Draft amendments to draft RTS 28 and 30 - please see amendments in BOLD

RTS 28 (Ancillary Activity exemption)

(6) In relation to the first threshold determining the extent to which ancillary activity constitutes a minority of activities at a group level, the capital employed for carrying out the ancillary activity relative to the capital employed for the main business should be considered. In order to take into account the global nature of commodity business and in line with the definition of the group, the main business should be determined by consideration of the overall activity of the group, including activity undertaken in third countries. The ancillary activity should be determined by taking together all ancillary activities undertaken in the European Union on the basis of the group excluding privileged transactions in the European Union on the basis of the group. Trading activity undertaken by a MiFID authorised entity **or a MiFID exempt entity** of the group should be excluded when determining the ancillary activity. The capital employed should be calculated on the basis of balance sheets and financial statements.
Justification We consider it appropriate and consistent with ESMA's proposed approach to also exclude the calculations any eligible activity of group entities that may avail of another MiFID exemption.

(7) With regard to the second threshold considering the size of the trading activity relative to the overall market trading activity, the size of the trading activity should be determined on the basis of all trading activity undertaken in the European Union at group level. The size of the trading activity should be determined by deducting the sum of the volume of privileged transactions from the volume of the overall trading activity undertaken by that person. Trading activity undertaken by a MiFID authorised **or MiFID exempt** entity of the group should be excluded. The volume should be determined by the gross notional value of contracts held by that person in the European Union at group level on the basis of a rolling average of three calendar years. The overall market size should be determined on the basis of trading activity undertaken in the EU and in relation to different asset classes, including metals, oil, coal, emission allowances, gas, power, agricultural products and other commodities. Derivatives on wholesale energy products as referred to in Article 2(4) of Regulation (EU) No 1227/2011 are not financial instruments in accordance with Article 4(1)(15) and Section C 6 of Annex I of Directive 2014/65/EU provided that they are traded on an OTF and "must be physically settled". Therefore, these derivatives should not be taken into account when establishing the size of the trading activity. Due to the lack of availability of global data, the overall market size should be established at the level of the European Union by means of data collected by trade repositories. Where a person operates simultaneously in different asset classes and exceeds the threshold in relation to one asset class, it should be subject to Directive 2014/65/EU for all commodity asset classes.

Justification We consider it appropriate and consistent with ESMA's proposed approach to also exclude the calculations any eligible activity of group entities that may avail of another MiFID exemption.

(9) In order to benefit from the exemption under Article 2(1)(j) of Directive 2014/65/EU, a person should comply on a continuous basis with the conditions laid down for that exemption. Furthermore, a person should notify the relevant competent authority on an annual basis that it makes use of that exemption and, upon request, report the basis on which it considers the activity to be ancillary to the main business. In order to avoid inconsistencies and potential conflicts of double regulation, the relevant competent authority should be the competent authority in the Member State of incorporation of the person making use of the exemption. If an entity situated in a third country undertakes ancillary activities in the European Union and wishes to benefit from the exemption it should make the notification to the competent authority of the Member State where its branch is situated **or to the competent authority of the Member State in which it undertakes the majority of ancillary activities**. In order to allow for market participants to plan and operate a business in a reasonable way and to take into account seasonal patterns of activity, the calculation of the thresholds determining when an activity is considered to be ancillary to the main business should take place on the basis of a rolling average of three calendar years.
Justification We are concerned that Recital (9) and the corresponding definition in Article 1(e) may be interpreted as a requirement for persons not established in an EU Member State to have a branch in an EU Member State to avail of the exemption. We believe such a requirement would be inconsistent with Article 39 MiFID 2. We suggest the amendment above to clarify application of the exemption.

Article 1 **Definitions** (e) "relevant national competent authority" means the national competent authority of the jurisdiction of the place of incorporation of the person making use of the exemption under Article 2(1)(j) of Directive 2014/65/EU or the national competent authority of the Member State where its branch is situated **or in which it**

undertakes the majority of ancillary activities if the person making use of that exemption is situated in a third country.
Justification We are concerned that Article 1(e) may be interpreted as a requirement for persons not established in an EU Member State to have a branch in an EU Member State to avail of the exemption. We believe such a requirement would be inconsistent with Article 39 MiFID 2. We suggest the amendment above to clarify application of the exemption.

Article 2

Application of the thresholds

An activity shall be considered to be ancillary to the main business in accordance with Article 2(1)(j) of Directive 2014/65 EU:

(a) if the capital employed by the group for carrying out eligible activity in the European Union accounts for less than ~~5%~~ **15%** of the capital employed for carrying out the main business of the group in the European Union and in third countries; and

(b) if the size of the trading activity

(i) in commodity derivatives of the group undertaken in the European Union accounts for less than ~~0.5% of~~ **the proportions** of overall market trading activity in the European Union in ~~one~~ **each** of the following asset classes:

1. **XX% of** metals;
2. **XX% of** oil and oil products;
3. **XX% of** coal;
4. **XX% of** gas;
5. **XX% of** power;
6. **10% of** agricultural products; or

~~7. other commodities, including freight and commodities referred to in Section C 10 of Annex I of Directive 2014/65/EU; or~~

(ii) in emission allowances or derivatives thereof of the group undertaken in the European Union accounts for less than ~~0.5%~~ **30%** of the overall market trading activity in the European Union.

Article 2 **Application of the thresholds** **1.** An activity shall be considered to be ancillary to the main business in accordance with Article 2(1)(j) of Directive 2014/65 EU: (a) if the capital employed by the group for carrying out eligible activity in the European Union accounts for less than ~~5%~~ **15%** of the capital employed for carrying out the main business of the group in the European Union and in third countries; and (b) if the size of the trading activity (i) in commodity derivatives of the group undertaken in the European Union accounts for less than ~~0.5% of~~ **the proportions** of overall market trading activity in the European Union in ~~one~~ **each** of the following asset classes: 1. **XX% of** metals; 2. **XX% of** oil and oil products; 3. **XX% of** coal; 4. **XX% of** gas; 5. **XX% of** power; 6. **10% of** agricultural products; or 7. **20% of** other commodities, including freight and commodities referred to in Section C 10 of Annex I of Directive 2014/65/EU; or (ii) in emission allowances or derivatives thereof ~~0.5%~~ **30%** of the overall market trading activity in the European Union.
Justification We do not agree with the proposed separate C10 asset class. We note ESMA's MiFID2/R Addendum Consultation Paper of 18 February, which indicates that freight derivatives constitute over 57% of all trading activity in the EU in C10 financial instruments. We believe that a C10 asset class would in effect be a stand-alone asset class for freight. We are concerned that due to the unique characteristics of the freight markets, many participants would have positions that do not meet the Article 10 EMIR requirements in excess of the threshold proposed by ESMA. We propose the following alternative approaches: 1. Disregard C10 financial instruments for the purposes of the Ancillary Activity exemption; or 2. Set an appropriately high threshold for any C10 asset class and require that persons exceeding that threshold must also exceed the threshold of another

asset class to be prevented from availing of the exemption.

We believe these approaches would both be consistent with Article 2(1)(j) and the directions to ESMA in Article 2(4) and would be justified given the characteristics of the freight derivatives markets and the positions of non-financial entities in freight derivatives

Article 3

Calculation of the capital employed

1. The capital employed for carrying out the eligible activity shall be calculated by deducting from the sum of the capital employed for eligible activity by the group in the European Union the sum of the capital employed for privileged transactions by the group in the European Union. Capital employed for trading activity undertaken by an entity of the group that holds a license **or is exempt** in accordance with **Articles 2,3 or 5** of Directive 2014/65/EU shall not be considered when calculating the capital employed for the eligible activity.

2. The capital employed for carrying out the eligible activity calculated in accordance with paragraph (1) shall be divided by the capital employed for the main business of the group in the European Union and in third countries.

Justification

We consider it appropriate and consistent with ESMA's proposed approach to also exclude the calculations any eligible activity of group entities that may avail of another MiFID exemption.

Article 4

Calculation of the size of the trading activity

1. The size of the trading activity shall be calculated by deducting from the volume of the overall trading activity of the group in the European Union the sum of the volume of the privileged transactions undertaken by the group in the European Union. The volume of trading activity undertaken by an entity of the group that holds license **or is exempt** in accordance with **Articles 2,3 or 5** of Directive 2014/65/EU shall not be considered when calculating the size of the trading in

the eligible activity. The volume shall be measured using the gross notional value of contracts. 2. The size of the trading activity calculated in accordance with paragraph (1) shall be divided by the overall market trading activity in the European Union in the relevant asset class referred to in Article 2(2)(b). 3. The size of the trading activity and the size of the overall trading activity in the relevant asset class referred to in Article 2(2)(b) shall be determined by using the records collected and maintained by trade repositories as referred to in Article 2(2) of Regulation (EU) No 648/2012.
Justification We consider it appropriate and consistent with ESMA's proposed approach to also exclude the calculations any eligible activity of group entities that may avail of another MiFID exemption.

RTS 30 (Methodology for calculating position limits)

(8) Article 57(1) of Directive 2014/65/EU requires that position limits shall be set on the basis of all positions held by a person and those held on its behalf at an aggregate group level. Article 4(34) of Directive 2014/65/EU establishes the definition of group in Article 2(11) of Directive 2013/34/EU which refers to a group as a parent undertaking and all its subsidiary undertakings. The positions of a person which is a member of a group shall therefore be aggregated with the positions in commodity derivatives that it holds in its own name together with those of ~~any wholly or partly owned~~ subsidiary undertakings of that entity **included in consolidated financial statements and reports**. The whole positions of the other entities within the group will be added to the person's positions, to simplify reporting and to reflect that a person which has effective control of an entity may use the full amount of that entity's position to support its activities.
Justification We do not agree with the 'whole position basis' for aggregating the positions of partly-owned subsidiaries. We believe this will lead many commercial market participants aggregating positions over which they have no control and for which they may be unable to use the proposed hedging exemption. We propose an alternative, three-step approach on aggregation below.

(17) A non-financial entity ~~will~~ **may** apply **annually** to the competent authority of the trading venue that establishes and applies the position for ~~the~~ relevant commodity derivative **contracts** for a general exemption from position limits for risk reducing positions in a ~~that~~ commodity derivative contract **or related contracts**. The person will need to provide information to demonstrate why positions in a commodity derivative are related to the person's commercial activity and how it reduces risk directly relating to that person's commercial activities. The competent authority may require persons to provide similar information to verify positions that they have reported as risk-reducing.
Justification We have grave concerns as to the proposed approach in the draft RTS and we do not believe the approach would be practical for non-financial entities that may needs to exceed a position limit on an ongoing basis for the purposes of commercial hedging. We propose an alternative approach for ESMA's consideration in amendments to Article 6 of the draft RTS below.

Article 2

Determining when positions of a person are to be aggregated within a group

[Article 57(12)(b) of Regulation (EU) No 600/2014]

1. The positions of a person shall be aggregated within a group by aggregating the positions in commodity derivatives that the person holds in its own name (whether held directly by itself or on its behalf by third parties such as investment firms, under a client relationship) together with those of any subsidiary undertakings of that group, but not to aggregate the positions of other subsidiary undertakings of a mutual parent or of any intermediate or ultimate holding company. Such aggregation shall be made on a whole position basis and not on a pro rata basis. A subsidiary undertaking means an undertaking that is controlled by a parent undertaking **and included in consolidated financial statements and reports**.

2. A parent undertaking may exclude from aggregation the positions in a commodity derivative subject to a position limit of a fully consolidated subsidiary where the parent undertaking can demonstrate to the national competent authority of the trading venue that it does not control the position of the subsidiary.

3. Positions that are held by an intermediary on behalf of a client shall not count towards that intermediary's own position limits regardless of whether, for reasons of market practice, operational structure or legal framework, the positions are held by the intermediary as principal.

Justification

We have reservations as regards the 'whole position basis' approach for aggregating positions. We believe that this should be restricted to fully consolidated subsidiaries. We also believe that parent undertakings should be able to exclude from aggregation positions of subsidiaries over which they have no control and for which they may be unable to use the proposed hedging exemption. We consider the suggested amendments to be consistent with the provisions of Directive 2013/34/EU as well as the application of comparable provisions of EMIR.

Article 6

Procedure for application of use of exemption from position limits

[Article 57(12)(f) of Regulation (EU) No 600/2014]

1. The non-financial entity shall apply **annually** for an exemption to the competent authority of the relevant trading venue that establishes and applies the position limit for the relevant commodity derivative where the non-financial entity considers that it holds **or reasonably expects to hold** a position which is objectively measureable as reducing risks directly relating to its commercial activity. Applications shall be made online to the relevant competent authority by means of an electronic portal or by such other means as the competent authority may specify.

2. The non-financial entity shall provide information demonstrating how the position is **objectively measureable as reducing risks directly relating to its commercial activity or that of its subsidiaries.**

~~(a) related to the commercial activity of the non-financial entity; and~~

~~(b) reduces risk directly relating to that person's commercial activities.~~

3. The non-financial entity shall apply to use the exemption before it exceeds the limits set for the size of a position in that particular commodity derivative. A position under Article x(10) shall not be considered as exempt from the relevant position limit if the competent authority has not approved the exemption.

4. A competent authority shall have up to 30 calendar days to approve an application under Article x(10). The competent authority shall send a confirmation to the non-financial entity to approve or reject the application. Where the non-financial entity has not received a refusal, confirmation or request for more information from the competent authority within a period of 30 calendar days, the person may use the exemption.

Justification

We do not believe the proposed approach would be practical for non-financial entities that may need to exceed a position limit on an ongoing basis for the purposes of commercial hedging. We caution that it is also not possible for persons to precisely predict the amount by which it may need to exceed a position limit at a future date as commercial risks being hedged can fluctuate significantly day to day. Consequently, any approach that requires regular renewal of an exemption application would be unworkable. We propose an alternative approach for ESMA's consideration, which would be similar to procedures in US agricultural commodity derivative markets that have worked effectively for many years. Under this approach, a non-financial entity would apply annually to the

competent authority of the trading venue for a general exemption in a commodity derivative. The applicant entity would demonstrate how a position in the commodity derivative would be considered as objectively measurable as reducing risks directly relating to the commercial activity of that entity or its subsidiaries based on its relevant physical market exposures in the preceding 12 months, relevant forward purchases and other information. The general exemption would cover the entity's aggregated position in the relevant commodity derivative.