Final Report

Technical Advice to the European Commission on weekly position reports under MiFID II

1 April 2020 | ESMA70-156-2287

Table of Contents

Acronyms used

CA	Competent Authority
CDR (EU) 2017/65	Commission Delegated Regulation (EU) No 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purpose of that Directive (OJL87,31.3.2017, p.1)
CP	Consultation Paper
ESMA	European Securities and Markets Authority
EC	European Commission
EU	European Union
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)
UK	United Kingdom

1 Executive Summary

Reasons for publication

Under Article 58 of MiFID II, trading venues trading commodity derivatives or emission allowances or derivatives thereof are required to make public a weekly report with the aggregate positions held by the different categories of persons for the different commodity derivatives, emission allowances or derivatives thereof traded on their trading venue when both the number of persons and their open positions exceed minimum thresholds. Those minimum thresholds are set out in Article 83 of CDR (EU) 217/65, building on ESMA's Technical Advice. Two years after MiFID II started to apply, the thresholds proposed in ESMA's Technical Advice in respect of the size of open positions do not appear to have fully delivered on the objective of providing market transparency to stakeholders and ESMA deems it appropriate to issue a new Technical Advice to the European Commission (EC) in this specific area.

On 5 November 2019, ESMA published a Consultation Paper (CP) (ESMA70-156-357) proposing to introduce a new threshold for the size of open positions triggering the publication of weekly position reports and asking stakeholders' views on the minimum number of position holders. ESMA received 16 responses to the CP. This final report describes the feedback received in the public consultation and ESMA's reaction to the feedback received.

Contents

Section 2 provides the background to the initial Technical Advice delivered to the EC in December 2014. Section 3 sets out the impact of the initial thresholds suggested in respect of the size of open positions, the reasons for the proposed change and ESMA's reaction to the feedback received during the public consultation together with the final Technical Advice. A summary of the responses received to the CP is provided in Annex I.

Next Steps

This report has been submitted to the EC on xxx March 2020.

ESMA stands ready to provide further assistance on the legal amendment suggested in the report.

2 Background

1. As part of the new commodity derivative framework, MiFID II introduced a requirement for trading venues to publish a weekly report with the aggregate positions held by different categories of persons in a commodity derivative, emission allowance or emission allowance derivative when both the number of position holders and the size of open position in a specific instrument exceed a minimum threshold.

Article 58, MiFID II

1. Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives or emission allowances or derivatives thereof:

(a) make 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 there-of traded on their trading venue, specifying the number of long and short positions by such categories, changes thereto since the previous report, the percentage of the total open interest represented by each category and the number of persons holding a position in each category in accordance with paragraph 4 and communicate that report to the competent authority and to ESMA; ESMA shall proceed to a centralised publication of the information included in those reports;

[…]

The obligation laid down in point (a) shall only apply when both the number of persons and their open positions exceed minimum thresholds.

[…]

6. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to specify the thresholds referred to in the second subparagraph of paragraph 1 this Article, having regard to the total number of open positions and their size and the total number of persons holding a position.

2. Under Article 58(6) of MiFID II, the EC invited ESMA "to provide technical advice on the thresholds referred to in respect of both the number of persons and their open positions which, if exceeded, means that the last subparagraph of paragraph 1 of Article 58 applies".

3. In the Technical Advice delivered on 19 December 2014, ESMA proposed in particular as regards the size of open positions that the publication of weekly position reports should only take place if the absolute value of the gross long or short volume of total open interest, expressed in the number of lots of the relevant commodity derivatives, exceeds a level of

four times the deliverable supply for the same commodity derivative, as expressed in number of lots.

4. In its Technical Advice, ESMA explained that the proposed thresholds for the number of position holders and the size of open positions aimed at achieving an appropriate balance between the two competing objectives of providing transparency to stakeholders and ensuring the prevention of market abuse and preservation of confidentiality by not disclosing details of position holders to the extent that they may be identifiable. However, ESMA also noted that the proposed thresholds were based on the existing arrangements for the US which are limited to the core and most liquid contracts. At the time there was no data available on the number of weekly reports that such thresholds would generate for less-liquid contracts in the Union.

5. ESMA's proposal has been incorporated in Article 83(1) (b) of CDR (EU) 2017/565 of 25 April 2016.

Article 83, Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.

1.For the purpose of the weekly reports referred to in Art 58(1)(a) of Directive 2014/65/EU, the obligation for a trading venue to make public such a report shall apply when both of the following two thresholds are met:

(a) 20 open position holders exist in a given contract on a given trading venue; and

(b) the absolute amount of the gross long or short volume of total open interest, expressed in the number of lots of the relevant commodity derivative, exceeds a level of four times the deliverable supply in the same commodity derivative, expressed in number of lots.

Where the commodity derivative does not have a physically deliverable underlying asset and for emission allowances and derivatives thereof, point (b) shall not apply.

[…]".

6. Two years after MiFID II started to apply, and taking into account the number of weekly position reports published under the applicable thresholds, ESMA is of the view that the threshold proposed in the initial Technical Advice in respect of the size of open positions do not appear to have fully delivered on the objective of providing market transparency to stakeholders. ESMA deems it appropriate to revise its Technical Advice to the EC in this specific area.

3 Analysis

7. Under Article 58(1)(a) of MiFID II, trading venues have to report weekly positions for commodity derivatives exceeding position holder and size of open position minimum

thresholds to the CA and to ESMA. Weekly position reports are also published on the ESMA website.[1]

8. In 2018 and 2019, ESMA received on average of around 65 weekly position reports meeting the minimum thresholds set out in Article 83(1) of Commission Delegated Regulation (EU) 2017/565, with a slight increase in the second half of 2019. However, it is worth noting that those weekly position reports came almost exclusively from two UK trading venues. Only one EU27 trading venue started publishing weekly position reports for one commodity derivative contract meeting minimum thresholds in May 2019.

9. It is also worth noting that those published weekly position reports are concentrated on a limited set of underlyings, i.e. oil and metals. With the exception of a recent addition of weekly position reports on a gas contract, no commodity derivative based on an underlying other than oil or metal traded on an EU trading venue meets, or has been meeting, the minimum thresholds for weekly position reports. Therefore, very little or no transparency is provided to market stakeholders on a range of contracts, although gas, power and agricultural commodity derivatives account for a non-negligible amount of on-venue commodity derivative trading activity as shown in ESMA's Opinion on Ancillary Activity calculations[2].

10. ESMA understands that the limited transparency provided to stakeholders through weekly position reports focussing on oil and metal commodity contracts is mainly due to the minimum threshold regarding the size of open position and the need for the absolute amount of the gross long or short open interest to be at least four times the size of the deliverable supply.

11. Consequently, and should those minimum thresholds remain unchanged, it appears that not only will the lack of transparency on contracts based on other underlyings such as agricultural products persist but that hardly any weekly position reports will be made public anymore in the Brexit context after the end of the transitional period. Such a development would appear to defeat the purpose of Article 58(1)(a) of MiFID II.

12. The cautious approach suggested in ESMA's initial Technical Advice aimed at providing transparency to stakeholders on the various categories of market participants in commodity derivatives with the highest potential of non-hedging trading volume. However, the past two years have demonstrated that this approach did not allow to fully deliver on the objective of Article 58(1)(a) of MiFID II and will even less so in a few months' time. ESMA therefore considers that the minimum threshold regarding the size of open position should be amended to provide transparency to stakeholders on a broader scope of commodity derivatives, including on instruments with possibly more balanced categories of stakeholders and for which the potential disparity between the size of open interest and the amount of deliverable supply would not be a relevant criterion.

---

[1] https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_coder58
[2] https://www.esma.europa.eu/press-news/esma-news/esma-updates-its-opinion-ancillary-activity-calculations-0

13. In the CP published on 5 November 2019, ESMA therefore proposed to base the publication of weekly position reports no longer on the size of open interest in comparison with the size of deliverable supply but just on the size of open interest in that commodity derivative, which appears to be a simpler and more straightforward criterion.

14. As regards the open interest threshold, weekly position reports would be published when the total combined open interest in spot and other months' contracts would be equal to, or exceeding,10,000 lots. The 10,000-lot minimum threshold should ensure that there is sufficient interest in a commodity derivative to justify the publication of weekly position reports. At the same time, this threshold in combination with the criterion of the minimum number of position holders should also ensure that the confidentiality of individual position holders is maintained.

15. ESMA also asked stakeholders whether they had any comments to make on the minimum number of position holders.

4 Feedback from the consultation paper

16. Most respondents agreed with the need to amend the open interest threshold but had split views on the approach proposed by ESMA.

17. Most non-financial counterparties supported ESMA's proposal, although a couple of them suggested that the new open interest threshold should be combined with a minimum number of four position holders in each category of persons to preserve the confidentiality of individual positions.

18. Some trading venues disagreed with ESMA's proposal, considering that the threshold was too low to prevent that market participants with open positions in a particular contract become easily identifiable. They expressed a preference for an approach where the open interest would have to be equal, or larger than the deliverable supply. One trading venue agreed that the criterion proposed was easier to measure and thus preferable but recommended to define for each derivative contract a "standard lot". Another trading venue suggested that the value of open interest should be an additional or alternative parameter and suggested a 1 billion EUR open interest threshold. Two trading venues replied that the proposed change would not have any impact on their current publication of weekly position reports.

19. To preserve the confidentiality of market participants' individual positions, two trading venues suggested that weekly position reports should only be published when there are at least 4 position holders in each category. Two non-financial counterparties were of the view that the number of position holders could be reduced from 20 to 10.

5 Conclusion and proposal

20. ESMA noted that some respondents to the CP would prefer maintaining a ratio of open interest compared to deliverable supply to assess the size of open interest triggering the publication of weekly reports. However, ESMA remains of the view that a criterion based on open interest only is a simpler and more effective measure and that such criterion will further enhance the achievement of the transparency objective set out in Article 58(1) of MiFID II. This revised measure of the size of open positions will make it easier for trading venues to identify commodity derivatives subject to weekly position reports as they already have access to open interest in contracts traded on their venue. It will also offer additional transparency and certainty to market stakeholders on commodity derivatives subject to weekly position reporting as data on deliverable supply may not always be readily available.

21. ESMA also notes that the proposed lower threshold of 10,000 lots for the size of open interest triggering the publication of weekly position reports raised concerns from some trading venues regarding the confidentiality of market participants' individual positions.

22. To ensure that the confidentiality of individual positions foreseen in Article 58(1)(a) of MiFID II is maintained, Article 83(3) of CDR (EU) 2017/565 currently provides that for contracts where there are less than five position holders active in a category of persons, the number of position holders in that category shall not be published. In light of the concerns raised in the feedback to the CP, and in order to further reduce the risks of a breach of confidentiality towards such position holders, ESMA is of the view that, it would be useful to amend Article 83(3) of CDR (EU) 2017/565 so that, for contracts where a category of persons would include less than five active position holders, the weekly position report published would include no information for that category of persons.

23. ESMA is of the view that this additional amendment to CDR (EU) 2017/565 will strike an appropriate balance between, on the one hand, providing more transparency to the stakeholders on commodity derivatives with a total open interest threshold of 10,000 lots and, on the other hand, the need to ensure the confidentiality of individual positions by not publishing any information on categories of persons with less than five position holders. Addressing the confidentiality concerns identified should also help avoiding that, notwithstanding the negative impact on liquidity, trading venues could be attracted to increase lot sizes to avoid position report publication.

24. For the avoidance of doubt, a weekly position report would need to be published under Article 58(1)(a) of MiFID II for commodity derivatives traded on a trading venue when both 20 or more persons hold a position in that commodity derivative, as currently foreseen in Article 83(1)(a) of CDR (EU) 2017/565 and when the absolute amount of the gross long or short volume of total open interest in that commodity derivative is equal to, or exceeds, 10,000 lots. When a category of persons would have less than five position holders, the weekly position report would still be published but would not provide information on the

aggregated long and short positions, the percentage of open interest and the number of persons holding a position for that category.

Technical advice

Article 83, Commission Delegated Regulation (EU) 2017/565 of XX/YY/2020. 1.For the purpose of the weekly reports referred to in Art 58(1)(a) of Directive 2014/65/EU, the obligation for a trading venue to make public such a report shall apply when both of the following two thresholds are met: […] and (b) the absolute amount of the gross long or short volume of total open interest expressed in the number of lots of the relevant commodity derivative equals to, or exceeds, 10,000 lots. For emission allowances and derivatives thereof, point (b) shall not apply. […] 3. For contracts where there are less than five position holders in a given category, the aggregate long and short positions, changes thereto since the previous report, the percentage of the total open interest and the number of position holders in that category shall not be published.

Weekly Position Reports

{Name of Trading Venue}
{Trading Venue Identifier}
{Date to which the Weekly Report refers}
{Date and time of Publication}
{Name of Commodity Derivative Contract, Emission Allowance or derivative thereof}
{Venue product code}
{Report status}

	Notation of the position quantity		Investment Firms or credit institutions		Investment Funds		Other Financial Institutions		Commercial Undertakings		Operators with compliance obligations under Directive 2003/87/EC	
			Long	Short	Long	Short	Long	Short	Long	Short	Long	Short
Number of positions		Risk Reducing directly related to commercial activities	xx	xx	N/A	N/A	xx	xx	xx	xx	xx	xx
		Other	xx	xx	N/A	N/A	xx	xx	xx	xx	xx	xx
		Total	xx	xx	N/A	N/A/	xx	xx	xx	xx	xx	xx
Changes since the previous report (+/-)		Risk Reducing directly related to commercial activities	xx	xx	N/A	N/A	xx	xx	xx	xx	xx	xx
		Other	xx	xx	N/A	N/A	xx	xx	xx	xx	xx	xx
		Total	xx	xx	N/A	N/A	xx	xx	xx	xx	xx	xx
Percentage of the total open interest		Risk Reducing directly related to commercial activities	xx	xx	N/A	N/A	xx	xx	xx	xx	xx	xx
		Other	xx	xx	N/A	N/A	xx	xx	xx	xx	xx	xx
		Total	xx	xx	N/A	N/A	xx	xx	xx	xx	xx	xx
Number of Persons holding a position in each category			Combined		Combined		Combined		Combined		Combined	
		Total	xx		Less than 5 N/A		xx		xx		xx	

6 ANNEX

6.1 Annex I: Feedback to the Consultation paper

Q 10: Do you agree with the revised proposed minimum threshold level for the open interest criterion for the publication of weekly position reports? If not, please state your preferred alternative for the definition of this threshold and explain why.

1. Most respondents agreed with the need to amend the open interest threshold but had split views on the approach proposed by ESMA.

2. Non-financial counterparties agreed with the revised minimum thresholds proposed by ESMA as long as the confidentiality of trading strategies and other key business decisions continue to be preserved. To that end, two of these respondents suggested that there should be at least four different position holders per category for weekly position reports to be published and one for one financial counterparty it would be appropriate to define the standard lot for each derivative contract to avoid circumvention of the open interest threshold for publication.

3. Some trading venues disagreed with ESMA's proposal. According to them, the proposed threshold was too low and market participants with open positions in a particular contract may become easily identifiable. These respondents suggested keeping the relation of open interest to deliverable supply as a criterion and setting out that weekly position reports should be published when the open interest equals, or exceed, the deliverable supply.

4. One trading venue noted that lot size was not a relevant criterion to assess the significance or criticality of a contract and suggested that the value of the open interest, for instance 1 billion EUR, should be an additional or alternative parameter. Two trading venues replied that the proposed changes would not have any material impact.

Q 11: Do you have any comment on the current number of position holders required for the publication of weekly position reports?

5. Two trading venues reiterated the views expressed under Q10 in support of an open interest criterion where the size of open interest would have to be equal or higher than the size of deliverable supply. In addition, they expressed concerns that if the number of position holders in one category is too low, their positions might be deducted by other market participants in the same category. To preserve the confidentiality of individual positions, those trading venues recommended that there should be at least four position holders in each category for the position report to be published.

6. Two non-financial counterparties suggested that the number of position holders could be reduced from 20 to 10