



VALDIS DOMBROVSKIS

*Vice-President of the European Commission*

Mr Steven Majoor  
Chair  
ESMA  
103 rue de Grenelle  
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Brussels,  
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Dear Chair,

*dear Steven!*

You are seeking clarification on the application of the ancillary activity test contained in Article 2(1)(j) of the Markets in Financial Instruments Directive (MiFID II).

Article 2(1)(j) MiFID II describes two types of MiFID activities for which a person may obtain an exemption: dealing on own account and providing investment services in relation to commodity derivatives. In order to benefit from the exemption, these two MiFID activities need to be ancillary to the main business of the person or the group of which this person forms part. Article 2(1)(j) requires that the test of whether the MiFID activities are ancillary needs to be assessed for both MiFID activities individually, and on an aggregate basis. In practical terms this implies that if a person undertakes both activities, it must pass the ancillary activity test with respect to both MiFID activities and cannot be exempt from MiFID II merely by passing the test for one of the MiFID activities.

Article 2(1)(j) applies the ancillary activity test by comparing the MiFID activities that a person is engaged in with the commercial activities of the person or the group of which the person forms part. In doing so, Article 2(1)(j) accommodates varying commercial group structures whereby groups divide their business activities into separate legal entities to match the different stages in the commercial value chain. For example, within a group the legal entity facing the market for trading in financial instruments is rarely if ever identical with the legal entity which undertakes, e.g., extraction or production activities.

In line with the structure of Article 2(1)(j) MiFID II, the reference to “persons within a group” in Delegated Regulation 2017/592 requires that the ancillary activities test needs to be calculated by each person within a group that engages in either of the two relevant MiFID activities mentioned in Article 2(1)(j). In consequence, the ancillary activities test must be calculated as many times as necessary for each separate person who trades in commodity derivatives within a group.

The approach in the Delegated Regulation 2017/592 reflects the fact that an authorisation pursuant to MiFID II cannot be obtained by a group of entities which, taken together, do not have a single legal personality, but should be obtained by the relevant entity (or entities) within that group.

The evidence presented to the Commission's services has shown that a representative sample of the major European energy and agricultural groups conduct the MiFID activities described in Article 2(1)(j) through a single trading entity. This is based on a variety of prudential and commercial considerations which are well-known to ESMA (e.g., capital requirements for trading activities, credit quality and netting opportunities). This means that, in practice, the ancillary activity test will need to be performed only once for each group within that sample.

Should you seek any further clarification on the specific methodology of the application of the ancillary activity test my services stand at your disposal to provide further clarifications.

Yours sincerely,

A handwritten signature in black ink, consisting of the initials 'V. D.' followed by a long, sweeping horizontal line that ends in a small hook.

Valdis Dombrovskis