

OPINION

On the classification of third-country financial entities in weekly position reports under MiFID II

1 Legal basis

1. ESMA's competence to deliver an opinion to competent authorities (CAs) is based on Article 29(1)(a) of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)¹ (ESMA Regulation).
2. Pursuant to Article 29(1)(a) of the ESMA Regulation, ESMA shall provide opinions to CAs for the purpose of building a common Union supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union.
3. In accordance with Article 44(1) of the ESMA Regulation, the Board of Supervisors has adopted this opinion.

2 Background

4. Article 58(1) of Directive 2014/65/EU on markets in financial instruments² ("MiFID II") introduces position reporting obligations on trading venues which trade commodity derivatives or emission allowances or derivatives thereof. It notably requires those trading venues to make public a weekly report with the aggregate positions held by the different categories of persons for the different commodity derivatives, emission allowances or derivatives thereof, specifying *inter alia* the number of long and short positions per such categories and the number of persons holding a position in each category.
5. Those weekly position reports are communicated by trading venues to the competent authority and to ESMA, and ESMA proceeds to a centralised publication of the information included in those reports.
6. The different categories of persons referred to in Article 58(1)(a) of MiFID II are further specified in Article 58(4) of MiFID II according to the nature of their main business, account taken of any applicable authorisation, and include:

¹ OJ L 331, 15.12.2010, p. 48

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

- (a) investment firms or credit institutions;
 - (b) investment funds, either an undertaking for collective investments in transferable securities (UCITS) as defined in Directive 2009/65/EC, or an alternative investment fund manager as defined in Directive 2011/61/EC;
 - (c) other financial institutions, including insurance undertakings and reinsurance undertakings as defined in Directive 2009/138/EC, and institutions for occupational retirement provision as defined in Directive 2003/41/EC;
 - (d) commercial undertakings;
 - (e) in the case of emission allowances or derivatives thereof, operators with compliance obligations under Directive 2003/87/EC³.
7. While the weekly position reports apply to all categories of persons (EU and non-EU) Article 58 of MiFID II does not expressly address the categorisation of financial entities established in third countries, and that are not authorised as investment firms, credit institutions, investment funds or other financial institution under EU law.
8. ESMA has observed that financial entities established in third countries are currently inconsistently classified in the weekly position reports. Some of them are classified according to the nature of their main business in the same way as they would be classified if they were established in the EU and subject to EU law under categories (a), (b) or (c) while others are classified as commercial undertakings (category (d), on the ground that they are not authorised under EU law, hence they do not fall under the categories (a) to (c)).
9. ESMA has also observed that the latter way of classification is not consistent with the approach taken in the context of Article 57 of MiFID II which is related to Article 58 of MiFID II (both articles forming the essence of Title IV of MiFID II – one dealing with position limits and the other with position reporting). Indeed, Commission Delegated Regulation (EU) 2017/591⁴, which supplements MiFID II regarding the application of position limits to commodity derivatives, and in particular Article 57 thereof, makes it clear that the classification of persons to financial and non-financial entities also covers persons established in third countries.
10. The weekly position reports are made available to the public by trading venues, and in a centralised way by ESMA on its website⁵. ESMA is concerned that the lack of clarity

³ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ L 275, 25.10.2003, p. 32).

⁴ Commission Delegated Regulation (EU) 2017/591 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives (OJ L 87, 31.3.2017, p. 479–491)

⁵ Commodities Derivatives Weekly Position Reporting System available at:

https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_coder58

regarding the classification of third-country financial entities negatively impacts the accuracy and reliability of the weekly position reports. ESMA therefore considers it necessary to provide guidance on the classification of third-country financial entities in weekly position reports to ensure a consistent classification of those entities. ESMA considers that such clarification will contribute positively to the consistency of supervisory practices and ensure a common approach across the Union, thereby enhancing the accuracy and reliability of the weekly positions reports made public under MiFID II. As a result, ESMA has decided to publish this opinion.

3 Opinion

11. To ensure that the transparency objectives of the weekly position reports set out in MiFID II are achieved and that the approach reflected in related provisions of MiFID II is taken into account, ESMA considers that financial entities holding positions in commodity derivatives or emission allowances or derivatives thereof should be categorised in a consistent manner irrespective of their geographical location.
12. As a result, ESMA considers that third-country financial entities should be categorised according to the nature of their main business in the same way as they would be categorised if they were established in the EU and subject to EU law, i.e. under categories (a), (b) or (c) of Article 58(4) of MiFID II.
13. ESMA expects that CAs will ensure that trading venues proceed with the classification of third-country financial entities as required under Article 58(4) of MiFID II in accordance with this Opinion and request the necessary information from their members or participants to that end.
14. ESMA also expects that CAs will ensure that the classification of third-country financial entities holding positions in commodity derivatives and emission allowances or derivatives thereof in accordance with this Opinion is reflected in the weekly position reports as soon as possible, and no later than 12 October 2022.