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ESMA’s response to the EC commodity derivatives review

1 Introduction

1.1 Background

1. Article 90(5) of MiFID II mandates the Commission, after consulting ESMA, the EBA and ACER, to submit reports to the European Parliament and to the Council containing a comprehensive assessment of the markets for commodity derivatives, for emission allowances and for derivatives of emission allowances.

2. On 26 February 2025, the Commission published a targeted consultation document on the functioning of commodity derivative markets. The consultation document also covers certain aspects relating to spot energy markets as a follow-up to some of the proposals made in the Draghi report for gas spot and derivative markets. To comply with the legal requirement to consult ESMA in the process of drawing up the Article 90(5) review report, the Commission requested ESMA to provide its input on the matter by responding to the consultation.

1.2 ESMA’s approach

3. ESMA has taken the approach of addressing the issues identified in the consultation document per “topic area”, as shown below. ESMA’s response focusses on the areas where it considers that its contribution is most valuable. The sections in the text mirror the sections in the consultation document, although some sub-sections may have been created to facilitate reading.

2 Data aspects

2.1 Data harmonisation

4. The consultation document seeks feedback on the level of overlap, harmonisation, standardisation of reporting under REMIT, MiFIR and EMIR. In this respect, ESMA would like to recall the findings of the European Commission’s “Fitness Check of EU

Supervisory Reporting Requirements”[1] which identified inefficiencies, lack of standardisation and duplications between EMIR, MiFIR and REMIT reporting obligations.

5. Indeed, these regimes were intrinsically developed to serve different needs and their implementation followed different timelines. So far, there has been no holistic approach to designing the overarching Level 1 legal frameworks of these reporting regimes to ensure cost-effective submission of the data by reporting entities and subsequent efficient access by authorities to serve all their needs. Siloed developments of sectorial legislation have led to inefficiencies, complexity of reporting and high level of compliance burden, in particular due to redundancies and overlapping scopes. The burden stemming from these reporting obligations has been highlighted multiple times by market participants.

6. Concerning the duplications, the Commission assessment highlighted that a given contract may be reported under all three frameworks, leading to increased complexity and compliance burden for market participants. This is due to the inconsistent definitions of the scope of reporting under the three frameworks, e.g. definition of “OTC derivatives” under MiFIR/EMIR and the definition of “commodity derivative” under MiFIR and “wholesale energy product” under REMIT. As the inconsistencies create uncertainty whether certain contracts are to be reported under REMIT or under EU financial market legislation, market participants often choose to report under all three frameworks even if they are not obliged to do so, which creates inefficiencies.

7. Concerning the lack of standardisation, variations in the rules on data standards to be used as well as reporting formats also implies costs. Further consistency in legal requirements on data standards and formats across MiFIR, EMIR and REMIT is needed. In particular, it would be beneficial if the respective EU sectoral legislations explicitly referred in a consistent manner to existing international data standards such as Legal Entity Identifier (LEI), Classification of Financial Instruments (CFI), International Securities Identification Number (ISIN), Unique Transaction Identifier (UTI), Unique Product Identifier (UPI) and International Securities Identification Number (ISIN) and the methodology to develop financial messages (ISO 20022). These standards are instrumental for both the regulators and the industry to move away from a regime-specific and siloed approach towards a more holistic approach to data, the end goal being to allow entities to report the same information in the same way, no matter which regulation they need to comply with. Such an approach can contribute to significantly reducing the compliance burden that market players face. The need to adhere to these international data standards is even stronger in the context of derivative markets, including commodity derivatives, due to the EU G20 commitment to ensure global aggregation of derivatives data, which resulted in the

[1] https://commission.europa.eu/document/download/b211935b-f732-40fe-a4fd-9eefdfbc9a27_en?filename=swd_2019_0402_en.pdf

CPMI-IOSCO guidance on the harmonisation of the Unique Trade Identifier (UTI), the Unique Product Identifier (UPI) and the OTC derivatives critical data elements (CDE)[2].

8. For example, this is the approach taken for MiFIR transactions under Article 26 (6), which explicitly obliges the reporting entities to use the LEI for identifying buyers and sellers that are legal entities. Other provisions under several EU regulations (e.g. MiFID II/MiFIR, EMIR, SFTR, CSDR and CRA) also envisage the use of LEIs for different types of entities (e.g. trading venues, investment firms, CCPs, CSDs, CRAs, rated entities and issuers, settlement internalisers, counterparties involved in financial transactions among the others). This is not the case for REMIT reporting, where LEI is requested alongside several alternative identification codes, e.g. BIC. The use of LEIs in EMIR and MiFIR allowed for synergies among different supervisory datasets and facilitated data sharing and reuse among authorities as well as compliance efforts for market stakeholders. For example, the LEI was essential for the development of the ESMA Carbon Markets Report as it ensured that the entities identified in the various data sources used for the report could be accurately classified even if the available data on the EU carbon markets was rather fragmented. This led to the adoption of the LEI standard beyond financial reporting requirements under ESMA remit, i.e. the LEI is now mandated in the Union Registry Regulation for emission allowances[3].

9. For all the above reasons, ESMA considers that the findings of the Fitness Check on supervisory data reporting are still very much relevant in the context of MiFIR, EMIR and REMIT obligations and thus agrees that there is a need for streamlining these frameworks.

2.2 Integrated reporting and data sharing

10. The consultation document seeks feedback on the need for centralisation of data collection and data sharing mechanisms. In this respect, ESMA is of the view that further integration and consolidation of EMIR/MiFIR and REMIT transaction data would increase efficiencies and bring benefits to market stakeholders due to the reduction of reporting flows and duplicative data processes arising from the inconsistencies across sectorial legislations highlighted in the previous section.

11. Common data standards and formats across sectoral legislations is the first step to achieve burden reduction but it should also be considered that for some datasets, such as MiFIR and EMIR transaction data, this step was already achieved. For these

[2] Harmonisation of critical OTC derivatives data elements (other than UTI and UPI) - Technical guidance.

[3] See Annex III of Commission Delegated Regulation (EU) 2019/1122 of 12 March 2019 supplementing Directive 2003/87/EC of the European Parliament and of the Council as regards the functioning of the Union Registry

datasets, ESMA has already built the common infrastructures and data processes necessary to facilitate the sharing and use of data by multiple authorities.

12. E.g., under EMIR, the NCAs agreed to delegate some tasks to ESMA to ensure that the process of accessing derivative data from trade repositories is streamlined through one common system. Under MiFIR, transaction data is reported in the same format and with the same logic to all NCAs and following the attribution of DRSP supervision to ESMA it is also transmitted by NCAs to ESMA. Following the access to this dataset by ESMA, new use cases have been identified, e.g. the MiFIR transparency calculations, which will allow to decommission two reporting systems and will reduce reporting burden by eliminating the relevant reporting regimes[4].

13. However, there remain significant inefficiencies in the reporting processes envisaged by these regulations. Data on derivatives transactions (including energy derivatives) is reported to trade repositories under EMIR, then distributed to ESMA and NCAs, via common queries. Under MiFIR transactions on financial instruments (including energy derivatives) are transmitted by market participants to NCAs and then forwarded to ESMA.

2.3 Transparency and transaction reporting

14. The consultation document seeks feedback on the potential extension of pre-trade and post-trade transparency requirements to commodity derivatives traded on Multilateral Trading Facilities (MTFs) and Organised Trading Facilities (OTFs). ESMA notes that there is currently hardly any trading activity taking place in commodity derivatives on MTFs and OTFs. As shown in Table 1 below, 99.8% of commodity derivatives volumes, and 99.9% of trades, are executed on regulated markets[5]. As shown in Table 2, trading activity on MTFs was only visible on paper derivatives. Regarding OTFs, trading activity was observed on energy derivatives but to a very limited extent, with on average 50 trades per day spread across 4 OTFs. This compares to 63,000 trades per day on regulated markets.

15. As a result, the effects of applying pre- and post-trade transparency to commodity derivatives traded on MTFs and OTFs would appear fairly limited as long as physically settled energy derivatives traded on OTFs (”C(6) carve out instruments”) remain excluded from the scope of MiFIR transparency requirements. The introduction of a

[4] ESMA contributes to simplification and burden reduction.

[5] The analysis relies on ESMA transparency data from the Financial Instruments Transparency System (FITRS). FITRS hardly includes any OTC trades because, prior to the MiFIR review, OTC transactions were only reported on instruments “traded on a trading venue” (ToTV), which was a very limited scope. With the MiFIR review, the ToTV concept was deleted for derivatives and only exchange-traded commodity derivatives (i.e. traded on a regulated market) remain subject to transparency. OTC transactions in commodity derivatives are reportable under EMIR.

trading obligation on EU regulated markets and MTFs would also lead to reconsider this assessment (see response on Obligation to trade in the EU in section 8.1).

	Volume (%)	Trade Count (%)
Regulated Markets	99.8%	99.9%
OTFs	0.2%	0.1%
MTF	0.0%	0.0%
Grand Total	**100.00%**	**100.00%**

Table 1: Volumes and trade count on commodity derivatives per type of trading venue (source: ESMA transparency data (FITRS), 2024)

	Volume (%)	Trade Count (%)	Number of MICs	Average Daily Number of Trade
Agricultural	**11.8%**	**30.0%**	**4**	**27,087**
Regulated Marke	100.0%	100.0%	4	27,087
Energy	**87.7%**	**69.7%**	**13**	**62,960**
Regulated Marke	99.7%	99.9%	9	62,910
OTFs	0.3%	0.1%	4	50
Freight	**0.5%**	**0.3%**	**1**	**281**
Regulated Marke	100.0%	100.0%	1	281
Paper	**0.0%**	**0.0%**	**2**	**0**
Regulated Marke	69.6%	85.7%	1	0
MTF	30.4%	14.3%	1	0
Other	**0.0%**	**0.0%**	**2**	**1**
Regulated Marke	100.0%	94.4%	1	1
OTFs	0.0%	5.6%	1	0
Grand Total	100.0%	100.0%	22	90,329

Table 2: Volumes, trade count, number of venues and average daily number of trades on commodity derivatives, per type of execution venue and per asset class (source: ESMA transparency data (FITRS), 2024)

16. As regards a possible consolidated tape for exchange-traded commodity derivatives, ESMA notes that trading activity in commodity derivatives is already relatively consolidated, with a few regulated markets concentrating most of the volumes. There are eleven regulated markets offering commodity and emission allowance derivatives in the EU but the largest three cumulate more than 99% of the trading volumes[6]. These regulated markets tend to be specialised by asset class: agricultural derivatives are mainly traded on Euronext Matif (99% of the volumes), emission allowance derivatives on ICE Endex (96% of the volume) and energy derivatives on ICE Endex and EEX (99% of the volume across the two venues). Other smaller regulated markets are specialised in niche products and offer contracts which are generally not traded elsewhere.

[6] Source: ESMA transparency data (FITRS) in 2023

17. As a result, it could be argued that a tape consolidating the transparency data already published by those regulated markets would only bring marginal benefit. Should such initiative nonetheless be contemplated, ESMA is of the view that it would appear beneficial for the tape to cover only a limited scope of instruments. This could be commodity derivatives with a wide base of market participants and which are available for trading on several regulated markets, i.e. energy derivatives.

18. Finally, the consultation document seeks feedback on the level of access by ESMA to transaction data reported to NCAs from trading venues and market participants. In this respect, ESMA recalls that, following the ESA review, Article 26 MiFIR was revised to enable ESMA to receive "all" transaction data reported to the NCAs under this article. So, from a legal perspective, ESMA has sufficient access to such data. However, as elaborated in in section 2.2, multiple inefficiencies related to reporting processes and infrastructures still exist and a comprehensive review across sectoral legislations is warranted.

2.4 General aspects on reporting

19. In addition to specific considerations related to commodity derivatives, there are also broader aspects concerning reporting under MiFID/MiFIR/EMIR and REMIT that should be addressed.

20. With reference to the duplications mentioned in paragraph 2.1, it is worth noting that these have further increased following the recent MiFIR review, which exacerbated overlaps between EMIR and MiFIR transaction reporting due to the inclusion in the MiFIR reporting of certain pure OTC derivatives that are traded outside SIs, MTFs and OTFs. For this reason, ESMA believes that an overall review of what is the most efficient and effective way to report derivatives is needed, ensuring that any derivative transaction is only reported once, and subsequently shared among all authorities that require access to this data to perform their tasks.

21. As also highlighted in the Fitness Check on supervisory data reporting, a sectoral approach limited exclusively to energy markets should be avoided. Instead, the scope of the above-mentioned frameworks should be streamlined in a comprehensive manner to cover all derivative contracts. This approach will avoid the unintended consequence of creating new inconsistencies between the reporting of energy and other derivatives. Such a holistic approach beyond the scope of energy derivatives reporting should be accompanied by a proper cost-benefit analysis.

22. The same applies to any consideration concerning integrated reporting and data sharing. Also in this case a sectoral approach limited exclusively to energy markets should be avoided; the reporting flow under the above-mentioned frameworks should be comprehensively streamlined to cover all derivative contracts with the ultimate goal

of simplification and reduce burden for reporting entities following a sound cost-benefit analysis.

3 Ancillary activity exemption

3.1 Article 2(1)(d) of MiFID II

23. As part of the exemptions available under Article 2 of MiFID II for persons dealing on own account in financial instruments, the differentiation between Article 2(1)(d) and (j) reflects different criteria being applicable to different asset classes, with Article 2(1)(j) focussing on commodity derivatives and emission allowances.

24. ESMA fails to understand the benefit that would result from completely revamping Article 2(1)(d) to have a single provision being applicable to all asset classes, whilst adding significant complexity to the criteria currently applicable in this provision to accommodate the specific activities of commodity firms trading commodity derivatives. It is also unclear if and how the proposed changes to Article 2(1)(d) would impact Article 2(1)(j). ESMA therefore supports keeping the existing differentiation of the MiFID II authorisation exemptions per asset classes.

3.2 Article 2(1)(j) of MiFID II

25. Under Article 2(1)(j) of MiFID II, non-financial entities can trade and provide investment services in commodity derivatives without being authorised as investment firms. The ancillary activity exemption is based on the principle that as far as the trading activity of a non-financial entity remains ancillary to the main commercial business of the entity, the entity should not be subject to the same requirements as an investment firm. To the best of ESMA's knowledge, all European commodity firms seeking to apply the ancillary activity exemption have passed at least one of the alternative ancillary activity tests[7] set out in Commission Delegated Regulation (EU) 2021/1833[8] and have been able to benefit from this exemption.

26. ESMA remains of the view that providing for fair competition between market participants with significant trading and investment activities is a sound policy objective, based on the same activity, same risks, same rules principle. In this regard, the relevance of a test which no entity fails could be questioned.

[7] The De minimis test, the Trading test and the Capital Employed test.

[8] Commission Delegated Regulation (EU) 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.

27. At the same time, ESMA notes the geopolitical competitive environment in which EU commodity firms operate, notably as the ancillary activity tests do not apply to entities based in third countries, unless a location requirement would be introduced (see response on that topic in section 6.1). ESMA also understands the critical role played by energy firms to support the timely clean energy transition and the competitiveness of European Industry under the EU Clean Industrial Deal and Affordable Energy Action Plan. ESMA would also see merit in some regulatory stability regarding the ancillary activity tests, noting that the de minimis test replaced the Overall Market threshold test and that the three tests became alternatives just four years ago, under the Capital Market Recovery Package.

28. Due to the short consultation period, ESMA was not able to conduct any impact assessment for potential alternative criteria for the ancillary activity test and therefore abstains from making a proposal in this area. ESMA however understands that most commodity firms assess eligibility for the ancillary activity exemption based on the De-minimis threshold test, with a more limited number of firms continuing using the Trading test as they did before the CMRP. To simplify the overall exercise, ESMA therefore considers that deleting the complex Capital Employed test may be helpful given the goal of overall burden reduction and simplification.

4 Position management and position reporting

4.1 Position reporting

Position reporting by market participants

29. Under Article 58(3) of MiFID II, members or participants of trading venues are required to report to the venue at least daily their own positions held through contracts traded on that venue, as well as those of their clients and the clients of those clients until the end client is reached. That reporting enables trading venues to subsequently report those positions to NCAs under Article 58(1)(b).

30. Question 31 asks whether trading venues should rely on clearing member data, rather than on market participants data (as is currently the case), to establish the daily position reports they are required to report to NCAs.

31. ESMA has not been made aware of concerns raised by market participants, trading venues or NCAs regarding the accuracy or completeness of such dataset. NCAs are relying on this dataset not only for the monitoring of the compliance with the position limit regime, but also to calculate open interests for the purpose of setting position limits, in accordance with a common methodology.

32. In addition, a survey undertaken by ESMA in 2019 highlighted various practices among trading venues and central counterparties (CCPs) on how to calculate open interest. The basis on which position accounting is done (e.g. maintaining positions on a gross or a net basis), the account set-up of clearing members, including account types used and the segregation requirements of clients are relevant when trading venues or CCPs calculate open interest. Should the calculation of open interest be performed by clearing members in the future, such differences could prevent a harmonised calculation of position limits.

33. Requiring clearing members to perform the calculation and reporting of open interest on behalf of market participants would reduce the number of reporting counterparties and could simplify the overall reporting process. However, there is no evidence of flaws in the existing reporting mechanism. Nor is there evidence that reporting by clearing members would enhance the accuracy or completeness of the dataset.

34. In terms of costs, changing the reporting flow at this stage would entail significant costs for clearing members (some of which are non-financial entities) and trading venues. Based on the above, ESMA does not consider this change to the position reporting framework as an advisable way forward for commodity derivative markets.

Outreach of position reporting

35. Question 37 seeks feedback on the reporting of positions held by non-EU firms. ESMA strongly supports amending the position reporting framework in Article 58(3) of MiFID to ensure that the beneficial owner of positions held in commodity derivatives are identified in daily position reports, irrespective of the presence of third-country entities (and their number) in the chain. This would be a significant improvement not only for a more straightforward enforcement of position limits but more generally for market surveillance by NCAs.

36. As noted above, position reporting serves multiple purposes, and the identification of the beneficial owner will also further contribute to a better understanding of the activities of the various types of market participants and identification of market trends. The identification of the beneficial owner will also be of assistance to trading venues for their position management mandate.

Classification of third-country counterparties in the weekly reports

37. In accordance with Article 58(1) of MiFID II, trading venues are required to make public weekly reports with the aggregate positions held by the different categories of persons for the different commodity and emission allowance derivatives. Those weekly position reports are communicated by trading venues to the competent authority and to ESMA, and ESMA proceeds to a centralised publication of the information included in those reports.

38. For those weekly reports, the different categories of persons are specified in Article 58(4) of MiFID II according to the nature of their main business[9]. While the weekly position reports apply to all categories of persons (EU and non-EU), MiFID II does not expressly address the categorisation of financial entities established in third countries.

39. ESMA noted that this had led to an inconsistent classification of financial entities established in third countries in the weekly position reports. It therefore published an Opinion[10] in July 2022 to indicate that third-country financial entities should be categorised according to the nature of their main business in the same way as they would be categorised if they were established in the EU and subject to EU law.

40. ESMA suggests adding this clarification in Article 58(4) of MiFID II to increase legal certainty for trading venues.

4.2 Position management controls

41. Article 57(8) of MiFID II describes the position management controls to be applied by trading venues trading commodity derivatives or derivatives of emission allowances. In particular, under Article 57(8), point b), of MiFID II, trading venues have the power to obtain information and relevant documentation from position holders about the size and purpose of positions held on that trading venue and in EEOTC contracts.

42. As explained in the previous section, under Article 6 of Commission Delegated Regulation (EU) 2022/1302, an OTC derivative contract needs to have identical contractual specifications, terms and conditions to be considered economically equivalent to a commodity derivative traded on a trading venue[11]. As a result of such a narrow definition of EEOTC, trading venues can request information from market participants only on a limited set of OTC-related contracts as part of their position management control powers.

43. The 2022 LME nickel incident highlighted that large positions held OTC have the potential to impact price formation and market volatility with implications for the orderly functioning of the market. Therefore, with a view to enhancing trading venues' ability to ensure orderly trading, ESMA is of the view that trading venues should be granted powers to request information on the positions held in a broader set of OTC contracts related to the commodity derivatives they offer for trading on an ad-hoc basis. This

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[9] Five categories are defined in Article 58(4): (a) investment firms or credit institutions; (b) investment funds (UCITS or AIFM); (c) other financial institutions; (d) commercial undertakings and (e) in the case of emission allowances or derivatives thereof, operators with compliance obligations.

[10] ESMA Opinion on the classification of third-country financial entities in weekly position reports under MiFID II (ESMA70-156-6046, 12 July 2022)

[11] Article 6 of Commission Delegated Regulation 2022/1302: *"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 1 calendar day and different post trade risk management arrangements."*

would also align with the conclusions drawn by IOSCO in a recent report on the regulation and supervision of commodity derivatives markets[12] where it recommended that further work should be done to improve the ability of exchanges to obtain information about market participants' positions in related OTC commodity derivatives and in the underlying physical commodity markets.

44. In ESMA's view, this power should cover all OTC contracts, including C(6) carve-out contracts, and contracts traded on third country trading venues which have the ability of influencing the pricing or settlement conditions of the relevant on-venue contract in the EU, to ensure that trading venues have the necessary visibility to maintain orderly trading conditions.

45. As to the detail of the OTC positions, the information provided to trading venues by their members should allow for the identification of the end beneficial owner of that position, to the extent possible. More precisely, trading venue members should be required to provide information on own positions as well as those of clients until the end-client is reached. The rationale for such a detailed reporting is that only the identification of the ultimate position holder would allow trading venues to identify where large positions are being built and to adequately assess related risks.

46. Beyond the power to ask information on OTC positions on an ad-hoc basis, for agricultural and critical or significant commodity derivatives contracts, trading venues should also be required to assess whether there is the need to require reporting of OTC positions on a regular or ad-hoc basis. At the same time, trading venues should be required to delineate the scope of the OTC information they would deem useful to include in such an additional reporting and share their assessment with their NCA. In contrast with the position reporting framework described in Section 4.1, this additional information on OTC positions received by trading venues would not be part of the data flow sent to NCAs on a daily basis. However, NCAs should be granted with powers to request access to the set of OTC information received by trading venues from market participants on an ad-hoc basis.

47. To increase NCAs' awareness of trading venues' monitoring of positions, it might also be worth exploring amending Commission Delegated Regulation (EU) 2022/1299[13] to review the content of the annual report on accountability thresholds to be provided by trading venues to NCAs to notably include some information on how the OTC information received has contributed to the management of those thresholds.

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[12] FR/11/2024 Targeted Implementation Review on Principles for the Regulation and Supervision of Commodity Derivatives Markets

[13] Commission Delegated Regulation (EU) 2022/1299 of 24 March 2022 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

5 Position limits

Purpose served by position limits for commodity derivatives.

48. As noted in its MiFID II Review report on position limits and position management, ESMA is of the view that position limits can contribute to the prevention of market abuse by limiting the ability of counterparties to make use of a dominant position to secure the price of a commodity derivative or of the underlying commodity at an artificial level. Position limits may cap the financial gain a market participant could potentially make when unlawfully taking advantage of inside information or when manipulating the market in a commodity derivative contract, thereby rendering such abusive practices less attractive. As such, position limits are relevant both for the spot month and for the other months. However, this rather appears as an indirect potential consequence of the position limits set than a means of preventing market abuse in its own right.

49. When it comes to supporting orderly pricing and settlement conditions, ESMA is of the view that position limits deliver most benefits during the spot month by restricting the position a person may hold in the period during which the physical delivery is to be made.

50. Position limits are also a means of addressing the potential for large positions in commodity derivative markets to prejudice orderly market functioning as the capacity of a market to absorb the liquidation of large positions in an orderly manner is related to the size of such positions relative to the market, be it in the spot month or in the other months.

51. It is worth stressing that the purpose of position limits is not to cap prices and that improperly calibrated position limits may have a negative impact on price formation by limiting market participants' ability to trade.

52. Considering the purpose of position limits above, ESMA does not see a rationale for setting differentiated position limits by type of traders as suggested in Question 48. The risks of potential market abuse and disorderly pricing and settlement arise irrespective of the type of trading activity undertaken by market participants.

53. Furthermore, it is important to note that a large open position is not, per se, an evidence of market abuse. In addition to being a source of additional complexity and costs for market participants and for the oversight framework, setting different limits per category of market participants could have unintended consequences on the structure and liquidity of the market. ESMA notes that the existing risk-reducing position limit exemptions already cater for the specific needs of some categories of market participants (e.g. hedging exemption, mandatory liquidity provision exemption).

Scope of commodity derivatives subject to position limits

54. In 2021, the Capital Market Recovery Package significantly reduced the scope of commodity derivatives subject to position limits, now limited to agricultural commodity derivatives and other critical or significant contracts with an open interest over 300,000 lots over a one-year period.

55. ESMA understands that all agricultural commodity derivatives are subject to position limits due to the specific nature of the underlying commodity. ESMA does not see a need for amending the open interest threshold above which contracts other than agricultural ones qualify as critical or significant and rather supports providing some regulatory stability to commodity derivative market participants in this area.

56. ESMA also notes that the difference between cash-settled and physically settled derivative contracts is often due to historical reasons and sees no reasons to restrict the application of position limits to the latter. Position limits also play a valuable role in the case of cash-settled benchmarks contracts where price formation takes place and that have a role in the pricing of other commodity derivatives.

Responsibility for setting and monitoring position limits

57. The consultation document seeks feedback on the transfer of most position limit competences from NCAs to trading venues, including for position limit setting and monitoring in Question 53 and for the granting of position limit exemptions in Question 51.

58. Based on the experience developed since MiFID application, including when all commodity derivatives were subject to position limits, ESMA is of the view that the existing framework for setting positing limits is a clear and efficient one. Commission Delegated Regulation (EU) 2022/1302 provides for the elements to be taken into account for setting position limits whilst leaving some discretion to NCAs to adjust to the characteristics of the market for that commodity derivative.

59. ESMA also understands that NCAs are in contact with the relevant trading venue when setting position limits. ESMA's Opinion not only assesses that the intended spot and other months' limits are consistent with the position limit objectives set out in MiFID and comply with the methodology but also ensures some consistency and convergence in the way position limits are set by NCAs. ESMA therefore does not see a need for the substantial change suggested in the consultation document.

60. ESMA further notes that the transfer of position limit setting to trading venues would no longer allow for the setting of a single EU limit by the Central Competent Authority when two contracts sharing the same characteristics are traded on two competing trading venues. Such a task can only be performed by a public authority and cannot be delegated to one of the trading venues offering that contract as commercial

interests would get in the way of one trading venue setting a limit which also applies on the other. The issue does not arise in the UK where there are no trading venues competing for the same commodity derivative subject to position limits.

61. ESMA does not consider it a viable option to amend ESMA's mandate to entrust ESMA with the Central Competent Authority's responsibility of setting a single position limit for significant contracts sharing the same characteristics and, furthermore, with supervisory responsibilities for monitoring compliance with the limit set based on daily position reports, as suggested in Question 44.

62. The substantial change that would be required to the current regulatory framework (including data reporting) and its cost impact would appear disproportionate compared to any potential benefit expected from such a new role for ESMA, considering notably the very few commodity derivatives subject to position limits.

6 C(6) carve out contracts

63. The consultation document refers to C(6) carve-out contracts in the context of position limits. In ESMA's view, the position limit framework, and the purpose it serves, is negatively affected by the C(6) carve-out and the lack of position limits when trading a physically settled significant contract on an OTF. Furthermore, the C(6) carve-out also has an impact on the implementation of the methodology for setting position limits for energy derivatives.

64. Under Article 6 of Commission Delegated Regulation (EU) 2022/1302, the baseline for position limits should be adjusted downwards when the level of deliverable supply is low relative to the amount required for orderly settlement and NCAs should assess the extent to which that deliverable supply is used also as the deliverable for other commodity derivatives. As C(6) carve out contracts do not qualify as financial instruments, NCAs have no legal basis to assess the risk to orderly settlement arising from the spot month positions in C(6) carve-out contracts and potentially adjust the baseline for position limits downwards.

65. Based on the above, and in response to Question 55, ESMA sees merit in applying position limits to C(6) carve-out contracts, based on the same methodology as the one set out in Commission Delegated Regulation (EU) 2022/1032 as C(6) carve-out contracts are bearing exactly the same risks. Where a C(6) carve-out contract is sharing the same characteristics as a significant energy derivative, the single position limit set by the Central Competent Authority (CCA) would then apply across all contracts.

66. Beyond position limits, ESMA notes that the C(6) carve-out has broader implications that should also be given further consideration. C(6) carve-out contracts are not subject to MiFIR pre-trade and post-trade transparency requirements. Although

REMIT sets out a framework for transparency to ACER through transaction reporting, there is no legal obligation to make information publicly available on prices and volumes in orders and transactions in those C(6) contracts, in contrast to identical contracts traded on a regulated market.

67. Furthermore, as C(6) contracts do not qualify as financial instruments, they are not subject to reporting to trade repositories under EMIR. In addition, C(6) carve-out contracts do not count towards the clearing threshold or towards bilateral margining under EMIR. As such, the C(6) carve-out creates a gap in the monitoring of financial stability.

7 Circuit breakers

68. ESMA submitted the Final Report on RTS 7a[14] to the EU Commission on 10 April 2025. The Final Report further specifies the technical requirements for the circuit breakers to be established by trading venues following the changes introduced by the MiFID II review.

69. The proposed RTS is applicable to all trading venues subject to MiFID II and does not distinguish between financial instruments or trading venues. Therefore, the RTS covers trading venues facilitating trading in commodity derivatives as well as other financial instruments.

70. As indicated in the Final Report, ESMA proposes to require trading venues to implement circuit breakers in the form of trading halts or price collars. Trading venues are required to implement both dynamic and static circuit breakers but it can suffice to have only either static or dynamic circuit breakers if the NCA agrees.

71. Concerning the exact settings of the circuit breakers, as articulated in MiFID II, the relevant trading venues are best placed to calibrate the circuit breakers. In doing so the RTS prescribes the methodology applied by the trading venue which should take into account various aspects such as the liquidity profile and the volatility profile of the financial instrument, without prescribing specific settings.

72. This is in line with ESMA's conclusions in its report on the functioning of the Intra-day Volatility Management Mechanism (IVM) for commodity markets published in June 2023. ESMA arrived at the conclusion "that circuit breakers, if implemented both as static and dynamic ones, are appropriate and suitable tools for dealing with intra-day price volatility."

[14] ESMA74-2134169708-7780

73. The Final Report on RTS 7a foresees an important role for the NCAs to verify (and enforce) the compliance of trading venues with the provisions in the RTS. In addition, the Final Report proposes to have trading venues regularly reviewing the methodology of the implemented circuit breakers to assure their correct functioning. ESMA considers such implementation and application of circuit breakers in MiFID preferable compared to having parallel, duplicative and overlapping requirements via circuit breakers in MiFID and the IVMs imposed via ad-hoc regulation in the energy space. Dealing with circuit breakers in one place in MiFID is the more efficient tool and also complies with the notions of burden reduction and simplification in EU regulation.

74. As explained in the Final Report and in line with Level 1, trading venues not operating a central limit order book or (periodic) auction systems are not prevented by ESMA from implementing other mechanisms achieving a similar outcome as trading halts or price collars, i.e. to temporarily halt or constrain trading if there is a significant price movement in a financial instrument during a short period of time. Trading venues facilitating trading in commodity derivatives may fall into this category.

8 Elements covered by the Draghi report

8.1 Obligation to trade in the EU

75. As noted in the consultation document, a call is made in the Draghi report for trading activities in energy derivatives "to be undertaken by companies trading in the EU". Should this proposal refer to the introduction of a trading obligation for energy derivatives, ESMA notes that a derivatives trading obligation (DTO) already exists under MiFIR. In order to ensure efficient and transparent price formation, derivatives contracts satisfying certain requirements, including falling under the clearing obligation and being sufficiently liquid, must be traded on an authorised EU trading venue or an equivalent third-country venue. Currently, there are no commodity derivatives satisfying these requirements.

76. If the intention is to force trading of energy derivatives in the EU via the DTO, it is worth noting that, in order to fall under the DTO, derivatives must first of all be centrally cleared. This could negatively impact many market participants, in particular end users and hedgers and further incentivise trading under the C(6) carve-out, i.e outside financial regulation, contrary to the very objective of the DTO. Finally, DTO in its current form would apply only to EU investment firms, i.e. only a subset of those trading those energy, and would still allow trading on equivalent third-country venues.

77. Alternatively, ESMA understands that the proposal aims at ensuring that EU energy contracts could only be traded by entities based in the EU. In ESMA's views, the introduction of such obligation is likely to severely impact market liquidity in the most highly traded energy contracts such as the TTF gas contract considering the significant

presence of third-country market participants in this contract. Reduced market liquidity would in turn affect commodity firms' ability to hedge.

78. Should any such obligation be introduced, the most impacted EU trading venues are likely to consider developing the trading of their relevant energy contracts on trading venues outside the EU where third-country market participants would not be subject to additional requirements (see also response on the MCM under section 7.2).

79. Another alternative would be for those trading venues to move the trading of physically settled energy contracts to OTFs where – due to the existence of the C(6) carve-out – they would no longer qualify as financial instruments and fall outside the scope of any financial regulation.

80. In all cases, a location requirement is expected to be detrimental to the attractiveness, liquidity and competitiveness of EU energy derivative markets.

81. The consultation document suggests that the obligation to trade in the EU could also be interpreted as a requirement for all market participants (irrespective of domicile) to report their trades (and positions) to regulators in the EU.

82. ESMA understands that the suggestion aims at ensuring that the end-beneficial owner is identified in the transaction reports and position reports received by EU regulators. If so, ESMA fully supports this proposal (see also response on position reporting in section 4.1). ESMA however also stresses the need to avoid double reporting by market participants under REMIT and MiFID/MiFIR.

8.2 The Market Correction Mechanism and other dynamic caps

83. The MCM was introduced as part of emergency measures addressing the energy crisis of 2022, aiming to mitigate episodes of high volatility in the gas market. However, the unprecedented spike in gas prices observed during 2022 was largely attributed to the unique geopolitical landscape and market fundamentals, as extensively analysed in e.g. the ACER market monitoring report.

84. As price caps artificially control price dynamics, they disrupt the natural price formation process which balances supply and demand. Limiting the MCM application to contracts traded on EU regulated markets fails to prevent gas prices globally from reflecting market fundamentals, instead leading to a divergence between prices on EU regulated markets, which no longer align with actual market conditions, and those traded elsewhere, such as OTC markets or third-country venues.

85. On March 1 2023, ESMA published its Effects assessment of the impact of the Market Correction Mechanism (MCM) on financial markets, as required by the MCM

Regulation[15]. One major risk identified was the potential shift of liquidity from regulated markets to less transparent OTC trading, or to venues outside the MCM's scope, such as OTFs and third-country trading venues. ICE Endex[16] and EEX responded by offering trading of TTF contracts in the UK and on an EU OTF respectively, both outside the Council Regulation's scope.

86. These measures aimed to allow market participants to continue trading TTF contracts without the dynamic bidding limit, anticipating a possible MCM activation. ESMA noted that once liquidity starts moving, more market participants are likely to follow. This shift would be undesirable from a regulatory perspective as it could reduce access to regulatory data, hindering financial regulators' ability to monitor market developments and intervene if necessary. It would also not support the goal of further developing and deepening European capital markets.

87. ESMA's report also analysed the impact of the MCM on clearing. The activation of the MCM would cap the price of transactions executed on the exchange, thereby impacting the price discovery function of the exchange. Reliable market prices are crucial for the risk management framework of CCPs, as they are essential for calculating margins, managing defaults, and determining settlement prices for physical deliveries. Therefore, the MCM activation (or its anticipation) would have impacted CCPs and the broader clearing ecosystem, potentially leading to additional margin calls and liquidity needs for clearing members and clients.

88. ESMA remains convinced that the potential effects and risks outlined above would unfold if the activation of the MCM, or similar price cap mechanisms, would become more likely. It could cause significant and abrupt changes in the broader market environment, potentially affecting the orderly functioning of markets, and ultimately financial stability.

89. Regarding Question 71 on the possible trading costs linked to the mere existence of the MCM (although the mechanism has never been triggered), ESMA notes the compliance costs imposed on the affected regulated markets and their participants, to implement the MCM into their systems. Those costs consist of one-off expenses, including adapting trading systems, informing market members through updated procedures, guidelines and documentation. Additionally, there are ongoing costs required to maintain the systems and integrate the potential MCM activation in risk management procedures.

8.3 Application of organisational and operational requirements to

[15] Council Regulation (EU) 2022/2578 of 22 December 2022 establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices

[16] On 17 March 2025, ICE announced its decision to discontinue the trading of the Dutch TTF Natural Gas Futures and Options contracts. This decision follows the non-extension of the MCM Regulation.

the spot market

90. ESMA sees merit in extending some organisational requirements imposed on MiFID investment firms to spot market participants subject to REMIT.

91. Financial and physical energy markets are interconnected and many market participants are active across both markets. The absence of similar standards for spot market participants may notably contribute to increased volatility and contagion effects. Any approach, however, should be proportionate and properly designed for the spot market, preventing excessive compliance burdens, particularly for smaller firms, and without imposing investment firm status on industrial players acting on the spot market.

92. REMIT already contains some MiFID-like rules regarding algorithmic trading (Article 5a of REMIT) and the registration of market participants with a national regulatory authority (Article 9 of REMIT). With the goal to further align regulatory frameworks, also the organisational requirements similar to those under Article 9 or Article 16 of MiFID II could be introduced in REMIT and applied to spot market participants. Moreover, the existing rules on algorithmic trading under REMIT could be refined through more detailed provisions on the basis of Commission Delegated Regulation EU) 2017/589[17].

93. ESMA is of the opinion that organisational requirements applicable to MiFID trading venues could also be adapted to organised marketplaces (OMPs) under REMIT.

94. In this context, Article 53 (and Article 54) of MiFID II could serve as a basis to regulate market access to OMPs, and Article 47 to set out organisational requirements for OMPs. In addition, and as described in Section 6, also the MIFID rules on circuit breakers and trading halts (Article 48 of MiFID II together with RTS 7) could be replicated to OMPs under REMIT taking into account the specificities of the spot market.

95. While applying MiFID-like rules would not have prevented the energy crisis of 2022 which was primarily caused by a supply shock, ESMA believes that it might have reduced some of the detrimental trading behaviours observed in this period and potentially limited the fallout on derivative markets.

8.4 Enhanced supervisory cooperation in the energy area

[17] Commission Delegated Regulation (EU) 2017/589 of 19 July 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the organisational requirements of investment firms engaged in algorithmic trading

96. ESMA agrees that the current supervisory framework for energy spot and derivative markets is fragmented, with inefficiencies which can lead to delays in crisis response. The division of responsibilities between National Regulatory Authorities (NRAs), National Competent Authorities (NCAs), ACER, and ESMA creates overlapping mandates and potential conflicts in decision-making.

97. ESMA considers that a common forum can facilitate coordination between authorities, enhancing information sharing and decision-making.

98. If implemented, such coordination body or supervisory college could consist of representatives from ACER, ESMA, NRAs, and NCAs, ensuring expertise from both energy and financial regulators and different jurisdictions. It could focus on crisis management, market monitoring, data sharing and analysis, joint cross-market investigations, or the development of common standards (such as for data reporting). A potential college could primarily focus on contracts or products with Union-wide relevance, i.e. with significant trading volumes, cross border activity, or those that serve as a benchmark.

99. To further enhance cooperation and alignment between energy and financial regulators (besides a common forum), the alignment of legislation appears fundamental.

100. A more clear-cut divide of competences and responsibilities with respect to energy markets, covering them entirely under either financial or non-financial regulation may be another option, while clearly such intervention would have to be carefully designed. For example, the financial rulebook contains comprehensive requirements for derivatives trading under EMIR aimed at reducing systemic risks. If energy markets were to be placed solely under the current framework for energy markets, such safeguards would be entirely removed.

101. As regards Question 77 on the Benchmark Regulation (Regulation (EU) 2016/1011)[18], ESMA notes that the Regulation has been recently revised by the EU co-legislators[19]. The revised regulatory framework will apply as of 1 January 2026. It has a reduced scope compared to the previous version and, starting next year, a smaller number of commodity benchmarks fulfilling certain criteria will be covered by the Regulation.

102. Against this background, for the energy benchmarks that will be within the scope of the revised Benchmark Regulation, it might be appropriate to carry out a case-by-case assessment to analyse the adequacy of the cooperation between the relevant energy market supervisors and securities markets supervisors. As a reminder,

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[18] Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds

[19] The amendments to the Regulation are available here

ACER and ESMA already have in place a Memorandum of Understanding which covers, inter-alia, the LNG price assessments and benchmarks administered by ACER as well as other energy-related benchmarks relevant for the two authorities.

Annex

Ref. Ares(2025)1790389 - 06/03/2025

EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION

The Director-General

Brussels
FISMA.C.3/AP/
fisma.c.3(2025)3263558

Ms Verena Ross
Chairperson of the European Securities and Markets Authority (ESMA)

verena.ross@esma.europa.eu

Subject: Publication of a targeted consultation document on the review of the functioning of commodity derivatives markets and certain aspects relating to spot energy markets

Dear Verena,

On 26 February, the Commission has published a targeted consultation on the review of the functioning of commodity derivatives markets and certain aspects relating to spot energy markets. This consultation will be open until 9 April 2025. It aims at assessing comprehensively the current regulatory landscape of commodity derivatives, emission allowances markets, as well as certain aspects of spot energy markets to ensure they continue to serve effectively their critical function in the EU economy.

The feedback collected will feed into the report by the Commission to the European Parliament and the Council, as set out in Article 90(5) of MiFID, which may then guide potential future policy initiatives in this area.

Article 90(5) requires that the Commission consults ESMA in the process of drawing up this report. To that end, I would like to kindly request ESMA to provide its input on the matter by responding to the launched targeted consultation.

My team stands ready to continue the excellent collaboration with yours on those topics and looks forward to ESMA's contribution to the consultation.

Yours sincerely,

Electronically signed

John BERRIGAN

c.c.: Alexandra JOUR-SCHROEDER (DDG FISMA), Martin MERLIN (Director FISMA C), Tatyana PANOVA, (FISMA C.3), Ward MOHLMANN (FISMA), Antoine BEGASSE (FISMA), Agnès LE THIEC (FISMA C.3), Antoine PICOT (FISMA C.3), Lilli HATTINGA (FISMA C.3), Veit NICKEL (FISMA C.3), Christoph EMSBACH (FISMA C.3)

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Electronically signed on 06/03/2025 12:20 (UTC+01) in accordance with Article 11 of Commission Decision (EU) 2021/2121