



## **JEAG supports EU Commission's draft delegated regulation for the implementation of the Ancillary Activity Exemption based on established regulatory technical standards (14.06.2021)**

### **Introduction**

The "MiFID II quick-fix" (Directive (EU) 2021/338<sup>1</sup>) amended the Ancillary Activity Exemption ("AAE") of Article 2 (1) (j) and (4) of the Markets in Financial Instruments Directive (Directive 2014/65/EU<sup>2</sup>, "MiFID II"). The amended AAE exempts persons (non-financial firms) dealing on their own account or providing investment services to clients in commodity derivatives, emission allowances or derivatives thereof, provided this is an ancillary activity to their main business on a group basis and the main business is not the provision of investment services within the meaning of MiFID II or banking activities under Directive 2013/36/EU. The current Commission Delegated Regulation 2017/592 ("RTS 20"), which will be replaced by a new delegated regulation of the EU Commission, establishes quantitative tests which define what constitutes an ancillary activity. These tests are the Market Size Test and the Main Business Test, the latter consisting of an alternative Trading Test and Capital Employed Test (see Articles 2 and 3 of RTS 20).

In this context, the EU Commission published for public consultation its draft delegated regulation of 27 May 2021 for the implementation of the AAE ("draft EC DA")<sup>3</sup>.

JEAG fully supports this draft EC DA for the reasons explained in the paragraphs below.

### **Changes to the AAE introduced by the MiFID quick-fix are considered by draft EC DA**

The aim of the MiFID II quick-fix is to support the recovery from the severe economic shock caused by the COVID-19 pandemic through the introduction of limited targeted amendments to existing Union financial services law, incl. to MiFID's II commodity regime. This MiFID II review shall remove unnecessary red tape and, therefore, those amendments should avoid

<sup>1</sup> OJ L 68, 26.2.2021, p. 14

<sup>2</sup> OJ L 173, 12.6.2014, p. 349

<sup>3</sup> See draft EC DA (Ref. Ares(2021)3500409 – 27/05/2021) under the following [link](#)

making changes that increase administrative burdens on the real economy.<sup>4</sup> JEAG welcomes that the draft EC DA takes those changes into account.

The relevant major changes triggered by the amended AAE text are the following:

- **Deletion of Market Size Test:** The Market Size Test of Article 2 of the RTS 20 was deleted as it was overly complex and, hence, presented a significant burden during the crisis. Also, it was a red-tape requirement as it did not alter the status quo in terms of non-financial firms that are eligible for the exemption.<sup>5</sup>
- **New De-minimis Test:** The introduction of a new De-minimis Threshold Test which offers a simplified test to non-financial firms and, consequently, minimise the compliance burdens.
- **Level of thresholds:** The amended AAE does not change the current methodology of the Trading Test and Capital Employed Test of Article 3 of the RTS 20 as they have worked well in practice. Consequently, the established calculation methodologies as described in Article 3 of RTS 20 are maintained. These two current tests were only changed with regard to the level of the corresponding test thresholds as defined in Article 2 (4) of the MiFID II quick fix text.
- **Deletion of yearly notification requirement:** The elimination of the requirement for non-financial firms to annually notify their relevant national competent authority (NCA) that they make use of that exemption and to provide the necessary elements to satisfy the exemption prerequisites. Instead non-financial firms should report only upon a request from the NCAs upon which basis they have assessed their activity to be ancillary to their main business. This change saves non-financial firms and NCAs resources.
- **EC Delegated Act:** Furthermore, Article 2(4) of MiFID II empowered the EU Commission (EC) to adopt a Delegated Act specifying the criteria for establishing when an activity is to be considered ancillary to the main business of a group ("EC Delegated Act"). This EC Delegated Act will replace the current RTS 20.

### **The draft EC DA implements MiFID II changes in the EC Delegated Act based on the current RTS 20**

We are supportive of the above-mentioned changes as they help non-financial firms to competitively access wholesale commodity markets in order to manage their commercial risks, whilst remaining out of scope of burdensome MIFID II license requirements. Furthermore, these amendments simplify the AAE substantially which lowers the compliance burden for the real economy.

In this context, we fully support the draft EC DA as it incorporates the above-mentioned changes into the current RTS 20 and retains all other elements of the RTS 20 unamended. This guarantees an efficient transition to the new AAE regime and it avoids additional, unnecessary implementation efforts by non-financial firms and financial regulators. Also, this approach does not change the nature or scope of the AAE.

In detail, we support the draft EC DA for the following reasons:

- It **deletes the Market Size Test** of the current RTS 20
- It **introduces the new De-minimis Threshold Test** as described in Article 2 (4), subparagraph 2 (a) of the MiFID quick-fix text (see Article 3 of draft EC DA). This new test is embedded in the established calculation methodologies and principles of the current RTS 20 as far as possible. Overall, this test substantially minimise the burdens for corporates without changing the nature or scope of the AAE.
- It **keeps the current provisions in the RTS 20 with regard to the calculation methodology and principles of the Trading and Capital Employed Test under the**

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<sup>4</sup> See recital 1 of Directive (EU) 2021/338

<sup>5</sup> See Proposal for a Directive amending Directive 2014/65/EU, 24.7.2020, 24.7.2020, p. 10 and 12.

**current RTS 20.** These are already implemented by non-financial firms and accordingly supervised by financial regulators and have not raised any concerns. The only required change to these two tests is the level of the corresponding test threshold as set out in Article 2 (4), sub-paragraph 2, lit. (b) and (c) of the MiFID quick-fix text.

- **It implements the amended levels of the thresholds for the Trading and Capital Employed Test** as far as they are required by the amended wording of the AAE in Article 2 (4), second paragraph, lit. b) and c) of the MiFID II. Therefore, under the Trading Test the non-privileged trading activities shall not exceed the total size of the other trading activities at group level. Alternatively, the capital employed by the group shall be predominantly allocated to the main business of the group. This is considered in the wording of Article 2 (1) lit (b) and (c) of the EC DA.
- **It allows non-financial firms to decide which of the three alternative tests to perform** in order to determine whether their trading activity is ancillary to the main business of the group. If a person's trading activity is ancillary under any of those tests, it is considered to be ancillary to the main business for the purpose of Article 2(1)(j) of MiFID II.
- **It deletes the reference to the former yearly notification requirement** in RTS 20
- Furthermore, the **new EC Delegated Act will apply in 2021 after its publication** to guarantee an efficient transition to the new AAE regime. This creates legal clarity that non-financial firms can apply the new AAE regime and ensures that they don't have to calculate in Q1 2022 under the current RTS 20 if they are eligible to use the AAE.

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