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| Reply Form to the Consultation Paper |
| MiFID II review report on position limits and position management  Draft Technical Advice on weekly position reports |

**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](http://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](http://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](http://www.esma.europa.eu) under the heading [Legal Notice](http://www.esma.europa.eu/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**

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| --- | --- |
| Name of the company / organisation | ICE Futures Europe and ICE Endex |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |  |
| Country/Region | Europe |

**Introduction**

***Please make your introductory comments below, if any***

<ESMA\_COMMENT\_WPR\_1>

ICE Futures Europe and ICE Endex (jointly referred to as “ICE” or “the Exchanges”) welcome the opportunity to provide their comments on the ESMA consultation paper on MiFID II position limits. The Exchanges are wholly-owned subsidiaries of Intercontinental Exchange, Inc.

ICE Futures Europe was established in 1980 and provides a highly regulated fully electronic marketplace. It has over 300 Members ranging from global investment banks and trading companies to proprietary individual and former floor traders. ICE Futures Europe is a Recognised Investment Exchange, a Recognised Auction Platform, and a Benchmark Administrator under the Financial Services and Markets Act 2000, supervised by the Financial Conduct Authority. ICE Clear Europe Limited provides clearing and settlement services for all of ICE Futures Europe’s contracts.

ICE Endex is the leading energy exchange in continental Europe. It provides liquid European gas and power markets, including the TTF natural gas benchmark, enabling energy firms and financial participants to manage risk. ICE Endex offers a regulated futures and options platform, as well as gas balancing markets and gas storage services. ICE Endex is a regulated market supervised by the Dutch Authority for the Financial Markets (“AFM”).

<ESMA\_COMMENT\_WPR\_1>

**Questions**

**Part I**

1. : 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>

ICE supports option 2. We understand and agree with the rationale for levelling the playing field for commodity derivatives with the same physical underlying that are traded on different venues. Indeed, the open interest figure that serves as a basis for setting “Other Months” limit should be provided by the trading venue with the largest average open interest over a certain period, i.e. one year. Such an approach would prevent any discriminatory outcomes of the MiFID II position limits regime and allow the EU energy markets’ development to continue.

At the same time, ICE disagrees with the proposal to amend the definition of the “same” commodity derivative. First, it should be emphasized that in practice commodity derivatives traded on different trading venues can never be considered as the “same contract,” even if they have the same physical underlying because a contract is designed by the trading venue. The rules and conditions, including those related to pricing and settlement, are different depending on the trading venues. Thus, commodity derivatives traded on different trading venues cannot and should not be netted against each other for position limits or other purposes. Also, for that reason, the removal of the condition for contracts to “form the same pool of open interest” would not remedy the level playing field problem that ESMA is trying to solve.

<ESMA\_QUESTION\_WPR\_1>

1. : 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>

For various reasons ICE continues to strongly support the policy rationale for the exemption of physically settled gas and power contracts from the rules of EU financial regulation. First, due to their specific characteristics, carved out energy commodity contracts are subjected to the tailor-made market abuse regime REMIT. Their inclusion in the complex matrix of requirements under MiFID II, which is designed predominantly for investment firms and banks, could undermine the functioning of these contracts which continue to play a crucial role in the liberalisation and development of power and gas markets in the EU and are important instruments within the context of the transition to a green economy in Europe.

Secondly, ICE does not agree with ESMA that evidence exists that would justify the elaborate reforms to the C(6) carve-out that have been proposed. Certain energy commodity exchanges operate both a Regulated Market (‘RM’) and an Organised Trading Facility (‘OTF’). Both RMs and OTFs offer physically settled gas and power products for trading with the same economic purpose, but only the products traded on the OTF are subject to the C(6) carve-out. ICE has not observed a noteworthy shift of traded volumes from these RMs to OTFs.

On the contrary, ICE’s RM has been able to increase its market share, especially in benchmark exchange traded commodity derivative contracts. We therefore do not see any evidence that the C(6) carve-out would have a negative impact on the level playing field among trading venues.

Finally, ICE believes that ESMA should give priority to addressing the main flaws in the position limits regime by limiting its scope to critical contracts. The limitation in scope is urgently needed to allow exchanges in Europe to develop new and foster nascent contracts and to successfully compete globally. The pursuit of other, unrelated policy changes could distract from this central aim.

<ESMA\_QUESTION\_WPR\_2>

1. : 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>

1. : 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>

ICE supports option 1. Indeed, we are of the view that the MIFID II position limits regime has had a material negative effect on less liquid and small contracts and the ability of trading venues to develop new ones. Thus, the proposal by ESMA to limit the scope of the regime to benchmark or ‘critical’ commodity derivative contracts is welcome.

At the same time, we concur with ESMA that a policy process involving the fundamental Level 1 change that option 1 would require, would take years to become effective. Therefore, we welcome the ESMA’s statement that some amendments to the Level 2 measures on position limits may be appropriate in the meantime. In order to prevent any negative consequences for new and illiquid markets during the course of the more thorough Level 1 policy process, ICE recommends that an interim solution in the form of change to RTS 21 be implemented in the shortest possible term.

Such a change of RTS 21 should build upon the policy recommendations proposed by ESMA under Option 2, whereby a transitional period would be introduced for new contracts during which no position limit shall apply. However, based on our experience, a 12-month period suggested by ESMA is too short to develop a contract and ICE therefore recommends, instead that this period should be extended to 24 months. In addition, we are concerned that a 50% position limit for new contracts might not be sufficient, especially for contracts with a very low open interest and typically a one-digit figure of market participants or contracts in which high peak OI is seasonal or sporadic. ICE recommends instead that if after 24 months the combined open interest of a contract has still not exceeded 20,000 lots, a 10,000 lots limit apply. Only such an approach can facilitate rapid growth, as well as provide sufficient time for NCAs to set a bespoke position limit. <ESMA\_QUESTION\_WPR\_4>

1. : 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>

In the view of ICE, the main indicator of a contract level of development is its Open Interest. We recommend that contracts with OI below 300 000 lots on average over the course of a year not be considered ‘critical’.

Whilst there are a number of other indicators that exchanges use in order to evaluate the level of liquidity and maturity of their contracts (e.g. number of market participants and market makers, churn ratio, screen execution ratio, relation to deliverable supply), in reality these other indicators are highly correlated with the OI.

Thus, in order to provide for a transparent and simple methodology that would be easy to administer, we suggest that the average yearly OI be the main indicator of whether a contract should be classified as ‘critical’ for MiFID II position limits purposes.

Nonetheless, the type of underlying commodity should be taken into account by regulators when determining the list of ‘critical’ contracts. For example, classifying certain commodity derivatives as ‘critical’ by definition may be considered.

Applying the abovementioned criteria would ensure that all benchmarks commodity derivatives remain within the position limits regime. In the case of ICE, these would include inter alia ICE Futures Europe’s Brent Crude Futures, WTI Crude Futures, Low Sulphur Gasoil Futures, UK Natural Gas Futures as well as the agricultural commodity derivatives and ICE Endex’s TTF Futures.

<ESMA\_QUESTION\_WPR\_5>

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

<ESMA\_QUESTION\_WPR\_6>

Based on the indicators it uses to determine which markets are e considered mature and developed, ICE recommends a contract have at least 300 000 lots of Open Interest on average over a year to qualify as ‘critical’.

In relation to the ‘type and variety of market participants’, we consider this indicator to normally be highly correlated with Open Interest. In the interest of transparency and simplicity of the regime, we therefore recommend that this not be a separate criterion.

If however, ESMA wishes to take the type and variety of market participants into account, we recommend that, in addition to meeting the threshold for open interest, there be at least 20 actively trading market participants in a contract on average over a one year period for such contract to be considered ‘critical’. This number of market participants is also a factor to be considered by NCAs when setting position limits under the implementing legislation of MiFID II Article 57. To qualify as critical a contract would have to breach both the thresholds for open interest and actively trading participants.

<ESMA\_QUESTION\_WPR\_6>

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

<ESMA\_QUESTION\_WPR\_7>

ICE supports such an exemption but does not believe it should be limited to financial counterparties. Non-financial counterparties often fulfil mandatory liquidity obligations and thus, the exemption should equally be granted them on the same terms.

This exemption is particularly relevant for new contracts that need the participation of financial as well as non-financial entities to develop. Especially if the 2,500 lots limit continues to apply, exchanges have to attract a high number of liquidity providers to ensure that none of these firms exceed the *de minimis* limit. In the case of nascent markets, gathering such a wide panel is a challenge.

Therefore, ICE recommends that the position limits regime includes such an exemption based on the same conditions as the liquidity provision exemption outlined in Art. 2(4) of MiFID II and the ESMA Q&A on MiFID II/MiFIR commodity derivative topics, and implemented similarly to the hedging exemption under the position limit regime.

<ESMA\_QUESTION\_WPR\_7>

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

<ESMA\_QUESTION\_WPR\_8>

ICE supports the introduction of a hedging exemption for financial counterparties. At the same time we disagree that the exemption should only cover financial counterparties that are part of a ‘real-economy’ conglomerate.

ICE does not agree with ESMA’s view that the compliance monitoring of such exemptions by regulators would not be possible or efficient. In fact, ICE has been operating an internal position management system allowing for exemptions from limits of positions held for genuine hedging purposes by market participants, regardless of their regulatory status and nature of their business. We believe that a similar system, inclusive of all financial counterparties, could be operated by financial regulators across the EU.

<ESMA\_QUESTION\_WPR\_8>

1. : 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>

No, ICE does not believe that level 2 measures are necessary for the introduction of position management controls.

Instead, ICE is very supportive of the approach whereby a substantial responsibility for position monitoring, management and control is delegated to exchanges. Trading venues are best placed to conduct these tasks and have operated sophisticated position management regimes since before the MiFID II entry into force. These regimes normally include:

1. accountability levels above which members are required to report certain information to the exchange (e.g. their positions in a contract in question and beneficiaries thereof),
2. position, expiry and delivery limits indicating maximum positions that can be held by members in the contract in question at a given time,
3. exchange rules providing compliance teams with powers to:

* request information from members as to the purpose of the positions they hold in a contract in question,
* order members to decrease their position,
* discipline members that do not comply with the above.

Furthermore, these regimes would be operated by compliance teams with sufficient staff and technologically advanced tools to monitor on a daily basis the open interest in contracts admitted to trading, positions held in those contracts by exchange members and the activity in physical markets underlying the commodity derivatives admitted to trading.

For example, the compliance team monitoring positions in a crude oil contract may compare these positions with the activity in the underlying physical market and the direction of travel of oil barges in the relevant geographical area. If these movements are not coherent with positions held or if the positions are considered excessive given the activity in the underlying market, the compliance team may decide to open an inquiry with regards to the positions and take further action if the response thereto is nor satisfactory.

These position management regimes are cautiously calibrated and tailored to the circumstances of each individual exchange such as the nature of its membership and the characteristics and underlying markets of contracts it admits to trading. There is no ‘one size fits all’ position management regime.

Against this backdrop, ICE does not believe that the design of position management regimes should be codified in Level 2 technical standards.

<ESMA\_QUESTION\_WPR\_9>

**Part II**

1. : 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>

ICE has published weekly position reports for all its contracts under MiFID II and its implementing legislation, provided that the number of market participants is sufficient. Therefore, the proposed change would not have a material impact.

<ESMA\_QUESTION\_WPR\_10>

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

<ESMA\_QUESTION\_WPR\_11>

In order to provide a sufficient level of confidentiality, in particular for contracts with lower participation, ICE recommends keeping the current thresholds.

<ESMA\_QUESTION\_WPR\_11>