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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
amending Regulation (EU) No 575/2013 as regards exemptions for commodity dealers

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The term 'commodity dealer' covers a wide spectrum of actors in energy and commodity markets: some trade exclusively in commodity derivative contracts and resemble investment firms in terms of functions and risks, whereas others trade commodity derivatives purely as an ancillary activity to commodities production. The requirements laid down in Regulation (EU) No 575/2013 (the 'Capital Requirements Regulation' or 'CRR') and in Directive 2013/36/EU (the 'Capital Requirements Directive' or 'CRD') apply to both credit institutions and investment firms. The prudential regime applicable to investment firms is derived from that imposed on credit institutions, adapted as a function of the investment services that they provide.

Articles 493(1) and 498(1) of the CRR exempt commodity dealers ("investment firms whose main business consists exclusively of the provision of investment services or activities in relation to the financial instruments set out in points 5, 6, 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC and to whom Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field did not apply on 31 December 2006") from large exposures requirements and from own funds requirements respectively.

Both exemptions expire on 31 December 2017. This 'sunset clause' was originally included in the CRR in order to allow time for regulators to determine a prudential regulation adapted to the risk profile of commodity dealers.¹ To this end, Articles 493(2) and 498(2) of the CRR mandate the Commission to prepare reports by the end of 2015. On the basis of those reports, the Commission may decide to submit proposals to amend the CRR. The Commission is also required to submit, within the same deadline, a report on an appropriate regime for the prudential supervision of investment firms in general. Here again, the report may be followed by a Commission proposal.

Since the abovementioned reports are related, the Commission decided to undertake a single review (henceforth 'investment firms review') and prepare a single report on the above topics. This was deemed necessary in order to ensure the development of a coherent prudential framework for all types of investment firms. The work on the investment firms review is already underway: the Commission asked the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) to provide technical advice on the matter. The advice is expected by the end of September 2015. The Commission will then use the advice to prepare its own report. Should the Commission decide to change the existing prudential framework for investment firms, the report will detail the next steps of the investment firms review and the broad outline of the changes the Commission is contemplating.

The investment firms review is a complex project which will not be completed by the end of this year. It is therefore highly improbable that any legislation that may result from this review can be prepared, adopted and applied before the current exemptions expire (i.e. before the end of 2017). This has implications for commodity dealers: if no specific prudential

¹ The CRR actually extended the exemptions that were already contained in Directive 2006/48/EC because there was not sufficient time to develop an appropriate prudential framework for commodity dealers.

framework that may result from the investment firm review would be in place by then, they would be subject to the full CRR/CRD requirements starting from 1 January 2018.

There are two problems related to this scenario. First, commodity dealers would become subject to the full CRR/CRD requirements without a conscious (and informed) decision that such treatment is indeed the most appropriate one for them. Second, assuming that the investment firm review would result in a tailor-made prudential framework for commodity dealers, they would be deprived of a stable regulatory framework. They would move from the current treatment where they are exempted from large exposures and own funds requirements, to a temporary treatment comprising the full CRR/CRD requirements, and eventually to the aforementioned tailor-made framework within a very short period of time (one to two years). This is not a desirable outcome.

To prevent that this situation arises it is therefore opportune to extend the existing exemptions laid down in the CRR. The extension should take into account the amount of time that will be necessary to conclude the investment firms review and to prepare, adopt and apply any legislation that may result from that review.

- **Consistency with existing policy provisions in the policy area**

This proposal is fully consistent with existing provisions in the CRR (it would extend an existing exemptions contained therein). It is also fully consistent with the general thrust of the investment firms review (finding the appropriate prudential framework for investment firms) mandated in that Regulation (it would allow maintaining the existing treatment of commodity dealers until the review is concluded and any potential legislative proposals resulting from it are implemented).

- **Consistency with other Union policies**

This proposal is related to implementing legislation under Directive 2014/65/EU ('MiFID 2'), which will identify those commodity dealers that will be classified as investment firms.² It is also related to policies in the area of energy markets given that commodity dealers are active on those markets (they may even be part of large energy groups).³

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Since the proposal amends the CRR, the same legal basis was chosen.

- **Subsidiarity (for non-exclusive competence)**

The current exemptions are contained in Union law and in particular in the CRR. Since the CRR does not grant Member States the possibility to extend those exemptions, they can be extended only at Union level.

- **Proportionality**

This proposal is proportionate as it introduces a very limited change to existing legislation in order to address the problem described in Section 1.

² The link runs from MiFID 2 to the CRR/CRD: if a commodity dealer is categorised as an investment firm under the former, it would become subject to the requirements in the latter.

³ An extension of the exemption will prevent any potential disruptions to those markets and will provide sufficient time to find an appropriate prudential framework for commodity dealers.

- **Choice of the instrument**

A regulation was chosen because the extension requires amending the CRR.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

As mentioned above, the prudential framework applicable to investment firms (including commodity dealers) laid down in the CRR and the CRD is currently under review. The results of that review will determine the appropriate prudential treatment of commodity dealers. The purpose of this proposal is to extend the existing treatment of commodity dealers until the investment firms review is completed and any potential changes to the existing prudential framework stemming therefrom are implemented.

- **Stakeholder consultations**

No specific stakeholder consultations were carried out.

- **Collection and use of expertise**

No external expertise was sought or used.

- **Impact assessment**

No impact assessment is foreseen for this proposal as it will not have any significant economic, environmental or social impact. Rather, significant impacts could materialise if the exemptions would not be extended and commodity dealers would, as a consequence, become subject to the full requirements laid down in the CRR and the CRD (without any analysis of whether such treatment would be the appropriate one for them).

- **Regulatory fitness and simplification**

The proposal entails no changes for the regulatory burden of commodity dealers compared to the status quo. Assuming that the investment firms review will result in the development of a new prudential framework for commodity dealers, this proposal is rather intended to prevent that commodity dealers would become subject to the full requirements under the CRR and the CRD (with the associated regulatory burden) only to become subject to the aforementioned new framework shortly thereafter.

In other words, this proposal aims at preventing a temporary increase in the regulatory burden of commodity dealers.

- **Fundamental rights**

The proposal does not have consequences for the protection of fundamental rights.

4. BUDGETARY IMPLICATIONS

This proposal does not have any budgetary implications.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

The purpose of this proposal is to extend the period during which commodity dealers are exempted from certain requirements laid down in the CRR. No specific implementation plans are needed since the extension is directly applicable and allows for the continuation of existing practice. For the same reasons there is no need for specific monitoring, evaluation and reporting frameworks to be put in place. Those will rather need to be put in place in the context of any changes to the prudential framework applicable to commodity dealers that may result from the investment firms review.

- **Explanatory documents (for directives)**

Not applicable.

- **Detailed explanation of the specific provisions of the proposal**

The provisions contained in the proposal concern only the extension of the exemptions for commodity dealers from the large exposures and own funds requirements laid down in the CRR. The previous sections of this Explanatory Memorandum already provide a detailed explanation of the reasons and logic behind the proposal and its provisions.

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REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,
Having regard to the proposal from the European Commission,
After transmission of the draft legislative act to the national parliaments,
Having regard to the opinion of the European Economic and Social Committee¹,
Having regard to the opinion of the European Central Bank²,
Acting in accordance with the ordinary legislative procedure,
Whereas:

- (1) Regulation (EU) No 575/2013 of the European Parliament and of the Council³ exempts investment firms whose main business consists exclusively of the provision of investment services or activities in relation to the financial instruments set out in points 5, 6, 7, 9 and 10 of Section C of Annex I to Directive 2004/39/EC of the European Parliament and of the Council⁴ and to whom Council Directive 93/22/EEC⁵ did not apply on 31 December 2006 ('commodity dealers') from large exposures requirements and from own funds requirements. Those exemptions apply until 31 December 2017.
- (2) Regulation (EU) No 575/2013 also requires the Commission to prepare, by 31 December 2015, a report on an appropriate regime for the prudential supervision of commodity dealers. Furthermore, that Regulation requires the Commission to prepare a report on an appropriate regime for the prudential supervision of investment firms in general by the same date. Where appropriate, those reports are to be followed by legislative proposals.

¹ OJ C , , p. .

² OJ C , , p. .

³ Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p.1).

⁴ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1).

⁵ Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ L 141, 11.6.1993, p. 27).

- (3) The review of the prudential treatment of investment firms ('investment firms review'), including commodity dealers is currently underway but has not been completed yet. The finalisation of the review and the adoption of new legislation that may be required in light of that review will be concluded only after 31 December 2017.
- (4) Under the existing regime, after 31 December 2017 commodity dealers will become subject to the large exposures requirements and own funds requirements. This could force them to significantly increase the amount of own funds that they need to have in order to continue their activities and could therefore increase the related costs of performing those activities.
- (5) The decision to apply large exposures requirements and own funds requirements to commodity dealers should not come as a result of a lapsed exemption. Instead, that decision should be a thoroughly reasoned one, based on conclusions of the investment firms review, and clearly expressed in legislation.
- (6) A new time limit until which the exemptions apply should therefore be established. Regulation (EU) No 575/2013 should be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) No 575/2013 is amended as follows:

(1) in Article 493(1), the second sentence is replaced by the following:

"This exemption is available until 31 December 2020 or the date of entry into force of any amendments pursuant to paragraph 2 of this Article, whichever is the earlier.";

(2) in Article 498(1), the second subparagraph is replaced by the following:

"This exemption shall apply until 31 December 2020 or the date of entry into force of any amendments pursuant to paragraphs 2 and 3, whichever is the earlier.".

Article 2

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,

For the European Parliament
The President

For the Council
The President