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Committee on Economic and Monetary Affairs
The Chair

Lord Jonathan Hill
Commissioner for Financial Stability, Financial
Services and Capital Markets Union
European Commission
Rue de la Loi 200
B – 1049 Bruxelles

D 320199 27.11.2015

Regulatory technical standards under MiFID II/MiFIR

Dear Commissioner Hill,

We are writing to you on behalf of the European Parliament's Negotiating Team for Directive 2014/65/EU (MiFID II) and Regulation (EU) No 600/2014 (MiFIR), and in particular on the draft regulatory technical standards (RTS) and the implementing technical standard (ITS) submitted to the Commission by ESMA on 28 September 2015.

As we have stressed to ESMA and to your services throughout the process of scrutinising the level-2 measures related to MiFID II and MiFIR, our objective is to ensure that the delegated acts and the technical standards are fully in line with the mandate given by the co-legislators, and we are deeply concerned that this goal would not be achieved if some of the RTS were adopted by the Commission without substantial changes to ESMA's drafts.

Indeed, as you are aware, we expressed in our letter of 23 July 2015 to ESMA Chair Steven Maijoor a number of concerns in relation to five areas of the draft RTS that were under preparation at the time. We appreciate that ESMA has taken into account some of our concerns and understand the complexity of some issues, such as access, where our views have been partially reflected.

However, we are very disappointed that our concerns in three specific areas have not been addressed by ESMA in a satisfactory manner, namely in the areas of position limits, non-equity transparency and the ancillary activity exemption. Those outstanding concerns remain priority issues for the Parliament's Negotiating Team, and we urge the Commission to take into account our recommendations on these issues, by making appropriate changes to the relevant draft RTS before it adopts them, in order to prevent an objection by Parliament to the standards concerned.

Details of our position are as follows:

- **Position limits (draft RTS 21)**

ESMA has failed to incorporate the Parliament's request to opt for "deliverable supply" rather than "open interest" as the relevant parameter also in non-spot months, and has kept 25% as the baseline while only adapting the range slightly from 10-40% to 5-35%. The Negotiating Team believes that such an approach does not fulfil the political objective of the level-1 text, namely "to improve the

regulation, functioning and transparency of financial and commodity markets to address excessive commodity price volatility" (Recital 125) and to "promote integrity of the market for the derivative and the underlying commodity" (Recital 127).

If "deliverable supply" is not chosen as the relevant parameter for non-spot months, the limits for non-spot months should be considerably lower than those for spot months; otherwise, the regime would be even less stringent than ESMA's initial draft.

For liquid contracts, the limits should be lower than currently proposed. In general terms, the Commission should devise a regime that reflects appropriately the specificities of each relevant derivatives class. The regime should send a clear message to national competent authorities that they should set low position limits wherever liquidity allows, and it should avoid circumvention by ensuring that contracts with highly correlated economic outcomes count towards the same position limits. The example of the US approach to positions limits shows the merits of such an approach.

Furthermore, in line with the requirements of level 1, besides the number, the size of market participants should also be a factor in the determination of position limits. We also believe the volatility of the relevant markets to be a parameter which needs to be reflected in the standard, in line with the level 1 mandate. The definition of portfolio hedging as well as of "economically equivalent" contracts should be devised in a way that they do not create loopholes.

- **Non-equity transparency (draft RTS 2)**

The Negotiating Team appreciates that the Instrument by Instrument Approach (IBIA) has been chosen by ESMA for bonds in general, in line with the suggestion that we expressed earlier. However, ESMA has not reflected in the draft RTS our demand that the definition for bonds and other fixed income instruments be tested to meet the requirements for continuous trading and therefore a test of 2-3 trades per day is not sufficient to identify liquid instruments. As mentioned previously, in our view, this test must better meet the characteristics of non-equity markets, which are *per se* less liquid than others, and reflect the level 1 definition of liquidity as being a situation in which there are "ready and willing buyers and sellers on a continuous basis", with a view to avoiding false positives.

We note the continued use of COFIA for the first 6 months of trading which we find unacceptable and suggest that the length of time that COFIA is used should be reduced and substituted for the more accurate "COFIA plus" methodology.

Furthermore, we urge the Commission to also include trades under EUR 100.000 when calculating the Large in Scale and Size Specific to the Instrument waivers for the pre- and post-trade transparency regime. We believe that excluding such trades could distort the overall level of the waivers. In addition we would propose that the percentiles used within the SSTI should be lowered to better reflect the level 1 empowerment of taking into account "undue risk".

- **Ancillary activity exemption (draft RTS 20)**

The Negotiating Team considers that the thresholds suggested by ESMA for the ancillary activity test (Article 3(2) of the draft RTS) are too high. Moreover, following the criteria laid down in this standard, a firm whose activities are for more than 50% in commodity derivatives could still be considered as qualifying for the exemption. This outcome is not in line with the spirit of the level-1

text which provides that commodity derivatives trading needs to be a minority of activities to qualify for the exemption.

We are also concerned that the exemption test still only refers to group trading activity (as denominator) and not to main business activity. This would not be in line with level-1 and would be problematic in particular for firms having a large non-trading business. Reverting to the 'Capital Employed Test' as suggested by ESMA in earlier drafts would better address this issue as it would take account of a firm's primary business activity. However, if the Commission does make this change to the denominator, then the thresholds would need to be adapted accordingly.

We also believe that a baseline problem might be caused by the fact that the calculation of the total size of the market seems also to exclude data on OTC trades that are available at trade repositories, in accordance with EMIR, and could be used, on top of trading venues' data, to make a more accurate determination of that total size.

Finally, we read with concern that ESMA only had a small data sample available and has therefore set the thresholds cautiously, while indicating that a review would be necessary when more data become available.

- **Package transactions (draft RTS 2)**

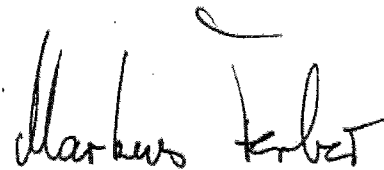
While ESMA found a solution for dealing with package transactions on the post-trade side, they indicated that a solution for package-specific provisions on the pre-trade side had not yet been found. We suggest discussing this issue at the next meeting between the Negotiating Team and the Commission.

The time until the date of application of MiFID II/MiFIR as set out in level 1 – 3 January 2017 – is now getting short. We will respond to your letter of 20 November 2015 on a possible delay of the application date of MiFIDII/MiFIR in a separate letter. In any event, the Parliament considers it to be of utmost importance that the Commission adopts the delegated acts and technical standards under MiFIDII/MiFIR without any further delays. In that context, we trust that the Commission will take the above-mentioned key issues very seriously and will swiftly make the appropriate and necessary changes to the draft RTS.

Yours sincerely,



Roberto Gualtieri, MEP



Markus Ferber, MEP

cc: Steven Maijoor (ESMA)
Tilman Lueder (DG FISMA)
Luxembourg Presidency of the EU