

Reaction to AMF interview on risk.net concerning MiFID II ancillary activity exemption

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Recently an official in the French financial regulatory authority, the AMF, who is also a member of ESMA's commodity derivatives task force, gave an [interview on RISK.NET](#) about the implementation of MiFID II in commodity markets and on eligibility tests for the ancillary activity exemption in particular. His attitude suggests that some regulators have remained deaf to the serious concerns about the ESMA approach to these tests expressed by industry, energy regulators, the European Parliament and Member State governments.

The AMF, according to this official, refutes the use of a business size test by reference to capital employed, because it would be too burdensome for smaller companies and lead to regulatory arbitrage. He dismisses practical solutions proposed by industry to tackle these objections as being unworkable. Instead, he justifies the use of a proxy "trading activity" test, because it would a good means to capture '*disproportionate speculative activity*'. He admits at the same time such a test does not take into account the magnitude of those industrial and commercial activities within a business group, which do not require hedging. Moreover, the AMF official confirms widespread industry concerns that data on the total size of EU commodities markets is not available. An inability to rely on published data would make it effectively impossible for firms to demonstrate they fulfil ESMA's stipulated criteria, which depend solely on an assessment of market share.

EFET has repeatedly and publicly stated that using a trading activity 'proxy' test would run counter to the political intentions underpinning MiFID II. Group hedging activity is not a viable proxy, since it ignores the significant investments of many commodity market participants in fixed assets and resource-intensive operations, entirely unrelated to derivative markets. The test, which ESMA has creatively invented, is merely an artificial measure to determine the proportion of "speculative" derivatives used in pursuit of a company's total industrial and commercial business. Capital employed is a much more suitable measure to determine whether or not a commodity trading business is ancillary to the activity in the rest of the company. A capital-based test would enable companies to correctly represent the size of their main corporate business as an alternative to market share measurements, which may be burdensome to organize, hard to verify and inappropriate for asset based energy companies.

To ensure that prohibitive administrative burdens on smaller companies are avoided, the capital employed test can be applied on an optional basis. Those non-financial firms, whose practice is not to allocate capital to specific business activities on their balance sheet, could still make use of the trading activity test. In this manner re-introduction of a capital employed test need not lead to a higher administrative hurdle nor disturb the level playing field among market participants, as the AMF official suggested in the interview. In fact, it would better reflect the policy and legal intentions underlying the MiFID II primary legislative text.

EFET emphasises the importance of a very careful assessment by the European Commission, Parliament and Council of the ancillary activity tests and thresholds put forward by ESMA, before a definitive version of RTS 20 is adopted. Otherwise, the ESMA proposals will put at risk achievement of crucial EU policy objectives. Stimulation of growth and competitiveness depend heavily on properly functioning commodity markets, especially in energy, at a time when Europe's economy is slowly recovering after the major setbacks of the financial and economic crisis.