



**Lord Jonathan Hill**  
Commissioner  
Financial Stability, Financial Services  
and Capital Markets Union  
European Commission  
Rue de la Loi 200  
B-1049 Brussels  
BELGIUM

21 April 2015

Dear Commissioner,

I write to you regarding the work on the implementation of the Markets in Financial Instruments Directive II/Regulation (MiFID II). BUSINESSEUROPE has long been a supporter of MiFID and its objectives and has provided input throughout the development of the new rules, supporting transparency and stability in financial markets and emphasising the importance of ensuring that the rules are supportive of European businesses.

We especially support MiFID II's provision of a new category of market to provide access to capital for small and medium-sized businesses. We support ESMA's principle-based approach to implementing measures that encapsulates a set of principles and regulatory objectives whilst leaving it to national competent authorities' discretion to determine whether market operators in their jurisdiction offer an appropriate operating model and, consequently, whether particular markets should be registered in the new category of SME-Growth Market.

We would however like to raise some issues we believe should be considered during the process of drafting implementing rules for MiFID II. These issues and our concerns are set out in more detail in the enclosed position paper.

We hope that you share these concerns and that work at Level 2 on MiFID II will ensure that the legislation will function effectively, encouraging growth and preventing damage to businesses in the wider economy. We remain at your disposal should you wish to discuss this subject further.

Yours sincerely,

Markus J. Beyrer



20 April 2015

## **MARKETS IN FINANCIAL INSTRUMENTS DIRECTIVE (MiFID II) MARKETS IN FINANCIAL INSTRUMENTS REGULATION (MiFIR)**

### ***Introduction***

BUSINESSEUROPE has long been a supporter of MiFID and its objectives. It supports transparency and stability in financial markets and emphasises the importance of ensuring that the rules are supportive of European businesses.

BUSINESSEUROPE would however like to raise some issues it believes should be considered during the process of drafting implementing rules for the Markets in Financial Instruments Directive II/Regulation (MiFID II).

### ***SME Growth Markets***

The encouragement of the development of specialist markets that cater for the needs of small and medium-sized issuers is a welcome prospect. BUSINESSEUROPE supports ESMA's principle-based approach to implementing the MiFID II provision of a new category of market to provide access to capital for small and medium-sized businesses (SME-GM). Adopting a set of principles and regulatory objectives whilst leaving it to national competent authorities' discretion to determine whether market operators in their jurisdiction offer an appropriate operating model and, consequently, whether particular markets should be registered in the new category of SME-GM is the best way forward and should be pursued.

### ***Transparency***

The proposed transparency requirements for derivatives would seriously interfere with the risk management strategy of non-financial companies that use tailor-made or bespoke derivatives to hedge risks associated with their underlying commercial business. The proposed waiver time frames are much too short especially for "illiquid" and "large in scale" transactions, which are important to non-financial company customers. There is a real risk that prices will increase when the supply side can attribute split orders to one and the same end-user. This will discourage legitimate hedging for operative business of non-financial companies especially for those transactions that transfer significant amounts of risk. It is important that the volumes of transactions in illiquid instruments and liquid instruments are omitted for a certain period of time. This is consistent with the omission of volumes in the TRACE system in the US.

In addition, we would like to emphasise that thresholds for instruments traded on an organised trading facility (OTF) that are able to operate under the size specific to the instrument (SSI) waiver need to be applied on an instrument-by-instrument basis using a risk-based methodology, which is determined by the risks the waiver is intended to calibrate. There should be different thresholds for pre-trade and post-trade waivers because there are greater risks for pre-trade transparency. It would not be appropriate



to calibrate such threshold simply as a percentage of the large-in-scale waiver. The SSI waiver by its very nature needs to be applied on an instrument-by-instrument basis. Otherwise, liquidity providers may pull out of certain asset classes leaving end users either unhedged or facing restrictions in their hedging options.

### ***Exemptions***

Exemptions aimed at non-financial companies on “ancillary activities” and “trading for own account” do not reflect business realities. They need to be adjusted to make it easier for non-financial companies that are far away from the proposed levels of “trading activities” to claim the exemption – irrespective of company size, as this is solely depending on business models. As calculating capital employed for normal treasury business is not a standard for most non-financial companies, we welcome the idea of ESMA to invent a “de minimis” shortcut for those who are concentrating on their normal treasury business.

The ancillary activities thresholds for capital employed and market share should therefore be set at a higher level as they are of concern for all market participants because major players will probably leave the markets or substantially scale back their activity to avoid MiFID licensing with unintended consequences for overall market liquidity. As a result, bid/offer spreads and hence prices for the respective instruments will rise, to the detriment of end-users.

### ***Emission allowances***

With regard to emission allowances, we believe there is a definition gap. Privileged transactions according to ESMA are limited to those certificates that are traded to fulfil liquidity obligations on platforms. No reference is made to end-users buying or selling emission allowances following their regulatory obligations. This entails the risk that companies required to participate in the EU Emissions Trading System will effectively be labelled as financial under EMIR, with considerable spill-over effects, such as MiFID licensing and clearing obligations. These effects would lead to many firms exiting the market resulting in severely reduced opportunities for commodity risk management. A possible solution would be to qualify these transactions as privileged hedging transactions.

### ***Commodity derivatives and contracts***

BUSINESSEUROPE is concerned that ESMA’s advice with regard to the definition of commodity derivatives will drive commercial commodity contracts, which are used by real economy firms to source commodities for their commercial activities and to mitigate their commercial commodity risks, into the scope of MiFID II. The qualification of such contracts as commodity derivatives would trigger various obligations under financial regulation which in the end are very costly for the real economy and end consumers without corresponding benefits.

Similarly, any criteria that require ‘must be physically settled’ contracts to contain provisions which ensure that parties to the contract have proportionate arrangements in place to be able to make or take delivery of the underlying commodity, should be interpreted with the aim to reflect the characteristics acquired by the counterparties, namely their capability to delivery or receipt of the commodity through adequate contractual arrangements. It should be avoided that only counterparties with



production, consumption or storage capabilities may enter into 'must be physically settled' contracts.

### ***Data collection***

It is unclear if ESMA intends to provide data for the tests regarding the calculation of the overall market activity. This is essential as market participants do not have access to all relevant trade repositories to calculate the respective figures themselves.

In addition, we would like to emphasise that position reporting in commodity derivatives should tap existing data in the European Market Infrastructure Regulation (EMIR) trade repositories to avoid costly duplication of reporting infrastructures.

### ***Research***

Strict provisions which seek to unbundle trading and research fees will lead to less demand for SME research which is already unsatisfactory (50% of listed SMEs of less than €1bn capitalisation have no research coverage). This will make it harder for these companies to access capital markets and find investors. This contradicts current EU policy to build a Capital Markets Union which identifies inadequate business information on SMEs as one of the reasons for limited investor interest in these companies. It is possible to implement an improved Commission Sharing Agreement mechanism (provisional budget range and improved disclosure for investors) that is applied to the fund management entities - and not fund by fund – so that a degree of mutualisation is maintained in research spending that will help to pay for SME research. The alternative whereby financial research is eventually paid directly through the fund management entity's P&L is certain to lead to far less spending on research and a severe loss of coverage for SMEs.

### ***Bank guarantees***

The use of bank guarantees by non-financial companies as collateral for CCP clearing should not be dependent on the guarantees being fully backed with highly liquid assets. Currently, non-financial companies may use bank guarantees as collateral for CCP clearing without the guarantees being fully backed. This supports the use of transparent trading platforms in markets rather than bilateral non-transparent trading where the use of bank guarantees does not have to be fully backed either. If bank guarantees would have to be fully backed, this would increase the costs of risk hedging adding further costs to end-users. Bank guarantees have limited market risk as issuers are evaluated in terms of credit worthiness and continuously monitored and EMIR already includes detailed requirements regarding the use of bank guarantees.

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