



STATUTORY INSTRUMENTS.

S.I. No. 6 of 2022

EUROPEAN UNION (MARKETS IN FINANCIAL INSTRUMENTS)
(AMENDMENT) REGULATIONS 2022

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I, PASCHAL DONOHOE, Minister for Finance, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972), and for the purpose of giving further effect to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014¹, as amended by Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021², hereby make the following regulations:

Citation and Commencement

1. (1) These Regulations may be cited as the European Union (Markets in Financial Instruments) (Amendment) Regulations 2022.

(2) These Regulations, other than paragraph (1) of Regulation 3, come into operation on 28 February 2022.

(3) Paragraph (1) of Regulation 3 comes into operation on the making of these Regulations.

Definition

2. In these Regulations, “Principal Regulations” means the European Union (Markets in Financial Instruments) Regulations 2017 (S.I. No. 375 of 2017).

Amendment of Regulation 3 of Principal Regulations

3. (1) Regulation 3(1) of the Principal Regulations is amended, in the definition of “Directive” –

(a) in subparagraph (d), by the deletion of “and” after “27 November 2019,”,

(b) in subparagraph (e), by the substitution of “27 November 2019,” for “27 November 2019;”, and

(c) by the insertion of the following subparagraphs after subparagraph (e):

“(f) Directive (EU) 2020/1504 of the European Parliament and of the Council of 7 October 2020³, and

¹ OJ No. L 173, 12.06.2014, p. 349.

² OJ No. L 68, 26.02.2021, p. 14.

³ OJ No. L 347, 20.10.2020, p. 50.

- (g) Directive (EU) 2019/2177 of the European Parliament and of the Council of 18 December 2019⁴;

(2) Regulation 3(1) of the Principal Regulations is amended –

- (a) in the definition of “agricultural commodity derivatives” by the insertion of “, as well as to products listed in Annex I to Regulation (EU) No 1379/2013 of the European Parliament and of the Council” after “and of the Council”,
- (b) in the definition of “Directive” (as amended by paragraph (1)) –
- (i) in subparagraph (f), by the deletion of “and” after “7 October 2020,”
- (ii) in subparagraph (g), by the substitution of “18 December 2019, and” for “18 December 2019;”, and
- (iii) by the insertion of the following subparagraph after subparagraph (g):

“(h) Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021⁵,”

and

- (c) by the insertion of the following definitions:

“ ‘electronic format’ means any durable medium other than paper;

‘make-whole clause’ means a clause that aims to protect the investor by ensuring that, in the event of early redemption of a bond, the issuer is required to pay to the investor holding the bond an amount equal to the sum of the net present value of the remaining coupon payments expected until maturity and the principal amount of the bond to be redeemed;

‘predominantly commercial group’ means any group the main business of which is not the provision of investment services within the meaning of the Directive, the performance of any activity listed in Annex I to Directive 2013/36/EU or acting as a market maker in relation to commodity derivatives;

‘switching of financial instruments’ means selling a financial instrument and buying another financial instrument or exercising a right to make a change with regard to an existing financial instrument;”.

⁴ OJ No. L 334, 27.12.2019, p. 155.

⁵ OJ No. L 68, 26.02.2021, p. 14.

Amendment of Regulation 4 of Principal Regulations

4. Regulation 4 of the Principal Regulations is amended, in paragraph (1)(k), by the substitution of the following subclauses for subclauses (I), (II) and (III):

- “(I) for each of those cases individually and on an aggregate basis, the activity is ancillary to their main business, when considered on a group basis,
- (II) those persons are not part of a group the main business of which is the provision of investment services within the meaning of these Regulations or the performance of any activity listed in Annex I to Directive 2013/36/EU, or acting as a market-maker for commodity derivatives,
- (III) those persons do not apply a high-frequency algorithmic trading technique, and
- (IV) those persons report upon request to the Bank the basis on which they have assessed that their activity under clauses (i) and (ii) is ancillary to their main business;”.

Exemptions from product governance requirements

5. The Principal Regulations are amended by the insertion of the following Regulation after Regulation 23:

“**23A.** An investment firm shall be exempted from the requirements set out in subparagraphs (c) and (d) of Regulation 23(1), Regulation 23(2) and paragraphs (1) and (2) of Regulation 32, where the investment service it provides relates to bonds with no other embedded derivative than a make-whole clause or where the financial instruments are marketed or distributed exclusively to eligible counterparties.”.

Amendment of Regulation 32 of Principal Regulations

6. Regulation 32 of the Principal Regulations is amended –

(a) by the insertion of the following paragraph after paragraph (9):

“(9A) For the purposes of paragraph (4), where the agreement to buy or sell a financial instrument is

concluded using a means of distance communication which prevents the prior delivery of the information on costs and charges –

- (a) the investment firm may provide the information on costs and charges either in electronic format or on paper, where requested by a retail client, without undue delay after the conclusion of the transaction, provided that both of the following conditions are met:
 - (i) the client has consented to receiving the information without undue delay after the conclusion of the transaction;
 - (ii) the investment firm has given the client the option of delaying the conclusion of the transaction until the client has received the information,

and
- (b) the investment firm shall give the client the option of receiving the information on costs and charges by telephone prior to the conclusion of the transaction.”,
- (b) in paragraphs (10) and (11), by the substitution of “(9A)” for “(8)” in each place where it occurs,
- (c) by the insertion of the following paragraphs after paragraph (11):

“(11A) Investment firms shall provide all information required to be provided by these Regulations to clients or potential clients in electronic format, except where the client or potential client is a retail client or potential retail client who has requested receiving the information on paper, in which case that information shall be provided on paper, free of charge.

(11B) Investment firms shall inform retail clients or potential retail clients that they have the option of receiving the information required to be provided by these Regulations on paper.

(11C) Investment firms shall inform existing retail clients who receive the information required to be provided by these Regulations on paper of the fact that

they will receive that information in electronic format at least eight weeks before sending that information in electronic format.

(11D) Investment firms shall inform existing retail clients who receive the information required to be provided by these Regulations on paper that –

- (a) they have the choice either to continue receiving the information on paper or to receive the information in electronic format, and
- (b) if they do not, within the eight week period referred to in paragraph (11C), request the continuation of the provision of the information on paper, the information will be provided in electronic format.

(11E) Existing retail clients who already receive the information required to be provided by these Regulations in electronic format are not required to be informed in accordance with paragraphs (11C) and (11D).”, and

- (d) by the insertion of the following paragraphs after paragraph (16):

“(16A) Where research is provided by a third party to an investment firm providing portfolio management or management or other investment or ancillary services to clients, the investment firm shall be regarded as having fulfilled the obligations under Regulation 31 where –

- (a) before the execution or research services have been provided, an agreement has been entered into between the investment firm and the research provider, identifying the part of any combined charges or joint payments for execution services and research that is attributable to research,
- (b) the investment firm informs its clients about the joint payments for execution services and research made to the third party providers of research, and

- (c) the research for which the combined charges or the joint payment is made concerns issuers whose market capitalisation for the period of 36 months preceding the provision of the research did not exceed €1 billion, as expressed by end-year quotes for the years when they are or were listed or by the own-capital for the financial years when they are or were not listed.

(16B) For the purposes of paragraph (16A), “research” means research material or services –

- (a) concerning one or several financial instruments or other assets, or the issuers or potential issuers of financial instruments,
- (b) closely related to a specific industry or market such that the material or services inform views on financial instruments, assets or issuers within that industry or market,
- (c) that explicitly or implicitly recommend or suggest an investment strategy and provide a substantiated opinion as to the present or future value or price of financial instruments or assets, or
- (d) that otherwise contain analysis and original insights and reach conclusions based on new or existing information that could be used to inform an investment strategy and be relevant and capable of adding value to the investment firm’s decisions on behalf of clients being charged for that research.”.

Amendment of Regulation 33 of Principal Regulations

7. Regulation 33 of the Principal Regulations is amended by the insertion of the following paragraph after paragraph (4):

“(4A) An investment firm shall –

- (a) when providing investment advice or portfolio management that involves the switching of financial instruments, obtain the necessary information on the client's investment and analyse the costs and benefits of the switching of financial instruments, and
- (b) when providing investment advice that involves the switching of financial instruments, inform the client whether or not the benefits of the switching of financial instruments are greater than the costs involved in such switching.”.

Amendment of Regulation 35 of Principal Regulations

8. Regulation 35 of the Principal Regulations is amended –
- (a) in paragraph (5), by the substitution of “Subject to paragraph (5A), each trading venue” for “Each trading venue”, and
 - (b) by the insertion of the following paragraph after paragraph (5):

“(5A) The obligations under paragraph (5) shall not apply until 28 February 2023.”.

Services provided to professional clients

9. The Principal Regulations are amended by the insertion of the following Regulation after Regulation 37:

“**37A.** (1) The requirements laid down in Regulation 32(7) shall not apply to services provided to professional clients except for investment advice and portfolio management.

(2) The requirements laid down in paragraphs (4A) and (13) to (16) of Regulation 33 shall not apply to services provided to professional clients, unless those clients inform the investment firm either in electronic format or on paper that they wish to benefit from the rights provided for in those provisions.

(3) Investment firms shall keep a record of the client communications referred to in paragraph (2).”.

Amendment of Regulation 38 of Principal Regulations

10. Regulation 38 of the Principal Regulations is amended, in paragraph (1), by the substitution of “Regulations 31, 32(1) to (11) and (12) to (20), 33, 35 and 36(1)” for “Regulations 31, 32(1) to (3) and (12) to (20), 33(1) to (12) and (17), 35 and 36(1)”.

Amendment of Regulation 81 of Principal Regulations

11. Regulation 81 of the Principal Regulations is amended –

- (a) by the substitution of the following paragraphs for paragraphs (1) and (2):

“(1) The Bank shall, in line with the calculation methodology determined by ESMA in the regulatory technical standards adopted in accordance with Article 57(3) of the Directive, set and apply limits on the size of a net position which a person can hold at all times in agricultural commodity derivatives and critical or significant commodity derivatives that are traded on trading venues, and in economically equivalent OTC contracts.

(2) Commodity derivatives shall be considered to be critical or significant where the sum of all net positions of end position holders constitutes the size of their open interest and is at a minimum of 300,000 lots on average over a one-year period.”

- (b) by the insertion of the following paragraph after paragraph (3):

“(3A) Position limits referred to in paragraph (1) shall not apply to the following:

- (a) positions held by, or on behalf of, a non-financial entity, and which are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity;
- (b) positions held by, or on behalf of, a financial entity that is part of a predominantly commercial group and is acting on behalf of a non-financial entity of the predominantly commercial group, where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity;
- (c) positions held by financial and non-financial counterparties for positions that are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4) of the Directive;

- (d) any other securities as referred to in subparagraph (c) of the definition of “transferable securities” in Regulation 3(1) which relate to a commodity or an underlying derivative as referred to in paragraph 10 of Part 3 of Schedule 1.”,
- (c) by the substitution of the following paragraphs for paragraphs (5) and (6):

“(5) The Bank shall set position limits for critical or significant commodity derivatives and agricultural commodity derivatives that are traded on trading venues, including economically equivalent OTC contracts, based on the calculation methodology laid down in the regulatory technical standards adopted by the Commission pursuant to Article 57(3) of the Directive.

(6) The Bank shall review the position limits referred to in paragraph (5) where there is a significant change on the market, including a significant change in deliverable supply or open interest, based on its determination of deliverable supply and open interest, and reset those position limits in accordance with the calculation methodology laid down in the regulatory technical standards adopted by the Commission pursuant to Article 57(3) of the Directive.”,

- (d) by the substitution of the following paragraphs for paragraphs (11) to (14):

“(11) Where –

- (a) agricultural commodity derivatives based on the same underlying and sharing the same characteristics are traded in significant volumes on trading venues in more than one jurisdiction, or
- (b) critical or significant commodity derivatives based on the same underlying and sharing the same characteristics are traded on trading venues in more than one jurisdiction,

the competent authority of the trading venue where the largest volume of trading takes place shall be known as the central competent authority and where the Bank becomes the central competent authority in accordance

with Article 57(6) of the Directive it shall set the single position limit to be applied on all trading in those derivatives.

(12) Where the Bank becomes the central competent authority it shall consult the competent authorities of other trading venues on which those agricultural commodity derivatives are traded in significant volumes or on which those critical or significant commodity derivatives are traded, on the single position limit to be applied and any revisions to that single position limit.

(13) Where the Bank does not agree with the setting of the single position limit by the central competent authority, it shall state in writing the full and detailed reasons why it considers that the requirements laid down in Article 57(1) of the Directive have not been met.

(14) Where –

- (a) agricultural commodity derivatives based on the same underlying and sharing the same characteristics are traded in significant volumes in the State and in another Member State or Member States, or
- (b) critical or significant commodity derivatives based on the same underlying and sharing the same characteristics are traded in the State and in another Member State or Member States,

the Bank shall put in place cooperation arrangements including the exchange of relevant data with the relevant competent authorities in order to enable the monitoring and enforcement of the single position limit.”,

and

- (e) by the substitution of the following paragraph for paragraph (16):

“(16) Position management controls shall permit the trading venue to –

- (a) monitor the open interest positions of persons,
- (b) obtain information, including all relevant documentation, from

persons about the size and purpose of a position or exposure entered into, information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market including, where appropriate, positions held in commodity derivatives that are based on the same underlying and that share the same characteristics on other trading venues and in economically equivalent OTC contracts through members and participants,

- (c) request a person to terminate or reduce a position, on a temporary or permanent basis, and to unilaterally take action to ensure the termination or reduction of the position where the person does not comply with such request, and
- (d) require a person to provide, on a temporary basis, liquidity back into the market at an agreed price and volume with the express intent of mitigating the effects of a large or dominant position.”.

Amendment of Regulation 82 of Principal Regulations

12. Regulation 82 of the Principal Regulations is amended –

- (a) by the insertion of the following paragraph after paragraph (2):

“(2A) The obligation under paragraph (1)(a) shall not apply to any other securities referred to in subparagraph (c) of the definition of “transferable securities” in Regulation 3(1) that relate to a commodity or an underlying derivative referred to in paragraph 10 of Part 3 of Schedule 1.”,

and

- (b) by the substitution of the following paragraph for paragraph (3):

“(3) Where an investment firm trades in commodity derivatives or emission allowances or derivatives of emission allowances outside a trading venue, it shall at least daily provide to –

- (a) the central competent authority referred to in Article 57(6) of the Directive, and
- (b) where there is no central competent authority, the competent authority of the trading venue where the commodity derivatives or emission allowances (or derivatives of emission allowances) are traded,

a complete breakdown of their positions taken in economically equivalent OTC contracts and, when relevant, in commodity derivatives or emission allowances (or derivatives of emission allowances) traded on a trading venue, as well as of those of other clients and the clients of those clients until the end client is reached, in accordance with Article 26 of Regulation (EU) No 600/2014 and, where applicable, Article 8 of Regulation (EU) No 1227/2011.”.

Amendment of Regulation 128 of Principal Regulations

13. Regulation 128 of the Principal Regulations is amended by the substitution of the following paragraph for paragraph (3):

“(3) All investment firms, market operators, APAs and ARMs authorised in accordance with Regulation (EU) No 600/2014 that are the subject of a derogation provided in accordance with Article 2(3) of that Regulation, credit institutions in relation to investment services or activities and ancillary services and branches of third-country firms shall have in place appropriate procedures for their employees to report potential or actual contraventions of these Regulations or Regulation (EU) No 600/2014 internally through a specific, independent and autonomous channel.”.

Amendment of section 2(1) of Central Bank Act 1971

14. Section 2(1) of the Central Bank Act 1971 (No. 24 of 1971) is amended, in the definition of “Capital Requirements Directive” –

- (a) in paragraph (e), by the substitution of “measures,” for “measures, and”,
- (b) in paragraph (f), by the substitution of “2014/65/EU, and” for “2014/65/EU;”, and
- (c) by the insertion of the following paragraph after paragraph (f):
 - “(g) Directive (EU) 2021/338 of the European Parliament and of the

Council of 16 February 2021⁶ amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis;”.

Amendment of Regulation 3(1) of European Communities (Financial Conglomerates) Regulations 2004

15. Regulation 3(1) of the European Communities (Financial Conglomerates) Regulations 2004 (S.I. No. 727 of 2004) is amended, in the definition of “Capital Requirements Directive” –

- (a) in subparagraph (e), by the substitution of “measures,” for “measures, and”,
- (b) in subparagraph (f), by the substitution of “2014/65/EU, and” for “2014/65/EU;”, and
- (c) by the insertion of the following subparagraph after subparagraph (f):

“(g) Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021⁷ amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis;”.

Amendment of Regulation 3(1) of European Union (Bank Recovery and Resolution) Regulations 2015

16. Regulation 3(1) of the European Union (Bank Recovery and Resolution) Regulations 2015 (S.I. No. 289 of 2015) is amended, in the definition of “Capital Requirements Directive” –

⁶ OJ No. L 68, 26.02.2021, p. 14.

⁷ OJ No. L 68, 26.02.2021, p. 14.

- (a) in subparagraph (e), by the substitution of “measures,” for “measures, and”,
- (b) in subparagraph (f), by the substitution of “2014/65/EU, and” for “2014/65/EU;”, and
- (c) by the insertion of the following subparagraph after subparagraph (f):
 - “(g) Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021⁸ amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis;”.

Amendment of Regulation 102 of European Union (Credit Institutions: Financial Statements) Regulations 2015

17. Regulation 102 of the European Union (Credit Institutions: Financial Statements) Regulations 2015 (S.I. No. 266 of 2015) is amended, in the definition of “Capital Requirements Directive” –

- (a) in subparagraph (e), by the substitution of “measures,” for “measures, and”,
- (b) in subparagraph (f), by the substitution of “2014/65/EU, and” for “2014/65/EU;”, and
- (c) by the insertion of the following subparagraph after subparagraph (f):
 - “(g) Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021⁹ amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis;”.

⁸ OJ No. L 68, 26.02.2021, p. 14.

⁹ OJ No. L 68, 26.02.2021, p. 14.

Amendment of Regulation 2(1) of European Union (Payment Services) Regulations 2018

18. Regulation 2(1) of the European Union (Payment Services) Regulations 2018 (S.I. No. 6 of 2018) is amended, in the definition of “Directive 2013/36/EU” –

- (a) in subparagraph (e), by the substitution of “measures,” for “measures, and”,
- (b) in subparagraph (f), by the substitution of “2014/65/EU, and” for “2014/65/EU;”, and
- (c) by the insertion of the following subparagraph after subparagraph (f):

“(g) Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021¹⁰ amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis;”.



GIVEN under my Official Seal,
3 January, 2022.

PASCHAL DONOHOE,
Minister for Finance.

¹⁰ OJ No. L 68, 26.02.2021, p. 14.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation)

These Regulations give effect to Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021, the Capital Markets Recovery Package (CMRP). The CMRP is a package of measures that sets out of targeted amendments to financial services frameworks to support economic recovery in the aftermath of Covid-19 crisis. Amendments to Directive 2014/65/EU, the Markets in Financial Instruments Directive (MiFID II), include simplifying information requirements in a targeted manner while safeguarding investor protection.

BAILE ÁTHA CLIATH
ARNA FHOILSIÚ AG OIFIG AN tSOLÁTHAIR
Le ceannach díreach ó
FOILSEACHÁIN RIALTAIS,
BÓTHAR BHAILE UÍ BHEOLÁIN,
CILL MHAIGHNEANN,
BAILE ÁTHA CLIATH 8,
D08 XAO6

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r-phost: publications@opw.ie

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