

Response to

**ESMA - Consultation Paper
MiFID II review report on position limits and
position management
Draft Technical Advice on weekly position
reports**

Dec 19, 2019

Introduction

E-Control welcomes the opportunity to respond to the topics raised in ESMA's consultation paper on the impact of position limits and position management and on weekly position reports (the "**Consultation Paper**").

As the Austrian national energy regulator E-Control is, *inter alia*, responsible for the application and enforcement of the "Regulation on wholesale market integrity and transparency" (**REMIT**). We highly appreciate ongoing cooperation between energy and financial regulators as a productive way to promote coherence and consistency between the two complementary economic and legal frameworks.

Shifts in the interaction of financial and energy regulation have the potential for significant impacts on wholesale energy market participants. Thus, in the following, E-Control would like to address **Question 2** of the Consultation Paper as it directly concerns the structure of the wholesale energy markets.

Question 2 – the MiFID II Annex I/C(6) carve-out

Question 2: 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

E-Control does not agree with the proposed position to reconsider the C (6) carve-out on the following basis:

- (i) The C (6) carve-out was introduced in order to take into account the very specific characteristics of the energy wholesale markets. These unique circumstances have not changed since that time.
- (ii) E-Control has not been able to observe a significant shift between trading venues that could justify such a re-consideration of the existing legislature.

First, as the European Commission has previously stated, wholesale energy contracts covered under REMIT are excluded from MiFID II / MiFIR requirements and the financial regulatory framework *"because these contracts are subject to a certain level of regulation and supervision comparable with financial markets legislation and so their exclusion is justified as a proportional amendment to avoid unnecessary dual regulation"*.¹ REMIT was adopted precisely for the reason to *"take into account the specific characteristics of the wholesale*

¹ European Commission, MEMO, 15.4.2014.

energy markets".² This includes the special features of electricity and gas products as well as the particular characteristics and structure of the wholesale energy markets.


In detail, counterparties in energy-related transactions are generally professional traders and energy producing companies and not consumers. As a result, the purpose of wholesale energy trading is primarily to optimise the procurement and distribution for electricity and gas companies, with close links between long-term pricing signals and investments into future generation capacity. Forward contracts on the energy wholesale markets are consequently used by non-financial firms to physically procure energy over a long period of time so as to hedge against price risks. The corresponding transactions do not represent a systemic risk for the wider financial markets. In contrast, due to existing sector regulation and the required level of security of supply involving physical assets, energy wholesale markets have shown higher resilience in the past.

We strongly believe that these original reasons for a distinct regulatory framework tailored to the gas and electricity sectors still hold true (and have even become increasingly important within the internal, pan-European energy market) and thus we see no necessity for a change to the current arrangements regarding the C (6) carve-out.

Second, it is argued in the Consultation Paper that due to the C (6) carve-out there exists an unlevel playing field for regulated markets and MTFs in comparison to OTFs, which would result in the shift of trading volumes to the latter venue. E-Control is not aware of a quantitatively significant adjustment in physically settled wholesale energy contracts from those venues towards OTFs.

Conclusion

In the light of these arguments, E-Control sees convincing reasons for a confirmation of the C (6) carve-out and strongly advises against opening up the current legal framework. We are also concerned that abolishing the carve-out may lead to unintended consequences by creating additional costs for energy producers and trading firms and higher prices ultimately paid by the end-consumer.



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² REMIT, Recital 8.