

Valdis Dombrovskis
Vice-President for the Euro and Social
Dialogue, also in charge of Financial
Stability, Financial Services and
Capital Markets Union
European Commission
200 rue de la Loi
1049 Bruxelles
Belgium

Ref: Ancillary Activity Exemption under MiFID II

Dear Vice-President Dombrovskis,

DEAR VALDIS,

I am writing to you regarding the exemption from authorisation as investment firm which non-financial entities are eligible for when their commodity derivative trading activity is ancillary to their main business as set out in Directive 2014/65/EU on markets in financial instruments¹ (MiFID II).

Commission Delegated Regulation (EU) 2017/592 of 1 December 2016² (RTS 20) provides for the criteria and tests to be performed for establishing whether an activity is to be considered to be ancillary to the main business.

Over the last few months, questions have emerged from stakeholders on how those tests should be performed and, in particular, whether those tests should be performed at group or single entity level.

Based on the Level 1 and 2 texts, there are indications that those tests should be performed at a group level. However, in the context of some drafting amendments that were introduced to RTS 20 by the Commission, it has also been argued that the ancillary activity tests should be performed at a single entity level.

¹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

² Commission Delegated Regulation (EU) 2017/592 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business (OJ L 87, 31.3.2017, p. 492)



As this appears to be a matter of interpretation related to the scope of the Level 1 text, and related amendments of the Level 2 text introduced by the Commission, in ESMA's view it is not appropriate to address this issue through an ESMA Q&A.

ESMA therefore invites the Commission to provide further guidance on how the ancillary activity criteria set out in Article 2(4) of MiFID II, and further specified in RTS 20, are to be interpreted and implemented, and more specifically at which level the tests should be performed.

For any question or further information on this issue, please do not hesitate to contact me or Fabrizio Planta, Head of the Markets Department.

Yours sincerely,

A handwritten signature in blue ink, consisting of a large, stylized 'S' followed by a horizontal line and a short vertical stroke.

Steven Maijoor

cc.: Roberto Gualtieri MEP, Chair of the Committee on Economic and Monetary Affairs, European Parliament

Vladislav Goranov, President of the ECOFIN Council, Council of the European Union

Jeppe Tranholm-Mikkelsen, Secretary-General of the Council of the European Union

Olivier Guersent, Director General, DG Financial Stability, Financial Services and Capital Markets Union, European Commission