



## Commodity Markets Council – Europe

- C/O Norton Rose Fulbright LLP
- 3 More London Riverside
- London SE1 2AQ
- United Kingdom
- Tel: +44 (0)20 7444 5693; +32 (0)2 237 6140
- Fax: +44 (0)20 7283 6500; +32 (0)2 237 61 36
- Eml: [conor.foley@nortontrosefulbright.com](mailto:conor.foley@nortontrosefulbright.com)
- Wb: <http://www.commoditymktcs.org/cmc-europe/>

Lord Jonathan Hill

Commissioner for Financial Stability,  
Financial Services and Capital Markets Union  
European Commission  
Rue de la Loi 200  
B-1049 Brussels  
Belgium

30 November 2015

Dear Commissioner Hill,

I am writing to you on behalf of the Commodity Markets Council – Europe (CMCE) regarding Directive 2014/65/EU (MiFID 2) and Regulation (EU) No 600/2014 (MiFIR), in particular on the potential delay to the application of MiFID 2/MiFIR and draft regulatory technical standards (RTS) 20 and 21.

As expressed previously, CMCE members support the objectives of MiFID 2/MiFIR such as improving transparency and dampening market volatility. We agree that a legally sound framework is needed for MiFID 2 to achieve its objectives and acknowledge the ‘data challenges’ faced by ESMA and national competent authorities. In this context, we welcome the 12 month delay of application as recently proposed by the European Commission and informally agreed by the European Parliament.

We note that the European Parliament has made its support conditional upon the speedy adoption by the European Commission of related implementing measures. While industry participants would welcome certainty on the final shape of those measures also, we are of the view draft RTS 20 and 21 are not currently fit for purpose. We therefore urge the Commission to use the application delay to ensure that both standards 20 and 21 are practical and workable for industry participants.

Below, we set out these concerns in further detail and suggest possible changes the Commission could request of ESMA before submitting the standards to the European Parliament and Council for review.

### **RTS 20 – Main Business Threshold**

(1) We remain concerned by Article 3 of RTS 20 on main business thresholds (previously “Group Test”).

In our view, the proposed assessment on the basis of trading in financial instruments is a poor proxy for the main business of a non-financial entity or group as only trading in financial instruments is considered. The vast majority of persons seeking to avail of the ancillary activity exemption will have assets, business lines and investments entirely unrelated to their trading in financial instruments as assessed in the current draft RTS.

While we appreciate that ESMA has moved away from this option, we continue to support an assessment of trading based on the allocation of accounting capital. Such an assessment should take into account the real size of the main commercial business, based on balance sheet data or audited accounting data from information systems used to prepare balance sheets.

While we understand ESMA's desire to use trading activity as a proxy, we consider the accounting capital test far easier for most market participants to apply and a more accurate assessment per the Article 2(1)(j) and (4) requirements.

We would therefore encourage you to request an amendment from ESMA to introduce *optionality* in the RTS – specifically, amendments to Article 3 that would allow persons to use either trading activity, or accounting capital to assess whether their non-privileged trading activity is ancillary compared with their main business at group level. [We support ESMA's suggestion in its December 2014 Consultation Paper regarding the use of audited accounting data in case financial statements are not immediately available for this test.]

#### **RTS 20 – Hedging exemptions**

(2) CMCE broadly supports the changes ESMA made on the application of the hedging exemption in the RTS as submitted to the Commission. We have long pointed to the inconsistency between the current ESMA EMIR Q&A guidance on portfolio hedging and the Article 10 EMIR provisions. We would however encourage the Commission to request the deletion of the last sentence of Recital 14 in RTS 20. This sentence risks excluding from the hedging exemption the necessary components of a portfolio that may not be demonstrated as objectively measurable as reducing risks, which would deny the reality of firms' physical business including the management of their risk hedging.

#### **RTS 20 – Intragroup transactions**

(3) CMCE is concerned that absent an Article 13(2) EMIR equivalence decision, intragroup transactions between EU persons and US affiliates cannot be excluded from the numerator of the Group Test in Article 3 of RTS 20. We would appreciate every effort from the Commission to deliver these decisions before the application of the new secondary legislation.

#### **RTS 20 – Phase-in**

(4) While CMCE welcomes the changes ESMA made to Article 4 in comparison to its initial proposal, we still consider the proposal to apply the ancillary activity exemption on the basis of data covering periods starting from 01 July 2015 impractical and unlawful. We believe that persons seeking to avail of the exemption must be considered provisionally exempt from 03 January 2017 pending completion of their first rolling-year average assessment.

We note with concern that RTS 20 is silent on the data for the Article 2 assessment (non-privileged trading activity v EU trading activity) in the eight (8) asset classes. This provision appears drafted to depend on transaction data reported to trade repositories per Article 9 EMIR and thus only accessible to ESMA. We encourage the Commission to seek a provision mandating ESMA to provide the data required for the Article 2 assessments, to do so quickly and to consider checks and reviews to ensure that the data is credible given concerns about reconciling transactions reports.

#### **RTS 21 – Position Limits**

(5) We recognise the political sensitivity of the proposed position limits regime and note the pressure currently exerted by the European Parliament on the Commission to set lower position limits as well as choosing 'deliverable supply' over 'open interest'. We would caution the Commission to acceding to such demands as this would create an onerous position limits regime detrimental to liquidity and price formation on EU markets.

In this light, we note ESMA's late-stage changes to RTS 21 to curtail the discretion of national competent authorities in setting position limits. We understand its approach but caution against undue restrictions on the discretion of national regulators. There is no single position limit suitable for all commodity derivative contracts and lower limits will not lead to lower prices in the underlying commodity. Indeed, such limits are likely to have the opposite effect through inefficient hedging, diminished liquidity and obstacles to price convergence. We would encourage the Commission to resist the push to set limits in the RTS, rather than on the basis of a common methodology as specified in Article 57 MiFID 2.

(6) While CMCE supports the current draft RTS 21 hedging exemption, we would appreciate a hedging exemption procedure that is efficient for market participants and national regulators so that that exemptions may be granted for a group of similar contracts where used to manage the risks of commercial activity.

(7) We note concerns raised as to the application of pre-trade transparency requirements for certain packaged transactions commonly used by commodity market participants for risk management purposes. We consider these transactions to be within the scope of the Article 8(1) MiFIR exemption and we encourage the Commission to request ESMA clarifications to this effect.

We hope these comments will be of use to you in your consideration of the MiFID 2 and MiFIR RTS ahead of submission to the co-legislators and throughout the process of a formal MiFID2 application delay.

Yours sincerely,

Jonathan Hill  
Chair,  
Commodity Markets Council – Europe

A handwritten signature in black ink, appearing to read 'Jonathan Hill', with a stylized flourish extending from the end.