

Press Release

ESMA issues opinion on MiFID II standards on ancillary activities

The European Securities and Markets Authority (ESMA) has issued today an Opinion in response to a letter sent by the European Commission (Commission) asking to amend its draft RTS 20 under the Markets in Financial Instruments Directive (MiFID II) and Regulation (MiFIR). RTS 20 provides criteria to establish when a non-financial firm's commodity derivatives trading activity is considered to be ancillary to its main business.

MiFID II aims at ensuring that non-financial firms are appropriately regulated and compete on a level-playing-field if they engage in commodity derivatives trading to an extent that cannot be considered ancillary to their main business. In order to achieve this, ESMA's RTS 20 had designed quantitative tests, a trading activity and a business activity test. The two tests measured the size of the speculative commodity trading activity of the firm relative to the total size of the commodity market concerned and relative to the total activity of the firm. The draft RTS 20 also included a backstop mechanism to ensure that only activities of certain relevance are captured. While supporting the overall approach of the draft RTS, the Commission letter asks ESMA to amend the business activity test and to introduce a capital-based test, where appropriate, for certain firms.

Opinion proposes options for capital-based test

The Commission requested ESMA to include in its RTS a capital-based test for groups that have undertaken significant capital investments in the creation of infrastructure, transportation or production facilities or groups that undertake activities or investments which cannot be hedged in financial markets.

ESMA maintains that its business activity test proposed is in line with the objectives pursued by the exemption for ancillary activities contained in MiFID II. A capital based test has significant drawbacks. Firstly, whether a firm would meet, or not meet the test, could be very unstable over time. Secondly, given the differences in size and the wide variety of sectors and participants represented in commodity derivatives markets, introducing such a test is not likely to meet the principle of ensuring a level-playing-field for market participants.



Nonetheless, should the Commission deem the introduction of a capital test necessary, ESMA has identified some metrics for a numerator and denominator that could be used by the Commission to construct a capital test as an alternative to the main business test already designed by ESMA. In the case where a capital test is introduced, ESMA proposes to allow entities choose between performing the original main business test based on trading activity or a capital test to avoid putting small and medium-sized entities at a disadvantage.

In September 2015, ESMA submitted 28 draft RTSs under MiFID II/ MiFIR for endorsement to the Commission. On 20 April 2016, the Commission asked ESMA to amend the three RTSs, on non-equity transparency, position limits and ancillary activities. In April 2016, ESMA sent its two Opinions on non-equity transparency and position limits to the Commission which has to decide whether or not endorse the proposed changes.



Notes for editors

1. ESMA's mission is to enhance investor protection and promote stable and orderly financial markets. The mission is based on the three objectives of:

- investor protection;
- orderly markets; and
- financial stability.

It achieves these objectives through four activities:

1. assessing risks to investors, markets and financial stability;
 2. completing a single rulebook for EU financial markets;
 3. promoting supervisory convergence; and
 4. directly supervising specific financial entities.
2. ESMA achieves its mission within the European System of Financial Supervision (ESFS) through active cooperation with the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), the European Systemic Risk Board (ESRB), and with national authorities with competencies for securities markets.

Further information:

Reemt Seibel

Senior Communications Officer

Tel: +33 (0)1 58 36 42 72

Mob: +33 (0) 64 24 855 29

Email: press@esma.europa.eu