Brussels, 14.7.2021
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COMMISSION DELEGATED REGULATION (EU) …/...

of 14.7.2021

supplementing Directive 2014/65/EU of the European Parliament and of the Council by specifying the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Markets in Financial Instruments Directive (Directive 2014/65/EU, MiFID II) exempts persons dealing on own account, or providing investment services to clients, in commodity derivatives, emission allowances or derivatives thereof, provided this is an ancillary activity to their main business on a group basis and the main business is not the provision of investment services within the meaning of MiFID II or banking activities under Directive 2013/36/EU.

In this context, Article 2(4) of MiFID II empowered the Commission to adopt regulatory technical standards (RTS) specifying the criteria for establishing when an activity is to be considered ancillary to the main business of a group.

Directive (EU) 2021/338 revisited the Ancillary Activity Exemption and empowered the Commission to adopt a Delegated Regulation that will replace CDR 2017/592 (RTS 20). The changes triggered by the amended Ancillary Activity Exemption are the deletion of the Overall Market Size Test of Article 2 of the CDR 2017/592 and the introduction of the new De-Minimis Threshold Test. The amended Ancillary Activity Exemption does not change the established calculation methodology of the Trading Test and Capital Employed Test as described in CDR 2017/592. The only change to these two tests is the level of the corresponding threshold as set out in Directive (EU) 2021/338.

Therefore, this Delegated Regulation continues to apply the established calculation methodologies and principles of the CDR 2017/592. These are already implemented by non-financial firms and accordingly supervised by financial regulators and did not raise any concerns. This guarantees an efficient transition to the new Ancillary Activity Exemption regime and avoids additional implementation efforts by non-financial firms and national competent authorities.

In order to address the legal uncertainty that would arise for those non-financial groups that do not have a complete and representative set of data covering their main and ancillary activities, a calculation period of three years is also maintained from CDR 2017/592. If calculated annually, the amount of capital employed and the size of the trading activity in financial instruments might fluctuate from year to year as, for example, events that occur periodically may require increased hedging activities in certain years but not in others. Therefore, a non-financial group may fall within the scope of MiFID II because it fulfils the relevant criteria in one year; however, it may qualify for an exemption from MiFID II in another year. In order to address this practical issue of an "oscillator" group, the calculations to be undertaken to verify whether non-hedging trading is ancillary or not need should cover a rolling average of three years.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of the Regulation (EU) 1095/2010 ESMA has carried out a public consultation on the draft regulatory technical standards. A consultation paper was published on 19 December 2014 on the ESMA website and the consultation closed on 2 March 2015. In addition, the ESMA sought the views of the Securities and Markets Stakeholder Group (SMSG) established in accordance with Article 37 of the ESMA Regulation. The SMSG chose not to provide advice on these issues due to the technical nature of the standards.

Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has submitted its impact assessment, including the analysis of costs and benefits related to the draft technical standards. This analysis is available at https://www.esma.europa.eu/databases-library/esma-library. The Delegated Regulation was presented to the Expert Group of the European Securities Committee (EGESC) for consultation.

On 21 May 2021, the draft Delegated Regulation was presented to the Expert Group of the European Securities Committee (EGESC) for consultation, in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making. Finally, the draft Delegated Regulation was published on the European Commission's website on 27 May 2021 for public feedback. The period for public feedback closed on 24 June 2021.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

Article 89 of Directive 2014/65/EU of the European Parliament and of the Council ("MIFID II") as amended by Article 1(13) of Directive (EU) 2021/338 of the European Parliament and of the Council (the "Capital Markets Recovery Package") and conferring to the Commission the power referred to in Article 2(4) of MIFID II as amended by Article 1 (1) b) of Directive (EU) 2021/338 to supplement MIFID II by specifying, for the purpose of point (j) of paragraph 1 of Article 2, the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level. The existing Commission Delegated Regulation 2017/592 will be repealed.

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supplementing Directive 2014/65/EU of the European Parliament and of the Council by specifying the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

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[1], and in particular Article 2(4) thereof,

Whereas:

(1) The assessment whether persons are dealing on own account or are providing investment services in commodity derivatives, emission allowances and derivatives thereof in the Union as an activity ancillary to their main business should be performed at a group level. In line with the definition in Article 2(11) of Directive 2013/34/EU of the European Parliament and of the Council[2], a 'group' is considered to comprise the parent undertaking and all its subsidiary undertakings. For the purpose of this regulation, it includes entities located in the Union and in third countries regardless of whether the group is headquartered inside or outside the Union.

(2) The assessment should be performed in the form of three alternative tests ('ancillary activity tests'), which are based on the trading activity of the persons within the group. The tests should determine whether the persons within the group trade on own account. If those persons provide investment services in commodity derivatives, emission allowances or derivatives thereof in the Union to such a large extent relative to the main business of the group that those activities cannot be considered to be ancillary at group level, those persons should be required to obtain authorisation as an investment firm. In order to take account of the economic reality of the heterogeneous groups that have to undertake the assessment of whether their trading is ancillary to their main business activities, those persons should be allowed to decide which of the three alternative tests to perform in order to determine whether their trading activity is ancillary to the main business of a particular group. If a person's trading activity is ancillary under any of those tests, it should be considered to be ancillary to the main business for the purpose of Article 2(1)(j) of Directive 2014/65/EU.

(3) Pursuant to the first alternative test a person's activity should be ancillary to the main business if its net outstanding notional exposure in commodity derivatives or emission

[1] OJ L 173 12.6.2014, p. 349.

[2] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

allowances or derivatives thereof for cash settlement traded in the Union, excluding commodity derivatives or emission allowances or derivatives thereof traded on a trading venue, is below an annual threshold of EUR 3 billion (the 'De-Minimis Threshold Test').

(4) The second alternative test compares the size of a person's trading activity against the overall trading activity of the group in the Union (the 'Trading Test'). The size of the trading activity of a person should be determined by deducting the sum of the size of the transactions for the purposes of intra-group liquidity or risk management purposes, objectively measurable reduction of risks directly relating to commercial or treasury financing activity or fulfilling obligations to provide liquidity on a trading venue ('privileged transactions') from the size of the overall trading activity undertaken by the person. Contracts where the person within the group that is a party to any of those contracts is authorised in accordance with Directive 2014/65/EU or Directive 2013/36/EU of the European Parliament and of the Council[3] should be deducted from the trading activity of a person. The overall trading activity of the group in the Union includes privileged transactions and contracts where the person within the group that is a party to any of those contracts is authorised in accordance with Directive 2014/65/EU or Directive 2013/36/EU.

(5) The size of the trading activity should be determined by the gross notional value of contracts in commodity derivatives, emission allowances and derivatives thereof in the Union on the basis of a rolling average of the preceding three annual periods.

(6) The size of the trading activity used as the parameter under the Trading test is taken as a proxy for the commercial activity that the person or group engages in as its main business. This proxy should be easy and cost-efficient for persons to apply as it builds on data already required to be collected for compliance purposes, such as for the reporting of transactions, while at the same time establishing a meaningful test.

(7) This proxy is appropriate because a rational risk-averse entity, such as a producer, processor or consumer of commodities or emission allowances, is deemed to hedge the volume of the commercial activity of its main business with an equivalent volume of commodity derivatives, emission allowances or derivatives thereof. Therefore, the volume of all its trading activity in commodity derivatives, emission allowances or derivatives thereof measured in the gross notional value of the underlying is an appropriate proxy for the size of the main business of the group. Since groups, whose main business activities are not related to commodities or emission allowances, would not use commodity or emission allowances derivatives as a risk-reducing tool, their trading in commodity derivatives, emission allowances or derivatives thereof should not qualify as hedging.

(8) The use of commodity derivatives as a risk-reducing tool however cannot be considered a perfect proxy for all the commercial activity that the person or group conducts as its main business since it may not take into account other investments in fixed assets unrelated to derivative markets.

(9) The second test may not adequately measure the main activity of persons who have significant capital investments, relative to their size, for example in the creation of infrastructure, transportation facilities and production facilities. Neither does it

[3] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176 27.6.2013, p. 338).

recognise investments that cannot be hedged in financial markets. Therefore it is necessary to provide for a third method that uses a capital employed based metric to measure whether that trading activity is ancillary to the main business of the group.

(10) The third alternative test, the Capital Employed Test, is provided in order to take into account the economic reality of the heterogeneous groups that need to undertake the assessment of whether their trading is ancillary to their main business, including groups that undertake significant capital investments, relative to their size, for example in the creation of infrastructure, transportation facilities and production facilities, as well as investments which cannot be easily hedged in financial markets. As the three alternative tests cater for the different underlying economic realities of various groups, all tests should constitute equally suitable, alternative and independent methods to determine whether the trading activity is ancillary to the main business of a particular group. If a person's trading activity is found to be ancillary under any of those tests, it should be ancillary to the main business for the purpose of Article 2(1)(j) of Directive 2014/65/EU.

(11) The third test uses the estimated capital that a non-financial group would be required to hold against the market risk inherent in its positions arising from trading in commodity derivatives, emission allowances and derivatives thereof in the Union, other than those from privileged transactions, as a proxy for the amount of ancillary activities undertaken by the persons in a group. The framework developed under the auspices of the Basel Committee in Banking Supervision and implemented in the Union through Directive 2013/36/EU is used to apply a proportionate notional capital weighting to positions. Within this framework, the net position in a commodity derivative, an emission allowance or a derivative thereof in the Union should be determined by netting long and short positions in a particular type of commodity derivative contract, emission allowance or derivative contract thereof, such as a future, option, forward or warrants. In determining the net position, netting should take place irrespective of where the contract is traded, the contract's counterparty or its maturity. The gross position in a relevant commodity derivative, emission allowance contract or a derivative contract thereof should, on the other hand, be calculated by adding the net positions of types of contracts that relate to a particular commodity or, emission allowance or derivative thereof. In this context, net positons in a particular type of commodity derivative contract, emission allowance contract or derivative contract thereof should not be netted against each other.

(12) Under the third test, the amount of the estimated capital of a group should be compared to the actual amount of capital employed of that group that should reflect the size of its main activity. The capital employed should be calculated on the basis of the sum of the total assets of the group minus its current debt. That current debt should comprise debt that is due to be settled within 12 months.

(13) The rationale of the ancillary activity tests is to check whether persons within a group that are not authorised in accordance with Directive 2014/65/EU should apply for an authorisation due to the relative or absolute size of their activity in commodity derivatives, emission allowances and derivatives thereof in the Union. The ancillary activity tests determine the size of activities in commodity derivatives, emission allowances and derivatives thereof in the Union that persons within a group may carry out without authorisation in accordance with Directive 2014/65/EU due to those activities being ancillary to the group's main business. It is therefore appropriate to calculate the size of the ancillary activity of the group by using criteria that exclude for all three tests the activity carried out by group members that are authorised in

accordance with that Directive in order to assess the size of genuine ancillary activity carried out by unauthorised group members.

(14) In order to allow market participants to plan and operate their business in a reasonable way and to take into account seasonal patterns of activity, the calculation of the alternative tests determining when an activity is considered to be ancillary to the main business should be based on a period of three years. Therefore, entities should perform the assessment whether they breach one of the three thresholds of the three alternative tests on an annual basis by calculating a simple average of three years on a rolling basis. This obligation should be without prejudice to the right of the competent authority to request at any time a person to report the basis on which that person has assessed its activity, for the purposes of Article 2(1)(j), points (i) and (ii), of Directive 2014/65/EU, to be ancillary to its main business.

(15) Transactions objectively measurable as reducing risks directly relating to commercial activity or treasury financing activity and intra-group transactions should be considered in accordance with the provisions of Regulation (EU) No 648/2012 of the European Parliament and of the Council[4]. However, in relation to transactions in derivatives which are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity, Commission Delegated Regulation (EU) No 149/2013[5] only refers to derivatives not traded on regulated markets while Article 2(4) of Directive 2014/65/EU covers derivatives traded on trading venues. Therefore, when the ancillary activity tests equally cover derivatives traded on regulated markets and derivatives not traded on regulated markets, it is appropriate to take into account derivatives traded on regulated markets in relation to transactions that are deemed to be objectively measurable as reducing risks directly related to commercial or treasury financing activity.

(16) In some circumstances, for example when existing market liquidity is insufficient or a corresponding derivative contract is not available, it may not be possible to hedge a commercial risk by using a directly related commodity derivative contract, that is to say a contract with exactly the same underlying and settlement date as the risk being covered. In such case, the person should be permitted to use proxy hedging through a closely correlated instrument to cover its exposure, such as an instrument with a different but very close underlying. Additionally, macro or portfolio hedging is permitted to be used by persons, which enter into commodity derivative contracts to hedge a risk in relation to their overall risks or the overall risks of the group. Those macro, portfolio or proxy hedging commodity derivative contracts should constitute hedging for the purpose of the ancillary activity tests. When a person applying the ancillary activity tests uses portfolio or macro hedging, it may not be able to establish a one-to-one link between a specific transaction in a commodity derivative and a specific risk directly related to the commercial and treasury financing activities entered into to hedge it. The risks directly related to the commercial and treasury financing activities may be of a complex nature, for example several geographic markets, several products, time horizons or entities. The portfolio of commodity derivative contracts

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[4] Regulation (EU) 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

[5] Commission Delegated Regulation (EU) No 149/2013 of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP (OJ L 52 23.2.2013, p. 11).

entered into to mitigate those risks may derive from complex risk management systems. In such cases the risk management systems should prevent non-hedging transactions from being categorised as hedging and provide for a sufficiently disaggregate view of the hedging portfolio so that speculative components are identified and counted towards the thresholds. Positions should not qualify as reducing risks related to commercial activity solely on the grounds that they form part of a risk-reducing portfolio on an overall basis.

(17) A risk may evolve over time and, in order to adapt to the evolution of the risk, commodity or emission allowance derivatives initially executed for reducing risk related to commercial activity may have to be offset through the use of additional commodity or emission allowance derivative contracts. As a result, hedging of a risk may be achieved by a combination of commodity or emission allowance derivative contracts, including offsetting commodity derivative contracts that offset those commodity derivative contracts that have become unrelated to the commercial risk. Additionally the evolution of a risk that has been addressed by the entering into of a position in a commodity or emission allowance derivative for the purpose of reducing that risk should not subsequently give rise to the re-evaluation of that position as being not a privileged transaction ab initio.

(18) Commission Delegated Regulation (EU) 2017/592[6] supplements Directive 2014/65/EU with regard to criteria to establish when an activity is considered to be ancillary to the main business. That Directive has been amended 16 February 2021 by Directive (EU) 2021/338, setting out new provisions regarding the ancillary activity exemption and the ancillary activity tests, and empowering the Commission to adopt a delegated act specifying the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level. In particular, the Overall Market Test has been removed as the commodity derivatives landscape in the Union has changed to such an extent that the Overall Market Test would render entities no longer eligible to the ancillary activity exemption even with no change to their business conduct. Furthermore, the De-Minimis Threshold Test is introduced and the thresholds for the Trading Test and the Capital Employed Test are changed. Therefore, Delegated Regulation (EU) 2017/592 should be repealed and replaced by this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

Asset classes eligible for the ancillary activity test

In order to be considered to be ancillary to the main business of the group, the activities of persons referred to in Article 2(1)(j), points (i) and (ii), of Directive 2014/65/EU shall relate to any of one or more of the following asset classes:

(a) commodity derivatives which relate to a commodity or an underlying referred to in points (5), (6), (7) and (10) of Section C of Annex I to Directive 2014/65/EU;

[6] Commission Delegated Regulation (EU) 2017/592 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 criteria to establish when an activity is considered to be ancillary to the main business (OJ L 87, 31.3.2017, p. 492).

(b) emission allowances referred to in Annex I, Section C 11, to Directive 2014/65/EU or emission allowances derivatives referred to in Annex I, Section C 4 to Directive 2014/65/EU.

Article 2

Ancillary activity tests

1. The activities of persons referred to in Article 1 shall be considered to be ancillary to the main business at group level where they comply with any of the following conditions:

   (a) the net outstanding notional exposure in commodity derivatives for cash settlement or emission allowances or derivatives thereof for cash settlement traded in the Union calculated in accordance with Article 3, excluding commodity derivatives or emission allowances or derivatives thereof traded on a trading venue, is below an annual threshold of EUR 3 billion (De-Minimis Threshold Test);

   (b) the size of those activities calculated in accordance with Article 4(1) accounts for 50 % or less of the total size of the other trading activities of the group calculated in accordance with Article 4(2);

   (c) the estimated capital employed for carrying out those activities calculated in accordance with Article 5, paragraphs 1 and 3, accounts for not more than 50 % of the capital employed at group level for carrying out the main business calculated in accordance with Article 5(4).

2. A group is considered to comprise the parent undertaking and all its subsidiary undertakings. It includes entities located in the Union and in third countries regardless of whether the group is headquartered inside or outside the Union.

Article 3

De-Minimis Threshold Test

1. The net outstanding notional exposure referred to in Article 2, paragraph 1, point (a), shall be calculated by averaging the aggregated month-end net outstanding notional values for the previous 12 months resulting from all contracts in commodity derivatives for cash settlement or emission allowances or derivatives thereof for cash settlement entered into in the Union by a person within a group.

   The net outstanding notional values referred to in the first subparagraph shall be calculated on the basis of all contracts in commodity derivatives for cash settlement or emission allowances or derivatives thereof for cash settlement that are not traded on a trading venue to which any person located in the Union is a party during the relevant annual accounting period referred to in Article 6(2).

   The contracts in commodity derivatives or emission allowances derivatives for cash settlement referred to in the first and second subparagraph shall include all derivative contracts relating to commodities or emission allowances which must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event.

2. The aggregation referred to in the first paragraph shall not include positions from contracts resulting from transactions referred to in Article 2(4), fourth subparagraph, points (a), (b) and (c), of Directive 2014/65/EU or from contracts where the person

within the group that is a party to any of them is authorised in accordance with Directive 2014/65/EU or Directive 2013/36/EU.

3. The net outstanding notional values referred to in paragraph 1 shall be determined pursuant to the netting methodology of Article 5(2).

4. The values resulting from the aggregation referred to in this Article shall be denominated in euro.

Article 4
Trading Test

1. The size of the activities referred to in Article 2, paragraph 1, point (b), undertaken in the Union by a person within a group shall be calculated by aggregating the gross notional value of all contracts in commodity derivatives or emission allowances or derivatives thereof to which that person is a party.

   The aggregation referred to in the first subparagraph shall not include contracts resulting from transactions referred to in Article 2(4), fourth subparagraph, points (a), (b) and (c), of Directive 2014/65/EU or contracts where the person within the group that is a party to any of them is authorised in accordance with Directive 2014/65/EU or Directive 2013/36/EU.

2. The total size of the other trading activities of the group referred to in Article 2, paragraph 1, point (b), shall be calculated by aggregating the gross notional value of all contracts in commodity derivatives, emission allowances and derivatives thereof to which persons within that group are a party.

   The aggregation referred to in the first subparagraph shall include contracts resulting from transactions referred to in Article 2(4), fourth subparagraph, points (a), (b) and (c), of Directive 2014/65/EU or contracts where the person within the group that is a party to any of them is authorised in accordance with Directive 2014/65/EU or Directive 2013/36/EU.

3. The overall market trading activities referred to in paragraphs 1 and 2 shall be calculated by aggregating the gross notional value of all contracts that are not traded on a trading venue to which any person located in the Union is a party and of any other contracts that is traded on a trading venue located in the Union during the relevant annual accounting period referred to in Article 6(2).

4. The aggregate values referred to in this Article shall be denominated in euro.

Article 5
Capital Employed Test

1. The estimated capital employed for carrying out the activities referred to in Article 2, paragraph 1, point (c), shall be the sum of the following:

   (a) 15 % of each net position, long or short, multiplied by the price for the commodity derivative, emission allowance or derivatives thereof;

   (b) 3 % of the gross position, long plus short, multiplied by the price for the commodity derivative, emission allowance or derivatives thereof.

   The positions referred to in the first subparagraph shall be calculated on the basis of all contracts that are not traded on a trading venue to which any person located in the

Union is a party and of any other contracts that is traded on a trading venue located in the Union during the relevant annual accounting period referred to in Article 6(2).

2. For the purposes of paragraph 1, first subparagraph, point (a), the net position in a commodity derivative, an emission allowance or a derivative thereof in the Union shall be determined by netting long and short positions:

(a) in each type of commodity derivative contract with a particular commodity as underlying in order to calculate the net position per type of contract with that commodity as underlying;

(b) in an emission allowance contract in order to calculate the net position in that emission allowances contract; or

(c) in each type of emission allowance derivative contract in order to calculate the net position per type of emission allowance derivative contract.

For the purposes of paragraph 1, first subparagraph, point (a), net positions in different types of contracts with the same commodity as underlying or different types of derivative contracts with the same emission allowance as underlying can be netted against each other.

3. For the purposes of paragraph 1, first subparagraph, point (b), the gross position in a commodity derivative, an emission allowance or a derivative contract thereof, shall be determined by computing the sum of the absolute values of the net positions per type of contract with a particular commodity as the underlying, per emission allowance contract or per type of contract with a particular emission allowance as the underlying.

For the purposes of paragraph 1, first subparagraph, point (b), net positions in different types of derivative contracts with the same commodity as underlying or different types of derivative contracts with the same emission allowance as underlying cannot be netted against each other.

The calculation of the estimated capital shall not include positions resulting from transactions referred to in Article 2(4), fourth subparagraph, points (a), (b) and (c), of Directive 2014/65/EU or contracts where the person within the group that is a party to any of them is authorised in accordance with Directive 2014/65/EU or Directive 2013/36/EU.

4. The capital employed for carrying out the main business of a group shall be the sum of the total assets of the group minus its short-term debt as recorded in its consolidated financial statements of the group at the end of the relevant annual calculation period. For the purposes of this paragraph, short-term debt means debt with a maturity of less than 12 months.

5. The values resulting from the calculations referred to in this Article shall be denominated in euro.

Article 6
Procedure for calculation

1. The calculation of the De-Minimis Threshold Test referred to in Article 3 shall be determined by reference to three annual calculation periods that precede the date of calculation, where the simple average of the resulting annual values shall be compared with the threshold referred to in Article 2, paragraph 1, point (a). The

calculation of the size of the trading activities and capital employed referred to in Articles 4 and 5 shall be based on a simple average of the daily trading activities or estimated capital allocated to such trading activities, during three annual calculation periods that precede the date of calculation. The calculations shall be carried out annually in the first quarter of the calendar year that follows an annual calculation period, where the simple average of the resulting annual values shall be compared with the respective thresholds referred to in Article 2, paragraph 1, points (b) and (c).

2. For the purpose of paragraph 1, an annual calculation period means a period which starts on 1 January of a given year and ends on 31 December of that year.

3. For the purpose of paragraph 1, the calculation of the size of trading activities or estimated capital allocated to trading activities taking place in 2022 shall take into account the three preceding annual calculation periods, starting on 1 January 2019, 1 January 2020 and 1 January 2021, and the calculation taking place in 2023 shall take into account the three preceding annual calculation periods, starting on 1 January 2020, 1 January 2021 and 1 January 2022.

4. By derogation from paragraph 3, the reference period for the calculation of daily trading activities or estimated capital allocated to such trading activities shall comprise only the most recent annual calculation period where both the following conditions are met:

(a) daily trading activities or estimated capital allocated to such trading activities declines by more than 10 %, when comparing the earliest of the three preceding annual calculation periods with the most recent annual calculation period; and

(b) daily trading activities or estimated capital allocated to such trading activities in the most recent of the three annual calculation periods is lower than in the two preceding calculation periods.

Article 7

Transactions qualifying as reducing risks

1. For the purposes of Article 2(4), fourth subparagraph, point (b), of Directive 2014/65/EU, a transaction in derivatives shall be considered objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity where one or more of the following criteria is met:

(a) the transaction reduces the risks arising from the potential change in the value of assets, services, inputs, products, commodities or liabilities that the person 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 normal course of its business;

(b) the transaction covers the risks arising from the potential indirect impact on the value of assets, services, inputs, products, commodities or liabilities referred to in point (a), resulting from fluctuation of interest rates, inflation rates, foreign exchange rates or credit risk;

(c) the transaction qualifies as a hedging contract pursuant to International Financial Reporting Standards adopted in accordance with Article 3 of Regulation (EC) No 1606/2002 of the European Parliament and Council[7].

2. For the purposes of paragraph 1, a qualifying risk-reducing transaction taken on its own or in combination with other derivatives is one for which a non-financial entity

(a) describes the following in its internal policies:

(i) the types of commodity derivative, emission allowance or derivative thereof contracts included in the portfolios used to reduce risks directly relating to commercial activity or treasury financing activity and their eligibility criteria;

(ii) the link between the portfolio and the risks that the portfolio is mitigating;

(iii) the measures adopted to ensure that the transactions concerning those contracts serve no other purpose than covering risks directly related to the commercial activity or the treasury financing activity of the non-financial entity, and that any transaction serving a different purpose can be clearly identified;

(b) is able to provide a sufficiently disaggregate view of the portfolios in terms of class of commodity derivative, emission allowance or derivative thereof, underlying commodity, time horizon and any other relevant factors.

Article 8

Repeal

Delegated Regulation (EU) 2017/592 is repealed.

References to Delegated Regulation (EU) 2017/592 shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex to this Regulation.

Article 9

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 14.7.2021

For the Commission
The President
Ursula VON DER LEYEN

[7] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).