

## OPINION (up-date of 6 July 2017)<sup>1</sup>

### On ancillary activity – market size calculation

#### 1 Legal basis

1. ESMA's competence to deliver an opinion to competent authorities is based on Article 29(1)(a) of Regulation (EC) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)<sup>2</sup>(ESMA Regulation).
2. Pursuant to Article 29(1)(a) of the ESMA Regulation, ESMA shall provide opinions to competent authorities for the purpose of building a common Union supervisory culture and consistent supervisory practices, as well as ensuring uniform procedures and consistent approaches throughout the Union.

#### 2 Background

3. Article 2 of Directive 2014/65/EU<sup>3</sup> ("MiFID II") lays down the exemptions from its scope of application. According to point (j) of Article 2(1), MiFID II does not apply to persons dealing on own account or providing investment services in specific cases, including where their activity is an ancillary activity to their main business provided that certain conditions are met.
4. Commission Delegated Regulation (EU) 2017/592 (the "Delegated Regulation")<sup>4</sup> further specifies the criteria for establishing when an activity is to be considered as ancillary to the main business at a group level pursuant to paragraph 4 of Article 2 of MiFID II.
5. In particular, Article 2(3) of the Delegated Regulation lays down the rules for calculating the overall market trading activity. The calculation of the overall market

---

<sup>1</sup> In the previous version of this document, published on 30 June 2017, there was a typing error in the table entitled "H2 2016 Estimates" on page 6. Two values for OTC figures were switched, namely between the items "Other C(10)" and "Emissions (combines emission allowances and derivatives thereof)". In this current version of the document, published on 06 July 2017, this error has been corrected.

<sup>2</sup> OJ L 331, 15.12.2010, p. 48.

<sup>3</sup> 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 (recast) (OJ L 174, 1.7.2011, p.1).

<sup>4</sup> 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.

trading activity is necessary for the establishment of the size of trading activity per market participant which ultimately will determine whether an activity is ancillary and, hence, whether a market participant falls within the scope of MiFID II.

6. However, it is challenging for national competent authorities and market participants to determine the market size figures since there is no centralised place recording on-venue and off-venue transactions for commodity derivatives and emission allowances which is publicly available.
7. As a result, national competent authorities and market participants have asked ESMA to provide guidance for the determination of the market size figures to ensure the correct application of Article 2(3) of the Delegated Regulation.
8. ESMA has considered that such guidance will contribute positively to the consistency of supervisory practices and will ensure consistent approaches throughout the Union, as a result of which, ESMA has decided to issue this Opinion.

### 3 Opinion

9. The guidance of ESMA is based on the methodology of assembling of data described below. ESMA is aware that the data used for the guidance may bear some inherent limitations, including in respect of its accuracy and completeness. Therefore, competent authorities may consider any alternative data which market participants may provide for the purpose of application of Article 2(3) of the Delegated Regulation.

#### *General methodology*

10. The data for the calculation of the on-venue market size was collected from the trading venues located in the EEA and is provided for the total year of 2015 and for the second half of the year 2016.
11. The data for the calculation of the OTC market size is based on reports submitted to the Trade Repositories (TRs) under Regulation (EU) No 648/2012<sup>5</sup>. The computations have used the methodology specified in the consultation paper on the public data methodology review<sup>6</sup>. Minor adjustments have been executed when the availability of data required such adjustments. This data was available only for the second half of the year 2016.
12. Given the partial availability of data, ESMA understands that the approximation of the total market size for 2016 could be achieved by annualising the half-year figures, and

---

<sup>5</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L201, 27.7.2012, p.1).

<sup>6</sup> [https://www.esma.europa.eu/sites/default/files/library/2016-1661\\_consultation\\_paper\\_on\\_tr\\_public\\_data\\_under\\_emir.pdf](https://www.esma.europa.eu/sites/default/files/library/2016-1661_consultation_paper_on_tr_public_data_under_emir.pdf).

for the year 2015, assuming a similar proportion for OTC and on-venue activity during both years.

13. The total market size for both on-venue and OTC markets, i.e. gross notional value traded was calculated on a dual-sided basis, that is both buyer's and seller's notional value of each transaction was added to establish a gross notional value traded. This ensures comparability with the approach market participants undertake when calculating the size of their own commodity derivatives activity.
14. For the calculation of the notional amount of ETD option contracts the following formula was used: lot size/multiplier (number of underlying instruments to be delivered for one contract) \* quantity (number of contracts traded) \* strike price. The same formula should be used for the calculation of the numerator by market participants performing the ancillary activity test.

#### *Data quality measures*

15. For TR data the following reconciliation procedure was applied: Each trade was classified into (I) single-sided (one reporting counterparty in the EEA) or double-sided (two reporting counterparties in the EEA) reports. The double-sided reports were (II) reconciled by selecting one of the two reports when possible (due to data issues this was not always the case), for the (III) unreconciled double-sided reports the notional was halved (i.e. the assumption was made that counterparties reported their transactions but did not use the same trade identifier). Then the single-sided market size was calculated, i.e. aggregation of the notional of the (I) single-sided reports and (II/III) double-sided reports. In the second step, this single-sided market size was doubled in order to provide the total volume traded.
16. With the aim of ensuring that the data provided by TRs is of sufficient quality, outliers have been identified and removed as follows. Outlier thresholds were set for the reported notional amount in euro, assuming a log normal distribution. ESMA considered as an outlier any observation that had a larger notional amount than the mean plus 4 times the standard deviation.
17. In terms of outlier detection in the data reported by trading venues, large values were affirmed for a second time with the reporting entities.

#### *Asset classes specifications*

18. In accordance with Article 2(1) of the Delegated Regulation, the market sizes are provided for the following asset classes: agricultural products, metals, oil and oil products, coal, gas, power, emission allowances and derivatives thereof and other commodities.

19. For OTC data<sup>7</sup> retrieved from TRs, the relevant classes of commodity derivatives were defined as follows:

- a. Agricultural products: "commodity base" reported as 'AG' and "commodity details" reported as 'GO' (grains oilseeds), 'DA' (dairy), 'LI' (livestock), 'FO' (forestry) or 'SO' (softs)
- b. Metals: "commodity base" reported as 'ME' and "commodity details" reported as 'PR' (precious) or 'NP' (non-precious)
- c. Oil and oil products: "commodity base" reported as 'EN' (energy) and "commodity details" reported as OI (oil)
- d. Coal: "commodity base" reported as EN (energy) and "commodity details" reported as CO (coal)
- e. Gas: "commodity base" reported as EN (energy) and "commodity details" reported as NG (natural gas)
- f. Power: "commodity base" reported as EN (energy) and "commodity details" reported as EL (electricity) or IE (inter-energy)
- g. Emission allowances and derivatives on emission allowances: "commodity base" reported as EV (environment) and "commodity details" reported as EM (emissions)
- h. Other commodities: "commodity base" reported as FR (freights), IN (index) or EX (exotic) as well as "commodity base" reported as EV (environment) and "commodity details" reported as WE (weather).

20. Commodity ETD data was determined on the basis of the data collected from trading venues for the purpose of the transitional calculations of MiFID II, and in particular defined by the Commission Delegated Regulation (EU) 2017/583<sup>8</sup> – data collection on non-equity instruments.<sup>9</sup> Such data is defined as follows<sup>10</sup>:

- a. Agricultural products: class reported as "commodity derivatives" and "underlying type" reported as 'AGRI'

---

<sup>7</sup> Reference period 01 July 2016 – 31 December 2016.

<sup>8</sup> Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives (OJ L 87, 31.3.2017, p. 229–349).

<sup>9</sup> Reference period 03 July 2016 – 02 January 2017.

<sup>10</sup> The selected value considered refer only to the fields that were populated with data.

- b. Metals: class reported as “commodity derivatives” and “underlying type” reported as ‘METL’
- c. Oil and oil products: class reported as “commodity derivatives”, “underlying type” reported as ‘NRGY’ (energy) and field “energy type” populated with ‘OILP’ (oil), ‘OtherBioFuels’
- d. Coal: class reported as “commodity derivatives”, “underlying type” reported as ‘NRGY’ (energy) and field “energy type” populated with ‘COAL’
- e. Gas: class reported as “commodity derivatives”, “underlying type” reported as ‘NRGY’ (energy) and field “energy type” populated with ‘NGAS’ (natural gas)
- f. Power: class reported as “commodity derivatives”, “underlying type” reported as ‘NRGY’ (energy) and field “energy type” populated with ‘ELEC’ (electricity)
- g. Emission allowances and derivatives on emission allowances: class reported as “emission allowances” and “derivatives emission allowances”
- h. Other commodities: class reported as “C10 derivatives”.

## 4 Estimates

All values in EUR million, notional values are counted double-sided

### H2 2016 estimates

	ETD	OTC
<b>Metals</b>	9,228,834	2,966,799
<b>Oil</b>	17,015,517	2,448,303
<b>Coal</b>	142,668	86,762
<b>Gas</b>	266,833	299,470
<b>Power</b>	179,860	259,695
<b>Agriculture</b>	555,731	865,313
<b>Other C(10)</b>	8,990	460,138
<b>Emissions (combines emission allowances and derivatives thereof)</b>	30,380	2,489

### Y 2015 estimates

	ETD
<b>Metals</b>	21,601,715
<b>Oil</b>	33,732,345
<b>Coal</b>	183,756
<b>Gas</b>	743,103
<b>Power</b>	267,384
<b>Agriculture</b>	1,019,671
<b>Other C(10)</b>	26,420
<b>Emissions (combines emission allowances and derivatives thereof)</b>	92,817



## Disclaimer

The analysis displayed in this opinion incorporates data related to European Economic Area (EEA) / European Free Trade Association (EFTA) States based on the notifications received by ESMA, the publication of which does not affect the status of incorporation of relevant EU law into the EEA Agreement and any related legal consequences.