "main business" in Art. 2(1)(k) and both references in Art. 2(1)(i).

Question 7.7
We interpret "part of a group" as a being part of a group of companies of which each company's majority of the shares are (ultimately) owned by the same parent company.

Question 7.8

The firms most likely to be caught by 2(1)(i) are for example energy companies (or the trading desks of these companies).

The companies that are caught by 2(1)(k) will probably be pure energy (derivatives) traders or commodity merchants. Furthermore large energy consumers who want to hedge their energy price exposure are likely to fall under this exemption.

We think that this exemption will indeed exclude certain companies from the MiFID regulations.

Question 7.9

We cannot think of companies that are caught by the exemption in 2(1)(i) (regarding the dealing on own account in financial instruments) that are not also caught by the exemption in 2(1)(d).

Question 7.10

In theory a market maker in commodity derivatives is caught by the exemption in 2(1)(k) but not by the exemption in 2(1)(d).

Furthermore - if you take Art. 2(1)(k) literally - an investment firm that has trading in commodities (derivatives) as its main activity is exempted from the MiFID when it wants to offer other investment services (whether or not they relate to their commodity trading activities). They would not fall under Art. 2(1)(d).

Question 8.1

At this moment the AFM has not produced and has no intention yet to produce any guidance on the interpretation of Article 38.

Question 8.2
We will determine this on a case-by-case basis, using the relevant definitions and articles with regard to regulated markets and multilateral trading facilities contained within MiFID.

Question 8.3
Yes

Question 8.4
No

Question 10.1
The AFM has no intention to formulate additional regulation for entities which are exempt under 2(1)(i) and (k). As mentioned in our answer to question 7.1 it is in our opinion very important that member states implement these exemptions in exactly the same way (straight copy out). This guarantees a level playing field for firms trading in commodity derivatives. Furthermore the exemptions take into account the specific characteristics of the commodity derivatives market.

Question 10.2
The AFM has no intention to formulate additional regulation for commodity or exotic derivatives not covered by sections C(5) to C(7) and C(10) of Annex I to MiFID and articles 38 and 39 of the implementing regulation.

In The Netherlands the Dutch central bank (DNB) is the prudential regulator. We have no knowledge of any desire by DNB to impose additional prudential regulation for firms active on commodity markets.

Norway

Question 7.1
Norway has implemented the exemptions by way of a straight copy out of the relevant MiFID articles.

Question 7.2
We have published a circular, which address the interpretation of the exemption (Circular 24/2007).

Question 7.3
Kredittilsynet agrees that Art 2 (1) (i) comprises two exemptions and that the mentioned phrase applies to both exemptions.

Question 7.4
"Clients of their main business": Kredittilsynet is of the opinion that in order for a party to be considered a client of the main business, there needs to be a direct commercial link between the party in question in respect of the main business of the company. I.e. the party in question must have a customer relationship with the company other than in respect of investment services regarding commodity and/or exotic derivatives. Furthermore, the commercial relationship will have to be between known parties, eg, no such customer relationship will be considered to be established between an producer of electricity and another party solely on the basis of trading of electricity in the Nord Pool spot market.
Furthermore, Kredittilsynet assumes that the customer relationship must be of a lasting nature. It will thus not be sufficient that the party in question is a customer at the time the company first provides investment services mentioned in the exemption.

"Ancillary": The distinction between ancillary and main business should be considered by financial measures. Thus, the main criterion will be the revenue generated by the business lines. The revenue generated by the investment services should be determined by way of commissions, fees, etc. earned by the company, and not value of the derivative contracts. However, the determination should not be based purely on such financial measures. Kredittilsynet thinks that there needs to be a natural connection between the main business and the mentioned investment services as the ancillary business.

"On a group basis": This condition relates to the distinction between main and ancillary business. In determining whether the exemption applies it is therefore irrelevant whether a group has established a separate legal entity for the provision of the mentioned investment services, as long as the other conditions are satisfied. Customer relationships with other group companies will thus be relevant. The revenue generated by the provision of investment services must be compared with the revenue generated by the other business lines of the group.

Question 7.5
Same as 7.2.

Question 7.6
The determination of what constitutes the main business should be made by way of the same criterions under both articles. However, under article 2(1) (k) what constitutes the main business should be considered for the individual company on a stand alone basis, as opposed to under Article 2 (1) (i) the determination should be made on a group wide basis. The practical application of the term will, thus, be different under the two articles.

Question 7.7
The determination of whether a company is part of a group must be determined in accordance with applicable company law.

Question 7.8
Examples of companies in the Norwegian market likely to be caught by the exemptions are companies whose main business is the production, transmission and distribution of electricity. We agree that the indication in Recital 22 of the implementing regulation is correct.

Question 7.9 and 7.10
The scope of the exemptions in Article 2(1)d and 2(1)i are different. The exemption in d is very limited in scope and will only apply to persons making a limited number of trades. The exemptions under I and k have much wider scopes of application and also apply to the entities specifically excluded from the scope of the exemption under d, such as market makers.

Question 8.1
Kredittilsynet has not produced any publicly available guidance on the interpretation of article 38.

Question 8.2

The determination must be made on a case-by-case basis.

Question 8.3
Yes.

Question 8.4
No.

Question 10.1
No additional regulation of entities exempt under Article 2(1) (i) and (k) has been decided. We are not aware of any such intended regulation.

Question 10.2
No additional regulation of commodity or exotic derivatives not covered by sections C(5) to C(7) and C(10) of Annex I to MiFID and articles 38 and 39 of the implementing regulation has been decided. We are not aware of any such intended regulation.

Poland

Question 7.1
Polish Jurisdiction intends to conduct a straight copy out of the exceptions under Article 2 (1) i, k of MiFiD.

Question 7.2
No

Question 7.3
Yes, we agree that Art 2 (1) (i) comprises two exemptions (one relating to dealing on own account, the other to providing services in commodity and exotic derivatives) and that the phrase starting with „….provided that…" applies to both of them. The suitable amendments within polish capital market law particularly Act on Trading in Financial Instruments are in course of preparing.

Question 7.4
Clients of their main business – it is a general clause and shall be assess „ad casum" - with regard to concrete case, matter. However, to be precise and to ensure the legal consistency within European capital market law the following prerequisites shall be taken into account:
scope of business performed by investment firm,
frequency of undertaken business,
incomes value generated by that kind of business related to other sources of incomes.
Ancillary – ancillary business is considered as a kind of undertaken business that is not in a main stream of an undertaken activities. It is provided for a selected group of clients. An investment firm may perform a recommendation related to some underlying products for some clients.

On a group basis – the term is related to the company (capital group) as a whole including subsidiaries and parent (dominating) companies.

Question 7.5
Due to the fact that Polish capital market at present is not very well developed with regard to commodities derivatives Polish supervision authority doesn't produce any publicly available guidance. However, if a polish capital market shall expand within the above mentioned sector Polish authority will produce such guidance in the future. Presently there is no need to produce such documentation.

Question 7.6
Polish supervision authority gives the same meaning of the term "main business" referred to art. 2 (1)(k) as in art 2 (1) (i). There are no differences.

Question 7.7
The term "being part of a group" is defined according to provisions of a Polish Accounting Act and a Polish initial public offering and public companies act.
Particularly the term is considered as a legal entity including subsidiaries, correlated subsidiaries, associated subsidiaries and parent (dominating) company of a capital group.

Question 8.1
The publicly available guidance is currently not planned to be produced because of lack of needs from Polish investment firms that are not yet involved in both commodities and especially exotic derivatives very deeply. However, it is not excluded to produce above mentioned documentation in the future if the Polish market gradually expands in that sector.

Question 8.2
The Polish supervision authority gives the meaning of the terms a „third country facility that performs similar functions to a regulated market or MTF" and an „other entity carrying out the same functions as a central counterparty" according to the art. 4 clause 1 points 14 and 15 of the MiFID I.

Question 8.3
With regard to the giving the same meaning to the conditions under art. 38 (1) for the purpose of commodity derivative and for the purpose of exotic derivatives the Polish supervision authority suggests the fulfillment of prerequisites under art. 38 (3) (c) Commission Regulation EC No 1287/2006.

Question 8.4
No suggestions

Portugal

Question 7.1
The Portuguese draft transposition legislation takes a copy out approach to the provisions in question. (Article 289/3/h and g – respectively – of the proposed amendments to the securities act.)

Question 7.2
There is no publicly available guidance on the interpretation of the article 2(1)(i) exemption issued by a Portuguese authority, and issuance of such guidance in the near future is not foreseen.

Question 7.3
Yes, we do.

Question 7.4
'clients of their main business' – clients, which main relationship with the investment services provider in commodities derivatives relates to another activity and to which the provision of services in commodities derivatives is residual.
'ancillary' – activities in commodities derivatives that are instrumental to the prosecution of the main business.
'on a group basis' –The general meaning of the term is defined in company law. According to the statute on company law there is a group, whenever a) a company owns another one, b) by contract several companies are subject to a single administration.

Question 7.5
There is no publicly available guidance on the interpretation o of the 2(1)(k) exemption issued by a Portuguese authority, and issuance of such guidance in the near future is not foreseen.

Question 7.6
Yes, we do.

Question 7.7
See answer to question 7.4.

Question 7.8
We agree with what is stated in recital 22 of MiFID Implementing Regulation, that is we think that Art 2(1)(i) and (k) include commercial producers of commodities (including energy and gas), suppliers and their subsidiaries.

Question 7.9
No. Article 2(1)(d) has a broader scope than article 2(1)(i) and so firms that are caught by the first exemption of article 2(1)(i) are also caught by article 2(1)(d).

Question 7.10
No. Article 2(1)(d) has a broader scope than article 2(1)(k) and so firms that are caught by the exemption of article 2(1)(k) are also caught by article 2(1)(d).

Question 8.1
There is no publicly available guidance on the interpretation of article 38.º of the implementing Regulation issued by a Portuguese authority, and issuance of such guidance in the near future is not foreseen.

Question 8.2
A 'third country facility that performs similar functions to a regulated market or MTF' will be assessed as an entity that performs the functions described in Article 4 (1) 14 and 15 MiFID.

Question 8.3
Yes, we are.

Question 8.4
No.

Question 10.1
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Question 10.2
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Romania

Question 7.1
Romania has conducted a straight copy of the exceptions under art. 2 (1)(i) and (k) of MiFID.

As a general remark we would like to inform you that CNVM, as supervisory authority for Romanian capital market, has no attributions related to commodities markets (the organization and operation of commodities exchanges fall under the authority of the Steering Committee of the Chamber of Commerce and Industry of Romania).
The commodity derivatives are included in the category of the financial instruments, according to the Capital Market Law no.297/2004 (art.2 alin.1 pct.11 letter h).
Also, there are no regulation concerning exotic derivatives.

Question 7.2
None.

Question 7.3
Yes.

Question 7.4
No definitive interpretations have been determined.

Question 7.5
We refer to answer 7.2. above.

Question 7.6
We refer to answer 7.4. above.

Question 7.7
We refer to answer 7.4. above.

Question 8.1
None.

Question 8.2
No official guidance has been issued yet

Question 8.3
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Question 8.4
No at the moment.

Question 10.1
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Question 10.2
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Spain

Question 7.1
Spain intends to conduct a straight copy out of the exemptions under Articles 2 (1) (i) and (k). However, in the light of the uncertainties related to the Commission's review under Article 65 of Directive 2004/39/EC, we think it may be worth considering the distinction between firms that deal own behalf and for their own account to take their own proprietary positions, and firms that deal on own account with clients

Question 7.2
At this moment there is no guidance on the interpretation of the 2(1)(i) exemption. However, the CNMV is currently undertaking the developing of further guidance on certain MiFID related topics as it has been requested by the industry. We do not rule out that, in the course of this process, further guidance on 2(1)(i) exemption will be produced.

Question 7.3
Yes, the CNMV agrees that Art 2(1)(i) comprises two exemptions and that the phrase starting with "provided that…" applies to both of them

Question 7.4
On a group basis: We will consider, in line with the Commission's view, that ´group´ covers all undertaking (whether subsidiaries or not) which are required to prepare consolidated accounts with another undertaking in accordance with Directive 83/349/EEC or similar criteria for non-EEA firms.

Ancillary: We will consider an activity to be 'ancillary' if it is both directly related and subordinated to the main business of the group.

Clients of their main business: Clients with an active commercial relationship with the main business of the company

Question 7.5
At this moment there is no guidance on the interpretation of the 2(1)(k) exemption. However, the CNMV is currently undertaking the developing of further guidance on certain MiFID related topics as it has been requested by the industry. We do not rule out that in the course of this process further guidance on 2(1)(k) exemption will be produced.

Question 7.6
We would give the term "*main business*" under Art 2(1)(k) the same meaning as under Art 2(1)(i).

Question 7.7

See answer 7.4

Question 7.8
We agree that certain commodity merchants and their trading subsidiaries will be exempt as a result of the application of Art 2(1)(i) and (k)

Question 7.9
We consider that there may be firms caught by art 2 (1) (i) that are not under the scope of Art. 2(1) (d). For example, some industrial entities that have trading subsidiaries acting as market makers in commodities derivatives would be excluded by lit (i) and not by lit (d)

Question 7.10
We consider that there may be firms caught by art 2 (1) (k) that are not under the scope of Art. 2(1) (d). For example, entities which main business is market making by dealing on own account on commodity derivatives.

Question 8.1
At this moment there is no guidance on the interpretation of Article 38 of the Implementing Regulation. However, the CNMV is currently undertaking the developing of further guidance on certain MiFID related topics as it has been

requested by the industry. We do not rule out that, in the course of this process, further guidance the interpretation of Article 38 will be produced.

Question 8.2

The determination will be made on a case-by-case basis taking into a account the MiFID definitions regarding regulated markets and MTF.

Question 8.3

Yes, the CNMV gives the conditions the same meaning for both purposes.

Question 8.4

At the moment, the CNMV has no additional views on this matter.

Question 10.1

There is no planned regulation of the entities exempt under art 2 (1) (i) and (k).

Question 10.2

There is no planned regulation of commodity and exotic derivatives not covered by sections C(5) to C(7) and C(10) of Annex I to MiFID and articles 38 and 39 of the Implementing Regulation.

Sweden

Question 7.1
Yes, the exceptions are copied out in the primary legislation

Question 7.2
No guidance has been published so far

Question 7.3
Yes, we agree with the first assumption and also agree on the assumption that " provided this.." applies to both exemptions.

Question 7.4
The terms have not been interpreted yet

Question 7.5
No guidance has been published so far.

Question 7.6
Yes, the legislator has used the same expression in both cases

Question 7.7
We have a definition in our primary legislation referring back to commercial law.

Question 7.8
Energy suppliers may be caught. Most of them are authorised as investment firms today according to the national law implementing ISD in Sweden, which defined commodity derivatives as financial instruments. Many of them have indicated that they don´t fall under the exemption and that they would need to have the Mifid-license.

Question 7.9
We are not aware of any such cases.

Question 7.10
The firm under 2.1 (k) could be a market maker for a narrow scope of instruments. The firm under 2.1.d is excepted for a wider range of instrument but could not be a market maker. In practice we are not aware of any firm caught by 2 (1) (d)

Question 8.1
No guidance has been published so far.

Question 8.2
We could not explain that yet. Will be decided on a case by case basis

Question 8.3

Question 8.4

Question 10.1
No additional regulation is planned

Question 10.2
No such regulation is planned

United Kingdom

Question 7.1
The UK intends to conduct a straight forward copy out of the exemptions under Articles 2 (1) (i) and (k) of MiFID and does not intend amendments. However, in copying out the exemptions this will serve to determine which UK firms are MiFID firms rather than necessarily whether a firm is required to be regulated in the UK.

Question 7.2
The UK FSA published PS 07/5 – Perimeter Guidance relating to MiFID, in March 2007 (http://www.fsa.gov.uk/pubs/policy/ps07_05.pdf). This document explains the UK's understanding of the exemption in Article 2(1) (i). The relevant sections in that document are: Section 13.5 Qs 44 and 45.

Question 7.3
Question 44, of PS 07/5, states the UK FSA's understanding and interpretation of Article 2 (1) (i) that it comprises two exemptions. Further, the phrase beginning with "provided this is an ancillary activity to their main business" applies to both dealing on own account as well as to providing services in commodity and exotic derivatives.

Question 7.4
Question 44 of PS 07/5 sets out the factors it considers to be relevant when considering whether any one operation or business line amounts to a firm's or group's main business. "Clients of their main business" should be understood to mean clients of the operation or business line that has been determined, by way of the analysis in Q.44, to be the main business of the firm or group.

Question 45 of PS 07/5 sets out the UK FSA's understanding of "ancillary" activity. Broadly, for the purposes of Article 2(1)(i), the activity must be both directly related to and subordinate to the main business of the group.

The UK FSA has not set out a specific definition of 'group basis', although we have
obviously seen the Commission's response to Question 59 on its Q&A Database which says that the notion of a group covers all undertakings which are required to prepare consolidated accounts with another undertaking in accordance with Directive 83/349/EEC.

Question 7.5
As stated at Q.7.2, The UK FSA has published PS 07/5 which is intended to aid firms in the interpretation of Article 2(1)(k). The relevant section is 13.5 Q.46.

Question 7.6
Question 46 of PS 07/5 states that 'main business' is determined on an entity basis and not a group basis, unlike the exemption at Article 2(1)(i). Subject to this, in our view a similar approach to determining what amounts to a firm's main business can be applied to both 2.1(i) and 2.1(l).

Question 7.7
As stated in our response to Q 7.4, the UK FSA has not produced guidance on what
constitutes a group but we have seen the Commission's response to Question 59 on its Q&A Database which relates to this issue.

Question 7.8
Yes, we expect significant numbers of commercial producers and consumers of energy and other commodities, including energy suppliers, commodity merchants and their subsidiaries to be excluded from MiFID as a result of the operation of Art 2(1)(i) and (k). Of those specialist commodity derivative firms (i.e. those that would meet the criteria of re-cast CAD Art 48(1)) that we currently regulate we estimate that approximately 50% may be MiFID exempt as a result of either Art 2(i) and/or (k).

It is worth noting that some trading subsidiaries of commodity firms appear to be ensuring that their business model is such that the exemptions do not apply and they are therefore able to "passport" their services across the EU.

Question 7.9
It may be that there are some firms that are caught by Art 2(1)(i) and not Art 2(1)(d) as a result of providing investment services or activities other than dealing on own account.

Question 7.10
The exemption in article 2(1)(d) can only apply to firms who do not provide any investment service or activity apart from dealing on own account, whereas article 2(1)(k) applies to firms whose "main business" consists of dealing on

own account in commodities / commodity derivatives. In our view, a firm can take advantage of article 2(1)(k) if it provides some other investment services, provided its main business is dealing on own account.

So it is possible that there may be some firms who may not be able to rely on 2(1)(d), but could rely on 2(1)(k), for example firms whose main MiFID business is dealing on own account in commodities / commodity derivatives (and thus fall within the article 2(1)(k) exemption) but also do some other MiFID business (and as a result article 2(1)(d) would not apply).

Question 8.1
In PS 07/5, Section 13.4 summarises in our answer to Question 32 the commodity derivatives which fall within MiFID, including those covered by Article 38 of the implementing regulation. It states:

"Broadly speaking, the following commodity derivatives fall within the scope of MiFID:

- A derivative relating to a commodity derivative, for example, an option on a commodity future (C4);
- Cash-settled commodity derivatives (including physical settled derivatives that provide for settlement in cash at the option of one of the parties other than in the event of default or termination (C5);
- Physically settled commodity derivatives traded on a regulated markets or MTF (C6); and
- Other commodity derivatives capable of physical settlement and not for commercial purposes, that is standardised contracts subject to clearing house or margin arrangements so long as they fall into one of the following categories (C7):
    - Instruments traded on a non-EEA trading facility that performs an analogous function to a regulated market or MTF;
    - Instruments expressly stated to be traded in or subject to the rules of a regulated market, MTF or a non-EEA trading facility that performs an analogous function; or
    - Back-to-back contracts with clients or counterparties equivalent to contracts traded on a regulated markets, MTF or such a non-EEA trading facility."

Question 8.2
We will have regard to:

- MiFID Level 1 Article 4(14) and (15) definitions of regulated market and multilateral trading facility;
- MiFID Level 1 Article 14 and Articles 39 to 43 which set out the broad regulatory standards for MTFs and regulated markets respectively;
- The list of markets the Commission is required to compile under MiFID Level 1 Article 19(6) that are to be considered as equivalent to regulated markets.

Section13.3 Q24 of PS 07/5 provides some guidance on how to interpret the definition of an MTF.

Question 8.3
There is nothing in the implementing regulation which suggests that the conditions under Article 38 (1) of the implementing regulation should be given different meanings for the purpose of commodity derivatives and exotic derivatives. Therefore we will apply the same meaning of the conditions to both types of derivative.

Question 8.4
No

Question 10.1
The UK currently takes an activities-based approach to the regulation of commodity business. As a result there are no equivalent exemptions to MiFID's 2(1)(i) and (k) to carve out specialist commodity firms from regulation (although authorised firms who meet the criteria in the MiFID exemptions will obviously not be MiFID firms).
Regulated UK non-MiFID scope authorised commodity firms will face one of two conduct of business regimes. Firms who deal in oil and energy market derivatives and who do not interact with retail clients have a specialist regime which disapplies most of the sort of conduct of business rules found in articles 19, 21 and 22 of MiFID (See Conduct of Business Sourcebook Ch 1.6 http://fsahandbook.info/FSA/html/handbook/COB/1/6). The disapplication of rules reflects the perceived lower risks to consumer protection of this business. Other non-MiFID scope authorised commodity firms face a conduct of business regime which is broadly similar to that in MiFID.

For regulated non-MiFID commodity derivative firms the UK imposes a capital regime that is broadly similar to the CAD/BCD regime through IPRU INV Chapter 3 of the FSA Handbook (http://fsahandbook.info/FSA/extra/4517.pdf). However, in certain circumstances firms who deal in oil and energy market derivatives and don't interact with retail clients can gain derogations from these standards.

Regulated UK non-MiFID commodity firms are subject to organisational requirements which cover broadly similar ground to those in MiFID Level 1 Article 13, although the exact standards sometimes differ from those in MiFID. These are contained in SYSC Chapter 3 of the FSA's Handbook (http://fsahandbook.info/FSA/html/handbook/SYSC/3).

Question 10.2

There are two areas where the UK's regulation of commodity derivatives goes wider than that required by MiFID. These are as follows:

- First, physically-settled options. All physically-settled options on palladium, platinum, gold or silver are inside the scope of UK regulation whether or not they meet the requirements of paragraphs 5, 6, 7 or 10 of Section C of Annex 1 to MiFID.
- Second, physically-settled futures. Physically-settled futures are regulated in the UK where a contract is deemed to be for "investment purposes". It is conceivable, although generally unlikely, that a physically-settled contract which does not meet the requirements of paragraphs 5,6, 7 or 10 of Section C of Annex 1 to MiFID would be regarded as being for investment purposes.

The current scope of regulation of options on precious metals reflects the prominence of the London-based bullion market. The "investment purposes" test for futures is trying to capture similar futures to those in MiFID (ie instruments "which are constituted and traded in such a manner as to give rise to regulatory issues comparable to traditional financial instruments" but is just specified slightly differently.

In implementing MiFID, the UK decided not to narrow its existing regulatory boundaries to align them with those in the directive in this area. This was because of the uncertainties related to the article 65 review. The intention is to revisit the issue in the light of the review's conclusions.

Appendix 1 -CESR Questionnaire on commodities, commodity derivatives and exotic derivatives: Application of MiFID exceptions under article 2(1) (i) (k) and Article 38 of MiFID Implementing Regulation

The aim of this Questionnaire is to provide comprehensive assistance to the Commission in its early work in re-examining specified provisions related to MiFID scope on commodity and exotic derivatives and related business. CESR assistance is sought to provide expert and focused advice in order to gain better understanding of the structure and regulatory context of these markets.

Questions regarding interpretation have been separated from those concerning implementation. The interpretation questions are important as they ought to help to understand how the specified provisions are to be implemented or applied in each member state.

Question 7: Please explain how CESR members intend to apply the exceptions under Article 2(1) (i) (k) of MiFID

Implementation:

7.1 Is your jurisdiction going to conduct a straight copy out of the exceptions under Articles 2(1)(i) and (k) of MiFID? If not, what amendments are you making? Please explain the rationale for the approach taken and for the intended amendments.

Interpretation: Art 2 (1)(i) Exemption

7.2 What publicly available guidance, if any, have you produced, or do you intend to produce, on the interpretation of the 2(1)(i) exemption?

7.3 Do you agree that Art 2(1)(i) comprises two exemptions (one relating to dealing on own account, the other to providing services in commodity and exotic derivatives) and that the phrase starting with "provided that…" applies to both of them?

7.4 Please explain how you intend to interpret the terms '*clients of their main business*', '*ancillary*', *'on a group basis*'.

Interpretation: Art 2(1)(k) Exemption

7.5 What publicly available guidance, if any, have you produced, or do you intend to produce, on the interpretation of the Article 2(1)(k) exemption?

7.6 Do you give '*main business*' reference under Art 2(1)(k) the same meaning as under Art 2(1)(i). If not, please explain the differences.

7.7 Please explain how you intend to interpret being '*part of a group*' for the purpose of Art 2(1)(k)

Additional questions

7.8 In practice what types of firm are likely to be caught by Art 2(1)(i) and (k)? e.g. do you agree that, as indicated in Recital 22 MiFID Implementing Regulation, Art 2(1)(i) and (k) "exclude significant numbers of commercial producers and consumers of energy and other commodities, including energy suppliers, commodity merchants and their subsidiaries"?

7.9 In practice are there any types of firm caught by the first exemption in Art 2(1)(i) (i.e. the dealing on own account in financial instruments limb) that are not also caught by the Article 2(1)(d) exemption? If so what types of firms are these?

7.10 In practice are there any types of firms caught by the Art 2(1)(k) exemption that are not also caught by the Article 2(1)(d) exemption? If so what types of firms are these?

Question 8: Please explain how CESR members intend to apply Article 38 of the Implementing Regulation

Interpretation: Art 38 (1) and (2) (Commodity derivatives)

8.1 What publicly available guidance, if any, have you produced or do you intend to produce on the interpretation of article 38.

8.2 Please explain how you will assess whether an entity is a '*third country facility that performs similar functions to a regulated market or MTF*' or an '*other entity carrying out the same functions as a central counterparty*'

Interpretation: Art 38 (3) (Exotic Derivatives)

8.3 Are you giving the same meaning to the conditions under Art 38(1) for the purpose of commodity derivative and for the purpose of exotic derivatives?

8.4 Do you have any additional views on the criteria to determine which commodity and exotic derivatives should be considered financial instruments for the purpose of MiFID?

Question 9: Is there a common CESR understanding as to the practical application of the exemptions under Articles 2(1) (i) and (k) of MiFID and of Article 38 of the MiFID implementing Regulation? If yes, please describe the view. If no, please outline the points of disagreement, describing the main competing interpretations

Question 10: Please clarify to what extent there will exist regulation of entities which are exempt under 2(1) (i) and (k) in different Members States. Please describe the nature and the rationales of any such regulation

Implementation:

10.1 Please describe if there is any intended regulation of entities exempt under art 2 (1) (i) (k) and the nature and rationale for any such regulation.

10.2 Please describe if there is any intended regulation of commodity or exotic derivatives not covered by sections C(5) to C(7) and C(10) of Annex I to MiFID and articles 38 and 39 of the implementing regulation and the nature and rationale for any such regulation..