



EUROPEAN COMMISSION

Directorate-General for Financial Stability, Financial Services and Capital Markets Union

Director General

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Mr Steven Maijoor
Chairman
European Securities and Markets
Authority - ESMA
103, rue de Grenelle
F-75345 Paris

Dear Mr Maijoor,

Dear Steven,

On 28 September 2015, ESMA submitted to the Commission the draft regulatory technical standard (draft RTS) on the criteria to establish when an activity is considered to be ancillary to the main business pursuant to Article 2(4) of Directive 2014/65/EU (MIFID II).

MIFID II exempts persons dealing on own account or providing investment services to clients in commodity derivatives provided that, *inter alia* this is an activity that is ancillary to their main business, determined on a group level, and that the main business is not the provision of investment services or banking services.

ESMA's draft RTS lay down the criteria to establish when an activity in commodity derivatives is to be considered as ancillary to the main business at group level. The RTS lays down two tests which need to be met in order for an activity to be considered ancillary:

- A market share test, and its associated trading activity thresholds, which compares the level of a person's trading activity against the overall trading activity in the Union on an asset class basis.
- A main business test, and its associated thresholds, which determines the extent to which the activity of the persons within the group who trade on own account or provide investment services in commodity derivatives constitute a minority of activities at group level.

ESMA's draft RTS proposes that the main business test is conducted by determining the ratio of non-hedging transactions to total transactions in commodity derivatives (including both hedging and non-hedging transactions) that a group engages in. ESMA argues that this ratio is an appropriate reflection of the main activity of a group. In arriving at this conclusion, ESMA assumes that a group is able to hedge all risks associated with its commercial activity by means of commodity derivatives. In ESMA's view, the size of the total turnover in commodity derivatives is a reliable proxy for the size of the commercial activity conducted by a group.

On behalf of Commissioner Hill, I would like to inform you that DG FISMA will recommend that the Commission endorses the standard on ancillary activities once certain amendments are made.

Overall, we are supportive of general approach that ESMA taken to this standard. However, in the areas set out below we would like a more cautious approach to be taken to the calibration of the regime in the initial years, during which ESMA should assess the functioning of the ancillary activities test on the basis of data collected once data officially reported under MiFID II becomes available. Such an approach is also consistent with the concerns raised by the European Parliament's ECON Committee and some members of the Council.

To this end, DG FISMA considers that the proposed main business test should consider a wider range of factors when determining the extent to which activities constitute a minority of activities at a group level. In particular, the empowerment contained in Article 2(4) of Directive 2014/65/EU refers to the capital employed for carrying out the ancillary activity relative to the capital employed for carrying out the main business. While this comparison may not suffice to demonstrate that an activity is ancillary to the main business of the group, capital employed is an important parameter that should only be set aside if manifestly unsuitable to determine the "center of gravity" of a given group's business activities. DG FISMA has seen no evidence demonstrating a manifest lack of suitability.

In light of the above, DG FISMA considers that the trading ratio that ESMA proposes in order to determine when an activity constitutes a minority of activities is not the appropriate test for all cases and for all groups potentially affected by the ancillary activities test. This is because a group's total transaction volume in commodity derivatives is not necessarily an accurate reflection of the main activity undertaken by that group. By assimilating the total transaction volume in commodity derivatives with a given group's business activity, the RTS as proposed by ESMA is not in line with the objective pursued by the exemption contained in Article 2(1)(j) Directive 2014/65/EU because the test does not, in all instances, accurately reflect a group's main activities.

The following considerations are relevant in this respect:

- The ratio employed by ESMA is not invariably representative of a group's commercial activity because commercial entities employ various means to hedge their business activity, including physical or financial means other than commodity derivatives.
- In some instances, significant parts of a commercial activity are not hedged at all.
- Furthermore, the test proposed by ESMA does not take into account a person's commercial activities which do not require any hedging or for which no derivatives-based hedging tools exist. The proposed test also neglects often considerable investments conducted by persons and groups entities that are not reflected in corresponding hedging positions.

DG FISMA therefore considers that, in order for the draft RTS submitted by ESMA to take full account of the objective of, and the mandate contained in, Article 2 of Directive 2014/65/EU, the capital test should be available to those entities that have undertaken significant capital investments in the creation of infrastructure, transportation and production facilities; investments which cannot be hedged in financial markets.

It is the view of DG FISMA that the appropriate period under which to make this assessment would be three years.

I would therefore like to inform you that DG FISMA will recommend that the Commission endorses the draft regulatory technical standard submitted by ESMA on the criteria to establish when an activity is considered to be ancillary to the main business once the above mentioned concerns are adequately taken into account and the necessary modifications are made.

I am very grateful for the work that has been undertaken by ESMA and its members to deliver the MiFID II level II package of measures. This is a substantial package that has been delivered professionally and to a high standard. The standards that have been submitted, if endorsed by the co-legislators, will contribute to better functioning markets in the EU with a high level of investor protection.

A handwritten signature in black ink, appearing to read 'O. Guersent', written over a horizontal line.

Yours sincerely,

Olivier Guersent