Deutsches Aktieninstitut

Retain the REMIT-Carve-Out in its current form

There is no need to adjust the definition of financial instruments under MiFID II

Comment on the ESMA consultation paper on „MiFID II review report on position limits and position management“, 19 January 2019

Introduction

Deutsches Aktieninstitut (identification number: 38064081304-25) represents the entire German economy interested in the capital markets. The about 200 members of Deutsches Aktieninstitut are listed corporations, banks, stock exchanges, investors and other important market participants. Deutsches Aktieninstitut keeps offices in Frankfurt, Brussels and in Berlin. We followed the legislation process regarding MiFID II/MiFIR very closely, expressing the view of non-financial companies using derivatives in their risk management.

Answers to Selected Questions

Q2: Do you agree that the C(6) carve-out creates an unlevel playing field across trading venues and should be reconsidered? If not, please explain why.

No, we do not agree that the C(6) carve-out creates an unlevel playing field.

First of all, there is no need to circumvent Regulated Markets and MTFs for reasons of regulatory arbitrage as the contracts exempted from the C(6) carve-out are closely regulated under REMIT. REMIT as such is the appropriate, tailor-made regulatory framework for physical energy markets as it considers the specific characteristics and needs of the European energy markets and its market participants, including the real economy end users. Therefore, from a supervisory perspective there is a level playing field as contracts traded on Regulated Markets, MTFs and OTFs are subject to specific regulation.

In addition, there is no unlevel playing field as every operator of a trading venue has the chance to set up an OTF and many of them did so already. Furthermore, there is no evidence available which shows a clear shift of contrats traded on Regulated Markets/MTFs to OTFs in order to avoid a classification as financial instrument.

We strongly refuse a reconsideration of the C(6) carve-out. The real economy as a whole uses contracts for the physical delivery of power and gas which are mostly bilaterally entered into. Removing the C(6) carve-out will create the risk that the before mentioned bilateral physically settled supply contracts will be deemed to be equivalent to contracts traded on an OTF and, hence, will be artificially classified as

a financial instrument. Wrongfully, as they clearly do not possess the characteristic of financial instruments. They serve to cover the physical power and gas demand of the real economy. In addition, it makes compliance more difficult with regards to C(7) as firms would have to check on a case-by-case basis whether equivalent contracts are traded at a trading venue somewhere in the EU. In addition, the respective contracts would need to be reported under EMIR, would be covered by the MAR and would cause additional compliance costs for the real economy.

Finally, a re-classification of physical gas and power transactions as financial instruments would mean that energy trading companies are regulated as if they were banks. Including detailed oversight by financial regulators and required to comply with onerous and costly financial market rules, such as MiFID II licensing requirements, EMIR clearing and margining obligations, and prudential regulation under IFR (capital and liquidity requirements). This would negatively impact the market and its end users. As a consequence, liquidity in the respective contracts would drop, prices would increase and costs for power and gas would rise for the real economy as a whole.

Q4: Which option do you support to address the negative impact of position limits on new and illiquid commodity derivatives: Option 1 or Option 2? Please explain why. If you support another alternative, please explain which one and why.

We stongly support a more focused approach regarding the position limit regime, which would also better reflect a level-playing field with the US competitors. We advocate for Option 1 defining “critical” contract subject to the position limit regime, for the reasons mentioned by ESMA.

Q7: Would you support a position limit exemption for financial counterparties under mandatory liquidity provision obligations? If not, please explain why.

Yes, we agree for the reasons mentioned by ESMA.

Q8: Would you support introducing a hedging exemption for financial counterparties along the lines described above? If not, please explain why.

Yes, we agree with the ESMA’s view to provide a hedging exemption for authorised investment firms acting as market facing entity for non-financial groups. Nevertheless, ESMA should also allow other financial firms not belonging to a non-financial group to benefit from such an exemption for positions entered into to objectively reduce the risk of the position holder or their clients. Investment firms/banks,

whilst dealing on own account, play a vital role in commodity market as they provide smaller commercial players access to derivative markets.

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