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*Committee on Industry, Research and Energy*

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**2011/0298(COD)**

4.6.2012

## **OPINION**

of the Committee on Industry, Research and Energy

for the Committee on Economic and Monetary Affairs

on the proposal for a directive of the European Parliament and of the Council  
on markets in financial instruments repealing Directive 2004/39/EC of the  
European Parliament and of the Council (recast)  
(COM(2011)0656 – C7-0382/2011 – 2011/0298(COD))

Rapporteur: Holger Krahmer

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## **SHORT JUSTIFICATION**

The Markets in Financial Instruments Directive (MiFID, 2004/39/EC), in force since November 2007, is one of the EU's cornerstones of financial regulation and your Rapporteur acknowledges the need of a revision of the current MiFID (hereinafter called MiFID II) in order to correct its weaknesses and provide for both an improved transparency and regulation of financial markets.

### **Exemptions under MiFID**

Your Rapporteur finds that several exemptions of the scope in MiFID II proposal are misleading or not clear enough and tabled some amendments in order to clarify them.

In general your Rapporteur believes that non-financial firms like commodities industries should, due to their nature, not be fully covered by the MiFID. This approach is also fully in line with the Commissions intention explained in recital 88, that it should be ensured that activities by non-financial firms involving for example the hedging of production-related and other risks on an ancillary basis should remain exempted. These trading activities of non-financial firms pose no systemic risk and are an essential element of the companies' business.

Other clarifications mainly refer to the criteria for defining whether an activity is ancillary to the main business. The main principles for this definition should not be left to delegated acts and this definition should include the fact that an activity can only be ancillary when it is a means of risk management for the main business, and when the size of the activity is considerably smaller than the main business.

If, under MiFID, non-financial firms are considered as financial firms, they have to fulfil costly obligations of several financial regulations. For example they become subject to the clearing obligation of all their standardised 'over-the-counter' derivative transactions as defined under the European Market Infrastructure Regulation (EMIR) or might be required to hold a capital buffer under the Capital Requirements Directive (CRD) after 2014.

As a result, both EMIR and CRD would stipulate companies to hold more capital as a reserve for their necessary trading activities, hampering the companies' ability to invest. Also risk management becomes much more expensive and as a consequence some companies, especially SMEs, would refrain from risk management or at least do so to a lesser extent.

Most SMEs can not afford to participate directly in traded markets themselves to manage the risks related to their main business and therefore they have set up joint entities to create a critical mass to access traded markets with the aim to manage risks of their main business. These company structures need also to be addressed, in order to guarantee appropriate exemptions for non-financial SMEs and their joint entities.

### **Classification of financial instruments**

Physically settled forward products in MiFID II proposal are classified as financial instruments. However, these forwards are crucial for risk management of commercial firms and are fundamentally different from speculative financial instruments - they do not involve any financial (cash) settlement and the underlying physical commodity will actually be delivered on schedule. Consequently physically settled forwards do not pose any risk to financial markets. The consequences of physical forward products being considered financial instruments include several implications under MiFID, EMIR and the Market Abuse Regulation (MAR).

The current MiFID II proposal reduces the ability of firms to take advantage of the ancillary activity exemption (Article 2(1)(i)) as the majority of their trading is in physical forward contracts. Also physically settled forwards could then be subject to position limits outlined in Article 59. Under EMIR, the classification of physically settled forwards as financial instrument would increase the probability for non-financial firms to hold positions beyond the so-called clearing threshold which would make them subject to the clearing obligation. Furthermore, physically settled forwards will fall under the scope of MAR.

In comparison, the respective draft law in the United States (i.e. Dodd-Frank-Act) uses another definition of financial instruments which also excludes physically-settled derivatives expressively. Besides, physically settled forwards in the energy sector are already covered by the Regulation on wholesale energy market integrity and transparency (REMIT).

Your Rapporteur therefore proposes to explicitly exclude products that can be physically settled and that are entered into for commercial purposes and do not display the characteristics of other derivative financial instruments.

### **Position limits**

Limiting firms' positions in the derivative market will constrain their ability to efficiently manage risks or access emission allowance markets which will ultimately increase costs and the overall risk level in their sector. Moreover, it may force them to seek hedging opportunities in other less liquid and riskier markets, pushing up risk management costs and ultimately prices to consumers. Your Rapporteur therefore prefers the position management approach as referred in MiFIR Article 35(1), because this is more flexible and better tailored for the characteristics of the market.

## **AMENDMENTS**

The Committee on Industry, Research and Energy calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

## Amendment 1

### Proposal for a directive Recital 22 a (new)

*Text proposed by the Commission*

*Amendment*

***(22a) For a well-functioning internal market in electricity and natural gas, and for the carrying out of the Transmission System Operators' (TSOs) tasks under Directive 2009/72/EC, Directive 2009/73/EC, Regulation (EC) No 714/2009, Regulation (EC) No 715/2009, or network codes and guidelines adopted pursuant to those Regulations, it is necessary that TSOs and their service providers are exempted when issuing transmission rights, in the form of either Physical Transmission Rights or Financial Transmission Rights, and when providing a platform for secondary trading. In order to enable efficient trade in transmission rights it is further necessary to exempt any person when buying or selling those transmission rights.***

#### *Justification*

*The qualification of Physical Transmission Rights (PTRs) and Financial Transmission Rights (FTRs) as financial instruments may well result in market players refraining from trading in transmission rights as they may consider the requirements under MiFID as too burdensome. However, trade in PTRs and FTRs, because of their risk hedging functions, is an important contribution to the efficient functioning of the internal energy market and should therefore be exempted from MiFID.*

## Amendment 2

### Proposal for a directive Recital 88

*Text proposed by the Commission*

*Amendment*

(88) Considering the communiqué of G20 finance ministers and central bank governors of 15 April 2011 on ensuring

(88) Considering the communiqué of G20 finance ministers and central bank governors of 15 April 2011 on ensuring

that participants on commodity derivatives markets should be subject to appropriate regulation and supervision, the exemptions from Directive 2004/39/EC for various participants active in commodity derivative markets should be modified to ensure that activities by firms, which are not part of a financial group, involving the hedging of production-related and other risks as well as the provision of investment services in commodity or exotic derivatives on an ancillary basis to clients of the main business remain exempt, **but that firms** specialising in trading commodities and commodity derivatives are brought within this Directive.

that participants on commodity derivatives markets should be subject to appropriate regulation and supervision, the exemptions from Directive 2004/39/EC for various participants active in commodity derivative markets should be modified to ensure that activities by firms, which are not part of a financial group, involving the hedging of production-related and other risks as well as the provision of investment services in commodity or exotic derivatives on an ancillary basis to clients of the main business remain exempt. ***It has to be kept in mind that firms whose main business is producing and/or supplying a commodity and which trade on own account in commodity derivatives as an ancillary activity are already subject to tailor-made regulatory oversight and to regulatory reporting obligations specifically to spot and physical forward transactions by virtue of Regulation 2011/1227/EC (REMIT) and are subject to regulatory reporting obligations in respect of standard derivative transactions and regulatory oversight by virtue of Regulation [ ] (EMIR). Firms specialising in trading commodities and commodity derivatives should, however, be brought within this Directive.***

#### *Justification*

*Commercial firms already covered by EMIR and sector-specific regulation (i.e. REMIT, Regulation 2011/1227/EC) should remain exempted from MiFID, provided that this is an ancillary activity to their main business. REMIT includes an effective and appropriate market oversight framework and transaction reporting requirements explicitly covering transactions falling outside the MiFID scope. In addition to this, EMIR will also provide the framework providing transaction reporting and central clearing or other risk management obligations.*

### **Amendment 3**

#### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point b**

*Text proposed by the Commission*

(b) persons which provide investment

*Amendment*

(b) persons, ***including jointly managed***

services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;

**undertakings**, which provide investment services exclusively for their parent undertakings, for their subsidiaries or for other subsidiaries of their parent undertakings;

#### **Amendment 4**

##### **Proposal for a directive**

##### **Article 2 – paragraph 1 – point d – point ii**

*Text proposed by the Commission*

*Amendment*

ii) are a member of or a participant in a regulated market or MTF; or

ii) are a member of or a participant in a regulated market or MTF **and practise algorithmic trading**; or

##### *Justification*

*There is a need for clarification of the exemption in order to ensure that the real economy does not result in every instance of exchange trading (even on the smallest scale) being governed by the MiFID rules (for example in order to safeguard against commodity price risks and foreign exchange risks or to buy or sell company-owned shares).*

#### **Amendment 5**

##### **Proposal for a directive**

##### **Article 2 – paragraph 1 – point d – subparagraph 1**

*Text proposed by the Commission*

*Amendment*

***This exemption does not apply to persons exempt under Article 2(1)(i) who deal on own account in financial instruments as members or participants of a regulated market or MTF, including as market makers in relation to commodity derivatives, emission allowances, or derivatives thereof;***

***Persons who are exempt under point (i) do not also need to meet the conditions laid down in this point in order to be exempt, as well as it does not prevent them to be exempted under another applicable exemption of this Article;***

***This exemption applies to persons who, when dealing on emission allowances, do not provide any investment services or activities other than dealing on own account and not by executing client orders, and which own or directly operate installations within the meaning of***

***Directive 2003/87/CE.***

*Justification*

*The relation between the exemptions under (d) and (i) should be clarified.*

**Amendment 6**

**Proposal for a directive**

**Article 2 – paragraph 1 – point i – indent 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***- provide investment services in commodity derivatives or derivative contracts included in Annex I, Section C 10 or emission allowances or derivatives thereof to clients, on the condition that:***

***(i) such persons enable the clients to carry out their industrial activities through the provision of essential infrastructure and services, and***

***(ii) the main business of the clients, on a group basis, is neither the provision of investment services within the meaning of this Directive nor of banking services within the meaning of Directive 2006/48/EC,***

***or***

*Justification*

*A level playing field is needed for large industrial companies who deal on own account in financial instruments and smaller players that, in order to compete, must use production sites (including support services and know-how) operated by third parties. Site operators that deal on own account in order to provide investment services to smaller companies carrying out their industrial activities within their sites should also be exempted when this is an ancillary activity to their main business.*



## Amendment 7

### Proposal for a directive

#### Article 2 – paragraph 1 – point i – indent 3 a (new)

*Text proposed by the Commission*

*Amendment*

**- deal on own account in financial instruments by executing orders of their owners and their affiliates in case of jointly managed undertakings;**

*Justification*

*The exemptions described in the Commission proposal do not pay due attention to characteristic company structures, in particular as regards SMEs. This amendment is intended to avoid discriminations towards SMEs that cannot afford to participate directly in traded markets and therefore set up a joint entity or engage in strategic agreements with third entities in order to create a critical mass to access traded markets to manage the risks related to their main business. Linked to Amendment 5.*

## Amendment 8

### Proposal for a directive

#### Article 2 – paragraph 1 – point i – subparagraph 2

*Text proposed by the Commission*

*Amendment*

provided that in all cases 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 2006/48/EC;

provided that in all cases this is an ancillary activity to their main business when considered on a group basis **or to the main business of the owners and their affiliates where the services are provided by jointly managed undertakings**, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2006/48/EC;

*Justification*

*The exemptions described in the Commission proposal do not pay due attention to characteristic company structures, in particular as regards SMEs. This amendment is intended to avoid discriminations towards SMEs that cannot afford to participate directly in traded markets and therefore set up a joint entity or engage in strategic agreements with third entities in order to create a critical mass to access traded markets to manage the risks related to their main business. Linked to Amendment 4.*

## Amendment 9

### Proposal for a directive

#### Article 2 – paragraph 1 – point i – subparagraph 1

##### *Text proposed by the Commission*

provided that in all cases 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 2006/48/EC ;

##### *Amendment*

provided that in all cases this is an ancillary activity to their main business, when considered on ***the basis of a consolidated or not consolidated*** group, and that main business is not the provision of investment services within the meaning of this Directive or banking services under Directive 2006/48/EC ;

##### *Justification*

*The amendment is intended to avoid discriminations towards commercial companies that cannot afford to participate directly in trading markets to manage the risks related to their main business. Mostly they form with their trading firm a not consolidated group, in order to create a critical mass to access traded markets. Current definitions of parent undertaking and subsidiary are not suitable in this context as they do not pay attention especially to the characteristics this company structure.*

## Amendment 10

### Proposal for a directive

#### Article 2 – paragraph 1 – point k

##### *Text proposed by the Commission*

(k) firms which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets or which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by

##### *Amendment*

(k) firms:

such firms is assumed by clearing members of the same markets;

(i) which provide investment services and/or perform investment activities consisting exclusively in dealing on own account on markets in financial futures or options or other derivatives and on cash markets for the sole purpose of hedging positions on derivatives markets, or

(ii) which deal for the accounts of other members of those markets or make prices for them and which are guaranteed by clearing members of the same markets, where responsibility for ensuring the performance of contracts entered into by such firms is assumed by clearing members of the same markets;

#### *Justification*

*The text should be split into two different characteristics so that it is fully clear that firms can use the exemption either under point (k)(i) or point (k)(ii).*

### **Amendment 11**

#### **Proposal for a directive**

#### **Article 2 – paragraph 1 – point n**

##### *Text proposed by the Commission*

(n) transmission system operators as defined in Article 2(4) of Directive 2009/72/EC or Article 2(4) of Directive 2009/73/EC when carrying out *their* tasks under those Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant those Regulations.

##### *Amendment*

(n) transmission **and distribution** system operators as defined in Article 2(4) **and (6)** of Directive 2009/72/EC or Article 2(4) **and(6)** of Directive 2009/73/EC **as well as storage and LNG system operators as defined in Article 2 (10) and (12) respectively of Directive 2009/73/EC and persons acting as their service providers** when carrying out **the system operators'** tasks under those Directives or Regulation (EC) 714/2009 or Regulation (EC) 715/2009 or network codes or guidelines adopted pursuant those Regulations, **such as the issuance of transmission rights, or other capacity rights, and the provision of a platform for secondary trading, and any**

*other persons when buying and/or selling such transmission rights or other capacity rights; this exemption applies only with regard to the aforementioned activities.*

#### *Justification*

*Transmission system operators (TSOs), distribution system operators (DSOs) and storage operators play a key role in the well functioning of the internal energy market, guaranteeing security of supply and offering access to transport, distribution or storage capacities in a competitive and fair way. Therefore the exemption regime should be extended to fully cover such infrastructure operators' activities.*

## **Amendment 12**

### **Proposal for a directive**

#### **Article 2 – paragraph 3 – subparagraph 2**

##### *Text proposed by the Commission*

The criteria for determining whether an activity is ancillary to the main business shall take into account at least the following elements:

- the extent to which the activity is objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity,
- the capital employed for carrying out the activity.

##### *Amendment*

The criteria for determining whether an activity is ancillary to the main business shall take into account at least the following elements:

- (a) the extent to which the activity is objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity,
- (b) the capital employed for carrying out the activity ***or the risk stemming from the activity, both as a proportion to the activities of the group,***
- (c) ***the activity relates to the management of commodity risks or other risk arising from the commercial business of the group.***

#### *Justification*

*In order to apply the principles referred to in recital 88, it is necessary to provide a clear exemption for activities by non-financial firms “involving the hedging of production-related and other risks”. Besides point (a), the ancillary character needs to be justified by comparing the size of the activity (by means of capital or risk employed) to the size of the main business and it should be ensured that commercial firms are only dealing in financial instruments related to the main business of the group of companies to which the entity/person belongs.*

## Amendment 13

### Proposal for a directive Article 3 – paragraph 2

*Text proposed by the Commission*

2. Persons excluded from the scope of this Directive according to paragraph 1 cannot benefit from the freedom to provide services and/or activities or to establish branches as provided for in Articles 36 and 37 respectively.

*Amendment*

2. Persons excluded from the scope of this Directive according to paragraph 1 cannot benefit from the freedom to provide services and/or activities or to establish branches as provided for in Articles 36 and 37 respectively. ***In the case of a subsidiary, the comparison should be made with the capital, employed for the group's activities.***

## Amendment 14

### Proposal for a directive Article 4 – paragraph 2 – point 25a (new)

*Text proposed by the Commission*

*Amendment*

***25a) 'Jointly managed undertaking' means a jointly managed undertaking within the meaning of Article 32 of Directive 83/349/EEC;***

*Justification*

*Necessary to refer to Directive 83/349/EEC for applying the newly introduced exemption in Amendments 4 and 5.*

## Amendment 15

### Proposal for a directive Article 4 – paragraph 2 – point 25 b (new)

*Text proposed by the Commission*

*Amendment*

***25b) 'Group basis' means undertakings forming a group by mutual or one-sided participation, regardless of whether they are consolidated or not; in this context the group is considered as one undertaking.***

## *Justification*

*The amendment is intended to avoid discriminations towards commercial companies that cannot afford to participate directly in trading markets to manage the risks related to their main business. Mostly they form with their trading firm a not consolidated group, in order to create a critical mass to access traded markets. Current definitions of parent undertaking and subsidiary are not suitable in this context as they do not pay attention especially to the characteristics this company structure.*

## **Amendment 16**

### **Proposal for a directive**

#### **Article 4 – paragraph 2 – point 33 a (new)**

*Text proposed by the Commission*

*Amendment*

***33a) 'Transaction objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity' means transaction which objective, when considered at group level and in combination with other contracts, is to reduce:***

***(i) the potential exposure to changes in mark-to-market value of assets, service, inputs, products, commodities, liabilities that the counterparty or its group owns, produces, manufactures, processes, provides, purchases, merchandises leases, sells or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the ordinary course of its business; or***

***(ii) the potential exposure to changes in mark-to-market value of assets, service, inputs, products, commodities, liabilities referred to in letter a, resulting from fluctuation of interest rates, inflation rates, foreign exchange rates, commodity or emission allowances prices, or other relevant variables.***

## **Amendment 17**

**Proposal for a directive**  
**Article 4 – paragraph 2 – point 33 b (new)**

*Text proposed by the Commission*

*Amendment*

**33b) A 'bona fide hedging transaction' means either:**

**(a) a transaction or position that:**

**(i) represents a substitute for transactions made or to be made or positions taken or to be taken at a later time in a physical marketing channel;**

**(ii) is economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise; and**

**(iii) arises from the potential change in the value of:**

**- assets that a person owns, produces, manufactures, processes, or merchandises or anticipates owning, producing, manufacturing, processing, or merchandising;**

**- liabilities that a person owns or anticipates incurring; or**

**- services that a person provides, purchases, or anticipates providing or purchasing;**

**or**

**(b) a transaction or position that that reduces risks attendant to a position resulting from a derivative that**

**(i) was executed opposite a counterparty for which the transaction would qualify as a bona fide hedging transaction pursuant to point (a) or**

**(ii) meets the requirements of point (a).**

*Justification*

*To promote the economic benefits of commodity markets, it is important to have a definition of a hedge. Market supervision should promote the interests of those parties who have an exposure to commodity prices that is an unavoidable consequence of the business and not a*

*bet on prices. Exemptions should be linked to this definition as they are in EMIR and under Dodd-Frank*

## **Amendment 18**

### **Proposal for a directive**

#### **Title IV**

*Text proposed by the Commission*

*Amendment*

POSITION **LIMITS** AND REPORTING

POSITION **MANAGEMENT** AND  
REPORTING

#### *Justification*

*The trading venues shall have a tool box of different management tools/arrangements in place. Position limits is one of these tools - but the venue should also be able to use other alternative "arrangements with equivalent effect" such as position management.*

## **Amendment 19**

### **Proposal for a directive**

#### **Article 59 – paragraph 1 – subparagraph 1 – introductory part**

*Text proposed by the Commission*

*Amendment*

1. Member States shall ensure that regulated markets, operators of MTFs **and OTFs** which admit to trading or trade commodity derivatives apply limits on the **number of contracts** which any given market members or participants can **enter into over a specified period of time**, or alternative arrangements with equivalent effect such as position management **with automatic review thresholds**, to be imposed in order to:

1. Member States shall ensure that regulated markets **and** operators of MTFs which admit to trading or trade commodity derivatives apply limits on the **open positions in a commodity derivative** which any given market members or participants can **hold, or on the exposure to such investments** or alternative arrangements with equivalent effect such as position management, to be imposed in order to:

#### *Justification*

*A threshold should not refer to the number of contracts a person can enter into. If a threshold should apply for commodity derivatives, it should refer to the open positions (in both Article 59 and in Article 72[(1)](g)). Compare with Article 60(1) second sub-paragraph: “open positions”. Compare also with the calculation of the clearing threshold in Article 7 of EMIR.*



## Amendment 20

### Proposal for a directive

#### Article 59 – paragraph 1 – subparagraph 1 – point a

*Text proposed by the Commission*

*Amendment*

(a) **support** liquidity;

(a) **ensure sufficient market** liquidity **for bona fide hedging transactions**;

#### *Justification*

*The primary aim of commodity market regulation must be to enable real economy producers and consumers to hedge, in an orderly market, at prices that represent, both in terms of level and volatility, the fundamental drivers of supply and demand rather than the volatile interests of the financial speculation.*

## Amendment 21

### Proposal for a directive

#### Article 59 – paragraph 1 – subparagraph 1 – point c

*Text proposed by the Commission*

*Amendment*

(c) **support orderly pricing** and settlement conditions.

(c) **ensure that the price discovery function** and settlement conditions **of the underlying market are not disrupted**;

#### *Justification*

*The primary aim of commodity market regulation must be to enable real economy producers and consumers to hedge, in an orderly market, at prices that represent, both in terms of level and volatility, the fundamental drivers of supply and demand rather than the volatile interests of the financial speculation.*

## Amendment 22

### Proposal for a directive

#### Article 59 – paragraph 1 – subparagraph 1 a (new)

*Text proposed by the Commission*

*Amendment*

***In setting the limits Member States shall ensure that the legitimate interests of participants conducting bona-fide hedging activities are respected.***

### *Justification*

*Where speculative interest significantly exceeds that of hedgers, the markets risk being driven more by the availability of capital from funds than the long-term fundamentals. It is important to make clear that, in such a situation, the market is not functioning for the benefit of those with an unavoidable exposure to commodity price risk. Supervisors should, as in the US, be mandated to take steps to counter any threat to the economic utility of markets to bona fide hedging*

### **Amendment 23**

#### **Proposal for a directive**

#### **Article 59 – paragraph 1 – subparagraph 2**

##### *Text proposed by the Commission*

The limits or arrangements shall be transparent and non-discriminatory, specifying the persons to whom they apply and any exemptions, and taking account of the nature and composition of market participants **and** of the use they make of the contracts admitted to trading. ***They shall specify clear quantitative thresholds such as the maximum number of contracts persons can enter, taking account*** of the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market.

##### *Amendment*

The limits or arrangements shall be transparent and non-discriminatory, specifying the persons to whom they apply and any exemptions, and taking account of the nature and composition of market participants, of the use they make of the contracts admitted to trading **and** of the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market. ***In particular, they shall differentiate between positions which objectively reduce risks directly related to commercial activities related to the commodity and other positions.***

### *Justification*

*A threshold should not refer to the number of contracts a person can enter into. Automatic thresholds can have a negative effect on the liquidity on trading venues. If a threshold should apply for commodity derivatives, it should refer to the open positions in both Article 59 and 72[(1)](g). See also Articles 7 and 60(1). The use of other controls on positions should be an addition, not an alternative, to the use of position limits. However, in setting such limits there should be a differentiation between positions related to commercial activity as regards to commodity and other positions.*

## Amendment 24

### Proposal for a directive

#### Article 59 – paragraph 1a (new)

*Text proposed by the Commission*

*Amendment*

***1a. Commercial firms shall not be subject to position limits for those products that are used for risk management activities or whose use results from regulatory compliance obligations.***

*Justification*

*Limiting firms' positions in the derivative market will constrain their ability to efficiently manage risks or access emission allowance markets which will ultimately increase costs and the overall level of risk in their sector. It may also force them to seek hedging opportunities in other less liquid and riskier markets. The position management approach as referred in MiFIR Article 35(1) is a better alternative.*

## Amendment 25

### Proposal for a directive

#### Article 59 – paragraph 2

*Text proposed by the Commission*

*Amendment*

2. Regulated markets, **MTF** and **OTFs** shall inform their competent authority of the details of the limits or arrangements. The competent authority shall communicate the same information to ESMA which shall publish and maintain on its website a database with summaries of the limits or arrangements in force.

2. Regulated markets and **MTFs** shall inform their competent authority of the details of the limits or arrangements. The competent authority shall communicate the same information to ESMA which shall publish and maintain on its website a database with summaries of the limits or arrangements in force.

*Justification*

*Excessive speculation on commodities should be banned. In this respect, the use of other controls on positions should be an addition, not an alternative, to the use of position limits. However, in setting such limits there should be a differentiation between positions related to commercial activity as regards to commodity and other positions.*

## Amendment 26

**Proposal for a directive**  
**Article 59 – paragraph 3**

*Text proposed by the Commission*

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to determine the limits or alternative arrangements on the **number of contracts** which any person can **enter into over a specified period of time** and the necessary equivalent effects of the alternative arrangements established in accordance with paragraph 1, as well as the conditions for exemptions. The limits or alternative arrangements shall take account of the conditions referred to in paragraph 1 and the limits that have been set by regulated markets, MTFs and OTFs. The limits or alternative arrangements determined in the delegated acts shall also take precedence over any measures imposed by competent authorities pursuant to Article 72(1) **paragraph** (g) of this Directive.

*Amendment*

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to determine the limits or alternative arrangements on the **open positions in a commodity derivative** which any person can **hold** and the necessary equivalent effects of the alternative arrangements established in accordance with paragraph 1, as well as the conditions for exemptions. The limits or alternative arrangements shall take account of the conditions referred to in paragraph 1 and the limits **or alternative arrangements** that have been set by regulated markets, MTFs and OTFs. The limits or alternative arrangements determined in the delegated acts shall also take precedence over any measures imposed by competent authorities pursuant to Article 72(1)(g) of this Directive.

*Justification*

*Automatic thresholds should not be required for alternative arrangements. Depending on the market structure, automatic thresholds risk having negative effect on the liquidity on transparent trading venues and risk driving trading OTC. A threshold should not refer to the number of contracts a person can enter into. If a threshold should apply for commodity derivatives, it should refer to the open positions (in both Article 59 and in Article 72[(1)](g)).*

**Amendment 27**

**Proposal for a directive**  
**Article 59 – paragraph 3**

*Text proposed by the Commission*

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to determine the limits or alternative arrangements on the **number of contracts** which any person can enter into over a specified period of time and the

*Amendment*

3. The Commission shall be empowered to adopt delegated acts in accordance with Article 94 to determine the limits or alternative arrangements on the **exposure to commodity derivatives** which any person can enter into over a specified period of

necessary equivalent effects of the alternative arrangements established in accordance with paragraph 1, as well as the conditions for exemptions. The limits or alternative arrangements shall take account of the conditions referred to in paragraph 1 and the limits that have been set by regulated markets, MTFs and OTFs. The limits or alternative arrangements determined in the delegated acts shall also take precedence over any measures imposed by competent authorities pursuant to Article 72(1) paragraph (g) of this Directive.

time and the necessary equivalent effects of the alternative arrangements established in accordance with paragraph 1, as well as the conditions for exemptions. The limits or alternative arrangements shall take account of the conditions referred to in paragraph 1 and the limits that have been set by regulated markets, MTFs and OTFs. The limits or alternative arrangements determined in the delegated acts shall also take precedence over any measures imposed by competent authorities pursuant to Article 72(1) paragraph (g) of this Directive.

## **Amendment 28**

### **Proposal for a directive Article 60 – paragraph 2**

#### *Text proposed by the Commission*

2. In order to enable the publication mentioned in point (a) of paragraph 1, Member States shall require members and participants of regulated markets, MTFs and OTFs to report to the respective trading venue the details of their positions ***in real-time***, including any positions held on behalf of their clients.

#### *Amendment*

2. In order to enable the publication mentioned in point (a) of paragraph 1, Member States shall require members and participants of regulated markets, MTFs and OTFs to report to the respective trading venue the details of their positions ***on a weekly basis***, including any positions held on behalf of their clients.

#### *Justification*

*Reporting requirements have to be proportionate for non-financial firms. Platforms do not need real time information to be able to provide weekly position reports. Real-time reporting would be extremely costly and burdensome for non-financial firms.*

## **Amendment 29**

### **Proposal for a directive Article 69 – paragraph 3 a (new)**

#### *Text proposed by the Commission*

#### *Amendment*

***3a. For the purposes of effectively carrying its duties in relation to***

*commodities markets and coordinating supervisory activities between the designated national competent authorities with responsibility for those markets, ESMA shall establish a specific commodities division.*

*Justification*

*The key role of commodities markets requires specific expertise. The ability to supervise commodities markets in the interests of bona fide hedgers, the broader economy and the private individuals whose lives are impacted by commodity prices, it is important that ESMA have a dedicated and specialised division for this area.*

**Amendment 30**

**Proposal for a directive  
Article 94 – paragraph 2**

*Text proposed by the Commission*

2. The delegation of power referred to in Article 93 shall be conferred for ***an indeterminate*** period of ***time*** from the date of entry into force of this Directive.

*Amendment*

(2) The delegation of power referred to in Article 93 shall be conferred for ***a*** period of ***five years*** from the date of entry into force of this Directive.

***The Commission shall submit a report in respect of the delegation of power at the latest nine months before the end of the five-year period. The delegation of power shall be extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension at the latest three months before the end of each period.***

**Amendment 31**

**Proposal for a directive  
Article 97 – paragraph 1 – subparagraph 3**

*Text proposed by the Commission*

Members States shall apply these measures from [...] except for the provisions transposing Article 67(2) which shall apply from ***[2 years after the application date for***

*Amendment*

Members States shall apply these measures from ...\* except for the provisions transposing Article 67(2) which shall apply

*the rest of the Directive].*

from ...\*\*.

***Member States shall apply these measures not before ...\*\* to persons whose main business is dealing on own account in commodities and / or commodity derivatives.***

***Sub-paragraph 3 of the existing Directive shall apply where the persons that deal on own account in commodities and/or commodity derivatives are part of a group the main business of which is the provision of other investment services within the meaning of this Directive or banking services under Directive 2000/12/EC;***

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***\* OJ: please insert date corresponding to two years after the entry into force of this Directive.***

***\* OJ: please insert date corresponding to two years after the start of the general application of the provisions of this Directive, in accordance with sub-paragraph 3.***

#### *Justification*

*MiFIR will in future apply to new entrants previously outside its scope, who will for the first time be required to meet its complex requirements and restructure accordingly, as opposed to financial undertakings simply required to meet additional requirements. They will accordingly need a longer implementation deadline.*

## **Amendment 32**

### **Proposal for a directive Annex I – section C – point 6**

#### *Text proposed by the Commission*

(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, an OTF, and/or an MTF;

#### *Amendment*

(6) Options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, an OTF and/or an MTF ***and are not entered***

*into for commercial purposes and display the characteristics of other derivative financial instruments;*

#### *Justification*

*Physically settled forward products are essential for commercial firms. The consequences for considering them as financial instruments are not proportionate for non-financial firms and include negative implications regarding:*

- reduced possibility to use the ancillary activity exemption mentioned in Article 2(1)i;*
- Market Abuse Regulation compliance;*
- increased probability for non-financial firms to hold positions beyond the clearing threshold under EMIR and become subject to the clearing obligation;*
- physical forward contracts would become subject to position limits.*

### **Amendment 33**

#### **Proposal for a directive Annex I – section C - point 7**

##### *Text proposed by the Commission*

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that ***can be*** physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

##### *Amendment*

(7) Options, futures, swaps, forwards and any other derivative contracts relating to commodities, that ***are not intended to*** physically settled not otherwise mentioned in C.6 and not being for commercial purposes, which have the characteristics of other derivative financial instruments, having regards to whether, inter alia, they are cleared and settled through recognised clearing houses or are subject to regular margin calls;

#### *Justification*

*A revised definition of financial instruments related to commodities by virtue of explicit exclusion of products delivered in the future is needed to clarify definitely that these products will not be considered as 'derivative financial instruments' regardless the place of execution. This proposal would align the EU legislation with the definition of Swaps under the Dodd-Frank Act in the U.S.*



## PROCEDURE

<b>Title</b>	Markets in financial instruments, and repeal of Directive 2004/39/EC (recast)						
<b>References</b>	COM(2011)0656 – C7-0382/2011 – 2011/0298(COD)						
<b>Committee responsible</b> Date announced in plenary	ECON 15.11.2011						
<b>Opinion by</b> Date announced in plenary	ITRE 15.12.2011						
<b>Rapporteur</b> Date appointed	Holger Krahmer 19.12.2011						
<b>Discussed in committee</b>	23.4.2012						
<b>Date adopted</b>	31.5.2012						
<b>Result of final vote</b>	<table> <tr> <td>+: </td><td>50</td></tr> <tr> <td>–: </td><td>1</td></tr> <tr> <td>0: </td><td>2</td></tr> </table>	+:	50	–:	1	0:	2
+:	50						
–:	1						
0:	2						
<b>Members present for the final vote</b>	Gabriele Albertini, Amelia Andersdotter, Josefa Andrés Barea, Jean-Pierre Audy, Zigmantas Balčytis, Ivo Belet, Jan Březina, Reinhard Bütikofer, Giles Chichester, Jürgen Creutzmann, Pilar del Castillo Vera, Dimitrios Droutsas, Christian Ehler, Vicky Ford, Gaston Franco, Adam Gierek, Norbert Glante, András Gyürk, Fiona Hall, Edit Herczog, Kent Johansson, Romana Jordan, Krišjānis Kariņš, Lena Kolarska-Bobińska, Angelika Niebler, Jaroslav Paška, Vittorio Prodi, Miloslav Ransdorf, Herbert Reul, Jens Rohde, Paul Rübig, Salvador Sedó i Alabart, Francisco Sosa Wagner, Patrizia Toia, Ioannis A. Tsoukalas, Claude Turmes, Vladimir Urutchev, Adina-Ioana Vălean, Alejo Vidal-Quadras, Henri Weber						
<b>Substitute(s) present for the final vote</b>	Maria Badia i Cutchet, Francesco De Angelis, Ioan Enciu, Françoise Grossetête, Satu Hassi, Roger Helmer, Jolanta Emilia Hibner, Seán Kelly, Eija-Riitta Korhola, Holger Krahmer, Zofija Mazej Kukovič, Vladimír Remek						
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Franziska Keller						