



7 September 2016

Subject: Joint Energy Associations Group's view on MiFID II RTS 20

Dear Mr Foulger,

We are writing to you on behalf of the Joint Energy Associations Group to explain the views on MiFID II RTS 20 of nine national and European associations and their members (BDEW, BDI, DAI, EFET, Eurelectric, Eurogas, Energy UK, IOGP, and VKU).

We welcome the efforts the Commission has put so far in finding an appropriate definition of the so-called Capital Employed Test to be used for the ancillary activity exemption under article 2(1)(j) of MiFID II (RTS 20). We would like to re-emphasise our support for the latest amendments introduced in the draft RTS 20 with regards to the so-called Capital Employed Test which we understand to be as follows:

- Possibility to use a Capital Employed Test as an alternative, optional test to the ESMA proxy test
- The capital employed for the trading activities based on a simplified CRR approach, Art. 360 CRR (numerator)
- The capital employed for the main business defined as total assets minus short term debt based on the person's group total main business at global level (denominator).

However, despite these necessary improvements and the extension of the MiFID II implementation date by 12 months, we remain concerned that the delivery of an orderly transition from MiFID I to MiFID II is potentially at risk due to the following factors:

- The period of assessment for ancillary activity exemptions: the Commission's proposal to assess firms in the redrafted RTS 20 on a retrospective basis (from January 2015 to December 2017) appears to be at odds with the principles of Better Regulation. In addition, we see no legal basis in MiFID II for the Article 2(1)(j) calculations to require retrospective

assessment of trading and main business activity. In practice, it will mean that firms will be required to conduct an assessment in absence of the final regulatory framework. In addition, the current timetable will make retrospective application unworkable due to the absence of available market data necessary for the purposes of the “trading activity” calculation. Management of the firms that are eligible for the ancillary activity exemption should be given time to assess the adopted rules and their impact, and should have sufficient time to adapt themselves to the new framework rather than being assessed retrospectively.

- The resulting timetable: The requirement from national competent authorities, such as the FCA, to get MiFID II applications submitted 6 months ahead of the expected go live of January 2018 means that the timetable for implementation is impractical for firms where a part or all their activities are not licensed under the current MiFID I rules. In the best case scenario firms would appear to have as little as 3-6 months post the rules being finalised, to assess their status against the exemptions and either change their activity sets or prepare to implement the MiFID II rules. In the absence of clarity regarding the final regulatory framework and the lack of appropriate market data, firms are at risk of not being able to complete their assessment by the 3 January 2018 deadline. There is therefore a significant risk that on 3 January 2018 certain market participants would face a material legal uncertainty if they have to be authorised or can remain exempt. This will have profound implications and potential to cause significant market disruptions.

As a practical solution to mitigate the risks identified above, we suggest a forward looking assessment period: the assessment period should commence in January 2017 rather than 2015 and run for three years. We expect that by 03 January 2017 the relevant technical standards will have entered into force and initial market data will be provided only thereafter by ESMA and/or trade repositories for the year 2017 and later, which should facilitate necessary calculations for these years. National regulators should “deem” eligible firms as exempt for the first two years of the MiFID II regime, during which time market participants will have time to complete the calculations and seek authorisations as and when required.

We remain available for any further information you may need.

Yours sincerely,

German Energy and Water Association, BDEW

Deutsches Aktieninstitut, DAI

Eurelectric

European Federation of Energy Traders, EFET

German Association of Local Utilities, VKU

Federation of German Industries, BDI

EnergyUK

Eurogas

International Association of Oil and Gas Producers, IOGP