

***Does “one-size-fits-all” bank
regulation “fit” the energy
sector?***

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MiFID I versus MiFID II – EXEMPTION FOR ENERGY COMPANIES

MiFID I

- Under the existing version of MiFID any **company specialising in commodities trading on own account is exempted** from MiFID

MiFID II

- The commodity trading exemption in Art. 2) k was **deleted**

Recital 88 – EC doesn't aim to catch utility traders, only sole speculators:

- 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 derivatives on an **ancillary basis** to clients of the main business remain exempt
- but firms specialising in trading commodities and commodity derivatives are brought in
- Exemption Art. 2) i - companies trading on own account in commodity derivatives are exempted if their trading **activity is ancillary** to their main business
- EU Commission shall adopt **delegated acts** to define “**Ancillary activity**“ to the main business on a group level through suggested **criteria**:
 - the extent to which the activity is objectively measurable as reducing risks directly related to the commercial activity or treasury financing activity
 - the amount of capital employed by the trading activity
- **BUT the definition should be clearer already at level 1**



CONSEQUENCES IF EXEMPTION IS NOT APPLICABLE

- Obligation to get MiFID licence as an investment firm
- Market abuse regulation (MAR) compliance
- Full impact of central clearing under EMIR (OTC Derivatives Regulation)
- Full impact of capital requirement directive (CRD) from 2014 onwards
- Possible doubling of requirements (eg. reporting)
- Regulatory oversight doubling (energy vs. financial regulator)

LEADING TO...

- Higher costs due to larger amount of capital and collateral required
- Mandatory central clearing – risk of resulting lower liquidity
- Increase in costs and liquidity risks may discourage hedging
- Capital held as collateral instead of physical investment


LEADING TO...

- **Significant increase in energy prices for final consumers**
- **Development of the internal energy market in danger**



DEFINITION OF FINANCIAL INSTRUMENTS – physical forwards

- **Physically settled OTC** commodity forward products are, correctly, still not classified as financial instruments
- **BUT** contract that is settled physically and traded on an organised trading facility (OTF) is now classified as a financial instrument
- The physically settled products (electricity and gas) are already covered by REMIT (Regulation on Energy Market Integrity and Transparency), which provides for effective supervision of energy markets



MiFID should exclude from the definition of financial instruments all products with delivery in the future that are **physically settled**