

# Decision of the Board of Supervisors

amending Decision ESMA70-155-5905 on delegation to 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/EC<sup>1</sup> (“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/EU<sup>2</sup> (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 derivatives<sup>3</sup> (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) 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.
- (3) In order to ensure the efficient processing of the high number of assessments, the Board of Supervisors adopted on 26 September 2018 a decision on the delegation to the ESMA Chair of the power to perform the assessment regarding third country trading venues for the purposes of Article 57(4) of MiFID (ESMA70-155-5905). The decision was also driven by the number of other

---

<sup>1</sup> OJ L 331, 15.12.2010, p. 84.

<sup>2</sup> OJ L 173, 12.6.2014, p. 349.

<sup>3</sup> OJ L 87, 31.3.2017, p. 479–491

new tasks for ESMA envisaged in MiFiR/MiFID II, often linked to tight deadlines. As a result, the Board of Supervisors of ESMA allocated more resources to the execution of some of these tasks.

- (4) While no major changes have occurred in the third country trading venues framework, it is appropriate to reflect the latest amendments in the ESMA governance structure, whereby the commodity derivatives task force (CDTF) ceases to exist, and a new commodity derivatives working group (CDWG) is established which reports directly to the newly established markets standing committee (MSC).
- (5) To take into account the amendments in the ESMA governance, it is desirable that Decision ESMA70-155-5905 is amended accordingly.

### **Has adopted this decision:**

#### **Article 1**

In Article 1 of Decision of the Board of Supervisors ESMA70-155-5905, the third paragraph is replaced by the following:

“For the purpose of this Decision, non-controversial assessment shall mean an assessment establishing that a third-country trading venue meets all the criteria outlined in Article 2 and in respect of which neither members of the Commodity Derivatives Working Group (CDWG), nor ESMA staff raise objections. In case one or more members of the CDWG, or ESMA staff, raise objections, the assessment shall still be considered uncontroversial provided that all members of the markets standing committee (MSC) reach an agreement which confirms the compatibility of a third country trading venue with the relevant criteria.”

#### **Article 2**

- (1) This decision enters into force on the day of its adoption.
- (2) It shall be published on ESMA’s website.

Done in Paris on 23 March

Verena Ross  
Chair  
For the Board of Supervisors