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FIA feedback on the European Commission’s consultation on the draft delegated act for the amended ancillary activities exemption in MiFID II

FIA welcomes the opportunity to provide feedback to the consultation launched by the European Commission on the draft delegated act for the amended ancillary activities exemption in MiFID II¹.

In July 2020, the European Commission (“Commission”) adopted a legislative package on capital markets recovery (“MiFID II quick-fix”) as part of its overall strategy to tackle the economic impacts of the coronavirus pandemic, which included increasing the competitiveness of EU commodity markets.² The amendments to the MiFID II framework refer to a number of requirements that were already identified (during the 2020 MiFID/MiFIR public consultation³) as being overly burdensome or hindering the development of European markets. The pandemic crisis made it even more crucial to lessen unnecessary burdens and provide opportunities to nascent markets. FIA members overwhelmingly welcomed and supported the Commission’s proposal as a means to remove administrative and other burdens for EU firms and market participants.

On 26 February 2021, the Directive (EU) 2021/338⁴ (the “Directive”) was published in the Official Journal of the EU. It included changes to the ancillary activities exemption and to the position limits regime. The Directive noted that “It is crucial 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. The overall aim of those amendments should therefore be to remove unnecessary red tape and introduce carefully calibrated measures that are deemed effective in order to mitigate the economic turmoil.”

The Directive also mandated that the European Commission by 31 July 2021, shall adopt a delegated act further specifying the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level.

FIA Members welcome the changes in the draft delegated act to the criteria for granting the exemption, including the discontinuation of the overall market size test and the introduction of a new de minimis threshold test. We remain convinced that the amended tests fulfil the objective set by the MiFID II quick-fix.

Since the introduction of MiFID II, FIA Members had found the market size test challenging to complete, not least because it required data that market participants were unable to obtain themselves, whereas relying on estimates created legal uncertainty.

¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13040-Investment-market-transparency-amended-ancillary-activity-exemption-specifications-_en

² [https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/679075/EPRS_ATA\(2021\)679075_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2021/679075/EPRS_ATA(2021)679075_EN.pdf)

³ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12167-Review-of-the-regulatory-framework-for-investment-firms-and-market-operators-MiFID-2-1-/public-consultation_en

⁴ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.068.01.0014.01.ENG&toc=OJ%3AL%3A2021%3A068%3ATOC



The new ancillary activities exemption simplifies the calculations. In particular, the simplified approach of the de-minimis threshold tests reduces legal uncertainty and compliance burden for market participants at an important time (Covid-19 recovery) and sets an appropriate level playing field.

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