The undersigned national and European associations, while supporting the overall policy objective to improve financial conduct and transparency in Europe, having in mind the G20 principles and the need to preserve the competitiveness of European markets, consider that the final draft level II rules published by ESMA on 28 September 2015 on the recast of the Markets in Financial Instruments Directive 65/2014/EU (MiFID II) are not appropriate and do not reflect the political intentions agreed by the European Parliament and the Council in the primary legislation.

A number of European governments as well as the Council of European Energy Regulators[i] have expressed their significant concerns about ESMA's proposals.

We note with concern that ESMA's final proposal for level II measures is designed in such a way that many non-financial companies trading in commodity derivatives on an ancillary basis to their main commercial group business would risk capture in the scope of MiFID II, facing as a consequence disproportionate capital, prudential and liquidity requirements normally applicable only to investment banks.

In the rules adopted by ESMA, the methodology for non-financial firms to apply for an ancillary activity exemption from MiFID licensing requirements uses the total size of trading in financial instruments as the proxy for industrial and commercial activities undertaken by a non-financial group. Although this approach could be deemed as simple to implement, it takes no account of a group company's asset base and primary commercial business. The rules should instead allow reflecting the MiFID II Level 1 text and intentions.

ESMA has also failed to provide a reasonable interim approach concerning the period of calculation for non-financial companies to perform the first assessment against the ancillary activity exemption thresholds. ESMA proposes to perform this assessment by looking into data from July 2015 rather than 2016, thus making the assessment itself, along with reasonable planning and operation of business, very difficult.

In addition, ESMA has not excluded from the calculations for the MiFID ancillary activity exemption those emission allowances traded for compliance reasons under the European Emission Trading Scheme. This means that non-financial counterparties operating industrial installations may find themselves caught by MiFID licensing requirements when they trade emission allowances through subsidiaries. This was certainly not the political intent.

The undersigned national and European associations urge the EU Commission, Parliament, and Council, as well as EU Member States to make use of their scrutiny powers on secondary legislation and to request changes to the ESMA proposals.

- A non-financial group's main industrial and commercial activity should be taken into account when determining whether an exemption from MiFID II should apply. To this end, we believe that a 'capital employed test' (as proposed by ESMA in December 2014) should be added as an additional option to ESMA's proposal. This would better reflect the political intentions set out in the primary European legislation. It would allow comparison of the capital invested in non-privileged commodity derivative transactions with the capital employed in assets and commercial activities at group level. Those non-financial firms for which it is not common practice to allocate capital for certain activities, can use e.g. the proxy proposed by ESMA.

- The assessment of the exemption should be based on a rolling period of three years starting not earlier than 2016 to allow market participants to plan and operate a business in a reasonable way.

- Emission allowances traded for compliance purposes should be excluded from the calculations underlying the ancillary activity exemption or the market size threshold should be kept at 20%, without any reduction resulting from the main 'business threshold'.

Without these changes, the proposals will produce unintended consequences for the achievement of the most important EU policy objectives, i.e. stimulating growth and competitiveness at a time when Europe's economy is slowly recovering after the major setbacks of the financial crisis.

As a result of the rules adopted by ESMA, many industrial groups would either reduce substantially their activity in the market, or move trading outside Europe, where this is possible. Impacts on market liquidity and market integration would also be sensitive, at a time where they both can play a crucial role for the competitiveness of the Internal Market.

It is estimated that the impact on prices for all commodities in Europe will amount to tens of billions of Euros. According to a conservative estimate, the direct costs in the energy market alone will amount to around 15-20 billion Euros per year. Additional resources will be diverted from investments in assets and jobs to meet regulatory capital standards and

collateral requirements under current legislation (Capital Requirements Directive (CRD IV) and European Markets Infrastructure Regulation (EMIR)).

These costs would harm the competitiveness of the EU and would be in stark contrast to some of the key policy objectives of the new Commission. The flagship European Fund for Strategic Investments aims to mobilise investment of 315 billion Euros in the real economy to stimulate real growth and jobs.

In addition, the EU Better Regulation Agenda states that any new proposals should "*meet policy goals at minimum cost and deliver maximum benefits to citizens, businesses and workers while avoiding all unnecessary regulatory burdens […] allowing the EU to ensure its competitiveness in the global economy*"[ii].

We fully support Commissioner Hill's statements on the need to strike the best possible balance between managing the risks and enabling growth to make sure that EU legislation is proportionate and that it does not have any unintended consequence[iii].

Brussels, 15 October 2015

Michele Governatori, President of AIGET, Italian Association of Energy Traders and Wholesalers

Hildegard Müller, Chief Executive of BDEW, German Energy and Water Association)

Dr. Reinhard Kudiß, Senior Manager BDI, Federation of German Industries

Gerhard Handke, Chief Executive of BGA, Federation of German Wholesale, Foreign Trade and Services

Dr. Franz-Josef Leven, Deputy Chief Executive of DAI, Deutsches Aktieninstitut

Jan van Aken, Secretary General of EFET

Lawrence Slade, Chief Executive of Energy UK

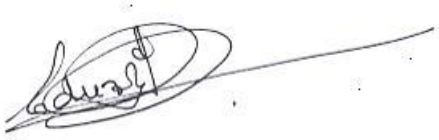
Hans ten Berge, Secretary General of Eurelectric

Beate Raabe, Secretary General of Eurogas

Sarah Deblock, EU Policy Director IETA, International Emissions Trading Association

Fernand Felzinger, President of IFIEC Europe

Barbara Schmidt, General Secretary of Österreichs E-Wirtschaft, Association of Austrian Electricity Companies



Eduardo Montes, Chairman of Unesa, Spanish Association of the Electricity Industry

Dr. Jörg Rothermel, Head of Department of Energy, Climate Protection and Raw Materials of VCI, German Chemical Industry Association

Ralf Schmitz, Chief Executive of VDM, German Association of Metal Traders

Dr. Annette Loske, Chief Executive of VIK, German Association of the Industrial Power and Energy Industry

Katherina Reiche, Chief Executive VKU, German Association of Local Utilities

Nikolai Malanowski, Chief Executive WGM, German Association of Metal Ores Traders

Franziska Erdle, Chief Executive WVM Wirtschaftsvereinigung Metalle

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[i] The Council of European Energy Regulators (CEER) brings together the EU's national energy regulators. In its press release of 15 May 2015, the CEER stated that ESMA's proposals "*will narrow unduly the scope of the exemption agreed by the legislators in the primary MiFID II Regulation*". The CEER takes the view that this "*leads not only to an increased regulatory burden for energy traders but also to an increased cost burden, potentially reducing liquidity and undermining efforts to create a competitive Internal Energy Market*".

[ii] For more information on the Better Regulation Agenda please visit http://ec.europa.eu/smart-regulation/index_en.htm

[iii] EU Commissioner Jonathan Hill at the Eurofi Financial Forum 2015 held on 10 September 2015. Full text available at http://europa.eu/rapid/press-release_SPEECH-15-5624_en.htm