



CMCE

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
Eml: conor.foley@nortontrosefulbright.com
Wb: www.commoditymktcs.org

13 May 2016

Commodity Derivatives Task Force Members
European Securities and Markets Authority
103 rue de Grenelle
75345 Paris Cedex 07
France

Amendments to draft RTS 20 (Ancillary Activity exemption)

Dear Commodity Derivatives Task Force Member,

I am writing to you on behalf of the Commodity Markets Council – Europe (**CMCE**) and regarding amendments to draft regulatory technical standards (**RTS**) for Article 2(4) of Directive 2014/65/EU on markets in financial instruments (“MiFID 2”) proposed by the European Commission) (“draft RTS 20”).

CMCE is an industry group bringing together commercial market participants active across agriculture and soft commodity, energy, base and precious metals and environmental markets. The group includes commodity producers, merchandisers and consumers, the main commodity trading venues and price reporting agencies. CMCE advocates effective regulation that facilitates the key role of these markets in price discovery and risk management.

Many CMCE members will seek to avail of the Article 2(1)(j) MiFID 2 exemption. We note the letter of 20 April from O. Guersent on behalf of the European Commission to S. Maijor regarding amendments to draft RTS 20. As the Commodity Derivatives Taskforce (**CDTF**) considers amendments to the draft RTS, we offer the following suggestions:

1. Phased application of the exemption

We note the Commission’s reference to a “cautious approach” to calibration of the exemption in the three year period from the application of the technical standards in 2018. We believe that the taskforce should adopt an approach similar to that taken by colleagues on amendments to draft RTS on transparency requirements in respect of bonds, structured finance products, emission allowances and derivatives (“draft RTS 2”) regarding the liquidity assessment for bonds.

We have raised with you previously the concerns of our members regarding the retrospective application of the assessments of the exemption. We do not expect draft RTS 20 to be adopted before the end of June. We expect the draft legislation to be subject to an extended scrutiny process and we do not expect relevant ESMA guidance to be agreed prior before the end of Q1 2017. Questions about the availability and credibility of market data aside, we consider it entirely inappropriate to apply assessments retrospectively and we fear that any attempts to do so risk placing commodity market participants in legal limbo come 03 January 2018 and application of the legislation.

We believe that persons seeking to avail of the exemption should inform their national competent authority as soon as practical. We consider that national competent authorities should set deadlines for authorisation for persons with trading activity that is not ancillary to their main business or the relevant market.

2. Scope of trading activity thresholds

The scope of the “trading activity threshold” calculation remains unclear. We are concerned that inconsistent use of “trading venue” (a defined term) may scope in commodity derivative contracts executed on third country markets and platforms within the asset class calculations. We do not believe this to be the intention of the co-legislators. We encourage the taskforce to use clear and concise language that would limit asset class calculations to commodity derivative and emissions contracts encompassing the trading activity of the person undertaken in the EU. This will be consistent with explanatory note included in ESMA’s Final Report accompanying draft RTS 20.

3. Re-introduction of ‘capital employed’ assessment

We support the Commission’s position on use of capital employed as a means of determining the relative size of non-privileged trading activity. We have on several prior occasions questioned the suitability of the ‘proxy’ approach and we encourage the taskforce to propose amendments re-introducing a capital employed assessment to determine the relative size of non-privileged trading activity. We favour for reasons of simplicity the net marked-to-market value of non-privileged positions in commodity derivatives, emission allowances and derivatives thereof as the numerator for this assessment.

CMCE members believe that carefully calibrated and proportionate technical standards for Articles 2(4) MiFID 2 are vital for Europe’s commodity derivative markets. We consider the Commission’s communications contain sensible suggestions on amendments to draft RTS 20 are sensible and we encourage the taskforce to reflect these suggestions in amendments. We include in annex and for your consideration amendments to Articles 2, 3 and 4 of draft RTS 20 in line with the positions of CMCE members summarised above. We encourage the taskforce to reflect on what is good for commodity derivative markets in any amendments to the draft RTS. I, fellow CMCE members and our external counsel remain at your disposal to provide any additional information on the comments above that might assist you and your colleagues.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Hill". The signature is written in a cursive, slightly slanted style.

Jonathan Hill
Chairman
CMCE Executive Committee

	<p style="text-align: center;"><i>Article 1A (new)</i></p> <p style="text-align: center;">Definitions</p> <p>For the purposes of this Regulation, the following definitions shall apply:</p> <p>(1) ‘capital employed’ means the sum of total assets of an undertaking less its current liabilities.</p>
<p style="text-align: center;">Article 2</p> <p style="text-align: center;">Trading activity threshold</p> <p>1. The size of the trading activity calculated in accordance with paragraph 2 divided by the overall market trading activity calculated in accordance with paragraph 3 shall, in each of the following asset classes, account for less than the following values:</p> <p>(a) 4 % in relation to derivatives on metals;</p> <p>(b) 3 % in relation to derivatives on oil and oil products;</p> <p>(c) 10 % in relation to derivatives on coal;</p> <p>(d) 3 % in relation to derivatives on gas;</p> <p>(e) 6 % in relation to derivatives on power;</p> <p>(f) 4 % in relation to derivatives on agricultural products;</p> <p>(g) 15 % in relation to derivatives on other commodities, including freight and commodities referred to in Section C 10 of Annex I to Directive 2014/65/EU;</p> <p>(h) 20 % in relation to emission allowances or derivatives thereof.</p> <p>2. The size of the trading activity undertaken by persons within a group in each of the asset classes referred to in paragraph 1 shall be calculated by aggregating the gross notional value of all contracts within the relevant asset class to which those persons are a party. The aggregation referred to in the first subparagraph shall not include contracts resulting from transactions referred to in points (a), (b) and (c) of the fifth subparagraph of Article 2(4) of Directive 2014/65/EU and transactions executed in an entity of the group authorised in accordance with Directive 2014/65/EU or Directive</p>	<p style="text-align: center;">Article 2</p> <p style="text-align: center;">Trading activity threshold</p> <p>1. The size of the trading activity calculated in accordance with paragraph 2 divided by the overall market trading activity calculated in accordance with paragraph 3 shall, in each of the following asset classes, account for less than the following values:</p> <p>(a) 4 12 % in relation to derivatives on metals;</p> <p>(b) 3 9 % in relation to derivatives on oil and oil products;</p> <p>(c) 10 20 % in relation to derivatives on coal;</p> <p>(d) 3 9 % in relation to derivatives on gas;</p> <p>(e) 6 18 % in relation to derivatives on power;</p> <p>(f) 4 12 % in relation to derivatives on agricultural products;</p> <p>(g) 15 30 % in relation to derivatives on other commodities, including freight and commodities referred to in Section C 10 of Annex I to Directive 2014/65/EU;</p> <p>(h) 20 40 % in relation to emission allowances or derivatives thereof.</p> <p>2. The size of the trading activity undertaken by persons within a group in each of the asset classes referred to in paragraph 1 shall be calculated by aggregating the gross notional value of all contracts within the relevant asset class to which those persons are a party. The aggregation referred to in the first subparagraph shall not include contracts resulting from transactions referred to in points (a), (b) and (c) of the fifth subparagraph of Article 2(4) of Directive 2014/65/EU and transactions executed in an entity of the group authorised in accordance with Directive 2014/65/EU or Directive</p>

<p>2013/36/EU.</p> <p>3. The overall market trading activity in each of the asset classes referred to in paragraph 1 shall be calculated by aggregating the gross notional value of all contracts that are not traded on a trading venue within the relevant asset class to which any person located in a Member State is a party and of any other contract within that asset class that is traded on a trading venue located in a Member State.</p> <p>4. The gross notional value shall be denominated in EUR.</p>	<p>2013/36/EU.</p> <p>3. The overall market trading activity in each of the asset classes referred to in paragraph 1 shall encompass the trading activity of the person undertaken in the EU and shall be calculated by aggregating the gross notional value of all contracts that are not traded on a trading venue within the relevant asset class to which any person located in a Member State is a party and of any other contract within that asset class that is traded on a trading venue located in a Member State.</p> <p>4. The values in sub-sections (a), (b), (d), (e) and (f) of paragraph 1 shall be reduced by one third on 1 January 2019 and 1 January 2020. The values in sub-sections (c), (g) and (h) shall be reduced by half on 1 January 2020.</p> <p>5. The gross notional value shall be denominated in EUR.</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</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:</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 does not account for more than 50% of the capital employed at group level calculated in accordance with paragraph 4.</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>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 classes referred to in Article 2(1) in accordance with the same calculation criteria as that referred to in Article 2(2).</p> <p>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.</p> <p>5. The gross notional value shall be denominated in EUR.</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 the overall market's size in the relevant asset class.</p> <p>3. By way of derogation from paragraph 1(b),</p> <p>(a) where the capital employed in the trading activity accounts for less than 5% of the capital employed at group level, the trading activity shall be considered to constitute a minority of activities at group level and the size of trading activity calculation in accordance with Article 2 is not required;</p> <p>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 net marked-to-market value as reported on the balance sheet of positions held 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).</p> <p>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.</p> <p>6. All gross notional values and capital employed measures shall be denominated in EUR.</p>
<p style="text-align: center;">Article 4</p> <p style="text-align: center;">Procedure for calculation</p> <p>1. The calculation of the size of the trading activities referred to in Articles 2 and 3 shall be undertaken annually on the basis of a simple average of the trading activities carried out in the three annual calculation periods preceding the date of calculation.</p> <p>2. By derogation to paragraph 1, the calculation of the size of the trading activities shall be undertaken</p>	<p style="text-align: center;">Article 4</p> <p style="text-align: center;">Procedure for calculation</p> <p>1. The calculation of the size of the trading activities referred to in Articles 2 and 3 shall be undertaken annually on the basis of a simple average of the trading activities carried out in the three annual calculation periods preceding the date of calculation.</p> <p>2. By derogation to paragraph 1, the calculation of the size of the trading activities shall be undertaken</p>

on the following basis:

- (a) before 1 July 2017, it shall only take into account the trading activities carried out from 1 July 2015 to 30 June 2016;
- (b) between 1 July 2017 and 30 June 2018 it shall only take into account the simple average of two annual calculation periods based on the trading activities carried out from the calendar year of 1 July 2015 to 30 June 2017;
- (c) In the case of a person that has no trading activity prior to an annual calculation period referred to in subparagraph (b) or paragraph 1, it shall only take into account trading activities carried out in the annual calculation period in which that person commenced trading and any following annual calculation period.

3. For the purposes of paragraphs 1 and 2, references to an 'annual calculation period' means a period which starts on 1 July of a given year and ends on 30 June in the following year.

on the following basis:

- ~~(a) before 1 July 2017, it shall only take into account the trading activities carried out from 1 July 2015 to 30 June 2016;~~
- (b) between 1 July 2017 1 January 2018 and 30 June 2018 1 January 2020 it shall only take into account the simple average of two three annual calculation periods based on the trading activities carried out from 1 January 2017 the calendar year of 1 July 2015 to 30 June 2017 1 January 2020; this calculation shall be submitted to national competent authority by 1 July 2020.**
- (c) In the case of a person that has no trading activity prior to an annual calculation period referred to in subparagraph (b) or paragraph 1, it shall only take into account trading activities carried out in the annual calculation period in which that person commenced trading and any following annual calculation period.

3. For the purposes of paragraphs 1 and 2, references to an 'annual calculation period' means a period which starts on ~~1 July~~ **1 January** of a given year and ends on ~~30 June~~ **1 January** in the following year.

4. National competent authorities shall determine a deadline, no earlier than six months after the due date for notification to them, for a person with trading activity exceeding any of the thresholds of paragraph 1 of Article 2 to reduce trading activity below the relevant threshold or to seek authorisation as an investment firm.

5. A person eligible to use the exemption and with trading activity in an annual calculation period shall be considered to meet the conditions of Articles 2 and 3 until the deadline set in accordance with paragraph 4 and during the period following its application to seek authorisation as an investment firm, when the application is submitted before the deadline set in accordance with paragraph 4 and until such time as the authorisation is granted.