

RTS 20: Proposed amendments (15 January 2016)

Amendments to ESMA proposal shown in green

<p style="text-align: center;"><i>Article 3</i></p> <p style="text-align: center;">Main business threshold</p>	<p style="text-align: center;"><i>Article 3</i></p> <p style="text-align: center;">Main business threshold</p>
<p>1. Ancillary activities shall be considered to constitute a minority of activities at group level compared to the main business of the group where the size of the trading activities calculated in accordance with paragraph 3 does not account for more than 10% of the total size of the trading activity of the group calculated in accordance with paragraph 4.</p> <p>2. By way of derogation from paragraph 1,</p> <p>(a) where the size of the trading activities calculated in accordance with paragraph 34 accounts for more than 10% but less than 50% of the total size of the trading activity of the group calculated in accordance with paragraph 4, ancillary activities shall be considered to constitute a minority of activities at group level only where the size of the trading activity for each of the asset classes referred to in Article 2(1) accounts for less than 50% of the threshold established by Article 2(1) of the overall market's size in the relevant asset class.</p> <p>(b) where the size of the trading activity calculated in accordance with paragraph 34 accounts for equal to or more than 50% of the size of the trading activity calculated in accordance with paragraph 4, ancillary activities shall be considered to constitute a minority of activities at group level only where the size of the trading activity for each of the asset classes referred to in Article 2(1) accounts for less than 20% of the threshold established by Article 2(1) of the overall market's size in the relevant asset class.</p> <p>3. The size of the activities referred to in points (i) and (ii) of Article 2(1)(j) of Directive 2014/65/EU undertaken by persons within a group shall be calculated by aggregating the trading activity undertaken by those persons in all of the asset</p>	<p>1. Ancillary activities shall be considered to constitute a minority of activities at group level compared to the main business of the group where either:</p> <p>(a) the size of the trading activities calculated in accordance with paragraph 4 does not account for more than 10% of the total size of the trading activity of the group calculated in accordance with paragraph 5; or</p> <p>(b) the capital employed in the trading activity undertaken calculated in accordance with paragraph 6 does not account for more than 10% of the capital employed in the main business at group level calculated in accordance with paragraph 6.</p> <p>2. By way of derogation from paragraph 1(a),</p> <p>(a) where the size of the trading activities calculated in accordance with paragraph 4 accounts for more than 10% but less than 50% of the total size of the trading activity of the group calculated in accordance with paragraph 5, ancillary activities shall be considered to constitute a minority of activities at group level only where the size of the trading activity for each of the asset classes referred to in Article 2(1) accounts for less than 50% of the threshold established by Article 2(1) of the overall market's size in the relevant asset class.</p> <p>(b) where the size of the trading activity calculated in accordance with paragraph 4 accounts for equal to or more than 50% of the size of the trading activity of the group calculated in accordance with paragraph 5, ancillary activities shall be considered to constitute a minority of activities at group level only where the size of the trading activity for each of the asset classes referred to in Article 2(1) accounts for less than 20% of the threshold established by Article 2(1) of</p>

classes referred to in Article 2(1) in accordance with the same calculation criteria as that referred to in Article 2(2).

4. The total size of the trading activity undertaken by persons within a group shall be calculated by aggregating the gross notional value of all contracts in financial instruments to which persons within that group are a party to.

5. The gross notional value shall be denominated in EUR.

the overall market's size in the relevant asset class.

3. By way of derogation from paragraph 1(b),

(a) where the capital employed in the trading activity calculated in accordance with paragraph 6 accounts for more than 10% but less than 50% of the capital employed in the main business at group level calculated in accordance with paragraph 6, ancillary activities shall be considered to constitute a minority of activities at group level only where the size of the trading activity for each of the asset classes referred to in Article 2(1) accounts for less than 50% of the threshold established by Article 2(1) of the overall market's size in the relevant asset class.

(b) where the capital employed in the trading activity calculated in accordance with paragraph 6 accounts for more than 50% of the capital employed in the main business at group level calculated in accordance with paragraph 6 the trading activities shall not be considered to be ancillary to the main business at a group level.

4. The size of the activities referred to in points (i) and (ii) of Article 2(1)(j) of Directive 2014/65/EU undertaken by persons within a group shall be calculated by aggregating the trading activity undertaken by those persons in all of the asset classes referred to in Article 2(1) in accordance with the same calculation criteria as that referred to in Article 2(2).

5. The total size of the trading activity undertaken by persons within a group shall be calculated by aggregating the gross notional value of all contracts in financial instruments as defined in Annex I, Section C (1) to (11) of Directive 2014/65/EU to which persons within that group are a party to.

6. The capital employed in the trading activities calculated in accordance with paragraph 4 and the capital employed in the main business at group level shall be calculated by aggregating total equity, current and non-current debt and current and non-current provisions as calculated from balance sheets, financial statements or

accounting information systems.

7. All gross notional values and capital employed measures shall be denominated in EUR.

8. Persons referred to in points (i) and (ii) of Article 2(1)(j) of Directive 2014/65/EU taking non-hedging positions in commodity derivatives, emission allowances and derivatives thereof of gross notional value less than EUR 3 billion calculated in accordance with article 10 of regulation (EU) No 648/2012 shall determine the main business threshold according to paragraph 1(a). Other persons referred to in points (i) and (ii) of Article 2(1)(j) of Directive 2014/65/EU shall determine the main business threshold according to paragraph 1 (b).

Justification

We believe that the ‘proxy approach’ to assessing ancillary activity at group level as proposed by ESMA would not take account of the real size of the main commercial business since only trading in financial instruments is considered. While we understand ESMA’s desire to use such a proxy, we propose an alternative ‘accounting capital’ assessment for non-financial firms active in the wholesale trading commodity derivatives markets, which is an accurate assessment, because it takes into account the real size of the main commercial business as it is based on balance sheet data or audited accounting data from information systems used to prepare the balance sheets. This additional test had been included in ESMA’s consultation paper published on 19 December 2014 and would be in line with the MiFID II Level 1 text (Articles 2(1)(j) and 2(4) MiFID II). As suggested by ESMA in its Consultation Paper, the calculation of the capital employed in the trading activities should be possible also by using audited accounting data in case the information is not immediately available from published financial statements. Non-financial firms with a certain level of activity in the wholesale trading commodity derivatives are used to allocate capital to their commodity trading activities and, therefore, are able to perform a capital employed test. Non-financial firms with a trading activity below the threshold would not be obliged to allocate capital to these activities and can perform ESMA’s proxy test, as they are mostly not used to employ capital to specific transactions. In line with the MiFID II scope, the proposed threshold calculation pursuant to article 3 (8) RTS 20 encompasses transactions traded over regulated venues and OTC, but in line with the EMIR calculation methodology to avoid additional regulatory burdens for firms. Furthermore, we note the concerns on cost cited by ESMA in the cost benefit analysis presented alongside the draft RTS. However, we consider it more important that the assessment is accurate given the regulatory consequences for market participants unable to avail of the exemption. We consider the amendment to be practical and proportionate and we encourage the Commission to support this amendment. Finally, we would like to clarify that Emission Allowances transactions entered into for the purpose of compliance with the EU ETS regime shall not count against any ancillary activity threshold as far as these transactions are exempted under article 2 (1) (e) of MiFID II.

