European Securities and Markets Authority

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MiFID II/MiFIR Scrutiny Hearing

Economic and Monetary Affairs Committee
European Parliament

Steven Maijoor
Chair
European Securities and Markets Authority

Dear Members of the European Parliament,

Ladies and gentlemen,

I am pleased to have been invited by the Chair and Members of ECON to update you once again on the work of ESMA on the implementing measures under MiFID II/MIFIR.

As you know, MiFID II/MiFIR is the most significant and voluminous piece of Level 2 regulation that ESMA has ever undertaken. It is important for ESMA that this work is carried out in an atmosphere of mutual trust and cooperation with ECON to ensure the smooth and timely adoption of the new regime by the EU Institutions.

During the last scrutiny slot, some of you expressed discontent about the apparent lack of transparency by ESMA in the process of finalising the draft RTS. I can reassure you that we do our utmost to keep you informed as early as possible about the direction and options the ESMA Board of Supervisors are considering. However, I would also ask for your understanding that there are some limits as to how detailed we can be at

particular points in time, especially on topics where our own ESMA Board, which is mandated to work in full independence, has not arrived at a firm position yet.

We are committed to work as transparently as possible and I believe that we can accommodate your concerns to ensure that we continue to work together co-operatively. I hope that our efforts in recent weeks have demonstrated this commitment. We provided the negotiating team with updates on the major changes to our draft RTS as well as pending issues following the consultations in December and February. In addition, we engaged bilaterally with those of you who expressed an interest in discussing our latest thinking.

The draft RTS are currently undergoing an early legal review by the Commission legal services. We agreed with the Commission to this process to ensure legally sound final draft technical standards and avoid a potentially lengthy re-approval process. By no means should this legal review process give the impression that we limit the scrutiny role of the European Parliament and the Council in the endorsement process of the technical standards. Our intention is to keep you informed of changes triggered by the legal review, in a similar form as we did in the last weeks.

Let me now briefly touch upon three important topics

Non-equity transparency

While the public discussion often focuses mainly on bond market transparency, please also bear in mind that the non-equity transparency

regime covers a vast range of asset classes, particularly on the derivatives side. Setting adequate thresholds for liquidity assessments and large transactions across those asset classes is an important and technically extremely difficult task for ESMA but essential to ensure that the future system works in practice.

As already stressed at our last hearing, we will not be able to find the ideal system balancing transparency and liquidity and at the same time satisfy the preferences of all stakeholders. However, I do believe that we have made significant progress towards creating a more adaptable and better calibrated system over the past half year and our public consultation process in that context has provided very valuable input.

Moving to bond market transparency specifically, at our last exchange you highlighted concerns as to the methodology to be applied for the liquidity assessment of bonds and the degree of accuracy of liquidity classifications. We took careful note of those concerns and went back to the drawing board to re-assess the two approaches that the ESMA Board had considered at some point: the Classes of Financial Instruments Approach (COFIA) and the Instrument by Instrument Approach (IBIA). Views on which approach is best are very much split between different groups of stakeholders. We have worked, over the last few weeks, on both options in order to find the right balance between accuracy, predictability and cost-efficiency which will be the main principles guiding the final decision of the ESMA Board.

Position limits

Let me now turn to the topic of position limits. A number of voices have expressed concerns on the range of potential limits going from 10% to 40%. This range is the result of a baseline of 25% with an adjustment of plus or minus 15%. Observers consider the baseline should be lower than 25%. Some stakeholders quote very specific examples where either a limit of 10% is considered too strict while a limit of 40% could be seen as unreasonably broad. However, focusing on extreme and unlikely combinations does not do justice to the soundness of the regime. I do not know of any national regulator who is intending to apply the lowest limit to the most illiquid contracts and furthest settlement dates or who intends to apply the maximum limit to the spot month of a liquid essential commodity.

Under the proposal, supervisors will apply the regime in a dynamic manner, meaning that limits, once imposed, are not unmovable and they will be lowered appropriately as the spot month approaches applying the criteria as included in the RTS. ESMA's approach means that national regulators can set strict limits where strict limits are needed.

Simply put, what we have to take into consideration is that the scope of the EU regime, as described in the Level 1, is extremely broad – broader than the US one for example – and will impact on a single, big-bang date. Therefore, a flexible and gradual approach is absolutely necessary for the individual national regulators to address specific contracts adequately and avoid unnecessarily or inadvertently damaging contracts and markets that serve the real economy. If there is any risk of national

divergent practices, ESMA's compulsory opinion should act as a safety mechanism.

Ancillary activity

Lastly, for the ancillary activity test we are aware that the stakes are high and we take careful note of the concerns expressed from the energy and other non-financial sectors. ESMA is certainly willing to approach this important test cautiously. However, let me also emphasise that the public discussion often goes in the wrong direction suggesting that the ESMA test is not right because it may require a MIFID licence for some non-financials.

However, that is the whole point of the test in the first place: the exemptions from financial regulation should be narrowed, opaque parts of the market should be reduced and large non-financial players conducting activities identical to financial players, should compete on a level playing field. We think that creating a test that will exempt all non-financial players, including those that are substantially involved in speculative trading in commodities derivatives, would clearly be against Level 1. ESMA instead is proposing a real test while designing it in a cautious and pragmatic way.

Finally, let me emphasise that for all three issues mentioned the applicable legal tool is the RTS. This implies that, depending on market developments and experiences obtained after MIFID 2/MIFIR has come into force, we can adjust and calibrate the RTS. Of course, changing an

RTS will again entail the full rule-making process, including scrutiny by your Committee and the power of the Parliament to object.

I am looking forward to hearing your views on our MIFID II/MIFIR Level 2 work, and especially on the three specific issues mentioned.

Thank you for your attention.