

DECISION OF THE BOARD OF SUPERVISORS

on delegation to the ESMA Chair of the assessment regarding third country trading venues for the purposes of Articles 57(4) of MiFID

The Board of Supervisors

Having regard to Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC¹ (“ESMA” and “Regulation”), and in particular Article 43(2) and Article 44(1) thereof

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU² (MiFID II), and in particular Article 57(4) thereof

Having regard to Commission Delegated Regulation (EU) 2017/591 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives³ (RTS 21), and in particular Article 6 thereof

Having regard to the ESMA Opinion (ESMA70-154-466) dated 15 December 2017 (the “ESMA Opinion”)

Whereas:

- (1) Article 57(4) of MiFID II requires competent authorities to set limits on the position that a person can hold at any time in a contract in commodity derivatives traded on a trading venue. It further specifies that such position limit shall include economically equivalent OTC contracts.
- (2) Article 6 of RTS 21 outlines the conditions under which an OTC derivative contract is to be considered as economically equivalent to a derivative traded on a trading venue.

However, neither Article 57 of MiFID II nor Article 6 of RTS 21 specify whether contracts in commodity derivatives traded on a third-country facility should be regarded

¹ OJ L 331, 15.12.2010, p. 84.

² OJ L 173, 12.6.2014, p. 349.

³ OJ L 87, 31.3.2017, p. 479–491

as OTC derivative contracts and, hence, that the positions resulting from trading those contracts should be subject to position limits in accordance with Article 57(4) of MiFID II.

- (3) The ESMA Board of Supervisors adopted an opinion in accordance with Article 29(1)(a) of the Regulation to clarify the matter. As expressed in the opinion, the ESMA Board of Supervisors is of the view that commodity derivatives traded on third-country trading venues, that meet the criteria outlined in ESMA opinion, should not be considered as OTC derivative contracts (which also means that they should not be assessed if they are “economically equivalent” in accordance with Article 6 of RTS 21), and therefore should not be taken into account for the purposes of Article 57(4) of MiFID II.
- (4) Due to the high number of assessments, which will have to be performed in respect of third-country trading venues for the purposes of Article 57(4) of MiFID II, in line with the ESMA opinion, the current decision-making process may create significant administrative burden, not only for ESMA staff but also for members of the ESMA Board of Supervisors. In addition, MiFIR/MiFID II⁴ envisaged a number of other new tasks for ESMA, which often are linked to tight deadlines, as a result of which the ESMA Board of Supervisors may need to allocate more resources to the execution of some of these tasks.
- (5) Therefore, it is desirable that the power to perform the assessment regarding third-country trading venues for the purposes of Article 57(4) of MiFID II, in line with ESMA opinion, is delegated to the Chair of ESMA.
- (6) The delegation should be exercised in accordance with the criteria outlined in the ESMA Opinion, reflected in this Decision, and conditions set out in this Decision.

Has adopted this Decision:

Article 1 – Delegation of powers

- (1) The ESMA Board of Supervisors (the Board of Supervisors) delegates to the Chair of ESMA (the Chair) the task to assess whether a third-country venue meets the criteria set out in Article 2.
- (2) The Board of Supervisors retains the powers to perform controversial assessments regarding third country trading venues for the purposes of Article 57(4) of MiFID.
- (3) For the purpose of this Decision, non-controversial assessment shall mean an assessment establishing that a third-country trading venue meets all the criteria

⁴ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance (OJ L 173, 12.6.2014, p. 349–496)



outlined in Article 2 and in respect of which neither members of the Commodity Derivatives Task Force (CDTF), nor ESMA staff raise objections.

Article 2 – Exercise of the delegation

The Chair shall consider a third-country entity as a trading venue for the purposes of Article 57(4) of MiFID (i.e. no commodity derivatives traded on such venue should be considered as OTC trades), only where such entity meets all the following criteria:

- a) it operates a multilateral system, i.e. a system or facility in which multiple third-party buying and selling interests in financial instruments are able to interact;
- b) it is subject to authorisation in accordance with the legal and supervisory framework of the third country;
- c) it is subject to supervision and enforcement on an ongoing basis in accordance with the legal and supervisory framework of the third-country by a competent authority that is a full signatory to the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)⁵.

Article 3 – Conditions for the delegation

- (1) The powers delegated under Article 1 are conferred on the Chair of ESMA for an indeterminate period.
- (2) The Chair shall update, at least annually, the Board of Supervisors about the assessment of third-country trading venues.
- (3) The Board of Supervisors may request information in respect of any assessment performed by the Chair under this Decision.
- (4) The Board of Supervisors can reconsider and revoke at any time the delegation of powers established under this Decision. The Decision of revocation shall put an end to the delegation of powers specified in this Decision.

Article 4 – Entry into force

- (1) This Decision enters into force on the day following the date of its signature.
- (2) It shall be published on ESMA's website.

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



Done at Vienna on 26th September 2018

Steven Maijoor

Chair

For the Board of Supervisors