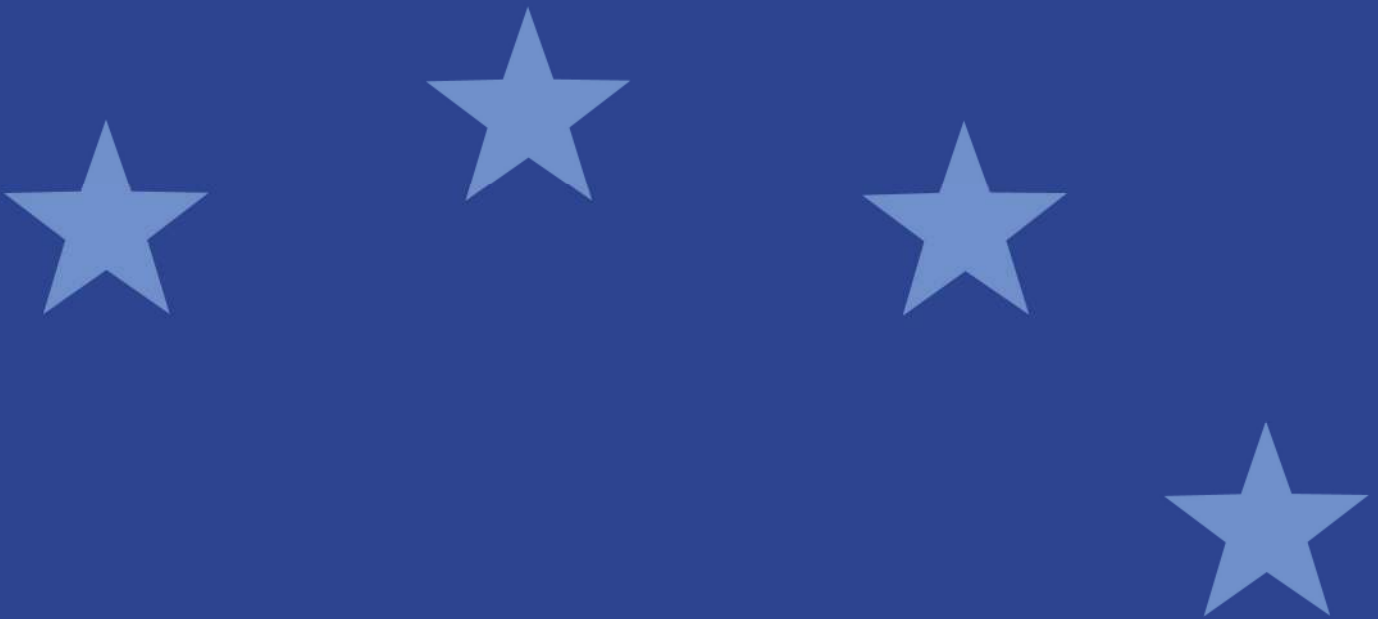




European Securities and
Markets Authority

Reply Form to the Consultation Paper

**MiFID II review report on position limits and position management
Draft Technical Advice on weekly position reports**



5 November 2019

Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **8 January 2020**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'. Please follow the instructions given in the document 'Reply form for the consultation paper on "[MiFID II review report on position limits and position management and draft technical advice on weekly position reports](#)"' also published on the ESMA website.

Instructions

In order to facilitate analysis of responses to the Consultation paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation paper in the present response form.
2. Please do not remove tags of the type <ESMA_QUESTION_WPR_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA_WPR_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_WPR_ABCD_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Call for Evidence on Position limits and position management in commodities derivatives").

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading [Legal Notice](#).

Who should read this paper

All interested stakeholders are invited to respond to this consultation paper. This consultation paper is primarily of interest to trading venues, investment firms and non-financial counterparties trading in commodity derivatives, but responses are also sought from any other market participant including trade associations, industry bodies and investors.

General information about respondent

Name of the company / organisation	Österreichs E-Wirtschaft – Association of Austrian Electricity Companies
Activity	Other / Non-financial counterparty
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	Austria

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_WPR_1>

Thank you for the possibility to comment on the consultation questions.

<ESMA_COMMENT_WPR_1>

Questions

Part I

Q1 : Which option (Option 1 or Option 2) do you support for dealing with competing contracts? Please explain why. If you support Option 1, do you have any suggestions for amending the definition of “same contract” in Article 5(1) of RTS 21? If you support another alternative, please explain which one and why.

<ESMA_QUESTION_WPR_1>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_WPR_1>

Q2 : Do you agree that the C(6) carve-out creates an unlevel playing field across trading venues and should be reconsidered? If not, please explain why.

<ESMA_QUESTION_WPR_2>

Österreichs E-Wirtschaft strongly disagrees with ESMA’s view that the C(6) carve-out creates an unlevel playing field. On the contrary, classifying physically delivered wholesale energy products traded through OTF brokers as financial instruments under MiFID II would create an unlevel playing field and violate the principle of proportionality as particularly small and medium market participants use these physical products for hedging exposures arising out of their production and sales portfolios .

The REMIT Carve-Out in MiFID II does only apply to OTF-traded bilateral physically settled supply contracts which clearly do not possess the characteristic of financial instruments as they serve to cover the physical power and gas demand of the real economy. Wholesale energy trading takes place between professional counterparties and is aimed at managing each party’s supply and demand. Physical forward transactions are necessary to hedge merchant risk related to physical deliveries of wholesale energy products and pose no threat to the well-functioning and stability of financial markets. They are essential to ensure a secure, sustainable and competitive energy supply to end consumers. The exclusion of these physically settled wholesale energy products traded on an OTF was a political acknowledgement of these realities, which has not changed since the introduction of MiFID II.

In our view, there is no evidence to suggest that the introduction of the REMIT Carve-Out has led to a shift in trading in physically-settled gas and power contracts from Regulated Markets (exchanges) and MTFs to OTFs post-MiFID II (see market data below). Furthermore, historically the concerned physical gas and power products have been out of scope of financial regulation since MiFID I, because they were always traded on non-MiFID I regulated broker platforms in the past. It is therefore, factually not possible that the trading in these physically-settled wholesale energy contracts shifted from MiFID regulated broker platforms (MTFs) to OTFs.

REMIT provides for a comprehensive and efficient market transparency and integrity framework for these physically settled gas and power products. In general, physical

gas and power markets are subject to strong sectoral regulations with sufficient powers and capability of energy regulators to oversee these markets. Hence, there is no requirement for these markets to be similarly regulated by financial regulation.

We see no reason to reconsider the REMIT Carve-Out particularly as there is no evidence to suggest that it has had any negative effects on the functioning and stability of the financial markets.

Furthermore no Regulated Market (exchange) has been put at a competitive disadvantage. All exchanges have had the opportunity to set up their own OTFs and a significant number of exchanges have done so.

In detail

Österreichs E-Wirtschaft is of the opinion that this REMIT Carve-Out should be maintained for the following reasons:

- The scope of the REMIT Carve-Out is appropriately drafted as it relates only to must be physical gas and power transactions (wholesale energy products) and these transactions are already sufficiently regulated by the REMIT and thus there is no further need for regulation. REMIT provides a legal framework for:
 - transparency through the reporting of order and transaction data, which is available to financial regulators in the event that they need to observe market activity.;
 - measures to prevent market abuse, which includes the abuse of market dominant positions at trading venues (e.g. cornering);
 - obligations to publish inside information, which ensure an orderly price formation process;
 - market monitoring, supervision and enforcement by ACER and national energy regulators;
 - registration of market participants;
 - sharing of information between regulators (including ESMA); and
 - co-operation at Union and national levels.
- The deletion of the REMIT Carve-Out would jeopardise the political aims of the Third Energy Package and the attained successes of the internal European energy market to the detriment of energy consumers and the real economy. The consequential fall in liquidity will significantly increase the costs of risk management for the real economy and it may be even impossible to hedge the commercial risks. Overall, this will result in higher end consumer gas and power prices.
- The alleged “shift of trading in physically-settled wholesale energy gas/power contracts from Regulated Markets and MTFs to OTFs” mentioned by ESMA has not taken place. Market data available from trading platforms (e.g. as published by Trayport within the monthly Market Size Report) do not show any shift. According to these publicly available statistics for European power and gas markets the share of non-financial instruments (C6 derivatives concluded using OTFs) is stable for power and gas markets for the last years with respect to traded volumes:

Year	Total Volume EL C6 (MWh)	Total Volume EL non-C6 (MWh)	% C6 EL	Total Volume NG C6 (MWh)	Total Volume NG non-C6 (MWh)	% C6 NG
2015	12,929,833,270	9,041,389,444	58.85%	51,714,506,446	33,169,279,029	60.92%
2016	15,248,728,586	11,929,993,346	56.11%	59,293,027,588	35,932,076,126	62.27%
2017	13,901,267,514	8,589,665,818	61.81%	53,124,561,716	37,937,821,264	58.34%
2018	12,961,468,356	9,468,296,280	57.79%	61,240,976,836	34,831,106,110	63.74%
2019 (01-08)	6,862,797,480	6,578,934,421	51.06%	48,376,471,973	31,915,135,711	60.25%

- On European wholesale power and gas markets we observe a (relatively) low number of large market-participants (including financial counterparties) which are primarily active on financial markets (MTF and Exchanges) as these markets clearly offer an easy access to commodity derivatives-markets due to the possibility of pure financial fulfilment of derivatives positions without the need to maintain costly scheduling systems. Moreover, as positions on financial markets can be closed out financially anytime, these markets enable participants to leave these markets on a daily basis, therefore attracting financial participants.
- On the other hand there is a large number of small market participants, primarily using derivatives for hedging exposures arising out of their production and sales portfolios and therefore primarily focused on physical derivatives as offered by OTF markets. Market participants active on these physical markets must maintain costly scheduling systems (IT-systems as well as personal requirements) and official approval by national authorities for power and gas is required to be active on these markets, therefore making these markets less attractive for financial counterparties. Although wholesale energy market participants also trade commodity derivatives on exchanges to a certain extent, most transactions are physically settled as they involve the delivery of the underlying gas or electricity by means of scheduling or nominating to the designated delivery point (e.g. gas hub or price area).
- The removal of the REMIT Carve-Out would lead to a re-classification of the physically settled gas and power products. This artificial re-classification of physical gas and power transactions as financial instruments would mean that energy trading companies and even some industrial companies are regulated as if they were banks, subject to detailed oversight by financial regulators and required to comply with onerous and costly financial market rules, such as MiFID II licensing requirements, EMIR clearing and margining obligations, and prudential regulation under IFR (capital and liquidity requirements):

 - Energy firms risk to breach the thresholds for the MiFID II ancillary activity exemption, which will trigger a MiFID licensing requirement and consequential prudential regulation under the IFR. In addition, energy firms will be exposed to a breach of the EMIR clearing threshold which will trigger EMIR clearing and margining obligations.
 - Therefore, small and medium sized energy (trading) companies and eventually industrial companies concerned may be forced to exit the market to avoid these prohibitive compliance, conservative capital and liquidity as well the costly margining and collateralisation requirements. In addition, larger companies will have an incentive to curtail or close their EU trading activity in

the light of these increased compliance, capital, margining and collateralisation costs.

- Despite the need for increased liquidity in many European energy markets, liquidity may dry out, particularly in less mature markets. The fall in liquidity will significantly increase the costs of risk management for energy companies and massively reduce opportunities for commodity risk management by industrial customers. For some products, it may be impossible to hedge the embedded risks.
- The damage to wholesale energy markets also directly undermines the political aims such as the completion of the internal European energy market. Illiquid wholesale markets will reduce market competition and efficiency in the production and retail markets and prices for consumers and industry can be expected to increase as a result.
- These increased costs and risks would come without additional improvement of the risk profile or integrity of the energy and financial markets. As explained above, energy markets are already effectively regulated, transparent and subject to the same high standards of conduct and integrity and are not of systemic relevance for the wider financial markets.
- Higher risk, constrained investment capital and poor market price signals will significantly undermine investment, production and consumption decisions and reduce security of supply. This will reduce the ability for firms to invest in the decarbonisation of the European economy and endanger the long-term goal of the “European Green Deal” of the EU Commission.

The underlying purpose of financial regulation was and is to create a stable financial market, ensure market integrity and promote investor protections. MiFID II / MiFIR, together with the associated regulations such as EMIR, was designed to facilitate differences between the operation of Regulated Markets, MTFs, OTFs and SI's. ESMA argues these differences create penalties and an unlevel playing field whereas such differences of purpose and outcomes were the specific intent of the architecture in order to bring together the wide scope of counterparty types.

Therefore it remains necessary that the REMIT Carve-Out is maintained as the REMIT is the appropriate, tailor-made regulatory framework for physical energy markets as it considers the specific characteristics and needs of the EU energy markets and its market participants, including the real economy.

<ESMA_QUESTION_WPR_2>

Q3 : Do you agree that the position limit framework should not apply to securitised derivatives? If not, please explain why.

<ESMA_QUESTION_WPR_3>

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<ESMA_QUESTION_WPR_3>

Q4 : Which option do you support to address the negative impact of position limits on new and illiquid commodity derivatives: Option 1 or Option 2? Please explain why. If you support another alternative, please explain which one and why.

<ESMA_QUESTION_WPR_4>
TYPE YOUR TEXT HERE
<ESMA_QUESTION_WPR_4>

Q5 : If you support Option 1 and would suggest different or additional criteria to determine whether a contract qualifies as a critical contract, please explain which ones.

<ESMA_QUESTION_WPR_5>
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<ESMA_QUESTION_WPR_5>

Q6 : Which open interest and participant threshold would you suggest for qualifying a commodity derivative as a critical one?

<ESMA_QUESTION_WPR_6>
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<ESMA_QUESTION_WPR_6>

Q7 : Would you support a position limit exemption for financial counterparties under mandatory liquidity provision obligations? If not, please explain why.

<ESMA_QUESTION_WPR_7>
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<ESMA_QUESTION_WPR_7>

Q8 : Would you support introducing a hedging exemption for financial counterparties along the lines described above? If not, please explain why.

<ESMA_QUESTION_WPR_8>
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<ESMA_QUESTION_WPR_8>

Q9 : Do you agree with ESMA's proposals to amend Article 57(8)(b) of MiFID II and to introduce Level 2 measures on position management controls? If not, please explain why.

<ESMA_QUESTION_WPR_9>
We do not agree with ESMA's proposal to amend the Article 57(8)(b) of MiFID II. The obligation for market participants to provide information on positions held on other market venues to another market venue would lead to disproportionate burden for market participants – especially for small and medium sized electricity supply companies. We do not see any reason why already available information should be delivered again by market participants.
<ESMA_QUESTION_WPR_9>

Part II

Q10 : 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.

<ESMA_QUESTION_WPR_10>
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<ESMA_QUESTION_WPR_10>

Q11 : Do you have any comment on the current number of position holders required for the publication of weekly position reports?

<ESMA_QUESTION_WPR_11>
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