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DRAFT STATUTORY INSTRUMENTS

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**2017 No.**

**The Financial Services and Markets Act 2000  
(Regulated Activities) (Amendment) Order 2017**

**Amendments to Schedule 2 to the Order**

**10.**—(1) Schedule 2 to the Order<sup>(1)</sup> (Sections A and C of Annex I to the markets in financial instruments directive and related Community subordinate legislation) is amended as follows.

(2) In the heading, for “Community” substitute “EU”.

(3) In Part 1 of Schedule 2 (Section C of Annex I to the markets in financial instruments directive)

—  
(a) in paragraph 4, after “or yields,” insert “emission allowances”;

(b) in paragraph 5—

(i) for “forward rate agreements” substitute “forwards”;

(ii) for “otherwise” substitute “other”;

(c) in paragraph 6—

(i) for “contracts” substitute “contract”;

(ii) for “and/or an MTF” substitute “, an MTF, or an OTF, except for wholesale energy products traded on an OTF that must be physically settled”;

(d) for paragraph 7 substitute—

“7. Option, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in point 6 of this Section and not being for commercial purposes, which have the characteristics of other derivative financial instruments;”;

(e) for paragraph 10 substitute—

“10. Options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that 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, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF;”;

(f) after paragraph 10 insert—

“11. Emission allowances consisting of any units recognised for compliance with the requirements of [Directive 2003/87/EC](#)<sup>(2)</sup> (Emissions Trading Scheme).”.

(4) For Part 2 of Schedule 2 (Chapter VI of the Commission Regulation) substitute—

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(1) Schedule 2 was substituted by [S.I. 2006/3384](#).

(2) OJ L275, 25/10/2003, p.32.

## “PART 2

### Articles 5 to 8, 10 and 11 of the Commission Regulation

#### Article 5 Wholesale energy products that must be physically settled

1. For the purposes of Section C(6) of Annex I to [Directive 2014/65/EU](#), a wholesale energy product must be physically settled where all the following conditions are satisfied:

- (a) it contains provisions which ensure that parties to the contract have proportionate arrangements in place to be able to make or take delivery of the underlying commodity; a balancing agreement with the Transmission System Operator in the area of electricity and gas shall be considered a proportionate arrangement where the parties to the agreement have to ensure physical delivery of electricity or gas.
- (b) it establishes unconditional, unrestricted and enforceable obligations of the parties to the contract to deliver and take delivery of the underlying commodity;
- (c) it does not allow either party to replace physical delivery with cash settlement;
- (d) the obligations under the contract cannot be offset against obligations from other contracts between the parties concerned, without prejudice to the rights of the parties to the contract, to net their cash payment obligations.

For the purposes of point (d), operational netting in power and gas markets shall not be considered as offsetting of obligations under a contract against obligations from other contracts.

2. Operational netting shall be understood as any nomination of quantities of power and gas to be fed into a gridwork upon being so required by the rules or requests of a Transmission System Operator as defined in Article 2(4) of [Directive 2009/72/EC](#) of the European Parliament and of the Council for an entity performing an equivalent function to a Transmission System Operator at the national level. Any nomination of quantities based on operational netting shall not be at the discretion of the parties to the contract.

3. For the purposes of Section C(6) of Annex I to [Directive 2014/65/EU](#), force majeure shall include any exceptional event or a set of circumstances which are outside the control of the parties to the contract, which the parties to the contract could not have reasonably foreseen or avoided by the exercise of appropriate and reasonable due diligence and which prevent one or both parties to the contract from fulfilling their contractual obligations.

4. For the purposes of Section C(6) of Annex I to [Directive 2014/65/EU](#) bona fide inability to settle shall include any event or set of circumstances, not qualifying as force majeure as referred to in paragraph 3, which are objectively and expressly defined in the contract terms, for one or both parties to the contract, acting in good faith, not to fulfil their contractual obligations.

5. The existence of force majeure or bona fide inability to settle provisions shall not prevent a contract from being considered as ‘physically settled’ for the purposes of Section C(6) of Annex I to [Directive 2014/65/EU](#).

6. The existence of default clauses providing that a party is entitled to financial compensation in the case of non- or defective performance of the contract shall not prevent the contract from being considered as ‘physically settled’ within the meaning of Section C(6) of Annex I to [Directive 2014/65/EU](#).

7. The delivery methods for the contracts being considered as ‘physically settled’ within the meaning of Section C(6) of Annex I to [Directive 2014/65/EU](#) shall include at least:

- (a) physical delivery of the relevant commodities themselves;
- (b) delivery of a document giving rights of an ownership nature to the relevant commodities or the relevant quantity of the commodities concerned;

- (c) other methods of bringing about the transfer of rights of an ownership nature in relation to the relevant quantity of goods without physically delivering them including notification, scheduling or nomination to the operator of an energy supply network, that entitles the recipient to the relevant quantity of the goods.

Article 6 Energy derivative contracts relating to oil and coal and wholesale energy products

1. For the purposes of Section C(6) of Annex I to [Directive 2014/65/EU](#), energy derivative contracts relating to oil shall be contracts with mineral oil, of any description and petroleum gases, whether in liquid or vapour form, including products, components and derivatives of oil and oil transport fuels, including those with biofuel additives, as an underlying.
2. For the purposes of Section C(6) of Annex I to [Directive 2014/65/EU](#), energy derivative contracts relating to coal shall be contracts with coal, defined as a black or dark-brown combustible mineral substance consisting of carbonised vegetable matter, used as a fuel, as an underlying.
3. For the purposes of Section C(6) of Annex I to [Directive 2014/65/EU](#) derivative contracts that have the characteristics of wholesale energy products as defined in Article 2(4) of Regulation (EU) 1227/2011 of the European Parliament and Council shall be derivatives with electricity or natural gas as an underlying, in accordance with points (b) and (d) of Article 2(4) of that Regulation.

Article 7 Other derivative financial instruments

1. For the purposes of Section C(7) of Annex I to [Directive 2014/65/EU](#), a contract which is not a spot contract in accordance with paragraph 2 and which is not for commercial purposes as laid down in paragraph 4 shall be considered as having the characteristics of other derivative financial instruments where it satisfies the following conditions:
  - (a) it meets one of the following criteria:
    - (i) it is traded on a third country trading venue that performs a similar function to a regulated market, an MTF or an OTF;
    - (ii) it is expressly stated to be traded on, or is subject to the rules of, a regulated market, an MTF, an OTF or such a third country trading venue;
    - (iii) it is equivalent to a contract traded on a regulated market, MTF, an OTF or such a third country trading venue, with regards to the price, the lot, the delivery date and other contractual terms;
  - (b) it is standardised so that the price, the lot, the delivery date and other terms are determined principally by reference to regularly published prices, standard lots or standard delivery dates.
2. A spot contract for the purposes of paragraph 1 shall be a contract for the sale of a commodity, asset or right, under the terms of which delivery is scheduled to be made within the longer of the following periods:
  - (a) 2 trading days;
  - (b) the period generally accepted in the market for that commodity, asset or right as the standard delivery period.

A contract shall not be considered a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the underlying is to be postponed and not to be performed within the period referred to in paragraph 2.

3. For the purposes of Section C(10) of Annex I to [Directive 2004/39/EU](#), a derivative contract relating to an underlying referred to in that Section or in Article 8 of this Regulation shall be considered to have the characteristics of other derivative financial instruments where one of the following conditions is satisfied:

- (a) it is settled in cash or may be settled in cash at the option of one or more of the parties, otherwise than by reason of a default or other termination event;
- (b) it is traded on a regulated market, an MTF, an OTF, or a third country trading venue that performs a similar function to a regulated market, MTF or an OTF;
- (c) the conditions laid down in paragraph 1 are satisfied in relation to that contract.

4. A contract shall be considered to be for commercial purposes for the purposes of Section C(7) of Annex I to [Directive 2014/65/EU](#), and as not having the characteristics of other derivative financial instruments for the purposes of Sections C(7) and (10) of that Annex, where the following conditions are both met:

- (a) it is entered into with or by an operator or administrator of an energy transmission grid, energy balancing mechanism or pipeline network,
- (b) it is necessary to keep in balance the supplies and uses of energy at a given time, including the case when the reserve capacity contracted by an electricity transmission system operator as defined in Article 2(4) of [Directive 2009/72/EC](#) is being transferred from one prequalified balancing service provider to another prequalified balancing service provider with the consent of the relevant transmission system operator.

Article 8 Derivatives under Section C(10) of Annex I to [Directive 2014/65/EU](#)

In addition to derivative contracts expressly referred to in Section C(10) of Annex I to [Directive 2014/65/EU](#), a derivative contract shall be subject to the provisions in that Section where it meets the criteria set out in that Section and in Article 7(3) of this Regulation and it relates to any of the following:

- (a) telecommunications bandwidth;
- (b) commodity storage capacity;
- (c) transmission or transportation capacity relating to commodities, whether cable, pipeline or other means with the exception of transmission rights related to electricity transmission cross zonal capacities when they are, on the primary market, entered into with or by a transmission system operator or any persons acting as service providers on their behalf and in order to allocate the transmission capacity;
- (d) an allowance, credit, permit, right or similar asset which is directly linked to the supply, distribution or consumption of energy derived from renewable resources, except if the contract is already with the scope of Section C(4) of Annex I to [Directive 2014/65/EU](#);
- (e) a geological, environmental or other physical variable, except if the contract is relating to any units recognised for compliance with the requirements of [Directive 2003/87/EC](#) of the European Parliament and of the Council;
- (f) any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred;
- (g) an index or measure related to the price or value of, or volume of transactions in any asset, right, service or obligation;
- (h) an index or measure based on actuarial statistics.

Article 10 Characteristics of other derivative contracts relating to currencies

1. For the purposes of Section C (4) of Annex I to [Directive 2014/65/EU](#), other derivative contracts relating to a currency shall not be a financial instrument where the contract is one of the following:

- (a) a spot contract within the meaning of paragraph 2 of this Article,
- (b) a means of payment that:

- (i) must be settled physically otherwise than by reason of a default or other termination event;
- (ii) is entered into by at least a person which is not a financial counterparty within the meaning of Article 2(8) of Regulation (EU) No. 648/2012 of the European Parliament and of the Council;
- (iii) is entered into in order to facilitate payment for identifiable goods, services or direct investment; and
- (iv) is not traded on a trading venue.

2. A spot contract for the purposes of paragraph 1 shall be a contract for the exchange of one currency against another currency, under the terms of which delivery is scheduled to be made within the longer of the following periods:

- (a) 2 trading days in respect of any pair of the major currencies set out in paragraph 3;
- (b) for any pair of currencies where at least one currency is not a major currency, the longer of 2 trading days or the period generally accepted in the market for that currency pair as the standard delivery period;
- (c) where the contract for the exchange of those currencies is used for the main purpose of the sale or purchase of a transferable security or a unit in a collective investment undertaking, the period generally accepted in the market for the settlement of that transferable security or a unit in a collective investment undertaking as the standard delivery period or 5 trading days, whichever is shorter.

A contract shall not be considered a spot contract where, irrespective of its explicit terms, there is an understanding between the parties to the contract that delivery of the currency is to be postponed and not to be performed within the period set out in the first subparagraph.

3. The major currencies for the purposes of paragraph 2 shall only include the US dollar, Euro, Japanese yen, Pound sterling, Australian dollar, Swiss franc, Canadian dollar, Hong Kong dollar, Swedish krona, New Zealand dollar, Singapore dollar, Norwegian krone, Mexican peso, Croatian kuna, Bulgarian lev, Czech koruna, Danish krone, Hungarian forint, Polish złoty and Romanian leu.

4. For the purposes of paragraph 2, a trading day shall mean any day of normal trading in the jurisdiction of both the currencies that are exchanged pursuant to the contract for the exchange of those currencies and in the jurisdiction of a third currency where any of the following conditions are met:

- (a) the exchange of those currencies involves converting them through that third currency for the purposes of liquidity;
- (b) the standard delivery period for the exchange of those currencies references the jurisdiction of that third currency.

#### Article 11 Money-market instruments

Money-market instruments in accordance with Article 4(1)(17) of [Directive 2014/65/EU](#), shall include treasury bills, certificates of deposits, commercial papers and other instruments with substantively equivalent features where they have the following characteristics:

- (a) they have a value that can be determined at any time;
- (b) they are not derivatives;
- (c) they have a maturity at issuance of 397 days or less.”.

(5) In Part 3 of Schedule 2 (Section A of Annex I to the markets in financial instruments directive)

- (a) in paragraph 8, for “Multilateral Trading Facilities” substitute “an MTF”;

(b) after paragraph 8 insert—

“9. Operation of an OTF.”.

(6) For Part 4 of Schedule 2 (Article 52 of Commission [Directive 2006/73/EC](#)) substitute—

## “PART 4

### Article 9 of the Commission Regulation

#### Article 9 Investment advice

For the purposes of the definition of ‘investment advice’ in Article 4(1)(4) of [Directive 2014/65/EU](#), a personal recommendation shall be considered a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor.

That recommendation shall be presented as suitable for that person, or shall be based on a consideration of the circumstances of that person, and shall constitute a recommendation to take one of the following sets of steps:

- (a) to buy, sell, subscribe for, exchange, redeem, hold or underwrite a particular financial instrument;
- (b) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument.

A recommendation shall not be considered a personal recommendation if it is issued exclusively to the public.”.