



## Commodity Markets Council – Europe

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### CMC Europe position: Delivering an effective and legally certain Ancillary Activity exemption

Dear [BoS rep],

I am writing to you on behalf of the Commodity Markets Council – Europe (CMCE) – a group of 20 commodity producers, merchandisers, consumers, market operators and price reporting agencies active in agricultural and soft, energy, metals commodity derivative markets, freight derivative markets and the emissions markets. CMCE members are concerned that provisions in the revised draft regulatory technical standards for Article 2(4) MiFID 2 may render the exemption unworkable. We ask the Board to consider the following amendments to the revised draft RTS.

- (1) We are concerned by the revised “group test” in Article 5. In our view, the proposed test ignores the main business of small, medium and large non-financial entities at group level. The vast majority of persons seeking to avail of the exemption will have assets, business lines and investments entirely unrelated to their “trading activity” as defined in the revised RTS. Hedging activity in financial instruments cannot and should not be used as a proxy for a person’s main business for the purposes of the exemption. Instead, we continue to support an assessment of trading in commodity derivatives, emission allowances and derivatives thereof based on accounting capital. We encourage the Board to support amendments to this provision that would base the test on accounting capital but also add an alternative approach available to persons unable to calculate and categorise accounting capital. Such persons should be able to use their EU trading activity as a basis for assessing whether their non-privileged trading activity is or is not ancillary compared with their main business at group level. We consider such an amendment an appropriate and reasonable compromise in line with the legislation.
- (2) With regards to the implementation provisions in Article 7, we consider the use of 2015 data impractical and inappropriate. Applying the exemption in this manner would necessarily include activities undertaken prior to any certainty on the exemption or indeed the data for assessing market size. We support ESMA’s efforts to phase-in the exemption procedure following application of the legislation on 03 January 2017. We believe the three-year rolling average should commence no earlier than 03 January 2017 and note no impediment in the MiFID 2 legislation to a proportionate phase-in period for the exemption procedure, mindful the Article 2(1)(j) provision will apply on 03 January 2017. We encourage the Board to support an interpretation of the provision that permits ESMA to commence the exemption procedure from January 2017 and not before.
- (3) We consider that Article 2 needs appropriate wording on portfolio hedging. We consider the current ESMA EMIR Q&A at OTC 10(3)(c) to be inconsistent with EMIR and inappropriate for MiFID 2 and MiFIR provisions. Copying this guidance into relevant RTS does not fix this problem. To effectively exclude hedging activity from the exemption calculations, as envisaged by the co-legislators, we would encourage the Board to endorse the following amendments to Article 2:
  - (a) include express reference to the hedging effects of derivative contracts in combination with other contracts and through closely correlated instruments in Article 2(1);
  - (b) delete the last sentence of Article 2(2)(b), which contrary to Article 10(1) CDR 149/2013 precludes classifying a whole portfolio as objectively measurable as reducing risks even if it can be shown that the aggregate effect of the whole portfolio is risk reducing; and
  - (c) delete the Article 2(3) exclusion from the hedging exemption for necessary components of a portfolio that may not be demonstrated as objectively measurable as reducing risks.

- (4) The current draft provides no legal certainty as to the data for the Article 4 “market share test”. This must be addressed in the revised draft RTS to facilitate any meaningful assessment of a person’s status relative to the proposed thresholds. We note particular questions regarding the treatment of exchange-traded derivatives and intragroup transactions. We support the use of trade repository data are concerned as to the current quality of this data. In any case, ESMA’s calculation methodology should be subject to consultation, periodic review and publicly disclosed with a list of all proposed information sources.

We recognise the challenges ESMA faces in drafting the technical standards for MiFID 2. We appreciate that the Board will be carefully consider the drafting of the revised regulatory technical standard. We understand if such consideration requires delaying adoption by the Board beyond 24 September, notwithstanding the resulting additional time pressure on implementation delay would add. We believe however it is of paramount importance to deliver an effective and legally certain Ancillary Activity exemption. The alternative is to risk material damage to Europe’s physical commodity, commodity derivative and environmental markets.

Your sincerely,

Jonathan Hill

Chair, CMC Europe