European Securities and Markets Authority

Final report

Technical standards for commodity derivatives

19 November 2021 | ESMA70-156-4710

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Acronyms used

CBA	Cost Benefit Analysis
CCA	Central Competent Authority
CP	Consultation Paper
EEOTC	Economically Equivalent OTC Contracts
ESMA	European Securities and Markets Authority
EC	European Commission
EU	European Union
ITS 4	Commission Implementing Regulation (EU) 2017/1093 of 20 June 2017 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators
MiFID II	Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349)
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84)
MTF	Multilateral Trading Facility
NCA	National Competent Authority
NFE	Non-Financial Entity
OTC	Over-The-Counter
OTF	Organised Trading Facility
RTS	Regulatory Technical Standard
RTS 21	Commission Delegated Regulation (EU) 2017/591 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives

1 Executive Summary

Reasons for publication

The Capital Markets Recovery Package adopted by the co-legislators in December 2020 and published in the Official Journal on 26 February 2021 introduces significant changes to the MiFID II commodity framework, including to the position limit regime.

Under Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 (the amending Directive), ESMA is required to develop four draft RTS to specify the application of the new commodity derivative framework. ESMA also considers it appropriate to amend ITS 4 as a consequence of the exclusion of securitised derivatives from the scope of position limits. Under Articles 10 and 15 of Regulation (EU) No 1095/2010 of the European Parliament and Council establishing ESMA (ESMA Regulation), ESMA needs to conduct a public consultation before submitting draft RTS or ITS to the Commission.

On 26 May 2021, ESMA therefore published a Consultation Paper (CP) (ESMA70-156-4067) presenting the structure and content of the draft RTS and ITS. ESMA also consulted the Securities and Markets Stakeholders Group.

This final report describes the feedback received in the public consultation, ESMA’s reaction to the feedback received, and the final proposal for responding to the mandates received and amending ITS 4.

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Section 2 presents the overall approach to this final report. In Part I of the final report, ESMA sets out its final proposal for a draft RTS on the application of position limits to commodity derivatives (RTS 21a). Draft RTS 21a includes the proposals arising from ESMA’s empowerments to develop draft RTS to determine procedures for financial entities undertaking hedging activities and for liquidity providers to apply for an exemption from position limits. Draft RTS 21a, which will be repealing RTS 21, also retains the provisions of RTS 21 that are not impacted by the changes made to the position limit regime and contains additional proposals by ESMA to improve the functioning of the position limits regime based on experiences following the application of MiFID II in January 2018.

In Part II of the final report, ESMA explains the amendment it considers necessary to ITS 4 as a consequence of the exclusion of securitised derivatives from the scope of position limits. Part III of the final report contains the draft RTS on position management controls.
Annex I provides a detailed description of feedback received to the consultation. Annex II contains the final Cost Benefit Analysis (CBA) and Annex III, the draft RTS and ITS.

Next Steps

ESMA submitted the final report to the European Commission on 19 November 2021. The Commission has three months to decide whether to endorse the draft regulatory and implementing technical standards.

2 Introduction

1. On 24 July 2020, the Commission adopted a Capital Markets Recovery Package as part of the Commission's overall coronavirus recovery strategy with the aim of making it easier for capital markets to support European businesses to recover from the crisis. The Recovery Package included targeted amendments to the Prospectus Directive, MiFID II and securitisation rules. The Recovery Package notably included amendments to the MiFID II commodity derivatives framework to help the development of energy markets in the EU as well as to allow European companies to cover their risks, while safeguarding the integrity of commodity markets, especially for agricultural products. On 10 December 2020, the European Parliament and the Council reached a political agreement on a compromise text which was ultimately signed on 16 February 2021. Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (the amending Directive) was published in the Official Journal on 26 February 2021. The new provisions will start applying on 28 February 2022, after transposition into national law by Member States.

2. The key changes to the MiFID II provisions regarding commodity derivatives introduced by the Recovery Package relate to the ancillary activity test and to the scope of application of position limits.

3. Pursuant to amended Article 2(4) of MiFID II, the criteria to be applied for the ancillary activity test has been specified in Commission Delegated Regulation (EU) 2021/1833[1] taking into account inter alia the newly introduced threshold of net exposure in cash-settled OTC commodity derivatives, emission allowances and derivatives thereof.

4. In Article 57 of MiFID II, the scope of the position limit regime is substantially reduced and limited to agricultural commodity derivatives and critical or significant commodity derivatives. Under Article 57(1) of MiFID II, critical or significant commodity derivatives are defined as commodity derivatives where the sum of all net positions of end position holders constitutes the size of their open interest and is at a minimum of 300,000 lots on average over a one-year period. All commodity derivatives remain however subject to position reporting. Securitised derivatives based on commodities are excluded from the position limit and position reporting framework. No draft RTS is required to be developed with respect to critical or significant commodity derivatives. ESMA is only required to draw up a list of such contracts, which ESMA will do in due course.

5. Additional exemptions from position limits are introduced by the changes to the MiFID II provisions. The positions resulting from transactions undertaken to fulfil mandatory liquidity provisions in a commodity derivative on a trading venue do not count towards the position

[1] Commission Delegated Regulation 2021/1833 of 14 July 2021 supplementing Directive 2014/65/EU of the European Parliament and of the Council by specifying the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level (OJ L 372, 20.10.2021, p.1)

limit set for that commodity derivative. The hedging exemption for non-financial counterparties is extended to positions held by, or on behalf of, a financial entity that is part of a predominantly commercial group and is acting on behalf of a non-financial entity of the predominantly commercial group, where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity. ESMA is empowered to develop draft RTS to specify the procedure to apply for those exemptions.

6. In addition, to ensure that a more harmonised and convergent implementation of the position management controls is put in place by trading venues in accordance with Article 57(8) of MiFID II, ESMA is empowered to develop draft RTS to specify the content of position management controls, thereby taking into account the characteristics of the trading venues concerned.

7. Finally, ITS 4 on the format of position reports by investment firms and market operators has to be amended to reflect the fact that securitised derivatives are no longer within the position reporting regime.

8. Part I of the report deals with the draft RTS on the calculation methodology for position limits ("RTS 21a") which is to replace current RTS 21). Draft RTS 21a includes various sets of provisions. Firstly, as the empowerments given to ESMA by Article 57(1) of MiFID II to develop draft RTS to specify the procedure for a financial entity to apply for a hedging exemption and for persons to apply for a liquidity provision exemption deal with issues closely linked to the application of position limits to commodity derivatives, ESMA has decided to execute those two empowerments in draft RTS 21a rather than by drafting two separate RTS. Secondly, draft RTS 21a includes proposed amendments to current RTS 21 either as a direct consequence of the changes made to the MiFID II provisions (i.e. at Level 1) or suggested by ESMA at its own initiative based on the experience in the first three years of MiFID II application. Thirdly, whilst draft RTS 21a will replace the current RTS 21, it retains those of the RTS 21 provisions that are unaffected by the changes made to the MiFID II provisions regarding commodity derivatives.

9. Part II of the report presents the amendments ESMA considers necessary to Table 2 of Annex II of ITS 4 on the format of position reports by investment firms and market operators as a consequence of the exclusion of securitised derivatives from the scope of the position limit regime.

10. Part III of the report presents the draft RTS on position management controls.

11. A mainly qualitative cost-benefit analysis of draft RTS 21a and the draft RTS on position management controls can be found in Annex I. Annex II contains a detailed summary of the responses received to the consultation and Annex III the draft legal texts.

Part I: Draft RTS 21a

2.1 Background/mandate

Article 57(3)

“ESMA shall […] develop a draft regulatory technical standard to determine the calculation methodology that competent authorities are to apply when establishing the spot month position limits and other months’ position limits for physically settled and cash settled commodity derivatives based on the characteristics of the relevant derivative concerned [..].

12. ESMA is required to develop a draft RTS on the calculation methodology for position limits. As the two other empowerments to draft RTS to determine a procedure for applying for the liquidity provision exemption and for the risk-reducing exemption are closely related to the methodology for establishing position limits, ESMA has included the proposals regarding those two more specific draft RTS in the more broadly encompassing draft RTS 21a on the calculation methodology for position limits.

13. Draft RTS 21a builds on RTS 21. Three categories of amendments are being suggested in draft RTS 21a compared to RTS 21. The first one relates to the empowerments described above and is discussed in section 3 and 4. Some other amendments are a direct consequence of Level 1 changes such as the deletion of certain adjustment factors or the exclusion of securitised derivatives from the scope of position limits. Finally, some amendments are being introduced at ESMA’s initiative based on the experience gained over the last few years with the existing methodology. Those last two categories of amendments are discussed in section 5.

3 Exemption from position limits for risk-reducing positions held by financial entities

3.1 Background/mandate

Article 57(1) third sub-paragraph

"ESMA shall develop draft regulatory technical standards to determine a procedure by which a financial entity that is part of a predominantly commercial group may apply for a hedging exemption for positions held by that financial entity that are objectively measurable as reducing risks directly relating to the commercial activities of the non-financial entities of the group."

Article 57(12)

"ESMA shall develop draft regulatory technical standards to determine:

(a) the criteria and methods for determining whether a position qualifies as reducing risks directly relating to commercial activities; […]

(e) the methodology for aggregating and netting OTC and on-venue commodity derivatives positions to establish the net position for purposes of assessing compliance with the limits. […]"

3.2 Analysis

14. Non-financial entities (NFEs) are currently the only persons eligible for a hedging exemption from position limits for the positions held that are objectively measurable as reducing risks directly related to their commercial activities. The creation of a limited exemption from position limits for positions held by financial entities that are objectively measurable as reducing risks directly related to the commercial activities of NFEs within predominantly commercial groups led to three new specific provisions in draft RTS 21a compared to RTS 21: i) a clarification for the aggregation and netting of positions, ii) the definition of qualifying positions and iii) the determination of the application procedure.

3.2.1 Aggregation of positions (Article 3(5) of RTS 21a)

15. Article 3(3) of RTS 21 currently provides that positions held by an NFE that are objectively measurable as reducing risks do not count towards the determination of the net position of the NFE. Taking into account the extension of the hedging exemption from position limits to financial entities within a predominantly commercial group, a new Article 3(5) is introduced in draft RTS 21a to clarify that positions held by a financial entity in commodity derivatives that are objectively measurable as reducing risks directly related to the commercial activities of NFEs in a predominantly commercial group, as approved by the competent authority pursuant to Article 7(2) and (4) of draft RTS 21a, shall not be aggregated for the purposes of comparing the net position of that financial entity with the limits for that commodity derivative.

3.2.2 Financial entities' positions qualifying as risk reducing (Article 7(2) and (4) of draft RTS 21a)

16. Article 7 of RTS 21 currently sets out the criteria to be met by a position held by an NFE to qualify as a position that is objectively measurable as reducing risks directly related to the commercial activities of the NFE.

17. The Level 1 text extends the exemption from position limits to the positions held by a financial entity that is objectively measurable as reducing risks directly related to the commercial activities of the NFEs in a predominantly commercial group. In ESMA's view, there are many similarities in the positions eligible to a hedging exemption, be they held by an NFE or a financial entity, and this should be reflected in the newly introduced definition of qualifying positions held by a financial entity.

18. Under Article 7(2) of draft RTS 21a, the circumstances under which a position held by a financial entity in relation to the commercial activities of the NFEs of the group may qualify as risk-reducing therefore replicate the circumstances set out in Article 7(1) regarding the positions held by NFEs. Likewise, Article 7(4) of draft RTS 21a sets out requirements regarding the information to be included in the financial entity's internal policies and the availability of a sufficiently disaggregated view of the hedging portfolios, in line with the provisions set out in Article 7(3) for NFEs.

3.2.3 Application procedure for the exemption from position limits for financial entities (Article 8(3), (4) and (7) of draft RTS 21a)

19. The procedure for NFEs to apply for a hedging exemption for qualifying positions is currently set out in Article 8 of RTS 21. When considering the procedure for financial entities to apply for a hedging exemption for positions held that are objectively measurable as reducing risks directly related to the commercial activities of the NFEs of the predominantly commercial group, ESMA assumed that the application procedure for the NFEs' hedging exemption is already familiar to non-financial groups. ESMA therefore considers that it would be more straightforward for both market participants and NCAs to draft a hedging application procedure for financial entities that would mirror the application procedure for NFEs to the extent possible.

20. Like NFEs, the financial entity holding a qualifying position must apply for an exemption from position limits to the NCA which sets the position limit for that commodity derivative as that NCA will be the one receiving daily position report from the financial entity (Article 8(3) of draft RTS 21a).

21. As regards the information to be submitted by the financial entity to the NCA at the time of application, it should be noted that the newly introduced hedging exemption for financial counterparties aims at addressing the specific circumstances where a financial entity is acting as the market facing entity of a non-financial group. This exemption for financial counterparties is therefore not intended to result in the broadening of the scope of the hedging exemption but rather as a transfer of the hedging exemption potentially available

to NFEs to the financial entity of the group. To ensure that this rationale is met, the information submitted to the NCA should demonstrate that the parent undertaking has entrusted to the financial entity the trading of commodity derivatives traded on a trading venue and their economically equivalent OTC contracts to reduce the exposure and risks in the commercial activities of the non-financial entities of the predominantly commercial group.

22. Further adjustments to the application procedure for NFEs are also needed in Article 8(4) of draft RTS 21a to cater for the fact that the financial entity will have to demonstrate that the position reduces risks directly related to the commercial activities of the non-financial entities of the group, and not of its own commercial activity.

23. The application file should continue to include a description of the nature and value of the NFE's commercial activities in the commodity derivative for which an exemption sought is relevant. Information should also be provided on the exposures and risks in the commodity which the NFE has or expects to have as a result of its commercial activities and which are or would be mitigated by the use of commodity derivatives.

24. As the financial entity in the predominantly commercial group will be the market facing entity of the group, it will be for the applying financial entity to provide a description of the nature and value of its activities in the relevant commodity derivatives and an explanation of how its use of commodity derivatives directly reduces the exposures and risks in the commercial activities of the NFEs of the predominantly commercial group.

25. It appears appropriate to retain the same 21 calendar day period for the NCA to approve or reject the financial entity's application and notify its decision to the applicant. It also appears appropriate to retain the same procedure as currently set out in Article 8(4) of RTS 21 in case of a significant change in the NFE's commercial activities or in the financial entity's trading activities in commodity derivatives and the change having an impact on the information provided at the time of application.

26. In the CP, ESMA asked stakeholders whether they agreed with the above analysis regarding the aggregation of positions, the positions held by financial entities qualifying as risk reducing and the application procedure for financial entities.

3.3 Feedback to the consultation

27. All respondents agreed with the analysis made by ESMA for the aggregation of the positions of financial entities in Article 3(5) of draft RTS 21a and the definition of financial entities' positions qualifying as risk reducing in Article 7(2) and (4) of draft RTS 21a.

28. Most respondents also agreed with ESMA's analysis regarding the application procedure for the exemption from position limits for financial entities in Article 8(3), (4) and (7) of draft RTS 21a. A trade association however suggested providing more clarity on how a financial entity is expected to demonstrate that the parent undertaking has entrusted to the financial entity the trading of commodity derivatives to reduce the exposure and risks in the

commercial activities of the NFEs. That same trade association also expressed concerns that requiring in Article 8(4)(b)(iv) of the draft RTS "an explanation of how the financial entity's use of commodity derivatives directly reduces the exposure and risks in the NFEs' commercial activities" is more restrictive than the Level 1 text which states that the exemption is available where a financial entity's positions are "objectively measurable as reducing risks directly relating to the commercial activity of [a] NFE”.

3.4 Conclusions and proposals

29. ESMA considered the comments received on Article 8(4) of draft RTS 21a. As regards the information to be provided to the NCA to demonstrate that the financial entity has been designated as the market facing entity of the predominantly commercial under Article 8(4)(a) of draft RTS 21a, ESMA is of the view that the RTS should not be overly prescriptive and that some discretion should be left to the applicant to assess what is the appropriate information to be provided to demonstrate its market facing role, notably taking into account the governance structure of the group.

30. ESMA notes that the drafting of Article 8(4)(b)(iv) of draft RTS 21a is aligned with the corresponding provision for NFEs in current Article 8(2)(d) of RTS 21, replicated in Article 8(2)(d) of draft RTS 21a. ESMA further notes that, in Level 1, the wording of the hedging exemption for NFEs (positions “which are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity”) and for financial entities (“where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity”) are aligned. ESMA therefore does not consider that Article 8(4)(b)(iv) of draft RTS 21a is more restrictive than the Level 1 text.

31. Based on the above, and considering the overall feedback to the consultation, ESMA is not introducing any change to Article 3(5), Article 7(2) and (4) and Article 8(3), (4) and (7) of draft RTS 21a.

4 Exemption from position limits for positions resulting from liquidity provision

4.1 Background/mandate

Article 57(1), third sub-paragraph

"ESMA shall develop draft regulatory technical standards to determine a procedure setting out how persons may apply for an exemption for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue."

Article 57(12)

"ESMA shall develop draft regulatory technical standards to determine […]

(e) the methodology for aggregating and netting OTC and on-venue commodity derivatives positions to establish the net position for purposes of assessing compliance with the limits. […]"

4.2 Analysis

32. As explained in Recital 13 of the draft RTS, the introduction of an exemption from position limits for positions resulting from transactions entered into to fulfil mandatory liquidity provisions on a trading venue aims at allowing liquidity providers to effectively fulfil their role without being hampered in doing so by position limits. ESMA understands that "the transactions entered into to fulfil obligations to provide liquidity on a trading venue" referred to in the empowerment are the same as the transactions excluded from the calculation of the ancillary activity test under Article 2(4)(c) of MiFID II, i.e. "(c) transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue, where such obligations are required by regulatory authorities in accordance with Union law or with national laws, regulations and administrative provisions, or by trading venues."

33. The creation of this exemption in Level 1 led to the execution of the two empowerments set out in the third sub-paragraph of Article 57(1) and Article 57(12)(e) of MiFID II regarding i) the aggregation and netting of positions ii) the determination of the application procedure and, iii) the definition of qualifying positions.

4.2.1 Aggregation of positions (Article 3(6) of draft RTS 21a)

34. Article 3(6) of draft RTS 21a clarifies that positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue, in accordance with Article 10 of draft RTS 21a and as approved by the relevant NCA pursuant to Article 9 of draft RTS 21a,

shall not be aggregated for the purposes of comparing the net position of that person with the limits for that commodity derivative.

4.2.2 Application for the exemption from position limits (Article 9 of draft RTS 21a)

35. In the CP, ESMA proposed that the procedure to apply for a position limit exemption in the context of mandatory liquidity provision on a trading venue ("liquidity provision exemption") draws on the current procedure for NFEs to apply for a hedging exemption but with adapted information to be provided at the time of application to cater for the different circumstances.

36. Application would be made to the NCA that sets the position limit for the commodity derivative for which mandatory liquidity is provided on a trading venue as this is the NCA receiving position reports from the liquidity provider.

37. One of the key eligibility criteria for the exemption is that the person providing liquidity in commodity derivatives on a trading venue is under the obligation to do so, as opposed to acting on a voluntary basis. Therefore, the information provided to the NCA at the time of application should include the legal basis for this mandatory liquidity provision and the agreement signed with the trading venue setting out the liquidity provision obligations to be met by the applicant on the trading venue per commodity derivative. The information provided in the application file should also enable the NCA to understand the nature and value of the person's activities in the trading of the relevant commodity derivative pursuant to mandatory liquidity provision activities and of the expected resulting positions.

38. As for the other applications for exemption from position limits, the NCA should approve or reject the application within 21 calendar days. Significant changes in the nature and value of the person's trading activities in the relevant commodity derivative that impact the information provided at the time of application should lead that person to submit a new application if it intends to continue using it. This will ensure that the positions reported as exempted from position limits remain consistent with the information available to the NCA on the person's trading activities pursuant to mandatory liquidity provision.

4.2.3 Positions qualifying as resulting from transactions entered into to fulfil mandatory liquidity provision (Article 10 of draft RTS 21a)

39. In order to ensure a uniform application of the procedure set out in Article 9 of RTS 21a, ESMA considers that it is necessary that the concept of a "qualifying position" for the purpose of this provision should also be defined in RTS 21a. ESMA proposes that a position held by a person in a commodity derivative traded on a trading venue qualifies as resulting from transactions undertaken by the person to fulfil mandatory liquidity provision obligations where the position directly results from transactions in a commodity derivative undertaken in compliance with the written agreement entered into with the trading venue and is identified as such by the trading venue, in accordance with the second paragraph of Article 48(3) of MiFID II. It would be for the liquidity provider to ensure that its own records

of transactions undertaken to comply with the written agreement entered into with the trading venue are consistent with the trading venue's records.

40. The person's internal policies should be such as to ensure that the positions resulting from transactions undertaken to fulfil mandatory liquidity provision can be properly identified. To that end, those internal policies should describe the link between the position held in a commodity derivative and the transactions undertaken to fulfil mandatory liquidity provisions as well as the measures adopted to ensure that any position not resulting from mandatory liquidity provision transactions or serving a different purpose can be clearly identified.

41. In the CP, ESMA asked stakeholders whether they agreed with the above analysis regarding the application procedure for the exemption from position limit for mandatory liquidity provision and the definition of positions resulting from transactions undertaken to fulfil mandatory liquidity provision.

4.3 Feedback to the consultation

42. Most respondents agreed with ESMA's analysis and suggested drafting regarding the application procedure for the liquidity provision exemption in Article 9 of draft RTS 21. Two stakeholders made suggestions that were not consistent with the Level 1 text, such as referring to market making arrangements instead of mandatory liquidity provision or extending the exemption to voluntary liquidity provision.

43. Most respondents also agreed with ESMA's analysis and suggested drafting regarding qualifying positions eligible to mandatory liquidity provision exemption in Article 10 of draft RTS 21a. One trade association suggested that the drafting of Article 10(1) of draft RTS 21a should be extended to also refer to mandatory liquidity provision at the request of a regulatory authority. That stakeholder also suggested that written agreements with trading venues should not be limited to the ones referred to in Article 48(3) of MiFID II, as mentioned in paragraph 35 of the CP.

44. A trade association disagreed with ESMA's analysis and considers that "qualifying positions" should only refer to positions held in centrally cleared commodity derivatives. More generally, this respondent opposed most of ESMA's proposals in the consultation paper stressing that ESMA's proposals need to be specific towards those commodity derivatives that are novated into a CCP and therefore create Open Interest, or that ESMA needs to clarify its definition of commodity derivatives such that they solely include CCP cleared contracts. Those comments are not repeated in the feedback to the other CP questions.

4.4 Conclusions and proposals

45. ESMA considered the comments received and agrees that mandatory liquidity may be provided on a trading venue by entities that are not authorised as investment firms, for

instance when they benefit from the ancillary activity exemption. The written agreements with trading venues referred to in Article 10(1) of RTS 21a should therefore not be limited to the ones referred to in Article 48(3) of MiFID II. ESMA also agrees that Article 10(1) of draft RTS 21a should be slightly amended to include a reference to mandatory liquidity provision upon a regulatory authority's request.

46. ESMA disagrees with the comments made by a trade association that no open interest may be calculated for non-centrally cleared commodity derivatives and the scope of the MiFID II commodity derivative position limit and position reporting framework should be limited to commodity derivatives admitted trading on regulated markets where transactions are novated into and to centrally cleared commodity derivatives (CCP).

47. ESMA notes that, under Article 57(1) of MiFID II, NCAs must establish and apply limits on the positions held in agricultural and critical or significant commodity derivatives trading on a trading venue. The Level 2 measures drafted by ESMA to further specify how those position limits should be established must apply accordingly to agricultural and critical or significant commodity derivatives traded on a trading venue. ESMA further notes that, under Article 58(3) of MiFID II, members and participants of trading venues, including of MTFs and OTFs, have to daily report to the trading venue their own positions in each of the commodity derivative contract traded as well as the positions of their clients, and their clients and the clients of those clients until the end client is reached. Based on those reports, the trading venue is therefore able to determine the open interest for each of the commodity derivative offered for trading, even when non-centrally cleared.

48. Taking into account the feedback received, ESMA has amended Article 10(1) of draft RTS 21a to include a reference to transactions in a commodity derivative undertaken in compliance with the requirement of a regulatory authority. For consistency purposes, ESMA has also merged letters (b) and (c) of Article 9(2) of draft RTS 21a. ESMA is not introducing other changes to Article 3(6), Article 9 and Article 10 of draft RTS 21

5 Other Amendments to RTS 21

49. This section of the CP focusses on the other changes to RTS 21 introduced in draft RTS 21a. Those changes may either be a direct consequence of the amending Directive or result from the experience gained by ESMA with the implementation of the RTS 21 methodology over the last few years. As part of the former, all references to commodity derivatives defined under point (c) of Article 4(1)(44) of MiFID II, i.e. to securitised derivatives, have been deleted.

5.1 Chapter I - General Provisions

5.1.1 Definitions (Article 2 of draft RTS 21a)

5.1.1.1 Analysis

50. The second sub-paragraph in Article 57(1) of the amended MiFID II introduces an exemption from position limits that is specific to financial entities. Only financial entities will be able to apply for that exemption in accordance with the procedure set out in Article 8(3), (4) and (7) of draft RTS 21a. There is therefore a need to define financial entities in draft RTS 21a.

51. Article 2 of existing RTS 21 defines NFEs as legal or natural persons other than the ones listed below in the Article. Article 2 of RTS 21a builds on the RTS 21 list of NFEs but turns it into a positive list of legal or natural persons defined as financial entities. Article 2 of draft RTS 21a also clarifies that a third-country entity that would require authorisation under any of the aforementioned legislations if it were based in the Union and subject to Union law would be considered as a financial entity. NFEs are then in turn defined as legal or natural persons not qualifying as financial entities.

52. In the CP, ESMA asked stakeholders whether they agreed with the analysis above.

5.1.1.2 Feedback to the consultation

53. All respondents agreed with ESMA's analysis.

5.1.1.3 Conclusions and proposals

54. Considering the feedback to the consultation, ESMA is not introducing any change to the definition of financial and non-financial entities in Article 2 of draft RTS 21a.

5.2 Chapter II – Method for calculating the size of the net position of a person

5.2.1 Aggregation and netting of positions in a commodity derivative (Article 3 of draft RTS 21a)

5.2.1.1 Analysis

55. ESMA is of the view that two sets of amendments should be made to Article 3 of RTS 21.

56. The first one is a direct consequence of the amending Directive and relates to the deletion of the concept of "the same commodity derivative" in Article 57(6) of MiFID II. Under previous Article 57(6) of MiFID II, when the same commodity derivative would be traded in

significant volumes on trading venues in more than one jurisdiction, the central competent authority (CCA) would set a single position limit to be applied on all trading in that contract.

57. Amended Article 57(6) of MiFID II provides that a single position limit is set by the CCA where agricultural commodity derivatives traded in significant volumes and critical or significant commodity derivatives based on the same underlying and sharing the same characteristics are traded on trading venues in more than one jurisdiction.

58. The reference to "the same commodity derivative" in Article 3(1) of RTS 21 has therefore been deleted. Instead, the aggregation of positions in a commodity derivative in Article 3(1) of draft RTS 21a includes positions held in commodity derivatives "based on the same underlying and sharing the same characteristics".

59. The other amendment proposed by ESMA regarding the aggregation of positions is based on the experience gained over the last few years suggesting that the net position of a person in a commodity derivative and the position limit setting process may require a more nuanced approach, notably for spread contracts and for commodity derivatives that are only a fraction of a principal or main contract traded on the same trading venue.

60. Spread contracts are instruments which are based solely on the value of the difference between two (or more) underlying reference instruments whose characteristics may vary in type, grade, location, time of delivery or otherwise. An issue arises due to the admitting of these spread contracts to trade, despite being comprised of two constituent instruments that will (for the most part) receive their own position limit.

61. The use of 'spread contracts' is to gain exposure to the value of the difference between two different reference instruments. Trading venues offer these contracts in pre-packaged form that allows the user to more readily, and 'safely' enter and exit spread positions. Having entered into a spread position, market participants (and venues) typically disaggregate spread contracts and assess the resulting positions individually to get an overall view of the portfolio risk. By retaining the ability to trade the same instruments via both outright contracts and spreads subject to different position limits, it would be possible to game the regime and circumvent the individual commodity derivative limits.

62. To avoid this scenario, ESMA issued a Q&A setting out that position limits should apply to outright contracts and that the use of spread contracts should be included in the limits set for those outright contracts so that the Level 1 goal can be met. However, ESMA considers that it would increase legal certainty if this approach is set out in Level 2 and therefore proposes to introduce it in Article 3(2) of draft RTS 21a.

63. A similar issue arises with commodity derivatives that are based on the same underlying and share almost the same specifications as the principal or main commodity derivative traded on the same trading venue, such as "minis" and "balmos". A mini contract is traded on the same trading venue as the principal contract, but in a smaller lot size. The two contracts share all other specifications and are priced off the same underlying commodity. A balmo ('balance-of-the month contract') can be entered into on any day of the spot month

of the principal contract and is settled on the last trading day of that month. The balmo shares contract specifications with the whole month contract (the principal) and is priced off the same underlying. The mini and balmo contracts provide commercial participants with the flexibility to ‘fine tune’ their hedging needs with regards to the size of the hedge and the duration of the hedge respectively.

64. ESMA is of the view that aggregating balmo and mini positions will avoid the creation of multiple limits for identical commodities potentially undermining the overall intentions of the regime. It will allow for a single centralised and representative position to be calculated from the report of positions held by the participant and a single clear position limit for the market, enhancing the approach already established with the aggregation of positions under Article 57 of MiFID II. Aggregating positions in mini and balmo contracts with positions in the principal contract will also increase insight into trading activity and would be consistent with the regime’s objectives of transparency and accountability.

65. In the CP, ESMA asked stakeholders whether they agreed with the analysis above regarding the aggregation and netting of positions in a commodity derivative.

5.2.1.2 Feedback to the consultation

66. All stakeholders agreed with ESMA’s analysis regarding the deletion of the reference to the “same commodity derivative” and the new reference to “commodity derivatives based on the underlying and sharing the same characteristics” in Article 3(1)(b) and (c) of draft RTS 21a. All stakeholders also agreed with ESMA’s analysis on the aggregation of positions in minis and balmos with positions held in the principal contract.

67. A majority of respondents were however against the addition of a specific reference to spread contracts in Article 3(2) of draft RTS 21a on the aggregation of positions. Those respondents stressed that spread contracts are not outright contracts but trading strategies where two outright futures contracts are traded at the same time and where both components of the trading strategy already count towards the position limits of the respective outright futures contracts. Some of those respondents also noted that where a trading venue admits to trading a differential contract whose contract terms reflect the economics of two separate outright contracts, a separate position limit is also not required. Instead, the position in the differential contract can be deconstructed into equivalent long and short positions and aggregated with any positions of the respective outright contracts reflecting the economics of the differential.

5.2.1.3 Conclusions and proposals

68. ESMA considered the comments received on the aggregation of positions in spread contracts and concluded that the disagreement expressed by a majority of stakeholders with the reference to spread contracts in Article 3(2) of draft RTS 21a was based on a misunderstanding of ESMA’s analysis.

69. As explained in Q&A 17 on position limits in its Q&A on MiFID II and MiFIR commodity derivatives topic[2], a commodity derivative contract in the legal form of a “spread” or “diff” contract is a cash-settled contract whose value is determined by the difference between two reference commodities that may vary in, inter alia, type, grade, location, or delivery characteristics. Whilst having multiple underlying constituents, a spread contract is a derivative available on a trading venue as a single tradable financial instrument. A spread contract differs from a ‘spread trading strategy’ (two or more commodity contracts traded together to achieve a particular economic effect) in that although a trading strategy may be executed by a single action in a venue’s trading systems it remains composed of separate, and legally distinct commodity derivatives which are traded simultaneously.

70. In Article 3(2) of draft RTS 21a, ESMA only meant to refer to actual spread or “diff” contracts admitted to trading as a single tradable instrument by a trading venue while most comments referred to trading strategies. ESMA agrees that in case of trading strategies where two orders in two different contracts are traded at the same time, each leg of the trading strategy will count towards the position held in the respective outright contracts traded, which may be subject to position limits where meeting the criteria set out in Article 57(1) of MiFID II. No further clarification is indeed needed in that area.

71. ESMA did not suggest either setting separate position limits for spread contracts. On the opposite, ESMA is of the view that settings separate limits for spread contracts may enable circumventing an individual commodity derivative contract limits by trading the same instrument via both outright contracts and spread contracts subject to different limits. To avoid this drawback, and in line with Q&A 17 on position limits, ESMA therefore proposed that the position held in a spread contract should be disaggregated into positions held in the commodity derivatives referenced in the spread contract and aggregated with the positions held in the outright commodity derivatives. ESMA notes that this proposal is in line with the analysis made by respondents to the CP on “diff” contracts.

72. Based on the above, ESMA did not consider it necessary to amend Article 3(2) of draft RTS 21a. However, Recital (3) of RTS 21a has been amended to clarify that the components of a spread contract would only have to be disaggregated for the calculation of the net position of a person when the spread contract is admitted to trading as a single tradable instrument on the same trading venue.

5.2.2 Significant volumes (Article 5 of draft RTS 21a)

5.2.2.1 Analysis

73. As a direct consequence of the amending Directive (see also paragraph 59), ESMA considers it appropriate to delete the reference to “Same commodity derivatives” in Article 5 of draft RTS 21a. ESMA also considers that the definition of a commodity derivative “traded in significant volumes on a trading venue” should be adjusted to refer to an

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[2] https://www.esma.europa.eu/sites/default/files/library/esma70-872942901-36_qas_commodity_derivatives.pdf, page 23

agricultural commodity derivative where the average daily open interest exceeds 20,000 lots in the spot month and other months' combined. In ESMA's view, the former threshold of 10,000 lots to assess whether a commodity derivative was traded in significant volumes required being adjusted upwards to 20,000 lots to be consistent with the proposal made in Article 17 of RTS 21a for new and less liquid agricultural commodity derivatives (see below).

74. In the CP, ESMA asked stakeholders whether they agreed with the analysis above.

5.2.2.2 Feedback to the consultation

75. All respondents agreed with ESMA's proposal.

5.2.2.3 Conclusions and proposals

76. Considering the feedback from market participants, ESMA is not introducing any change to Article 5 of draft RTS 21a.

5.3 Chapter III – Methodology for Competent Authorities to calculate position limits

Section I – Determination of baseline figures

5.3.1 Methodology for determining the baseline figure for spot month limits (Article 11 of draft RTS 21a)

5.3.1.1 Analysis

77. Under Article 9(1) of RTS 21, the baseline figure for the spot month position limit is set at 25% of deliverable supply, and 20% for certain commodity derivatives with an underlying that qualifies as food intended for human consumption. Considering the relevant adjustment factors, the baseline figure can then be adjusted upward or downward in accordance with Article 14 of RTS 21. NCAs can notably adjust the baseline figure down to 5% (and 2.5% for certain commodity derivatives with an underlying that qualifies as food intended for human consumption) of deliverable supply.

78. However, ESMA experienced that where the level of deliverable supply for a commodity derivative is significantly higher than the level of open interest, such as for instance in many power commodity derivatives, the methodology above for setting the spot month limit appears ineffective. Even when the baseline is adjusted downward to the maximum extent possible, i.e. to 5 or 2.5% of deliverable supply, the level of the spot month limit often remains above the spot month open interest, and sometimes above the overall open interest in that commodity derivative. The spot month limit is therefore deprived of any material effect, in contrast to the objectives of position limits set out in Article 57(1) of MiFID II.

79. In order for the spot month position limits to be effective and meaningful in all circumstances, ESMA considers appropriate to set out in Article 11(1) of draft RTS 21a that, where the deliverable supply is significantly higher than the open interest, the NCA should set the baseline for the spot month limit as 25% of the open interest. The same approach would apply for setting the baseline for commodity derivatives with an underlying that qualifies as food for human consumption under Article 11(4) of draft RTS 21a. Once the baseline for the spot month limit has been determined, the NCA should then consider the relevant adjustment factors available in draft RTS 21a, including to ensure that the spot month limit is consistent with the objectives of Article 57 of MiFID II.

5.3.1.2 Feedback to the consultation

80. Most respondents disagreed with the proposal to change the baseline for the spot month limit and use the open interest instead of the deliverable supply when the deliverable supply is significantly higher than the open interest. They did not consider this change necessary as, in their view, there is no risk of market manipulation when there is a high level of deliverable supply. This risk only materialises where there is sufficient constraint in the deliverable supply, and where there is a real risk that participants intending to make delivery of the underlying commodity would not be able to do so. Stricter spot month position limits would therefore bring no benefits.

81. Moreover, respondents consider that the proposed amendment could have unintended adverse consequences on the growth of contracts newly admitted to trading where the open interest is often low compared to the deliverable supply. Position limits could hamper the significant growth potential of those contracts. This could in turn have a negative impact on market integrity as less liquid contracts are more prone to market manipulation.

5.3.1.3 Conclusions and proposals

82. ESMA considered the feedback to the consultation but remains unconvinced by the arguments put forward to oppose the alternative approach suggested in Article 11(1) of draft RTS 21a for calculating the baseline figure for the spot month limit when the deliverable supply is substantially higher than the open interest.

83. Firstly, ESMA notes that Article 57(1) of MiFID II requires NCAs to establish and apply position limits for all agricultural commodity derivatives and critical or significant commodity derivates, including cash-settled ones, and does not make it conditional upon evidenced risk of market cornering. Secondly, ESMA notes that position limits only apply to agricultural and critical or significant commodity derivatives, which significantly reduces the risk that position limit would hamper the development of new contracts, also taking into account that the de minimis position limits for new and less liquid agricultural commodity derivatives are being increased under Article 17 of draft RTS 21a. Thirdly, under ESMA's proposal, and in contrast with some comments received, the baseline figure for the determination of the spot month limit would indeed be set at 25% of the open interest but NCAs could then apply relevant upward adjustment factors, as appropriate, for the determination of the final spot month position limit.

84. ESMA further notes that in their feedback to the consultation, stakeholders did not provide any example where the development of a commodity derivative contract would be hampered by the fall-back approach suggested by ESMA for determining the baseline figure for the spot month limit when the deliverable supply is substantially higher than the open interest.

85. Lastly, ESMA recalls that under Article 57(5) of MiFID II, it is required to issue non-binding opinions on the position limits that NCAs intend to set. When doing so, ESMA considers it is responsible for ensuring that the position limits set do not lead to making the requirement for NCAs to apply position limits a void provision considering the size of the position limit set.

86. Based on the above, ESMA considers that it is appropriate to maintain its proposal to use the open interest for determining the baseline figure for the spot month when the open interest is substantially higher than the deliverable supply. No change is therefore introduced to Article 11(2) of RTS 21a.

5.3.2 Deliverable supply (Article 12 of RTS 21a)

5.3.2.1 Analysis

87. Under Article 10(2) of RTS 21, the reference to be used to determine the deliverable supply for a commodity derivative is the average monthly amount of the underlying commodity available for delivery over the one-year period immediately preceding the determination of the position limit.

88. When reviewing the deliverable supply figures provided by NCAs in the notification of position limits, ESMA however noted that public data sources are often not available for the one-year period immediately preceding the determination of the position limit. ESMA therefore proposes to clarify in Article 12(2) of RTS 21a that the deliverable supply should be determined by reference to the average monthly amount of the underlying commodity available for delivery based on the most recent available data covering a one-year period immediately preceding the determination.

5.3.2.2 Feedback to the consultation

89. Most respondents considered that more flexibility should be provided to NCAs to determine the amount of deliverable supply. They recommended using an approach similar to the one used for the determination of the open interest, open interest determination, i.e. calculating the reference amount not necessarily over a one-year period but “over a representative period of time”. According to those respondents, this would allow better taking into account the characteristic of the various commodity derivatives contracts, including agricultural commodity derivatives where deliverable supply may vary significantly from one year to the other.

5.3.2.3 Conclusions and proposals

90. In ESMA's view, there is little justification for amending the reference period for the calculation of deliverable supply for commodity derivatives other than agricultural commodity derivatives where no significant volatility in the available deliverable supply from one year to the other appears to have been identified.

91. In contrast, ESMA appreciates that crops in agricultural products can be subject to high volatility due to weather conditions. It is therefore appropriate that the reference period for the determination of deliverable supply in agricultural commodity derivatives extends beyond the reference period used for the determination of deliverable supply in other commodity derivatives.

92. ESMA has therefore amended Article 12 of draft RTS 21a products to specify that for agricultural commodity derivatives, the reference period used for the calculation of deliverable supply can range from one to five years.

5.3.3 Open interest (Article 14 of RTS 21a)

5.3.3.1 Analysis

93. Under Article 12 of RTS 21, the open interest in a commodity derivative must be calculated by aggregating the number of lots that are outstanding on trading venues at a point in time. Based on the experience gained with the methodology for position limits, ESMA considers it appropriate to introduce four clarifications in the calculation of open interest under Article 14(1) of RTS 21a.

94. Firstly, as position limits apply to commodity derivatives traded on a trading venue and EEOTC contracts, the reference amount used for setting those limits should in ESMA's view also include open interest in EEOTC contracts, which is now spelled out in Article 14(1) of RTS 21a.

95. Secondly, ESMA noted that the calculation of open interest was not harmonised across NCAs, with some NCAs referring to gross open interest and others to net open interest. In addition, different data sources were being used. To ensure a more harmonised approach to applying position limits, ESMA agreed with NCAs that the open interest should be calculated on a net basis, based on position reporting data. As the Level 1 text refers to the "net open interest" in a commodity derivative to assess whether that commodity derivative qualifies as critical or significant, it is appropriate that the same open interest calculation methodology applies to all commodity derivatives subject to position limits, including agricultural commodity derivatives. Furthermore, ESMA considers that the calculation of open interest based on position reporting data provides the most accurate and reliable figure while promoting convergence in the setting of position limits by NCAs. Article 14(1) of RTS 21a therefore clarifies that the net open interest in a commodity derivative must be determined based on position reporting data.

96. Thirdly, whilst Article 12 of RTS 21 refers to the aggregation of the number of lots in a commodity derivative that are outstanding “at a point in time”, this single reference point does not appear to allow to appropriately capture the trading characteristics of a commodity derivative, including potential seasonality effects or rapid changes in trading patterns. ESMA is therefore of the view that it would be more appropriate for the open interest to be calculated “over a representative period of time” which would depend on the characteristics of the commodity derivative. For instance, where trading in a commodity derivative is subject to seasonality effects, a sufficiently long period of time should be considered to remove this data bias. Where trading in a commodity derivative is in a rapid upward, or downward, phase, a shorter reference period may be more appropriate for the calculation of open interest to better capture market trends.

97. Lastly, ESMA also proposes to introduce a second paragraph in Article 14 of RTS 21a to cater for the calculation of open interest in certain specific circumstances. As experienced over the last three years, following a merger or other corporate events, a commodity derivative may be transferred from one trading venue to another. Alternatively, a new commodity derivative may be admitted to trading on a trading venue to gradually replace an existing one, in case for instance of a change in the underlying index. In both circumstances, considering the newly launched commodity derivative as a “new” contract for position limit purposes would not allow to appropriately capture potential trading interests in that contract and would hamper the adequate development of this contract. ESMA is therefore of the view that when first setting a position limit for such commodity derivative, the NCA should be able to take into consideration the open interest in that commodity derivative on the former trading venue or in the commodity derivative to be gradually replaced.

98. In the CP, ESMA asked stakeholders whether they agree with the analysis above and the related impacts on the calculation of open interest.

5.3.3.2 Feedback to the consultation

99. All respondents agreed with the calculation of the open interest on a net basis, based on position reporting data. Most respondents also agreed with the calculation of the open interest over a representative period of time, although a couple of stakeholders suggested that it could also be appropriate to calculate the open interest based on a forward-looking basis.

100. Several respondents raised doubts about the inclusion of EEOTC in the calculation of the open interest, noting that no EEOTC contracts have been identified due to the very narrow definition of EEOTC contracts.

101. Some respondents disagreed with the use a reference period of six months for the calculation of open interest in commodity derivatives newly admitted to trading in case of merger or transfer of activities and suggested to expand the circumstances captured by Article 14 (2).

102. A couple of respondents suggested to clarify that when one NCA sets the other months' position limit for two critical contracts based on the same underlying and sharing the same characteristics traded on trading venues in more than one jurisdiction, the NCA should use the open interest in those contracts on the relevant trading venues.

5.3.3.3 Conclusion and proposals

103. Whilst several respondents did not support including the open interest in EEOTC contracts in the calculation of the overall open interest in a commodity derivative, ESMA recalls that under Article 57(4) of MiFID II position limits apply to agricultural commodity derivatives and critical or significant commodity derivatives that are traded on trading venues and to EEOTC contracts. As the other month's limit is based on the open interest, ESMA remains of the view that, for consistency purposes, the open interest taken into consideration for the determination of position limits should be aligned with the scope of commodity derivatives subject to position limits and that the reference amount used for setting those limits should therefore also include the open interest in EEOTC contracts. Furthermore, and in contrast to some stakeholders' comments, ESMA notes that EEOTC contracts are reported to the NCA in at least one jurisdiction.

104. As regards the suggestion made to take a forward-looking approach to the calculation of open interest for rapidly growing commodity derivative, ESMA considers that the discretion left to NCAs to anticipate a potential growth in open interest and set the position limit accordingly may not result in meaningful limits until the anticipated growth materialised and notes that such an approach would not foster convergence in the implementation of the position limit methodology. ESMA is also uncertain on how this forward-looking approach would combine with the assessment of the 300,000 lot threshold for the determination of critical or significant contracts. Lastly, ESMA notes that the number of commodity derivatives potentially eligible to such a forward-looking approach would be very limited considering the scope of commodity derivatives subject to position limits. In ESMA's view, such scenario would be better addressed by a proposed change to position limits notified by the NCA to ESMA in accordance with Article 57(4)of MiFID II.

105. ESMA appreciates that the drafting of its proposal on the calculation of open interest in case of merger or transfer of activities in Article 14(2) of draft RTS 21a may have created some confusion. ESMA's intention was to specify that in case of merger or transfer of activities, and for an initial period of six months the calculation of the open interest in the commodity derivative newly admitted to trading on a trading venue should take into account the open interest in the previously traded commodity derivative. After this initial six-month period, the NCA should then calculate the open interest in that commodity derivative according to the standard methodology set out in Article 14(1). The drafting of Article 14(2) of RTS 21a has been amended to clarify this point and the revised drafting should, in ESMA's view, address the concerns expressed. ESMA has also taken on board the suggestion to cater for other circumstances that may also call for the calculation of the open interest in a commodity derivative in accordance with the approach set out in Article 14(2).

106. Lastly, ESMA considers that it does not have a mandate to further specify how the open interest should be calculated by the CCA when setting a single position limit for all trading in critical commodity derivatives based on the same underlying and sharing the same characteristics in accordance with Article 57(6) of MiFID II.

Section II – Factors relevant for the calculation of position limits

5.3.4 New and less liquid agricultural commodity derivatives (Article 17 of draft RTS 21a)

5.3.4.1 Analysis

107. Agricultural commodity derivatives remain subject to position limits, independently of the level of open interest and ESMA has given further consideration to the methodology for setting position limits for new and less liquid commodity derivatives currently set out in Article 15 of RTS 21.

108. In Article 17 of draft RTS 21a, ESMA considers it appropriate to simplify the methodology for new and less liquid agricultural commodity derivatives and use the same *de minimis* position limit for all agricultural commodity derivatives with an overall open interest below 20,000 lots over a consecutive three-month period. For those commodity derivatives, the position limit would be set at 10,000 lots for the spot month and 10,000 lots for the other months. The aim of this new approach to *de minimis* position limits for new and less liquid agricultural commodity derivatives would be to allow those contracts to grow and stabilise, without hindering market participants to trade from the start or shortly after for fear of breaching overly restrictive limits. When an agricultural commodity derivative has gathered sufficient trading interest and the open interest has exceeded 20,000 lots, the NCA would then determine bespoke position limits for the contract, in accordance with the methodology set out in RTS 21a.

109. In the CP, ESMA asked stakeholders whether they agree with the approach above for new and less liquid agricultural commodity derivatives.

5.3.4.2 Feedback to the consultation

110. All respondents agreed with ESMA's proposal.

5.3.4.1 Conclusions and proposals

111. Considering the feedback received, ESMA is not introducing any change to Article 17 of draft RTS 21a.

5.3.5 The overall open interest (Article 19 of draft RTS 21a)

5.3.5.1 Analysis

112. Based on the experience gained with the issuance of opinions on the position limits notified by NCAs, ESMA is of the view that further clarification should be introduced in the adjustment factors currently set out in Article 18(2) and (3) of RTS 21 which are based on a comparison between the size of deliverable supply and open interest.

113. Where the open interest is significantly higher than the deliverable supply, ESMA considers it useful to clarify in Article 19(2) of draft RTS 21a that it is the other months' limit that must be adjusted downwards so as to avoid a cliff-edge effect with the spot month limit which is based on deliverable supply. That cliff-edge effect should not be addressed by adjusting the spot month limit upwards due to an increased risk of market cornering in such circumstances.

114. Where the open interest is significantly lower than the deliverable supply, ESMA is of the view that the other months' limit should be adjusted upwards to avoid the risk of unduly constraining trading. In contrast, as deliverable supply is significantly higher than open interest, the spot month limit based on deliverable supply that results from the baseline is expected to exceed the open positions held by market participants in the spot month. To avoid that the spot month is deprived of any effect and to ensure that it does prevent market participants from building a dominant position that would be contrary to the objective of preventing market abuse and ensuring orderly markets, the spot month limit should be adjusted downwards. This is clarified in Article 19(3) of RTS 21a.

115. In the CP, ESMA asked to stakeholders whether they agree with the clarifications suggested above to the adjustment factors in Article 19(2) and (3) of RTS 21a.

5.3.5.2 Feedback to the consultation

116. All respondents agreed with ESMA's proposal to clarify in Article 19(3) of RTS 21a that in case where the open interest is significantly lower compared to the deliverable supply, NCAs should adjust the other months' position limit upwards to avoid the risk of unduly constraining trading. However, most respondents disagreed with the downward adjustment of the spot month position limit when open interest is significantly lower than deliverable supply.

117. Those respondents argued that a higher deliverable supply does not entail a higher risk of market cornering which cannot materialise when the open interest reflects only a small share of the overall physical market supply. More restrictive position limits would therefore not contribute to ensuring the orderly functioning of the market while lowering the spot month limit when the open interest is relatively low compared to deliverable supply might hamper the development of futures contracts newly admitted to trading.

5.3.5.3 Conclusions and proposals

118. ESMA notes that the concerns expressed by stakeholders on the proposed drafting of Article 19(3) of RTS 21a and the downward adjustment of the spot month limit are similar to the ones expressed in their response to Q(9) and the use of open interest as a baseline for determining the spot month limit when the deliverable supply is substantially higher than the open interest.

119. ESMA therefore reiterates the comments made in section 5.3.1.3. In particular, ESMA recalls, in particular, that position limits will apply only to agricultural and critical or significant commodity derivatives. Such scope of application significantly reduces the risk that position limit would hamper the development of new contracts, also considering the increase in de minimis position limits for new and less liquid agricultural commodity derivatives, as per Article 17 of draft RTS 21a. ESMA also notes that no quantitative data was provided to demonstrate that the downward adjustment of the spot limit mentioned in Article 19(3) of draft RTS 21a would negatively impact the development of commodity derivatives. Lastly, and as already stated, ESMA is of the view that it is its responsibility to ensure that meaningful limits are set by NCAs when issuing opinions on those position limits.

120. ESMA therefore continues to consider that it is appropriate to adjust the spot month limit downwards when the open interest is significantly lower than the deliverable supply. ESMA however agrees that when under the exceptional circumstances described in section 5.3.1.1, the open interest has been used for setting the baseline for the spot month limit in accordance with Article 11(2) of draft RTS 21a, the spot month limit does not require a further downward adjustment under Article 19(3). This has been clarified in the amendment introduced to Article 19(3) of draft RTS 21a.

5.3.6 The number of market participants (Article 20 of draft RTS 21a)

5.3.6.1 Analysis

121. Under Article 19(2) of RTS 21, the NCA may increase the spot month and the other months' limit up to 50% when there are less than ten market participants holding a position in a commodity derivative or when there are less than three investment firms active as a market maker in a commodity derivative. However, those specific circumstances do not establish a reason for an upward adjustment on their own.

122. ESMA is however of the view that a small number of market participants justifies increasing the position limits up to 50% of the reference amount on their own, even without additional available upward adjustment factors. When the number of market participants trading a given commodity derivative is low, one of those market participants is more likely to reach a position representing a significant share of the overall open interest than in case of a more widespread participation without the intention of building a dominant position. NCAs should therefore have the possibility to increase the position limit based on that sole circumstance.

123. As regards market makers, real-economy firms seeking to hedge their positions are typically on one side of the market and investment firms on the other side. Where there are only very few market makers, they may be prevented from providing liquidity to the market and fully playing their role in the development of a commodity derivative by restrictive position limits. ESMA however notes that the newly introduced exemption from position limits for positions resulting from transactions undertaken to fulfil mandatory liquidity provision addresses many of the concerns that Article 19(2)(b) of RTS 21 was seeking to address and the role of market makers is less critical for the most liquid contracts. However, ESMA is also aware that in some contracts, liquidity may be provided by persons that do not operate under formal liquidity provision agreements. Based on the above, ESMA is of the view that NCAs should be able to adjust the position limit upward up to 50% of the reference amount when the commodity derivative is an agricultural commodity derivative with a net open interest below 300,000 lots and when there are less than three market makers in that agricultural commodity

124. In the CP, ESMA sought stakeholders' views on the analysis above.

5.3.6.2 Feedback to the consultation

125. All respondents agreed with ESMA's proposal. Although not directly related to the question raised, one respondent asked ESMA to clarify how commodity derivatives should be assessed in order to identify them as being "based on the same underlying and sharing the same characteristics" in the scope of the proposal.

5.3.6.3 Conclusions and proposals

126. Considering the support received from stakeholders, ESMA is not introducing any change to Article 20(2) of draft RTS 21a.

127. ESMA considers that it does not have a mandate to further specify in Level 2 which commodity derivatives are "based on the same underlying and sharing the same characteristics."

5.3.7 Other adjustment factors

128. The maturity of the commodity derivative and the volatility in the relevant markets no longer appear as adjustment factors in the Level 1 empowerment given to ESMA to develop a methodology to be applied by NCAs when establishing position limits. Those adjustment factors have therefore been deleted in draft RTS 21a.

Part II: Amendments to ITS 4

5.4 Background/mandate

Article 58(5), first sub-paragraph

"ESMA shall develop draft implementing technical standards to determine the format of the reports referred to in point (a) of paragraph 1 and of the breakdowns referred to in paragraph 2."

129. Article 58(1)(a) of MiFID II requires Member States to ensure that an investment firm or a market operator operating a trading venue which offers trading in commodity derivatives, emission allowances or derivatives thereof makes public a weekly report with the aggregate positions held by the different categories of persons for the different commodity derivatives or emission allowances or derivatives thereof traded on their trading venue ("weekly reports"). The weekly reports are communicated to the NCAs and to ESMA, and ESMA proceeds with a centralised publication thereof.

130. Article 58(2) of MiFID II sets obligations for investment firms trading commodity derivatives or emission allowances or derivatives thereof when traded outside a trading venue (EEOTC) to submit daily reports to the competent authority ("daily reports"). Investment firms have the duty to provide the information in Article 58(2) of MiFID II in relation to the positions of their clients and the clients of those clients until the end client is reached.

131. Weekly and daily reports shall differentiate between positions which "in an objectively measurable way reduce risks directly relating to commercial activities" and other positions.

132. Article 58(5) of MiFID II mandated ESMA to draft implementing technical standards to determine the format of the reports and how the breakdown of the positions should be performed. Based on this empowerment, ESMA developed ITS 4[3], which sets out the format of position reports to be used by investment firms and market operators. The following sections analyse the impact on ITS 4 of the new exemptions from the position limits regime resulting from the amending Directive.

5.5 Analysis

5.5.1 Hedging exemption for financial counterparties

133. Article 57(1) of MiFID II introduces a hedging exemption from the position limit regime for positions held by financial entities that are part of a predominantly commercial group

[3] COMMISSION IMPLEMENTING REGULATION (EU) 2017/1093 of 20 June 2017 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators

and are acting on behalf of a non-financial entity of the predominantly commercial group, where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity.

134. MiFID II states that the weekly and daily reports shall differentiate between risk-reducing positions and other positions (third subparagraph of Article 58(4) of MiFID II). No amendments have been introduced here by the amending Directive. The wording “reduce risks directly relating to commercial activities” encompasses both the hedging activity of non-financial counterparties (existing exemption), and the new hedging exemption available to financial counterparties acting on behalf of a non-financial entity.

135. Therefore, it is necessary to ensure that, in ITS 4, the risk-reducing positions of financial entities that are part of a predominantly commercial group and are acting on behalf of a non-financial entity are reflected in both daily and weekly reports.

5.5.1.1 Weekly reports

136. With respect to weekly reports, ESMA notes that the distinction between hedging and non-hedging positions was introduced to enhance transparency to the public on speculative trading activity. This policy objective should be fulfilled when the speculative trading activity stems from financial and from non-financial counterparties. To that effect, the published weekly reports should provide for the identification of hedging versus non-hedging positions, irrespective of the type of counterparty (financial or non-financial) holding those positions.

137. In ITS 4, Table 1 of Annex I already includes a breakdown for “Risk Reducing directly related to commercial activities”. Currently, this line is only expected to be populated regarding positions held by non-financial entities. ESMA is of the view that the same line should be used to report the risk reducing positions held by financial entities and that there is no need to amend Annex I of ITS 4 in this respect.

5.5.1.2 Daily reports

138. With respect to daily reports under Article 58(2) of MiFID II, competent authorities should be provided with the information related to the use of the hedging exemption by financial counterparties to enable monitoring of compliance with the position limit regime, as they currently do with regards to non-financial counterparties.

139. In Table 2 of Annex II of ITS 4, there is a field labelled “Indicator of whether the position is risk reducing in relation to commercial activity”, which is currently only used for the purpose of the existing hedging exemption for non-financial entities. In ESMA’s views, the same field could be used for the purpose of reporting positions benefitting from the coming hedging exemption for financial entities. There would be therefore no need to amend Annex II of ITS 4 in this respect.

5.5.2 Liquidity provision exemption from the position limit regime

140. The amending Directive introduces an exemption from the position limit regime for financial and non-financial counterparties for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue[4].

141. The section of MiFID II establishing the obligation to distinguish between hedging and non-hedging transactions in the weekly or daily reports (third sub paragraph of Article 58(4) of MiFID II) has not been modified in the amending Directive. As a result, there is no explicit reference in Level 1 requiring the identification of positions resulting from liquidity provision in the daily or weekly reports.

142. ESMA did not identify any clear benefit from making the positions benefitting from the liquidity provision exemption visible in the weekly reports. In ESMA's views, such distinction would introduce implementation costs for the reporting counterparties, NCAs and ESMA, with no discernible benefit in terms of transparency for the public.

143. As the exemption for positions resulting from mandatory liquidity provision only applies to liquidity provided on a trading venue, ESMA considers that there is no need either to introduce this exemption in daily reports.

5.5.3 Technical amendments to ITS 4

144. The amending Directive excludes securitised derivatives[5] from the scope of the position limit regime. As a result, all references to securitised derivatives should be deleted from ITS 4. In addition, references to RTS 21 in ITS 4 should be replaced with references to the new RTS 21a.

145. In the CP, ESMA asked stakeholders whether they agreed with the analysis above regarding the impact of the hedging exemption for financial counterparties and the liquidity provision exemption on ITS 4 as well as with other technical amendments.

5.6 Feedback to the consultation

146. All stakeholders agreed with ESMA's analysis that the introduction of a hedging exemption for financial counterparties does not require amending ITS 4. They also agreed that the introduction of a liquidity provision exemption does not call for an amendment to ITS 4 either and supported the technical amendments suggested.

[4] Positions held by financial and non-financial counterparties for positions that are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4) of MiFID II.

[5] Securities as referred to in point (c) of point (44) of Article 4(1) of MiFID II which relate to a commodity or an underlying as referred to in Section C.10 of Annex I thereof.

5.7 Conclusions and proposals

147. Considering the feedback received, ESMA is not introducing any change to ITS 4 others than deleting references to securitised derivatives in ITS 4 and replacing references to RTS 21 with references to draft RTS21a.

Part III: Draft RTS on position management controls

5.8 Background/mandate

Article 57(8) of MIFID II, second sub-paragraph

"ESMA shall develop draft regulatory technical standards to specify the content of position management controls, thereby taking into account the characteristics of the trading venues concerned".

148. The Recovery Package requires ESMA to develop a draft RTS to specify the content of position management controls, taking into account the characteristics of the trading venues concerned, in order to diminish the significant dissimilarities currently existent in the way positions are managed by trading venues and increase its harmonisation across the EU.

149. Under Article 57(8), first sub-paragraph, of MiFID II, as amended by the Recovery Package:

"Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives applies position management controls, including powers for the trading venue to:

(a) monitor the open interest positions of persons;

(b) obtain information, including all relevant documentation, from persons about the size and purpose of a position or exposure entered into, information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market, including, where appropriate, positions held in commodity derivatives that are based on the same underlying and that share the same characteristics on other trading venues and in economically equivalent OTC contracts through members and participants;

(c) request a person to terminate or reduce a position, on a temporary or permanent basis, and to unilaterally take action to ensure the termination or reduction of the position where the person does not comply with such request; and

(d) require a person to provide, on a temporary basis, liquidity back into the market at an agreed price and volume with the express intent of mitigating the effects of a large or dominant position."

150. Furthermore, as per Article 57(9) of MiFID II, position management controls must be transparent and non-discriminatory, specifying how those controls are applicable to persons and taking into account the nature and composition of market participants and the usage of the contracts submitted to trading.

151. The trading venue must communicate the details on position management controls to the NCA. In turn, the NCA must inform ESMA which will publish and maintain a database[6] with the summaries of such position management controls, as defined by Article 57(10) of MiFID II.

5.9 Analysis

152. ESMA considered the position management controls implemented by some non-EU commodity derivative markets, including where those position management controls run in parallel with position limits set by the regulatory authority and explored how position management controls on EU trading venues could be further specified.

5.9.1 Position management on non-EU venues

5.9.1.1 CFTC rules for position limits and position management

153. As a reminder, on 15 October 2020, the CFTC established federal spot month speculative position limits for derivative contracts associated with 16 physical commodities and amended single-month and all-months-combined federal limits for most of the nine agricultural contracts currently subject to federal position limits. Under the final rule, federal non-spot month position limits were not extended to the sixteen new physical commodities.

154. The new rule became effective on 15 March 2021 with a phased-in compliance schedule. On January 1, 2022, (1) federal speculative position limits will apply for the first time to 16 core referenced futures contracts on certain agricultural, metals and energy commodities, and (2) exchanges must establish speculative position limits for referenced contracts and must impose speculative position limits or position accountability levels for physical commodity contracts not subject to federal speculative position limits outside of the spot month.

155. The existing federal speculative position limits function in parallel to exchange-set position limits and/or exchange-set position accountability limits required by designated contract market (''DCM'') Core Principle 5.

[6] https://www.esma.europa.eu/sites/default/files/library/position_management_controls.xls

156. DCM Core Principle 5 provides that “To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators. Position limits generally cannot be exceeded absent an exemption, whereas position accountability allows an exchange to establish a level at which market participants, including those participants who do not qualify for an exemption, are required to: Provide position information to the exchange prior to increasing a position above the accountability level; halt further position increases; and/or reduce positions in an orderly manner.”.

157. For physically settled contracts that are not subject to federal position limits, an exchange is required to set spot month limit, approved by the CFTC. Outside of the spot month, an exchange has additional flexibility to set either position limits or position accountability levels.

158. ESMA also considered how the limits described in the previous paragraphs are applied across some of the US trading venues trading commodity derivatives. For instance, the Chicago Mercantile Exchange (CME) implements position management controls by setting position limits and position accountability levels[7] for selected products traded on the exchange. Exchange-set position limits, as discussed above, are applied to various physical commodity contracts offered for trading, including agricultural contracts such as corn, soybean, wheat and oat and metal contracts. Such limits cannot be exceeded unless a market participant has an approved exemption. Exceeding the limits without an exemption is considered a violation of the exchange rules.

159. The CME also applies position accountability levels. Such levels might be exceeded by market participants. Nevertheless, the exchange can ask to a market participant who exceeds accountability levels to provide information relating to its position, and in cases where deemed necessary the position holder might be asked not to further increase the positions, to comply with any exchange imposed limit on the size of the position and/or reduce the position. Participants are expected to comply with such exchange requests and may otherwise face disciplinary action.

5.9.1.2 Position management at ICE Futures Europe (IFEU) and London Metal Exchange (LME)

160. ESMA also considered the arrangements in place at some significant UK commodity derivatives exchanges where position management controls had been in place for many years, including before the application of MiFID II.

161. Position management controls at ICE Futures Europe (IFEU), include exchange set position limits, accountability levels, delivery limits and expiry limits[8], which apply to selected contracts. Exchange set position limits are mandatory position limits, below the

[7] https://www.cmegroup.com/rulebook/files/cme-group-Rule-562.pdf
[8] https://www.theice.com/publicdocs/futures/Position_and_Expiry_Limit_and_Accountability_Levels.pdf

MiFID II position limits, which apply to contracts that are also listed in the US, such as the ICE WTI Futures contract or the ICE Heating Oil Futures where those exchange limits become binding three days prior to expiry. Such limits cannot be exceeded by market participants, unless they obtain an exemption from the exchange.

162. Accountability levels are, as for the CME, levels of positions set by the exchange for the spot month and/or for all months. Such levels can be exceeded by market participants but exceeding them might trigger an information request by the exchange requiring further details from the position holder as to the nature and rationale for the position. When the exchange deems this necessary it can direct position holders not to increase the position or to reduce it below the relevant accountability level.

163. IFEU also applies delivery limits to selected physically settled contracts and expiry limits to some others. Expiry limits are limits unilaterally imposed by the exchange for a set period prior to expiry (e.g. the last five trading days leading to expiry). Delivery limits apply to the final position. Expiry and delivery limits are binding and cannot be exceeded unless the market participant obtains an exemption from the exchange. Accountability levels do not apply to contracts subject to delivery or expiry limits but, the exchange might request information to market participants in case of concerns regarding the size of a position.

164. The LME implements accountability levels, exchange set position limits as well as warrant reporting and lending rules that are unique to trading characteristics on the LME.

5.9.2 Position management controls on EU trading venues

165. In its recent MiFID II Review Report on position limits and position management controls[9] ESMA suggested that, should the scope of commodity derivatives subject to position limits be significantly reduced as suggested, there would be merit in further clarifying the position management controls expected to be implemented by trading venues. As noted in its report, ESMA fully appreciates that trading venues are already required to ensure fair and orderly trading in accordance with MiFID II and that their market monitoring and surveillance departments' mission statement is to ensure compliance with all other relevant requirements under MiFID II/MiFIR, MAR and REMIT where applicable. However, ESMA notes that position management controls aim at addressing the specific challenges arising from commodity derivatives trading. ESMA also notes that position management controls by trading venues are not intended to mirror the position limits set by NCAs as they serve a separate purpose. As a reminder, ESMA clarified its MiFID II Q&A that the application of position limits under Article 57(1) MiFID II is the responsibility of the NCA.

166. In ESMA's views, the content of position management controls could be specified in two areas: a) the on-going monitoring of positions and b) accountability levels.

[9] https://www.esma.europa.eu/sites/default/files/library/esma70-156-2311_mifid_ii_review_report_position_limits.pdf

a. On-going monitoring of positions obligations

167. As recalled above, Article 57(8)(a) of MiFID II refers to the monitoring of positions as one of the position management controls to be implemented by trading venues. In ESMA's view, such monitoring of positions should take place on an ongoing basis and apply to positions under common ownership or controls held in each commodity derivative available for trading on that venue. Such ongoing monitoring of positions, and the understanding of changes thereof, in all commodity derivatives available for trading appears as a prerequisite to other effective and meaningful arrangements contributing to orderly markets in commodity derivatives.

168. In the CP, ESMA therefore suggested to specify that the ongoing monitoring of positions held by persons with close links should be part of the position management controls implemented by trading venues, noting that the term "Persons with close links" refers to Article 4(35) of MiFID II.

b. Accountability Levels

169. In line with the empowerment set out in the second sub-paragraph of Article 57(8) of MiFID II, the need to specify the content of position management and to take into account the characteristics of the trading venues concerned when specifying the content of position management controls, ESMA has considered the risk profile of the various types of commodity derivatives available for trading to assess whether some of them would most notably deserve enhanced attention by trading venues as part of their position management controls.

170. While recognising that risks to orderly markets also exist for cash-settled contracts where the position holder would have the capacity to influence the price of the underlying, ESMA's analysis is that such risks are more salient for physically settled commodity derivatives. As noted in the 2011 IOSCO Principles for the Regulation and Supervision of Commodity Derivatives Markets[10] IOSCO "The trading of physical commodity derivatives differs fundamentally from the trading of financial-based derivatives in that the actual supply of the underlying physical commodity is restricted to a finite supply". This unique characteristic makes physically settled commodity derivatives more susceptible to disorderly trading practices such as market squeezes or market cornering where counterparties would make use of a dominant position to secure the price of a commodity derivative or of the underlying commodity at an artificial level.

171. In the CP, ESMA therefore suggested that trading venues should be required to set out accountability levels in the spot month and in the other months at least for each physically settled commodity derivative made available for trading. Trading venues would have to consider whether it is appropriate to set accountability levels for the other commodity derivatives available for trading. Accountability levels would refer to a level of net position held by persons with close links that the trading venue may consider as a potential source

[10] https://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf

of concern or trigger alarm. Where the accountability level would be exceeded, the trading venue would have to make use of the power set out in Article 57(8)(b) of MiFID II and require additional information on the purpose and rationale of the position held.

172. After assessing the information received, and where necessary, the trading venue would make use of the powers set out in Article 57(8) (c) and (d), i.e. require the position holders to reduce their positions or provide liquidity back to the market at a given price and time if fitted to the characteristics of the trading venue. However, members or participants, as well as their clients, could hold positions that are in excess of the accountability levels and a request for information on the rationale of the position would not necessarily trigger a formal action from the trading venue where its potential concerns would have been addressed by the information received.

173. Accountability levels would be calibrated taking into account the characteristics of the physically settled contract traded and of the underlying commodity, as well as the contract trading characteristics. According to ESMA's preliminary considerations, accountability levels may or may not differ for the spot and for the other months and positions under common control or ownership should be aggregated for the purpose of the calculation of accountability levels.

174. In the CP, ESMA kept an open approach as to the methodology to be used by trading venues for setting accountability but considered that there would be value in developing some further guidance on such methodology to contribute to a harmonised approach and level playing field across trading venues.

175. ESMA was also of the view that to ensure that position management controls are applied effectively, trading venues should evaluate the adequacy of their accountability levels on a regular basis and revise the thresholds set whenever necessary for accountability levels to continue to serve their intended purpose.

176. ESMA also considered that NCAs should receive adequate information on the position management controls in place. To that end, ESMA suggested that trading venues should communicate to their NCA the details of the methodology used for setting accountability levels and submit an annual report on how accountability levels were applied in practice, including (i) how many times those were exceeded, (ii) how many further information requests were made by the trading venue and (iii) the follow-up actions taking by the trading venue.

177. ESMA asked stakeholders whether they agree with the analysis and proposals above. ESMA also asked stakeholders for their views on how accountability levels should be set and whether any other types of position management controls could be further specified in the draft technical standard.

5.10 Feedback to the consultation

a. On-going monitoring of positions

178. Most respondents supported ESMA's analysis and the requirement for trading venues to have arrangements in place for the ongoing monitoring of positions. However, respondents also expressed significant concerns about the reference to "persons with close links", stressing that this is a foreign concept to EU commodity derivative trading venues. Identifying those close links and keeping them updated would require setting up highly sophisticated and expensive systems supported by appropriate legal arrangements without identified benefits.

179. Most respondents further noted that introducing such concept would create an inconsistency between the various components of the requirements applicable to commodity derivatives markets (position limit regime, position reporting requirements and position management controls and suggested to refer instead to already existing concepts such as end position holders and parent undertakings).

b. Accountability Levels

180. Most respondents agreed with ESMA's proposal to introduce accountability levels as part of position management controls. However, most respondents also considered that the proposed regime was overly prescriptive and that it would quickly become very burdensome for both trading venues and market participants.

181. While generally agreeing that accountability levels would be of particular relevance for physically settled contracts, respondents considered that trading venues should retain the necessary discretion in setting accountability levels for appropriate commodity derivatives, in line with the CFTC rulemaking on position management controls. A couple of stakeholders also pointed out that the term "at least" in Article 2 creates uncertainty over the scope of this requirement as there is no clarity of what "other" contracts could be included in the provision.

182. Respondents also advocated that trading venues should have the discretion to establish whether further investigations and information requests are appropriate when an accountability level is breached and whether additional follow-up actions are necessary. According to those respondents, individual trading venues are most familiar with trading dynamics on their platform, the behaviour of market participants and the intricacies of the market, and thus best situated to devise the most appropriate methodology. A single methodology for determining accountability levels would not allow taking into account those characteristics with sufficient granularity and a one-size-fits-all regime would prove ineffective. Most respondents supported requiring trading venues to review accountability levels on a regular-basis and to report on their implementation to their NCA.

183. Little feedback was provided on the other position management controls that could be introduced in the draft RTS. A couple of trading venues noted that the draft RTS on position management controls should focus on optimising the quality of position reporting and leveraging their use for other market surveillance purposes.

5.11 Conclusion and proposals

a. On-going monitoring of positions

184. Whilst noting the positive feedback received to complementing position management controls with the on-going monitoring of positions, ESMA has considered the concerns expressed by respondents with respect to the monitoring of positions held by “persons with close links”.

185. ESMA appreciates that “persons with close links” would be a new concept in the MiFID II commodity derivative framework and that gathering and updating the relevant information may be a source of substantial additional complexity and costs for trading venues. ESMA therefore considered it appropriate to take on board the suggestion made by many stakeholders to refer to existing concepts already familiar to trading venues for transaction reporting and has replaced the reference to “persons with close links” with “end position holders and parent undertakings” in Article 1 of the draft RTS on position management controls. For consistency purposes, the same amendment has been introduced in Article 2 of the draft RTS on position management controls.

b. Accountability levels

186. Regarding the scope of accountability levels, ESMA agrees that the reference to “at least” in Article 2(1) of the draft RTS may have created some uncertainties for trading venues and market participants. ESMA has therefore clarified in Article 2(1) of the draft RTS that accountability levels would only be mandatory for commodity derivatives that are physically settled or can be physically settled at the option of the buyer or the seller. ESMA however also wishes to highlight that trading venues may set accountability levels for cash settled commodity derivatives offered for trading on their venue should they deem appropriate to do so.

187. ESMA does not consider that it would be appropriate to give trading venues full discretion to decide on the commodity derivatives to which accountability levels would apply. ESMA notes that trading venues can already now implement accountability levels on a voluntary basis but understands that most EU venues however did not do so. Providing discretion to trading venues appears unlikely to produce changes in this area. An approach open to complete discretion is also is unlikely to create a harmonized and convergent EU regime which ESMA understands to be the purpose of the mandate received to “specify the content of position management controls”. Furthermore, in ESMA’s view, it would appear reasonable that the Level 2 measures should provide an adequate balance between reducing obligations for the industry, on the one hand, (on position limits, scope, abilities to use exemptions) while improving oversight of markets on the other, noting that position management is the only tool improving such oversight in the Recovery Package. Lastly, providing full discretion to trading venues to decide on the scope of accounatbility levels would be difficult to justify from a legal perspective having regard to the Level 1 obligation for trading venues to apply position management controls.

188. ESMA however appreciates that trading venues are typically familiar with trading dynamics on their platform and the behaviour of market participants and agrees that there would be merits of leaving some discretion to trading venues when deciding whether to require additional information when the accountability level is exceeded. In ESMA's view, when exercising judgement, trading venues should notably take into account the frequency of breaches by the same market participant as well as the size of the breach and make use of any other relevant information that may be already available. The corresponding amendments have been introduced in Article 2(2) and 2(3) of the draft RTS.

189. As regards to the methodology to be used for setting position limits, ESMA took note of the concerns expressed by stakeholders about the lack of granularity of a potential one-size fits all regime and maintains an open approach as to the methodology to be used by trading venues in the draft RTS. However, ESMA continues to consider that there will be value in developing some further guidance on such methodology at a later stage to contribute to a harmonised approach and level playing field across trading venues.

190. Taking into account the limited input received, ESMA is not introducing other position management arrangements in the draft RTS.

6 ANNEXES

6.1 Annex I: Cost Benefit Analysis

191. This section provides a cost-benefit analysis (CBA) of RTS 21a and the draft RTS on position management controls. ESMA however notes that the questions raised in the CP inviting stakeholders to more specifically identify the cost associated with RTS 21a did not attract any answer. The questions raised regarding the RTS on position management controls attracted some general comments that were not supported by any data. This CBA remains therefore of a qualitative nature. In accordance with Article 15(1), second subparagraph of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[11], ESMA does not provide a CBA for the amendments suggested to ITS 4 as it considers a CBA would be disproportionate considering the scope and impact of those amendments.

6.1.1 Draft RTS 21a

6.1.1.1 Introduction

192. Draft RTS 21a determines a standard calculation methodology that competent authorities are to apply when establishing position limits for commodity derivatives based on the characteristics of the relevant derivative concerned. Draft RTS 21a also includes the empowerment received by ESMA to determine a procedure for financial counterparties to apply for a hedging exemption, subject to certain conditions, and for persons to apply for an exemption from position limits for mandatory liquidity provision.

193. Draft RTS 21a will be repealing existing RTS 21 and will retain the provisions in existing RTS 21 that are unaffected by the Level 1 changes to the position limit regime or by other changes suggested by ESMA at its own initiative. As ESMA already provided a CBA for existing RTS 21 in Annex II of ESMA Final Report on Draft Regulatory and Implementing Technical Standards MiFID II/MiFIR Standards[12], this CBA therefore focusses on the provisions newly introduced in RTS 21a compared to existing RTS 21.

6.1.1.2 Baseline

194. From a legal perspective, the baseline to consider is:

195. Article 57(1)(b) of MiFID II which introduces an exemption from position limits for positions held by, or on behalf of, a financial entity that is part of a predominantly commercial group and is acting on behalf of a non-financial entity of the predominantly

[11] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).
[12] https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_ii_-_cba_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

commercial group, where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity;

196. Article 57(1)(c) of MiFID II which introduces an exemption from position limits for positions held by financial and non-financial counterparties for positions that are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4) of MiFID II;

197. Article 57(1) of MiFID II which requires NCAs, in line with the methodology for calculation determined by ESMA, to establish and apply position limits on the size of a net position which a person can hold at all times in commodity derivatives traded on trading venues and EEOTC contracts and Article 57(3) of MiFID II setting out the factors to be taken by ESMA when determining the methodology for setting position limits.

6.1.1.3 Stakeholders

198. The stakeholders identified are: NCAs, financial entities and NFEs trading agricultural commodity derivatives and/or critical or significant contracts.

- NCAs: NCAs will need to have arrangements in place to review applications for the new exemptions from position limits introduced in Article 57(1) of MiFID II. They will also need to review existing procedures for the aggregation of positions held by a person with a view to monitoring compliance of position limits to exclude positions covered by those new exemptions. NCAs will also have to take into account the revised adjustment factors when setting position limits. On the other hand, NCAs will only have to set position limits for a much smaller number of contracts.

- Financial entities: A financial entity within a predominantly commercial group will be able to apply for a hedging exemption for positions held by that financial entity that are objectively measurable as reducing risks directly relating to the commercial activities of the non-financial entities of the group. Financial entities will also be able to apply for an exemption for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue.

- NFEs: Like financial entities, NFEs will also be able to apply for an exemption for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue.

6.1.1.4 Cost Benefit Analysis

We provide below an analysis of the costs and benefits that could arise from the provisions in draft RTS 21a that are new or amended compared to existing RTS 21.

<u>Hedging exemption for financial entities in predominantly commercial groups</u>

Policy Objective	Ensuring that financial entities in predominantly commercial groups that act as the market facing entity of the group can smoothly apply for an exemption from position limits for risk-reducing positions directly relating to the commercial activities of the non-financial entities of the group.
Technical Proposal	The procedure to apply for the above exemption and the definition of qualifying positions would be very similar to the existing application procedure and definition of qualifying positions for NFEs holding risk-reducing positions in relation to their commercial activities. Once the NCA has approved the application, the risk-reducing positions held by the financial entity will not count towards the position limits set for that commodity derivative.
Benefits	Provides clarity and certainty on the criteria needed to determine when a position reduces risks directly related to the commercial activities of the NFEs of the group. Including this into internal policies avoids ad-hoc decisions on which types of derivatives are used to reduce risks directly related to such commercial activity. Provides clarity and certainty on the information to be provided to the NCA when applying for the exemption as well as timeline for approval or rejection by the NCA.
Cost to regulator: - *One-off* - *On-going*	NCAs may incur staff compliance costs as they will have to verify the information provided by financial entities to determine whether the position qualifies as reducing risks related to the commercial activities of the NFEs of the predominantly commercial group and to process the application procedures. NCAs may also incur one-off IT costs to review existing procedures for the aggregation of positions held by a financial entity with a view to monitoring compliance of position limits to exclude hedging positions. Those costs are expected to be non-significant as the number of financial entities eligible to the hedging exemption should be rather limited.
Compliance cost:	Financial entities trading commodity derivatives eligible to the hedging exemption may incur one-off staff costs to apply for the exemption. They may also incur IT compliance costs to adjust position reporting to the new exemption.

- *One-off* - *On-going*	Those costs are expected to be non-significant
Cost to other stakeholders	None identified
Indirect costs	None identified

Exemption for positions directly resulting from transactions undertaken to fulfil mandatory liquidity provision

Policy Objective	Ensuring that persons providing liquidity to the market under mandatory liquidity agreement can smoothly apply for an exemption from position limits for positions directly resulting from such liquidity provision.
Technical Proposal	The procedure to apply for the above exemption would be close to the existing application procedure for NFEs but with a significant adjustment to the information to be provided to the NCA at the time of application to justify eligibility to the exemption, focussing on the liquidity provision activity of the applicant and resulting positions. Once the NCA has approved the application, the person's positions resulting from mandatory liquidity provision will not count towards the position limits set for that commodity derivative.
Benefits	Provides clarity and certainty on the information to be provided to the NCA when applying for the exemption as well as timeline for approval or rejection by the NCA. Provides clarity and certainty on the criteria needed to determine what is a qualifying position.
Cost to regulator: - *One-off* - *On-going*	NCAs may incur staff compliance costs to process the application procedures and assess the information provided by financial entities or NFEs at the time of application or updated afterwards. NCAs may also incur one-off IT costs to review existing procedures for the aggregation of positions held by a person benefiting from a liquidity provision exemption with a view to monitoring compliance with position limits.

Compliance cost: - *One-off* - *On-going*	Financial entities and NFEs may incur one-off staff costs to apply for the exemption. They may also incur IT compliance costs to adjust position reporting to the new exemption.
Cost to other stakeholders	None identified
Indirect costs	None identified

Aggregation and netting of positions (Article 3 of draft RTS 21a)

Policy Objective	Ensuring that the aggregation of positions in spread contracts and in commodity derivatives that are only a fraction of a principal or main contract traded on the same trading venue prevents circumventing the individual commodity derivative limits and challenging the overall intentions of the position limit regime.
Technical Proposal	Include in the aggregate position held by a person in a commodity derivative traded on a trading venue the position resulting from the disaggregation of the components of a spread contract traded on the same trading venue and the positions in commodity derivatives traded on the same trading venue that are a sub-set of the principal contract with regards to their size or pricing period maturity.
Benefits	Allow for a single centralised and representative position to be calculated from the report of positions held by the participant and a single clear position limit for related contracts traded on the same trading venue. Increase insight into a person's trading activity, in line with the position reporting regime's objectives of transparency and accountability.
Cost to regulator: - *One-off* - *On-going*	NCAs may also incur one-off staff and IT costs to review existing procedures for the aggregation of positions held by a person benefiting from a liquidity provision exemption with a view to monitoring compliance with position limits.
Compliance cost: - *One-off*	Persons trading spreads contracts or commodity derivatives that are a sub-set of commodity derivatives traded on the same trading

- *On-going*	venue may incur on-off staff and IT costs to adjust position reporting to the revised aggregation of positions. Trading venues may incur one-staff staff and IT costs to adjust reports sent to NCAs to the revised aggregation of positions.
Cost to other stakeholders	None identified
Indirect costs	None identified

<u>Amendments with regards to baseline figure calculation (Articles 11, 12 and 14 of draft RTS 21a)</u>

Policy Objective	Ensuring that the reference amount used as a basis for calculation of position limits allows the limits to be effective given the level of trading in a commodity derivative. Also ensuring that the calculation of the open interest is consistent among different trading venues.
Technical Proposal	The baseline figure used for commodity derivatives contracts with very large level of deliverable supply should be the open interest. The calculation of open interest is clarified, and the source of data used unified among NCAs.
Benefits	Provides clarity and certainty on the methodology of calculation of open interest. Ensures the level playing field of the position limits where the similar contracts are traded on more than one trading venue and ensures effective position limits for contracts with very high deliverable supply.
Cost to regulator: - *One-off* - *On-going*	NCAs may incur one-off costs of reviewing the existing procedures and setting up the relevant reports on the basis of position reporting data.
Compliance cost: - *One-off* - *On-going*	None identified.
Cost to other stakeholders	None identified

Indirect costs	None identified

New and less liquid agricultural commodity derivatives (Article 17 of draft RTS 21a)

Policy Objective	Ensures an effective process for position limits in case of agricultural contracts, with de minimis limits applying to new growing contracts.
Technical Proposal	The new and less liquid agricultural commodity contract will have new higher de minimis position limits until they reach the relevant thresholds of standard position limits.
Benefits	Will allow new and less liquid agricultural contracts to develop.
Cost to regulator: - *One-off* - *On-going*	NCAs may also incur one-off staff costs to review existing procedures for the position limits setting process. Those costs should not be significant given the previous experiences with the regime.
Compliance cost: - *One-off* - *On-going*	None identified.
Cost to other stakeholders	None identified
Indirect costs	None identified

Amendments with regards to adjustment factors (Articles 19 and 20 of draft RTS 21a)

Policy Objective	Provides more clarity on the application of the relevant adjustment factors by the NCAs with regards to the overall open interest and the number of market participants.
Technical Proposal	The circumstances when adjustment factors can be used have been clarified when the size of the open interest and deliverable supply are significantly different. Upward adjustment based on the number of market participants or investment firms acting as market makers has also been clarified.

Benefits	Provides more clarity and certainty with regards to the adjustment factors to be used when setting position limits. Will contribute to a more harmonised approach across NCAs.
Cost to regulator: - *One-off* - *On-going*	NCAs may also incur one-off staff costs to review existing procedures for the position limits setting process. Those costs should not be significant given the previous experiences with the regime.
Compliance cost: - *One-off* - *On-going*	None identified.
Cost to other stakeholders	None identified
Indirect costs	None identified

6.1.2 Draft RTS on position management controls

6.1.2.1 Introduction

199. The draft RTS on position management controls responds to the empowerment received by ESMA to specify the content of position management controls, taking into account the characteristics of the trading venues concerned.

6.1.2.2 Baseline

200. From a legal perspective, the baseline to consider is;

201. The first sub-paragraph of Article 57(8) of MiFID II, as amended by Directive (EU) 2021/338 of the European Parliament and of the Council[13] requiring trading venues trading commodity derivatives to apply position management controls. Those controls must include, at least, the powers to:

(a) monitor the open interest positions of persons;

[13] Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

(b) obtain information from persons about the size and purpose of a position as well as information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market including, where appropriate, positions held in commodity derivatives that are based on the same underlying and that share the same characteristics on other trading venues and in economically equivalent OTC contracts through members and participants;

(c) request a person to terminate or reduce a position, on a temporary or permanent basis, and to unilaterally take action to ensure the termination or reduction of the position where the person does not comply with such request; and

(d) require a person to provide, on a temporary basis, liquidity back into the market at an agreed price and volume with the express intent of mitigating the effects of a large or dominant position.

202. The second sub-paragraph of Article 57(8) of MiFID II, as amended by Directive (EU) 2021/338 of the European Parliament and of the Council mandating ESMA to develop draft RTS to specify the content of position management controls, thereby taking into account the characteristics of the trading venues concerned.

6.1.2.3 Stakeholders

203. The stakeholders identified are: trading venues offering trading in commodity derivatives, market participants trading commodity derivatives and NCAs.

- *Trading venues*: Trading venues offering trading in commodity derivatives would be the most impacted by the draft RTS on position management controls. First, they will need to ensure that appropriate systems are in place for the ongoing monitoring of positions held by end-position holders and parent undertakings. Second, trading venues offering trading in physically settled commodity will need to set up and review accountability levels for those commodity derivatives as well, when appropriate, request and assess additional information when those levels are exceeded and report to their NCA on an annual basis.

- *Market participants*: Market participants trading the commodity derivatives mentioned above will have to answer additional information request from trading venues in case where accountability levels are exceeded, and the trading venue deems appropriate to send additional information requests.

- *NCAs*: The impact on NCAs is less significant as competent authorities should only receive information from trading venues on the methodology used for setting up accountability levels and an annual summary on their practical application.

6.1.2.4 Cost Benefit Analysis

We provide below an analysis of the costs and benefits that could arise from the draft RTS on position management controls.

General monitoring obligations (Article 1 of the draft RTS on position management controls)

204. In their feedback to the CP, several respondents stressed that the concept of "persons with close links" initially suggested by ESMA regarding the on-going monitoring of positions is not a concept used so far in the MiFID II commodity derivatives framework. EU commodity derivative trading venues currently do not have access to such information. According to those respondents, the introduction of such concept paired with the duty of ongoing monitoring of positions would require legal arrangements and a highly sophisticated and expensive system to be put in place by venues to collect information on the positions held by "persons with close links" and keep them updated.

205. References to "persons with close links" have been deleted in the revised draft RTS on position management controls and replaced with reference to the ongoing monitoring of positions held by "end position holders and parent undertakings" (see section 5.11 of the report). This wording is aligned with current position reporting formats which include information on end position holders and parent undertakings. Reference to "end position holders and parent undertakings" will reduce the costs associated with the on-going monitoring of positions by the trading venue, while still bringing additional benefit for orderly markets.

Policy Objective	Ensuring that trading venues trading commodity derivatives are continuously monitoring open interest in commodity derivatives with the objective of contributing to orderly markets.
Technical Proposal	On-going monitoring by trading venues of positions held in commodity derivatives available for trading by end position holders and parent undertakings.
Benefits	The on-going monitoring of positions will allow trading venues to identify potential sources of concerns with regards to orderly markets without delay. The draft RTS provides further clarity and legal certainty on the monitoring of positions that trading venues are expected to carry out and will further contribute to ensuring a harmonised approach across trading venues.
Cost to regulator: - *One-off* - *On-going*	NCAs may incur surveillance costs to ensure that trading venues comply with the requirement set out in the draft RTS. Those costs are expected to be non-significant.
Compliance cost:	Trading venues may incur one-off IT and staff compliance costs to adjust the procedures and systems in place for the monitoring of

- *One-off* - *On-going*	positions to comply with the requirements set out in Article 1 of the draft RTS. Those costs are expected to be non-significant as trading venues are already required to monitor positions and information on positions held on position holders and parent undertaking is included in current reporting formats.
Cost to other stakeholders	None identified
Indirect costs	None identified

Accountability levels setting (Article 2 and Article 3(1) of the draft RTS on position management controls)

206. In their response to the CBA questions on position management controls, most respondents considered that the lack of flexibility in the management of position management controls would likely to result in significant and disproportionate costs for trading venues and market participants. However, respondents were not specific about how those additional costs would spread across the additional requirements included in the draft RTS and no data was provided to support the concern expressed. Several respondents stressed that the absence of discretion for information requests in case of breach of an accountability would likely trigger high staff compliance costs, for trading venues having to systematically request and process additional information and for market participants having to answer those requests.

207. ESMA appreciates that any new requirement comes with a cost but is the view that the amendments made to the draft RTS on position management controls regarding accountability levels (see section 5.11 of the report) will substantially reduce compliance costs for trading venues and market participants as the mandatory scope of accountability levels is limited to physically settled commodity derivatives and flexibility is provided to trading venues to assess whether to request additional information to position holders when accountability levels are exceeded.

Policy Objective	Ensure that trading venues identify large positions in commodity derivatives that are or can be physically delivered which may be a source of concern with regards to the objective of ensuring orderly markets and take appropriate action without delay.
Technical Proposal	For physically settled commodity derivatives, trading venues are to determine, and periodically review, a level of positions in the spot month and in the other month that, when exceeded, will require the trading venue to exercise its power to obtain additional information

	on the position held when appropriate and request a person to terminate or reduce a position or provide liquidity back to the market on a temporary basis, as deemed appropriate by the trading venue.
Benefits	Contributes to ensuring that trading venues can promptly identify positions the size of which may be a source of concern with regards to ensuring orderly markets and orderly settlement and will take appropriate action without delay. Provides more clarity and legal certainty on how and when trading venues are expected to use the powers set out in Article 57(8) of MiFID II for physically settled commodity derivatives, whilst retaining some discretion for the trading venue in the determination of the accountability levels based on the characteristics of the commodity derivatives traded. Will further contribute to ensuring a harmonised approach across trading venues.
Cost to regulator: - *One-off* - *On-going*	None identified
Compliance cost: - *One-off* - *On-going*	Trading venues will incur one-off compliance costs to determine accountability levels for physically settled contracts. They may also incur one-off IT costs to adjust monitoring systems so that positions exceeding accountability levels are immediately identified. On-going IT costs may be incurred for the periodic review the levels set to ensure they remain effective. Trading venues may incur on-going staff compliance associated with assessing, when an accountability level is exceeded, whether additional information should be requested to the position holder and, based on available information, deciding on appropriate follow-up actions where necessary.
Cost to other stakeholders	Members of the trading venues and other market participants may incur on-going staff costs to answer the additional information requests that may be sent by trading venues when accountability levels are exceeded. They may incur IT costs to adjust systems and procedures to the accountability levels set by the trading venue.

	Those costs are not expected to be significant.
Indirect costs	None identified

Reporting to NCAs (Article 3 (2) and (3) of the draft RTS on position management controls)

Policy Objective	Providing greater transparency to NCAs on the position management controls implemented by trading venues.
Technical Proposal	Trading venues should share the methodology used to determine the levels of positions triggering an additional information request with their NCAs and submit an annual report on the implementation of this position management control.
Benefits	Ensures greater transparency towards NCAs on the implementation of position management controls. Provides an opportunity to the NCA to engage into a dialogue with the trading venue on the methodology used for setting accountability levels and on the follow up actions undertaken as appropriate when those levels have been exceeded.
Cost to regulator: - *One-off* - *On-going*	NCAs may incur staff costs for reviewing the information submitted by trading venues and take action where needed.
Compliance cost: - *One-off* - *On-going*	Trading venues may incur on-going staff costs to prepare the report to be submitted to NCAs on an annual basis.
Cost to other stakeholders	None identified
Indirect costs	None identified

6.2 Annex II: Summary of responses

Part I

Q1: Do you agree with ESMA's proposal regarding the impact of the new hedging exemption on the aggregation of positions? If not, please elaborate.

All respondents agreed with ESMA's proposal.

Q2: Do you agree with ESMA's proposal for positions qualifying as risk-reducing? If not, please elaborate and provide an alternative proposal.

All respondents agreed with ESMA's proposal.

Q3: Do you agree with ESMA's proposal on the application procedure for financial entities?? If not, please elaborate and provide an alternative proposal.

Most respondents agreed with ESMA's proposal.

One trade association suggested that the application procedure should be based on a simpler self-attestation. Another trade association (GFMA) suggested providing more clarity on the criteria that a financial entity must demonstrate that "the parent undertaking has entrusted to the financial entity the trading of commodity derivatives … to reduce the exposure and risks in the commercial activities of the NFEs." That same trade association also claimed that requiring in Article 8(4)(b)(iv) "an explanation of how the financial entity's use of commodity derivatives directly reduces the exposure and risks in the NFEs' commercial activities" is more restrictive than the Level 1 text which states that the exemption is available where a financial entity's positions are "objectively measurable as reducing risks directly relating to the commercial activity of [a] NFE".

Q4: Do you agree with ESMA's proposal on the application procedure for mandatory liquidity provision exemption? If not, please elaborate and provide an alternative proposal.

Most respondents agreed with ESMA's proposal.

One trade association suggested replacing the reference to "mandatory liquidity provision" with a reference to "market making arrangements". Another trade association suggested extending the exemption to voluntary liquidity provision and liquidity provision on non-EU trading venues.

Q5: Do you agree with ESMA's proposal on qualifying positions? If not, please elaborate and provide an alternative proposal.

All respondents but two agreed with ESMA's proposal.

One trade association suggested that, in Article 10(1) of draft RTS 21a, the definition of qualifying position should be extended to cover mandatory liquidity provision based on a regulatory authority' request. This would not give rise to a liquidity provision agreement signed with trading venues would therefore not be covered by Article 48(3) of MiFID II.

One trade association was of the view that "qualifying positions" should only refer to positions held in centrally cleared commodity derivatives. More generally, this respondent opposed most of ESMA's proposals in the consultation paper stressing that ESMA's proposals need to be specific towards those commodity derivatives that are novated into a CCP and therefore create Open Interest, or that ESMA needs to clarify its definition of commodity derivatives such that they solely include CCP cleared contracts. Those comments at not repeated in the summaries of responses below.

Q6: Do you agree with ESMA's proposed definition of financial entities? If not, please elaborate.

All respondents agreed with ESMA's proposal.

Q7: Do you agree with ESMA's proposal regarding the aggregation and netting of positions in a commodity derivative? If not, please elaborate and provide an alternative proposal.

All respondents agreed with ESMA's proposal regarding the revised drafting referring to "commodity derivatives based on the same underlying and sharing the same characteristics" and with the aggregation suggested of minis and balmos.

A majority of respondents opposed the reference to spread contracts in Article 3(2) of draft RTS 21a and do not believe that "spread contracts" require a special treatment under the position limit regime. Most of those respondents noted that spread contracts are not actual outright contracts but trading strategies where two outright futures contracts are traded at the same time and where both components of the trading strategy already count towards the position limits of the respective outright futures contracts.

Some stakeholders stressed that where a trading venue admits to trading a differential contract whose contract terms reflect the economics of two separate outright markets, a separate position limit is also not required. Instead, the position in the differential contract can be deconstructed into equivalent long and short positions and aggregated with any positions of the respective outright markets reflecting the economics of the differential.

Q8: Do you agree with ESMA's proposal for significant volumes? If not, please elaborate.

All respondents agreed with ESMA's proposal.

Q9: Do you agree with ESMA's proposal? If not, please elaborate and provide an alternative proposal where available.

Most respondents disagreed with the proposal to change the baseline for the spot month limit and use the open interest instead of the deliverable supply when the deliverable supply is significantly higher than the open interest. They recommend maintaining the current approach.

Stakeholders did not consider that this change to the methodology was needed since, in their view, there is no risk of market manipulation when there is a high level of deliverable supply. They stressed that the purpose of the spot month position limit is to protect market integrity by reducing the potential for the contract to become subject to an abusive squeeze (cornering). This risk only materialises where there is sufficient constraint in the deliverable supply, and where there is a real risk that participants wishing to make delivery would not be able to do so. This risk does not arise where the deliverable supply is substantially higher than the open interest.

Moreover, respondents considered that the proposed amendment could have unintended adverse consequences on the growth of commodity derivatives. Where the open interest is low compared to deliverable supply, there is a growth potential that could be hampered by the position limits, for instance when there is a time delay in the update of the limits following an increase in the level of open interest. This could in turn have a negative impact on market integrity since less liquid contracts are more prone to market manipulation.

Additionally, some stakeholders suggested replacing the reference to “contracts with an underlying that qualifies as food intended for human consumption” with the definition of agricultural derivative contracts laid down in the MiFID II “quick fix”.

Q10: Do you agree with ESMA’s proposal? If not, please elaborate.

Most respondents consider that more flexibility should be provided to the NCAs when determining the amount of deliverable supply. They recommended using an approach similar to the one used for the open interest determination and suggested that the reference amount should be calculated not necessarily over a one-year period but “over a representative period of time”. This approach would allow better taking into account the characteristic of commodity derivatives, including agricultural commodity derivatives where deliverable supply may vary significantly from one year to the other and would provide NCAs with the opportunity to exercise judgment when appropriate.

Q11: Do you agree with ESMA’s proposals regarding Article 14 of RTS 21a? If not, please elaborate and provide alternative proposals.

Several respondents expressed doubts about the inclusion of EEOTC in the calculation of the open interest, claiming that no EEOTC contracts have been identified due to the very narrow definition of EEOTC contracts and challenging the interpretation made by a minority of market participants. One respondent stressed that the competent authority should check that the contract does qualify as EEOTC before taking on board the related open interest.

All respondents agreed with the calculation of open interest on a net basis, based on position reporting data and over a representative period of time. A couple of respondents suggested that it could also be appropriate to calculate open interest based on a forward-looking basis for contracts with a strong period of growth.

Some respondents disagreed with what they understood as being the reference period of six months to be used for the calculation of open interest in new contracts in case of merger or transfer of activities. These respondents suggested that the calculation of the open interest in these special circumstances should be based on the open interest of the previous trading venue over a representative period of time. Furthermore, they noted that the circumstances where the alternative approach for calculating the open interest set out in Article 14(2) would apply were too narrowly drafted and suggested broadening them.

One respondent considered that the conditions under which NCAs can take into consideration open interest data on the former venue or in the former commodity derivative in case of merger or transfer should be further specified as this might not always be justified.

A couple of respondents suggested to clarify that when one NCA sets the other months position limit for two critical contracts traded on different trading venues that are based on the same underlying and that share the same characteristics, the NCA should use the open interest in both trading venues.

Q12: Do you see merit in the new approach considered by ESMA for new and less liquid agricultural commodity derivatives? If not, please elaborate and provide an alternative proposal.

All respondents agreed with ESMA's proposal.

Q13: Do you agree with ESMA's proposal regarding Article 19 of RTS 21a? If not, please elaborate.

All respondents agreed with ESMA's proposal to clarify that, where the open interest is significantly lower compared to the deliverable supply, NCAs should adjust the other months' position limit upwards. However, most respondents disagreed with the need to adjust the spot month position limit downwards when open interest is significantly lower than deliverable supply. They notably stressed that a higher deliverable supply does not entail a higher risk of market cornering as it would be very difficult to "squeeze" a contract with an open interest that is only a small share of the physical market supply. Those respondents also argued that there is no evidence to suggest that a more restrictive position limit would provide any benefit to the orderly functioning of the market when there is no clear constraint on deliverable supply.

Respondents also stressed that lowering the spot month limit when the open interest is relatively low compared to deliverable supply may hamper the development of contracts newly recently admitted to trading. Where contracts are at their initial stage of development, deliverable supply is often significantly higher than open interest. This reflects a market with a substantial growth potential which a limit based on open interest could hinder.

Some respondents further stressed the importance of allowing speculative trading to take place in the market, as this has overall beneficial effects.

One trade association supported ESMA's proposal.

Q14: Do you agree with ESMA' proposal regarding the upward adjustment factor to be used in case of a small number of market participants or less than three investment firms acting as market makers? If not, please elaborate and provide an alternative proposal.

All respondents agreed with ESMA's proposal. One stakeholder asked ESMA to clarify how commodity derivatives will be assessed to identify that they are "based on the same underlying and sharing the same characteristics".

Part II

Q15: Do you agree with ESMA's proposed amendments to ITS 4? If not, please elaborate.

All respondents agreed with ESMA's proposal.

Part III

Q16: Do you agree with ESMA's suggestion to introduce such ongoing position monitoring requirement in the draft RTS? If not, please elaborate.

Most respondents agreed with the proposal to require trading venues to have arrangements in place for the ongoing monitoring of positions.

However, most respondents also stressed that the concept of "persons with close links" is a foreign concept for EU commodity derivative trading venues and that venues do not have access to such information. According to those respondents, the introduction of such concept would require a highly sophisticated and expensive system supported by legal arrangements to identify these "close links" and keep them updated. It would also increase the burden on reporting entities without identified benefits.

Most respondents further noted that introducing such concept would create an inconsistency between the various components of the requirements applicable to commodity derivatives markets (position limit regime, position reporting requirements and position management controls). They suggested to refer instead to already existing concepts such as end position holders and parent undertakings.

Q17: Do you agree with ESMA's suggestion to introduce accountability levels as part of position management controls? Do you agree with ESMA's assessment that accountability levels would be of particular relevance for physically settled commodity derivatives? If not, please elaborate and provide alternative proposals.

Most respondents generally agreed with the suggestion to introduce accountability levels as part of position management controls. However, almost all respondents stated that the proposed regime would be overly prescriptive and that position management controls would only properly function by leaving trading venues full discretion.

Those respondents notably advocated for more flexibility, inviting ESMA to introduce full discretion for exchanges to set accountability levels (i.e., identifying commodity derivatives and periods to which they should apply), and take action in case of breach, in line with the CFTC approach in the U.S.

All respondents agreed that accountability levels would be of particular relevance for physically settled commodity derivatives. However, they stressed that that it should be at the discretion of the trading venue to determine which physically settled commodity derivatives would benefit from a position accountability level. Parameters to be considered for assessing the relevance of accountability levels for physically settled contracts could include: i) ratio OTC trading versus on-exchange trading; ii) the liquidity established in the respective contract; and iii) whether it is easy to control the delivery of the underlying commodity

However, one trade association expressed concerns that the entry into force of the provisions requiring accountability levels without a prior specification of the methodology that should be applied by trading venues would create regulatory uncertainty for trading venues. In parallel, another respondent stressed that it is essential for trading venues to be able to establish and adapt their own methodologies when establishing accountability levels whereas one trading venue encouraged ESMA to find ways for NCAs to co-ordinate their review of accountability levels across jurisdictions.

A couple of stakeholders pointed out that the term “at least” in Article 2 creates uncertainty over the scope of this requirement as there is no clarity of what “other” contracts could be included in the provision.

Q18: In your view, how should accountability levels be set for the spot month and the other months? Based on which methodology or criteria? Should all types of positions count towards the accountability levels?

Most respondents expressed concerns about a one-size-fits-all regime and, in line with the responses to Q17, stressed that trading venues should be granted discretion to determine the optimal approach to the accountability levels introduced on their platforms. The introduction of a harmonised methodology for setting accountability levels by means of ESMA guidance would not provide sufficient granularity for the broad variety of products available for trading. As a general comment, one trading venue suggested that, rather than producing guidelines on the methodology for accountability level, ESMA should act as a platform for NCAs to share best practices with a view to ensure convergence.

Few trading venues provided detailed suggestions for the methodology. Regarding the differentiation between spot month and other months, one respondent argued that this approach is too simplistic and other criteria should be considered, such as: (i) liquidity in the relevant contract; (ii) the contract’s importance for the markets price formation; and the (iii) deliverable supply.

A couple of respondents noted that positions qualifying as reducing risks directly related to commercial activities and transactions entered into to fulfil obligations to provide liquidity should not count towards the accountability levels.

Q19: Do you agree with ESMA's suggestion to introduce requirements for the review of accountability levels? Do you also agree with ESMA's proposal regarding reporting requirements to the NCA on accountability levels? If not, please elaborate.

A large majority of stakeholders agreed with ESMA's proposal.

However, one trade association opposed the proposal which, in its view, will increase the burden on trading venues. A similar view was shared by another respondent which emphasized that trading venues can be relied upon to regularly review the appropriateness of the accountability levels they apply. The same respondent considered that annual reporting on the application of accountability levels would not enhance supervision by NCAs. One trading venue would welcome an obligation for NCAs to coordinate their review of accountability levels for contracts with the same underlying across trading venues and NCA jurisdictions.

Q20: In your view, what other types of position management controls could be further specified in the draft RTS?

Most respondents did not provide any suggestions as to the other types of position management controls that could be considered. Some respondents stressed that there was no need for further types of position management controls beyond those proposed in the CP. They rather made clear that trading venues should have the discretion to introduce relevant measures, where necessary.

A couple of trading venues argued that the new RTS on position management controls should focus on optimising the quality of position reporting and leveraging their use for other market surveillance purposes.

6.3 Annex III: Draft RTS and ITS

6.3.1 Draft RTS 21a

COMMISSION DELEGATED REGULATION (EU) .../...

of [ ]

supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives and procedures for applying for exemption from position limits and repealing Commission Delegated Regulation (EU) 2017/591

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU[1], and in particular Article 57(1), (3) and (12) thereof,

Whereas:

(1) To reflect the amendments introduced by Directive (EU) 2021/338 of the European Parliament and of the Council[2] to Directive 2014/65/EU as regards, among other things, position limits, which also include new related empowerments, this Regulation should repeal and replace Commission Delegated Regulation (EU) 2017/591.

(2) In order to ensure a harmonised approach to applying position limits to commodity derivatives in the Union, a methodology should be specified for calculating those limits. The methodology should prevent regulatory arbitrage and promote consistency whilst providing competent authorities with sufficient flexibility to take into account the variations among different commodity derivatives markets and the markets in the underlying commodities. The methodology for calculating the limits should allow competent authorities to balance the objectives of setting limits at a level sufficiently low to prevent persons holding positions in

[1] OJ L 173, 12.6.2014, p. 349

[2] Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis

those commodity derivatives from abusing or distorting the market against the objectives of supporting orderly pricing and settlement arrangements, developing new commodity derivatives and enabling commodity derivatives to continue to support the functioning of commercial activities in the underlying commodity market.

(3) In order to clearly identify a limited number of concepts stemming from Directive 2014/65/EU, as well as to specify technical terms necessary for this Regulation, a number of terms should be defined to ensure uniform application..

(4) Long and short positions in a commodity derivative of market participants should be netted off against each other to determine the effective size of a position a person controls at any point in time. The size of a position held through an option contract or a commodity derivative traded on the same trading venue that is a sub-set of the principal contract should be calculated on a delta equivalent basis. To allow for a comprehensive, centralised and representative overview of a person's activity, and to prevent circumventing the objective of the position limit set for the principal contract, the aggregate position held by a person in a commodity derivative traded on a trading venue should also include the position resulting from the disaggregation of the components of a spread contract admitted to trading as a single tradable instrument on the same trading venue and the positions in commodity derivatives traded on the same trading venue that are a sub-set of the principal contract with regards to their size (minis), or pricing period maturity, such as balance-of-the-month (balmos) contracts.

(5) Directive 2014/65/EU requires that any positions held by other persons on behalf of a person should be included in the calculation of that person's position limit and for position limits to be applied at both an entity level and at a group level and it is therefore necessary to aggregate positions at a group level. It is appropriate to only provide for aggregation at the group level if a parent undertaking can control the use of positions. Accordingly, parent undertakings should aggregate positions held by their subsidiaries with any positions that the parent entity holds directly, in addition to the subsidiaries aggregating their own positions. Such aggregation can lead to positions calculated at the level of the parent undertaking which are larger or, due to a netting of long and short positions held by different subsidiaries, lower than at individual subsidiary level. Positions should not be aggregated at the level of the parent undertaking if the positions are held by collective investment undertakings which hold those positions on behalf of their investors rather than on behalf of their parent undertakings in cases where the parent undertaking cannot control the use of those positions for its own benefit.

(6) Agricultural commodity derivatives should only be considered as trading in significant volume on a trading venue if they exceed the liquidity threshold specified in this Regulation for a sufficient period of time.

(7) Where an over-the-counter (OTC) contract is valued on the same underlying commodity that is deliverable at the same location and with the same contractual conditions and if it is

having a highly correlated economic outcome to a contract traded on a trading venue, it should be deemed economically equivalent regardless of small differences in the contractual specifications concerning the lot sizes and the date of delivery. Also differences in post trade risk management arrangements, such as clearing arrangements, should not be barriers to declaring such contracts as economically equivalent. In order to prevent inappropriate netting of potentially dominant positions traded on a trading venue by the use of bilateral arrangements in OTC contracts and to ensure an efficient operation of the position limits regime in practice it is necessary for commodity derivatives traded OTC to be considered economically equivalent to trading venue contracts only in limited circumstances. To deter avoidance of position limits and to enhance the integrity of the position limit regime it is necessary that a definition of an economically equivalent OTC contract is narrowly framed so that it does not permit a person to net an OTC position against multiple other positions and that the exercise of discretion in the consistent choice of positions against which it is netted is limited to the specific circumstances where an OTC contract is economically equivalent to more than one commodity derivative traded on a trading venue in the EU.

(8) In order to establish which positions in commodity derivatives are objectively measurable as reducing risks directly relating to commercial activity, certain criteria should be provided, including the use of the accounting definition of a hedging contract based on International Financial Reporting Standards (IFRS) rules. That accounting definition should be also available to non-financial entities even though they do not apply IFRS rules at an entity level.

(9) Additionally, non-financial entities should be able to use risk management techniques to mitigate their overall risks arising from their commercial activity or that of their group including risks arising from several geographic markets, several products, time horizons or entities ('macro or portfolio hedging'). Likewise, financial entities within predominantly commercial groups should be able to use risk management techniques to mitigate the overall risks arising from the commercial activity of the non-financial entities of the group. When a non-financial entity or a financial entity uses macro or portfolio hedging, it may not be able to establish a one-to-one link between a specific position in a commodity derivative and a specific risk arising from the commercial activity that the commodity derivative is intended to hedge. A non-financial entity or a financial entity may also use a non-equivalent commodity derivative to hedge a specific risk arising from commercial activity of the non-financial entity where an identical commodity derivative is not available or where a more closely correlated commodity derivative does not have sufficient liquidity (‘proxy hedging’). In such cases, risk management policies and systems should be able to prevent non-hedging transactions from being categorised as hedging and should be able to provide for a sufficiently disaggregate view of the hedging portfolio so that speculative components are identified and counted towards the position limits. Positions should not qualify as reducing risks related to commercial activity solely on the grounds that they have been included as part of a risk-reducing portfolio on an overall basis.

(10) A risk may evolve over time and, in order to adapt to the evolution of the risk, commodity derivatives initially executed for reducing risk related to commercial activity, may have to be offset through the use of additional commodity derivative contracts that close out those commodity derivative contracts that have become unrelated to the commercial risk. Additionally, the evolution of a risk that has been addressed by the entering into of a position in a commodity derivative for the purpose of reducing risk should not subsequently give rise to the re-evaluation of that position as not being a privileged transaction ab initio.

(11) Financial and non-financial entities should be able to apply for the exemption in relation to hedging of commercial activities before entering into a position. The application should give the competent authority a clear and concise overview of the commercial activities of the non-financial entities in respect of an underlying commodity that are intended to be hedged, the associated risks and how commodity derivatives are utilised to mitigate those risks. Position limits apply at all times to agricultural commodity derivatives and to critical or significant commodity derivatives and should the exemption ultimately not be granted by the competent authority, the financial or the non-financial entity as the case may be should reduce any position in excess of a limit accordingly and may face supervisory measures in respect of a breach of a limit. Financial and non-financial entities should re-assess their activities periodically to ensure that the continued application of the exemption is justified.

(12) Financial and non-financial entities should be able to apply for the exemption in relation to positions resulting from the mandatory provision of liquidity on trading venues before those transactions are undertaken. The application should give the competent authority a clear and concise overview of the mandatory liquidity provision framework under which those persons operate, the person' activities in the trading of commodity derivatives in accordance with the written agreement entered into with the trading venue and of the resulting open positions. Position limits apply at all times to agricultural commodity derivatives and to critical or significant commodity derivatives and should the exemption ultimately not be granted by the competent authority, the non-financial or financial entity should reduce any position in excess of a limit accordingly and may face supervisory measures in respect of a breach of a limit. Non-financial and financial entities should re-assess their activities periodically to ensure that the continued application of the exemption is justified.

(13) The spot-month period, which is the time period immediately before delivery at expiry, is specific to each commodity derivative and may not correspond to exactly one month. Spot month contracts should therefore refer to the contract that is the next contract in that commodity derivative to mature. Restricting the positions a person may hold in the period during which delivery of the physical commodity is to be made limits the quantity of the underlying deliverable supply each person may make or take delivery of, thereby preventing the accumulation of dominant positions by individuals which may enable them to squeeze the market through restricting access to the commodity. The standard baseline for the spot month position limit for both physically and cash settled commodity derivatives should therefore be

computed as a percentage of the deliverable supply estimate. Competent authorities should be able to implement a schedule of decreasing position limits ranging from the point in time when a contract becomes a spot month contract until maturity in order to more precisely ensure that position limits are adequately set throughout the spot month period and to ensure orderly settlement.

(14) Where there is relatively little derivative trading compared with the deliverable supply of a commodity, open interest will be smaller in comparison with deliverable supply. In such circumstances, even using the lowest percentage of the deliverable supply in the methodology may not allow the competent authorities to set a spot month limit that is consistent with the objective of ensuring orderly pricing and settlement conditions and preventing market abuse. To ensure that those objectives are met in all circumstances, when the deliverable supply for a commodity derivative is substantially higher than the total open interest to such extend that the spot month limit based on deliverable supply would deprive the requirement for competent authorities to apply position limits of any effect, competent authorities should, as a fall back methodology, determine the baseline figure for the spot month limit in that commodity derivative as a percentage of the total open interest in that commodity derivative and then proceed with the relevant adjustment factors.

(15) Crops in agricultural products can be subject to high volatility due to weather conditions. It is therefore appropriate that the reference period for the determination of deliverable supply in agricultural commodity derivatives extends beyond the reference period used for the determination of deliverable supply in other commodity derivatives.

(16) The other months' position limit is applied across all maturities other than the spot month. The standard baseline for the other months' position limits for both physically and cash settled commodity derivatives should be computed as a percentage of the total open interest. The distribution of positions across the other months' of a commodity contract is often concentrated in the months closest to maturity. Therefore, total open interest provides a more appropriate baseline for setting position limits than using a figure averaged across all maturities. As open interest may change significantly over a short period of time, the open interest should be calculated by the competent authorities over a period of time that adequately reflects the commodity derivative trading characteristics. That reference period should notably account for seasonality of trading of a contract.

(17) To ensure that the position limits established by competent authorities are based on a comprehensive representation of the overall open positions held in a commodity derivative, the open interest calculated by the competent authority should include both the outstanding positions on the trading venue where the commodity derivative is traded and the outstanding positions in economically equivalent OTC contracts reported to the competent authority.

(18) The standard baseline of 25% of deliverable supply and of open interest has been set with reference to the experience of other markets and other jurisdictions. The baseline should be adjusted by competent authorities to enable it to be reduced to 5% of deliverable supply and open interest (or 2.5% in the case of some agricultural commodity derivatives) and to be increased up to 35% of deliverable supply and open interest should the characteristics of the market require it in order to support the orderly settlement and functioning of the contract and its underlying market. Since any adjustment to the baseline figure applies only where, and for so long as, objective characteristics of the market require it, temporary adjustments to the baseline should be therefore possible. Competent authorities should ensure that an adjustment downwards of the baseline is affected whenever it is necessary to prevent dominant positions and to support orderly pricing in the commodity derivative and in the underlying commodity. For derivatives without a tangible underlying the deliverable supply cannot be used to establish a position limit. Therefore, competent authorities should be able to enhance or adjust the methodologies to determine position limits for these commodity derivatives based on different parameters the use of open interest also for the spot month.

(19) There may be circumstances where a commodity derivative admitted to trading on a trading venue was formerly traded on one or more trading venues in the European Union or in third countries. In order to allow for the smooth transfer of open interest in the formerly traded contract to the newly traded one, the open interest in the formerly traded contract should be taken into account by the competent authority when establishing the initial position limits for the newly admitted to trading commodity derivative. Other circumstances may arise, for example, where two commodity derivatives are traded on the same trading venue and open interest in one contract is expected to move to another one due a to change in that contract’s characteristics, such as a change in the underlying index or bidding zone. When establishing the position limits for the developing contract, the competent authority should take into account the open interest in the previous contract to also allow for the smooth transfer of open interest from one contract to the other.

(20) Certain commodity derivatives, in particular based on power and gas, provide that the underlying be delivered constantly over a specified period of time such as day, month, or year. Moreover, certain contracts with longer delivery periods such as year or quarter may be automatically substituted by related contracts of shorter delivery periods such as quarter or month (cascading contracts). In these cases, a spot month position limit for the contract to be substituted prior to delivery would be inappropriate, as such limit would not cover the expiry and physical delivery or cash settlement of the contract. To the extent that delivery periods of contracts for the same underlying overlap, a single position limit should apply to all the related contracts in order to properly take into account the positions across those contracts which may potentially be delivered. To facilitate this, related contracts should be measured in units of the underlying and aggregated and netted accordingly.

(21) For certain agricultural commodity derivatives, which have a material impact on consumer food prices, the methodology enables a competent authority to set a baseline and position limit beneath the minimum of the general range where it finds evidence of speculative activity impacting significantly on prices.

(22) The competent authority should assess whether the factors listed under paragraph 3 of Article 57 of Directive 2014/65/EU necessitate adjustment of the baseline in order to set the final level of the position limit. The assessment should take into account these factors as relevant for the particular commodity derivative in question. The methodologies should provide a direction of how to set the limit without taking away the ultimate decision on an appropriate position limit for a commodity derivative from the competent authority in order to prevent market abuse. The factors should give important indications to the competent authorities and also to ESMA to facilitate forming its opinions and ensuring an adequate alignment of position limits across the Union.

(23) Position limits should not create barriers to the development of new agricultural commodity derivatives and should not prevent less liquid sections of the agricultural commodity derivative markets from working adequately. The methodology should take into account the time required to develop and attract liquidity to both new and existing commodity derivatives and, in particular, for agricultural commodity derivatives that may support risk management in bespoke or immature markets or seek to develop new hedging arrangements in new commodities. Equally, there are agricultural commodity derivative contracts which may never attract sufficient participants or liquidity to enable the effective application of position limits without the risk of participants regularly and inadvertently breaching the limit and consequently disrupting the pricing and settlement of those commodity derivatives. In order to address these risks to the efficient functioning of markets, the position limit for the spot month and for other months is set at a fixed level of 10,000 lots until the open interest in the agricultural commodity derivative exceeds a threshold of 20,000 lots.

(24) The number, composition, and the role of market participants in a commodity derivative can influence the nature and the size of positions that certain market participants hold in the market. For some commodity derivatives, certain market participants might hold a large position which reflects their role in the buying and selling of, and the delivery of, the commodity when they are on the opposite side of the market to the majority of other market participants providing liquidity or risk management services for the underlying commodity market.

(25) The supply, use, access to, and availability of the underlying commodity are characteristics of the underlying commodity market. Through the assessment of more granular components of these characteristics, such as perishability of the commodity and method of transportation, the competent authority can determine the flexibility of the market and adjust position limits appropriately.

(26) For some commodity derivatives there may be a large discrepancy between open interest and deliverable supply. This may occur where there is relatively little derivative trading compared with the deliverable supply, in which case open interest will be smaller in comparison with deliverable supply, or, for example, where a particular commodity derivative is widely used to hedge many different risk exposures and deliverable supply is therefore smaller in comparison with open interest. Such significant discrepancies between open interest and deliverable supply justify adjustments from the baseline applicable to the other months' limit upwards or downwards in order to avoid a disorderly market when the spot month approaches. More specifically, when open interest is significantly higher than deliverable supply, the other months' limit should be adjusted downwards to avoid a cliff-edge effect with the spot month limit that is based on deliverable supply. It would not be appropriate to adjust the spot month limit upward in such circumstances considering the risk of market cornering. When deliverable supply is significantly higher than open interest, the other months' limit should be adjusted upwards to avoid the risk of unduly constraining trading. As deliverable supply is significantly higher than open interest, the spot month limit based on deliverable supply that results from the baseline is expected to exceed the open positions held by market participants in the spot month. To ensure that the spot month limit does prevent market participant to build a dominant position and that the objective of preventing market abuse and ensuring orderly pricing, as required by Article 57(1) of Directive 2014/65/EU are effectively achieved, the spot month limit should be adjusted downwards when based on deliverable supply.

(27) With the same objective of limiting disorderly markets as the spot month approaches because of large discrepancies between calculations of deliverable supply and open interest, deliverable supply is defined to include any substitute grades or types of a commodity that can be delivered in settlement of a commodity derivative contract under the terms of that contract.

(28) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(29) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council [3].

(30) The legislation of the European Parliament and of the Council on markets in financial instruments set out in Directive 2014/65/EU, as amended by Directive (EU) 2021/338 of the

[3] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

European Parliament and of the Council[4], applies from 28 February 2022. To ensure consistency and legal certainty, this Regulation should apply from the same date:

HAS ADOPTED THIS REGULATION:

CHAPTER I
GENERAL PROVISIONS

Article 1
Subject matter

This Regulation lays down rules for the calculation of the net position held by a person in a commodity derivative, the methodology for calculating the position limits on the size of that position and the procedures for applying for exemptions to position limits.

Article 2
Definitions

For the purposes of this Regulation, the following definitions shall apply:

1. 'financial entity' means any of the following:

   (a) an investment firm authorised in accordance with Directive 2014/65/EC,

   (b) a credit institution authorised in accordance with Directive 2013/36/EU of the European Parliament and of the Council[5],

   (c) an insurance undertaking authorised in accordance with Directive 73/239/EEC[6],

   (d) an assurance undertaking authorised in accordance with Directive 2002/83/EC of the European Parliament and of the Council[7] ,

   (e) a reinsurance undertaking authorised in accordance with Directive 2005/68/EC of the European Parliament and of the Council[8] ,

[4] Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).
[5] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.
[6] First Council Directive of 24 July 1973 on the coordination of laws regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance.
7 Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.
8 Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance.

(f) a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC of the European Parliament and of the Council[9],

(g) an institution for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC of the European Parliament and of the Council[10] ,

(h) an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU of the European Parliament and of the Council[11],

(i) a CCP authorised in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council[12] ,

(j) a central securities depositary authorised in accordance with Regulation EU No 909/2014 of the European Parliament and of the Council[13].

A third-country entity is a financial entity if it would require authorisation under any of the aforementioned legislation if it were based in the Union and subject to Union law.

2. 'non-financial entity' means a legal or natural person other than a financial entity.

A third-country entity is a non-financial entity if it would fall under the definition of "non-financial entity if it were based in the Union and subject to Union law.

3. 'spot month contract' means the commodity derivative contract in relation to a particular underlying commodity whose maturity is the next to expire in accordance with the rules set by the trading venue.

4. 'other months' contract' means any commodity derivative contract that is not a spot month contract.

5. 'lot' means the unit of trading used by the trading venue on which the commodity derivative trades representing a standardised quantity of the underlying commodity.

CHAPTER II

9 Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).
10 Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision
11 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.
12 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.
13 Regulation 2014/909/EU of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories.

METHOD FOR CALCULATING THE SIZE OF THE NET POSITION OF A PERSON

Article 3
(Article 57(1) of Directive 2014/65/EU)
Aggregation and netting of positions in a commodity derivative

1. The net position of a person in a commodity derivative shall be the aggregation of:

(a) its positions held in that commodity derivative traded on a trading venue and in economically equivalent OTC contracts pursuant to Article 6;

(b) where the commodity derivative is an agricultural commodity derivative traded in significant volume in accordance with Article 5, its position held in agricultural commodity derivatives based on the same underlying and sharing the same characteristics traded in significant volumes on other trading venues and subject to the position limits set by the central competent authority;

(c) where the commodity derivative is a critical or significant contract, its positions held in critical or significant contracts based on the same underlying and sharing the same characteristics traded on other trading venues and subject to the position limits set by the central competent authority.

2. The positions held in a commodity derivative traded on a trading venue referred to in point (a) of paragraph 1 shall include the positions held in the disaggregated component of a spread contract and in other closely related commodity derivatives traded on the same trading venue that are a fraction of the value of a corresponding standard futures contract or whose pricing period is defined as the selected start date to the end of the contract month of the standard commodity derivative.

3. Where a person holds both long and short positions in any of the commodity derivatives referred to in paragraphs 1 and 2, the person shall net those positions to determine its net position for that commodity derivative.

4. Positions held by a non-financial entity in commodity derivatives that are objectively measurable as reducing risks in accordance with Article 7(1) and (3), as approved by the competent authority pursuant to Article 8(5) on the basis of Article 8(1) and (2), shall not be aggregated for the purposes of comparing the net position of that non-financial entity with the limits for that commodity derivative.

5. Positions held by a financial entity in commodity derivatives that are objectively measurable as reducing risks in accordance with Article 7(2) and (4), as approved by the competent authority pursuant to Article 8(5) on the basis of Article 8(3) and (4), shall not be aggregated for the purposes of comparing the net position of that financial entity with the limits for that commodity derivative.

6. Positions held by a person in commodity derivatives that result from transactions undertaken on trading venues to fulfil liquidity provision obligations in accordance with Article

10, as approved by the competent authority pursuant to Article 9, shall not be aggregated for the purposes of comparing the net position of that person with the limits for that commodity derivative.

7. A person shall determine separately the net position it holds in a commodity derivative for both the spot month contracts and the other months' contracts.

Article 4

(Article 57(1) of Directive 2014/65/EU)

Method of calculating positions for legal entities within a group

1. A parent undertaking shall determine its net position by aggregating the following positions in accordance with Article 3:

(a) its own net position;
(b) the net positions of each of its subsidiary undertakings.

2. By way of derogation to paragraph 1, the parent undertaking of a collective investment undertaking or, where the collective investment undertaking has appointed a management company, the parent undertaking of that management company shall not aggregate the positions in commodity derivatives in any collective investment undertaking where it does not in any way influence the investment decisions in respect of opening, holding or closing those positions.

Article 5

(Article 57(6) of Directive (EU) No 2014/65/EU)

Significant volumes

1. An agricultural commodity derivative shall be considered to be traded in a significant volume on a trading venue when the trading in the agricultural commodity derivative on that trading venue over a consecutive three month period exceeds an average daily open interest of 20,000 lots in the spot and other months' combined.

2. The trading venue where the largest volume of trading in commodity derivatives based on the same underlying and sharing the same characteristics takes place shall be the trading venue that over one year has the largest average daily open interest.

Article 6

(Article 57(1) of Directive 2014/65/EU)

OTC contracts economically equivalent to commodity derivatives traded on trading venues

An OTC derivative shall be considered economically equivalent to a commodity derivative traded on a trading venue where it has identical contractual specifications, terms and conditions, excluding different lot size specifications, delivery dates diverging by less than one calendar day and different post trade risk management arrangements.

Article 7

(Article 57(1) of Directive 2014/65/EU)

Positions qualifying as reducing risks directly related to commercial activities

1. A position held by a non-financial entity in a commodity derivative traded on trading venues or in economically equivalent OTC contracts pursuant to Article 6 qualifies as reducing risks directly relating to the commercial activities of that non-financial entity in accordance with point (a) of the second subparagraph of Article 57(1) of Directive 2014/65/EU where by itself, or in combination with other derivatives in accordance with paragraph 3 ('position in a portfolio of commodity derivatives'), the position meets one of the following criteria:

(a) it reduces the risks arising from the potential change in the value of assets, services, inputs, products, commodities or liabilities that the non-financial entity or its group owns, produces, manufactures, processes, provides, purchases, merchandises, leases, sells, or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business;

(b) it qualifies as a hedging contract pursuant to International Financial Reporting Standards (IFRS) adopted in accordance with Article 3 of Regulation (EC) No 1606/2002 of the European Parliament and Council.

2. A position held by a financial entity in an agricultural commodity derivative or in a critical or significant commodity derivative traded on trading venues or in economically equivalent OTC contracts pursuant to Article 6 qualifies as reducing risks directly related to the commercial activities of the non-financial entities of a predominantly commercial group in accordance with point (b) of the second subparagraph of Article 57(1) of Directive 2014/65/EU where by itself, or in combination with other derivatives in accordance with paragraph 3 (position in a portfolio of commodity derivatives), the position meets one of the criteria mentioned in point (a) or (b) of paragraph 1.

3. For the purposes of paragraph 1, a position qualifying as risk-reducing taken on its own or in combination with other derivatives is one for which the non-financial entity or the person holding the position on behalf of that entity:

(a) describes the following in its internal policies:

(i) the types of commodity derivatives included in the portfolios used to reduce risks directly relating to commercial activity and their eligibility criteria;
(ii) the link between the portfolio and the risks that the portfolio is mitigating;
(iii) the measures adopted to ensure that the positions concerning those commodity derivatives serve no other purpose than covering risks directly related to the commercial activities of the non-financial entity, and that any position serving a different purpose can be clearly identified;

(b) is able to provide a sufficiently disaggregated view of the portfolios in terms of class of commodity derivative, underlying commodity, time horizon and any other relevant factors.

4. For the purposes of paragraph 2, a position qualifying as risk-reducing taken on its own or in combination with other derivatives is one for which the financial entity complies with the conditions set out in point (a) and (b) of paragraph 3.

Article 8

(Article 57(1) of Directive 2014/65/EU)

Application for the exemption from position limits for positions qualifying as reducing risks directly related to commercial activities

1. A non-financial entity holding a qualifying position in an agricultural commodity derivative or in a critical or significant commodity derivative shall apply for the exemption referred to in point (a) of the second subparagraph of paragraph 1 of Article 57 of Directive 2014/65/EU to the competent authority which sets the position limit for that commodity derivative.

2. The person referred to in paragraph 1 shall submit to the competent authority the following information which demonstrates how the position reduces risks directly relating to the non-financial entity's commercial activity:

(a) a description of the nature and value of the non-financial entity's commercial activities in the commodity to which the commodity derivative for which an exemption is sought is relevant;

(b) a description of the nature and value of the non-financial entity's activities in the trading of and positions held in the relevant commodity derivatives traded on trading venues and in their economically equivalent OTC contracts;

(c) a description of the nature and size of the exposures and risks in the commodity which the non-financial entity has or expects to have as a result of its commercial activities and which are or would be mitigated by the use of commodity derivatives;

(d) an explanation of how the non-financial entity's use of commodity derivatives directly reduces its exposure and risks in its commercial activities.

3. A financial entity holding a qualifying position in an agricultural commodity derivative or in a critical or significant commodity derivative shall apply for the exemption referred to in point (b) of the second subparagraph of paragraph 1 of Article 57 of Directive 2014/65/EU) to the competent authority which sets the position limit for that commodity derivative.

4. The person referred to in paragraph 3 shall submit to the competent authority:

(a) appropriate information which demonstrates that the parent undertaking has entrusted to the financial entity the trading of commodity derivatives traded on a trading venue and their economically equivalent OTC contracts to reduce the exposure and risks in the commercial activities of the non-financial entities of the predominantly commercial group;

(b) the following information which demonstrates how the position reduces risks directly relating to the commercial activity of the non-financial entities of the same predominantly commercial group:

(i) a description of the nature and value of the non-financial entities' commercial activities in the commodity to which the commodity derivative for which an exemption is sought is relevant;
(ii) a description of the nature and size of the exposures and risks in the commodity which the non-financial entities have or expect to have as a result of the non-financial entities' commercial activities which are or would be mitigated by the use of commodity derivatives;
(iii) a description of the nature and value of the financial entity's activities in the trading of and positions held in the relevant commodity derivatives traded on trading venues and in their economically equivalent OTC contracts;
(iv) an explanation of how the financial entity's use of commodity derivatives directly reduces the exposure and risks in the non-financial entities' commercial activities.

5. The competent authority shall approve or reject the application within 21 calendar days after it has received the application and shall notify the applicant of its approval or rejection of the exemption.

6. The non-financial entity shall notify the competent authority if there is a significant change to the nature or value of the non-financial entity's commercial activities or its trading activities in commodity derivatives and the change is relevant to the information set out in point (b) of paragraph 2 and shall submit a new application for the exemption if it intends to continue to use it.

7. The financial entity shall notify the competent authority if there is a change to the information set out in point (a) of paragraph 4 or a significant change to the nature or value of the non-financial entity's commercial activities or the financial entity's trading activities in commodity derivatives and the change is relevant to the information set out in point (b)(iii) of paragraph 4 and shall submit a new application for the exemption if it intends to continue to use it.

Article 9

(Article 57(1) of Directive 2014/65/EU))

Application for the exemption from position limits for mandatory liquidity provision

1. A person holding a qualifying position in an agricultural commodity derivative or a critical or significant commodity derivative shall apply for the exemption referred to in point

(c) of the second subparagraph of the first paragraph of Article 57 of Directive 2014/65/EU to the competent authority which sets the position limit for that commodity derivative.

2. The person referred to in paragraph 1 shall submit to the competent authority the following information which demonstrates how the positions result from transactions entered into to fulfil obligations to provide liquidity in that commodity derivative on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4) of Directive 2014/65/EU.

(a) the list of commodity derivatives in which that person provides liquidity on a trading venue in accordance with point (b) and (c);

(b) the provisions under which that person is required by a regulatory authority to provide liquidity in a commodity derivative on a trading venue or the written agreement signed with the trading venue setting out the liquidity provision obligations to be met by the person on the trading venue per commodity derivative;

(c) a description of the nature and value of the person's mandatory liquidity provision activities in the relevant commodity derivative and of the expected resulting positions thereof;

(d) any position limit that may have been set in its internal policy per commodity derivative for such mandatory liquidity provision.

3. The competent authority shall approve or reject the application within 21 calendar days after it has received the application and shall notify the person of its approval or rejection of the exemption.

4. The person shall notify the competent authority if there is a significant change to the nature or value of the person's trading activities in commodity derivatives and the change is relevant to the information set out in paragraph 2 and shall submit a new application for the exemption if it intends to continue to use it.

Article 10

(Article 57(1) of Directive 2014/65/EU)

Positions qualifying as resulting from mandatory liquidity provision

1. For the purpose of paragraph 1 of Article 9, a position held by a person in an agricultural or a critical or significant commodity derivative traded on a trading venue qualifies as resulting from transactions undertaken to fulfil mandatory liquidity provision obligations where the position directly results from transactions in a commodity derivative undertaken in compliance with obligations required by regulatory authorities in accordance with Union law or with national laws, regulations and administrative provisions, or the written agreement entered into with the trading venue and identified as such by the trading venue.

2. For the purpose of paragraph 1 of Article 9, a qualifying position resulting from mandatory liquidity is one for which the person holding the position describes the following in its internal policies:

(a) the types of commodity derivatives included in the portfolios in which mandatory liquidity provision is provided;

(b) the link between the position held in a commodity derivative and the transactions undertaken to fulfil mandatory liquidity provisions in that derivative in accordance with paragraph 1;

(c) the measures adopted to ensure that any position not resulting from transactions undertaken to fulfil mandatory liquidity provision or serving a different purpose can be clearly identified.

CHAPTER III
METHODOLOGY FOR COMPETENT AUTHORITIES TO CALCULATE POSITION LIMITS

SECTION 1
Determination of baseline figures

Article 11

(Article 57(3) of Directive 2014/65/EU)

Methodology for determining the baseline figure for spot month limits

1. Competent authorities shall determine a baseline figure for the spot month position limit in an agricultural commodity derivative or a critical or significant commodity derivative by calculating 25% of the deliverable supply for that commodity derivative. Where the deliverable supply is substantially higher than the total open interest, competent authorities shall determine the baseline figure for the spot month limit by calculating 25% of the open interest in that commodity derivative.

2. The baseline figure shall be specified in lots.

3. Where a competent authority establishes different position limits for different times within the spot month period, those position limits shall decrease on an incremental basis towards the maturity of the commodity derivative and shall take into account the position management arrangements of the trading venue.

4. By way of derogation to paragraph 1, competent authorities shall determine the baseline figure for the spot month position limit for any commodity derivative with an underlying that qualifies as food intended for human consumption with a total combined open interest in spot and other months' contracts exceeding 50,000 lots over a consecutive three-month period by calculating 20% of the deliverable supply in that commodity derivative. Where deliverable supply is substantially higher than total open interest, competent authorities shall determine the baseline figure for the spot month limit for such a commodity derivative by calculating 20% of the open interest in that commodity derivative.

Article 12

(Article 57(3) of Directive 2014/65/EU)

Deliverable supply

1. Competent authorities shall calculate the deliverable supply for an agricultural commodity derivative or a critical or significant commodity derivative by identifying the quantity of the underlying commodity that can be used to fulfil the delivery requirements of the commodity derivative.

2. Competent authorities shall determine the deliverable supply for a commodity derivative referred to in paragraph 1 by reference to the average monthly amount of the underlying commodity available for delivery based on the most recent available data covering:

(a) a one-year period immediately preceding the determination for a critical or significant commodity derivative;

(b) a one to five-year period immediately preceding the determination for an agricultural commodity derivative.

3. In order to identify the quantity of the underlying commodity meeting the conditions of paragraph 1, competent authorities shall take into account the following criteria:

(a) the storage arrangements for the underlying commodity;

(b) the factors that may affect the supply of the underlying commodity.

Article 13

(Article 57(3) of Directive 2014/65/EU)

Methodology for determining the baseline figure for other months' limits

1. Competent authorities shall determine a baseline figure for the other months' position limit in an agricultural commodity derivative or a critical or significant commodity derivative by calculating 25% of the open interest in that commodity derivative.

2. The baseline shall be specified in lots.

Article 14

(Article 57(3) of Directive 2014/65/EU)

Open interest

1. Competent authorities shall calculate the net open interest in an agricultural commodity derivative or a critical or significant commodity derivative by aggregating the number of lots of that commodity derivative that are outstanding on trading venues and reported positions in economically equivalent OTC contracts over a representative period of time. Competent

authorities shall calculate the net open interest in that commodity derivative based on position reporting data.

2. By way of derogation to paragraph 1, when trading in a commodity derivative is transferred from one EU or third country trading venue to an EU trading venue following a merger, business transfer or other corporate event or from one or more existing commodity derivatives to a commodity derivative newly admitted to trading on the same trading venue or in other similar circumstances, the competent authority shall calculate the open interest in that commodity derivative by taking into account the open interest on the former venue or in the former commodity derivatives. After a six-month period, the competent authority shall calculate the open interest in accordance with paragraph 1.

Article 15

(Article 57(3) of Directive (EU) No 2014/65/EU)

Methodology for determining the baseline figure in respect of certain commodity derivatives

1. By way of derogation to Article 11, competent authorities shall determine the baseline figure for the spot month position limits for critical or significant cash settled spot month commodity derivatives which are under C(10) of Annex I to Directive 2014/65/EU and which have no measurable deliverable supply of their underlying commodities by calculating 25% of the open interest in those commodity derivatives.

2. By way of derogation to Articles 11 and 13, where a commodity derivative provides that the underlying is delivered constantly over a specified period of time, the baseline figures calculated pursuant to Articles 11 and 13 shall apply to related commodity derivatives for the same underlying to the extent that their delivery periods overlap. The baseline figure shall be specified in units of the underlying.

SECTION II
Factors relevant for the calculation of position limits

Article 16

(Article 57(3) of Directive 2014/65/EU)

Assessment of factors

Competent authorities shall set the spot month and other months' position limits for an agricultural commodity derivative or a critical or significant commodity derivative by taking the baseline figure determined in accordance with Articles 11, 13 and 15 and adjusting it according to the potential impact of the factors referred to in Articles 18 to 21 on the integrity of the market for that derivative and for its underlying commodity to a limit:

(a) between 5% and 35%; or

(b) between 2.5% and 35%, for any derivative contract with an underlying that qualifies as food intended for human consumption with a total combined open interest in spot and other months' contracts exceeding 50,000 lots over a consecutive three-month period.

Article 17

(Article 57(3)(e) of Directive 2014/65/EU)

New and less liquid agricultural commodity derivatives

1. By way of derogation to Article 16, for agricultural commodity derivatives traded on a trading venue with a total combined open interest in spot and other months' contracts not exceeding 20,000 lots over a consecutive three-month period, competent authorities shall set the spot month and other months' limit of positions held in those commodity derivatives at 10,000 lots.

2. The trading venue shall notify the competent authority when the total open interest of any commodity derivative referred to in paragraph 1 reaches 20,000 lots over a consecutive three-month period. Competent authorities shall review the position limit upon receiving such notifications.

Article 18

(Article 57(3)(a) of Directive 2014/65/EU)

Deliverable supply in the underlying commodity

Where the deliverable supply in the underlying commodity can be restricted or controlled or if the level of deliverable supply is low relative to the amount required for orderly settlement competent authorities shall adjust the spot month position limit downwards. Competent authorities shall assess the extent to which this deliverable supply is used also as the deliverable supply for other commodity derivatives.

Article 19

(Article 57(3)(b) of Directive 2014/65/EU)

The overall open interest

1. Where there is a large volume of overall open interest, competent authorities shall adjust the position limit downwards.

2. Where the open interest is significantly higher than the deliverable supply, competent authorities shall adjust the other months' position limit downwards.

3. Where the open interest is significantly lower than the deliverable supply, competent authorities shall adjust the other months' position limit upwards and, except where the baseline figure for the spot month limit is based on the open interest, shall adjust the spot month position limit downwards.

Article 20
(Article 57(3)(c) of Directive 2014/65/EU)
The number of market participants

1. Where the daily average number of market participants holding a position in the commodity derivative over a period of one year is high the competent authority shall adjust the position limit downwards.

2. By way of derogation to Article 16, competent authorities shall adjust the position limit upwards and set the spot month and other months' position limit between 5% and 50% of the reference amount if:

(a) the average number of market participants holding a position in the commodity derivative in the period leading up to the setting of the position limit is lower than 10; or

(b) where the commodity derivative is an agricultural commodity derivative with a net open interest below 300,000 lots, the number of investment firms acting as a market maker in accordance with Article 4(1)(7) of Directive 2014/65/EU in the commodity derivative at the time the position limit is set or reviewed is lower than 3.

For the purposes of the first subparagraph, competent authorities may establish different position limits for different times within the spot month period, the other months' period or for both periods.

Article 21
(Article 57(3)(d) of Directive 2014/65/EU)
Characteristics of the underlying commodity market

1. Competent authorities shall take into account how the characteristics of the underlying commodity market impact on the functioning and trading of the commodity derivative and on the size of the positions held by market participants, including having regard to the ease and speed of access which market participants have to the underlying commodity.

2. The assessment of the underlying commodity market referred to in paragraph 1 shall take into account:

(a) whether there are restrictions on the supply of the commodity, including the perishability of the deliverable commodity;

(b) the method of transportation and delivery of the physical commodity, including the following:

(i) whether the commodity can be delivered to specified delivery points only;

(ii) the capacity constraints of specified delivery points.

(c) the structure, organisation and the operation of the market, including the seasonality present in extractive and agricultural commodity markets whereby physical supply fluctuates over the calendar year;

(d) the composition and role of market participants in the underlying commodity market, including consideration of the number of market participants which provide specific services that enable the functioning of the underlying commodity market such as risk management, delivery, storage, or settlement services;

(e) macroeconomic or other related factors that influence the operation of the underlying commodity market including the delivery, storage, and settlement of the commodity;

(f) the characteristics, physical properties and lifecycles of the underlying commodity.

Article 23
Repeal

Commission Delegated Regulation (EU) 2017/591 is repealed. References to the repealed Regulation shall be construed as references to this Regulation.

Article 23
Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 28 February 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission

The President

[On behalf of the President]

[Position]

6.3.2 Amendment to ITS 4

COMMISSION IMPLEMENTING REGULATION (EU) .../...

of [ ]

amending Implementing Regulation (EU) 2017/1093 of 20 June 2017 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU[1], and in particular Article 58(5), third subparagraph, thereof,

Whereas:

(1) Directive (EU) 2021/338 of the European Parliament and of the Counci[2] provides for amendments to Directive 2014/65/EU as regards, in particular, position reporting under Article 58 of Directive 2014/65/EU.

(2) According to Article 58 of Directive 2014/65/EU, as amended by Directive (EU) 2021/338, position reporting does not apply any longer to securities referred to in point (c) of point (44) of Article 4(1) that relate to a commodity or an underlying as referred to in Section C.10 of Annex I of Directive 2014/65/EU. Therefore, references to those derivatives in Commission Implementing Regulation (EU) 2017/1093 should be deleted.

(3) This Regulation is based on the draft implementing technical standards submitted to the Commission by the European Securities and Markets Authority.

(4) ESMA has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group

[1] OJ L 173, 12.6.2014, p. 349
[2] Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council.[3]

(5) The legislation of the European Parliament and of the Council on markets in financial instruments set out in Directive 2014/65/EU, as amended by Directive (EU) 2021/338 of the European Parliament and of the Council[4], applies from 28 February 2022. To ensure consistency and legal certainty, this Regulation should apply from the same date;

HAS ADOPTED THIS REGULATION:

Article 1

Table 2 of Annex II to Implementing Regulation (EU) 2017/1093 is replaced by the text in ~~this~~ the Annex to this Regulation.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 28 February 2022

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission

The President

[On behalf of the President]

[Position]

[3] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).
[4] Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

ANNEX

"Table 2

Table of fields to be reported for all positions across all maturities of all contracts for the purposes of Article 2

FIELD	DETAILS TO BE REPORTED	FORMAT FOR REPORTING
Date and time of report submission	Field to be populated with the date and time on which the report is submitted.	{DATE_TIME_FORMAT}
Report reference number	Field to be populated with the unique identifier given by the submitter unambiguously identifying the report to both submitter and receiving competent authority.	{ALPHANUM-52}
Date of the trading day of the reported position	Field to be populated with the date on which the reported position is held at the close of the trading day on the relevant trading venue.	{DATEFORMAT}
Report status	Indication as to whether the report is new or a previously submitted report is cancelled or amended. Where a previously submitted report is cancelled or amended, a report which contains all the details of the original report and using the original Report Reference Number should be sent and the 'Report status' should be flagged as 'CANC'. For amendments a new report that contains all the details of the original report and using the original Report Reference Number with all necessary details amended should be sent and the 'Report status' should be flagged as 'AMND'.	'NEWT' — New 'CANC' —Cancellation 'AMND' — Amendment
Reporting entity ID	The identifier of the reporting investment firm. Field to be populated with the Legal Entity Identifier code (LEI) for legal entities or {NATIONAL_ID} for natural persons not having an LEI.	{LEI} or {NATIONAL_ID} — Natural persons

Position holder ID	Field to be populated with the Legal Entity Identifier code (LEI) for legal entities or {NATIONAL_ID} for natural persons not having an LEI. (Note: if the position is held as a proprietary position of the reporting firm, this field shall be identical to field 'Reporting entity ID').	{LEI} or {NATIONAL_ID} — Natural persons
Email address of position holder	Email address for notifications of position-related matters.	{ALPHANUM-256}
Ultimate parent entity ID	Field to be populated with the Legal Entity Identifier code (LEI) for legal entities or {NATIONAL_ID} for natural persons not having an LEI. Note: this field may be identical to field 'Reporting entity ID' or 'Position holder ID' if the ultimate parent entity holds its own positions, or makes its own reports.	{LEI} or {NATIONAL_ID} — Natural persons
Email address of ultimate parent entity	Email address for correspondence in relation to aggregated positions.	{ALPHANUM-256}
Parent of collective investment scheme status	Field to report on whether the position holder is a collective investment undertaking that makes investment decisions independently from its parent as set out by Article 4(2) of the Commission Delegated Regulation (EU) [please insert reference to RTS 21a].	'TRUE' — the position holder is a collective investment undertaking that makes independent investment decisions 'FALSE' — the position holder is not a collective investment undertaking that makes independent investment decisions
Identification code of con- tract traded on trading venues	Identifier of the commodity derivative, emission allowance or derivative thereof. See field 'Trading venue identifier' for treatment of OTC contracts that are eco- nomically equivalent to contracts that are traded on trading venues.	{ISIN}
Venue product code	Field to be populated with a unique and unambiguous alphanumeric identifier utilised by the trading venue grouping together contracts with different maturities and strike prices in the same product.	{ALPHANUM-12}

Trading venue identifier	Field to be populated with the ISO 10383 segment MIC for positions reported in respect of on-venue contracts. Where the segment MIC does not exist, use the operating MIC.	{MIC}
	Use MIC code 'XXXX' for off-venue positions in economically equivalent OTC contracts. Use MIC code 'XOFF' for listed derivatives or emission allowances traded off-exchange.	
Position type	Field to report whether the position is in either futures, options, emission allowances or derivatives thereof or any other contract type.	'OPTN' — Options, including separately tradable options on FUTR or OTHR types, excluding products where the optionality is only an embedded element 'FUTR' — Futures 'EMIS' — Emission allowances and derivatives thereof 'OTHR' — any other contract type
Position maturity	Indication of whether the maturity of the contract comprising the reported position relates to the spot month or to all other months. Note: separate reports are required for spot months and all other months.	'SPOT' — spot month, including all positions in position types EMIS 'OTHR' — all other months

Position quantity	Field to be populated with the net position quantity held in the commodity derivative, emission allowances or derivatives thereof expressed either in lots, when the position limits are expressed in lots, or units of the underlying. This field should be populated with a positive number for long positions and a negative number for short positions.	{DECIMAL-15/2}
Notation of the position quantity	This field shall be populated with the units used to report the position quantity.	'LOTS' — if the position quantity is ex- pressed in lots {ALPHANUM-25} — a description of the units used if the position quantity is ex- pressed in units of the underlying 'UNIT' — if the position quantity is ex- pressed in units
Delta equivalent position quantity	If the Position Type is 'OPTN' or an option on 'EMIS', then this field shall contain the delta-equivalent quantity of the position reported in the 'Position Quantity' field. This field should be populated with a positive number for long calls and short puts and a negative number for long puts and short calls.	{DECIMAL-15/2}
Indicator of whether the position is risk reducing in relation to commercial activity	Field to report whether the position is risk reducing in accordance with Article 7 of Delegated Regulation (EU) [please insert reference to RTS 21a].	'TRUE' — the position is risk reducing 'FALSE' — the position is not risk reducing

”

6.3.3 Draft RTS on position management controls

COMMISSION DELEGATED REGULATION (EU) .../...

of [ ]

supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of position management controls by trading venues

(**Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU[1], and in particular the fourth subparagraph of Article 57(8) thereof,

Whereas:

(1) In order to ensure a more consistent approach to applying position management controls to commodity derivatives in the Union, the content of the position management controls that trading venues should have in place should be specified, taking into account the characteristics of the trading venues concerned. Those position management controls should prevent regulatory arbitrage and promote consistency while providing trading venues with sufficient flexibility to take into account the differences among various commodity derivatives markets and the markets in the underlying commodities.

(2) It is important that trading venues which trade commodity derivatives have in place and apply effective position management controls to prevent and address disorderly trading, support orderly pricing and settlement conditions and ensure the efficiency of markets.

(3) Effective position management controls should be based on the ongoing monitoring by the trading venue of positions held in a commodity derivative by end position holders and parent undertakings.

(4) In order to ensure that the price discovery process is not unduly influenced by the existence of a position and to identify the build-up of concentrations of positions that could result in price distortion, market manipulation or other abusive trading practices, trading venues should be aware of large positions held by end position holders and parent undertakings in

[1] OJ L 173, 12.6.2014, p. 349

physically settled commodity derivatives and the reasons for holding these positions considering the specific risks to orderly markets that may arise from large positions in such commodity derivatives. As the actual supply of the underlying physical commodity is restricted to a finite supply, physically settled commodity derivatives are more susceptible to disorderly trading practices such as market squeezes or market cornering where counterparties would make use of a dominant position to secure the price of a commodity derivative or of the underlying commodity at an artificial level. Thus, large positions should be identified in commodity derivatives that are physically settled by design as well as in commodity derivatives that can be physically settled at the option of the buyer or the seller.

(5) The determination of what constitutes a large position should be made by trading venues taking into account the size and composition of the market in question. For that purpose, trading venues should establish qualitative or quantitative criteria that are used to identify such large exposures and should have procedures in place to identify all positions held by any person which exceed such pre-determined accountability levels. Where such levels are exceeded, the trading venue should seek to understand the rationale for the build-up of that large position. To that end, the trading venue should assess whether it needs to request additional information to the person holding that large position considering in particular how frequently the positions held by that person exceed the accountability levels and the extent to which the accountability levels are exceeded. Based on the information already available or gathered through the request for information, the trading venue should take appropriate actions where necessary, including in accordance with Article 57(8)(c) and (d) of Directive 2014/65/EU[2].

(6) It is important that the accountability levels set remain adequate and effective to serve their intended purpose and that the competent authority is informed of the methodology used for setting and updating those accountability levels.

(7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(8) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council[3].

(9) The legislation of the European Parliament and of the Council on markets in financial instruments set out in Directive 2014/65/EU, as amended by Directive (EU) 2021/338 of the

[2] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).
[3] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

European Parliament and of the Council[4], applies from 28 February 2022. To ensure consistency and legal certainty, this Regulation should apply from the same date,

HAS ADOPTED THIS REGULATION:

Article 1
General monitoring obligations

Trading venues shall have arrangements in place for the ongoing monitoring of positions held by end position holders and parent undertakings in each commodity derivative traded on their trading venues.

Article 2
Accountability levels

1. As part of their position management controls, trading venues offering trading in commodity derivatives shall set accountability levels in the spot month as defined in Article 2(3) of Commission Delegated Regulation [RTS 21a] and in the other months as defined in Article 2(4) of Commission Delegated Regulation [RTS 21a] for commodity derivatives made available for trading that are physically settled or can be physically settled.

2. For the purpose of paragraph 1, an accountability level is the level of the net position held in a commodity derivative by an end position holder or parent undertaking that, when exceeded, may trigger a request for additional information by the trading venue in accordance with paragraph 3.

3. When a net position held by an end position holder or a parent undertaking in a commodity derivative referred to in paragraph 1 exceeds the accountability level set for the spot month or for the other months in accordance with paragraph 1, the trading venue shall, where deemed appropriate, exercise the power set out in point (b) of the first subparagraph of Article 57(8) of Directive 2014/65/EU to obtain any additional information as to the nature and purpose of the position held in that commodity derivative.

When assessing whether it is appropriate to obtain additional information, the trading venue shall notably take into account the frequency by which the accountability levels are exceeded by the same end position holder or parent undertaking, the magnitude of the excess and other relevant information already available.

4. The trading venue shall assess available information, including any additional information gathered in accordance with paragraph 3 and, where appropriate, exercise the

[4] Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

powers set out in points (c) and (d) of the first subparagraphs Article 57(8) of Directive 2014/65/EU.

Article 3

Review and reporting of accountability levels

1. Trading venues shall, on a regular basis, evaluate the adequacy and effectiveness of the accountability levels established pursuant to paragraph 1 of Article 2.

2. A trading venue shall communicate to its competent authority the methodology used for setting the accountability levels referred to in paragraph 1 of Article 2.

3. The trading venue shall inform its competent authority on an annual basis of the number of instances where accountability levels have been exceeded, of any requests for additional information made in accordance with paragraph 3 of Article 2 and of any actions taken in accordance with paragraph 4 of Article 2.

Article 4

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 28 February 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission

The President

[On behalf of the President]

[Position]