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| Response Form to the Consultation Paper  |
| **Technical standards for commodity derivatives**  |

**Responding to this paper**

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions summarised in Annex I. 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 **23 July 2021.**

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input - Consultations’.

**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\_CD\_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\_PFG\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_PFG\_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” 🡪 “Consultation 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**

This document will be of interest to asset managers managing retail funds and their trade associations, as well as institutional and retail investors investing into such funds and their associations.

**General information about respondent**

|  |  |
| --- | --- |
| Name of the company / organisation | European Federation of Energy Traders (EFET) |
| Activity | Other Financial service providers |
| Are you representing an association? |[x]
| Country/Region | Europe |

**Introduction**

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

<ESMA\_COMMENT\_CD\_00>

The European Federation of Energy Traders (EFET) promotes and facilitates European energy trading in open, transparent and liquid wholesale markets, unhindered by national borders or other undue obstacles. We build trust in power and gas markets across Europe, so that they may underpin a sustainable and secure energy supply and enable the transition to a carbon neutral economy. EFET currently represents more than 100 energy trading companies, active in over 27 European countries.

We would like to thank ESMA for the opportunity to reply to its proposals on technical standards for commodity derivatives. We generally agree and support the amendments brought by the Agency. In some instances, we would like further clarifications and we have added some modifications that we strongly think would improve the RTS.

<ESMA\_COMMENT\_CD\_00>

**Questions**

1. : Do you agree with ESMA’s proposal regarding the impact of the new hedging exemption on the aggregation of positions? If not, please elaborate.

<ESMA\_QUESTION\_CD\_01>

Yes, EFET agrees with the ESMA proposal. Since the commodity derivatives entered into by a financial company are aimed at reducing risks related to commercial activities of a non-financial company, the *modus operandi* of the aggregation of positions should be the same as that of non -financial companies. Therefore, these positions should not be aggregated.

<ESMA\_QUESTION\_CD\_01>

1. : Do you agree with ESMA’s proposal for positions qualifying as risk-reducing? If not, please elaborate and provide an alternative proposal.

<ESMA\_QUESTION\_CD\_02>

EFET agrees with this proposal. Since the commodity derivatives entered into by the financial company are aimed at reducing risks related to the commercial activities of a non-financial company, the circumstances under which said positions may qualify as risk-reducing should replicate the circumstances set out in Article 7(1) regarding the positions held by NFEs.

<ESMA\_QUESTION\_CD\_02>

1. : Do you agree with ESMA’s proposal on the application procedure for financial entities?? If not, please elaborate and provide an alternative proposal.

<ESMA\_QUESTION\_CD\_03>

EFET supports this proposal to have the application procedure for financial entities similar, to the maximum extent possible, as the non-financial companies.

<ESMA\_QUESTION\_CD\_03>

1. : Do you agree with ESMA’s proposal on the application procedure for mandatory liquidity provision exemption? If not, please elaborate and provide an alternative proposal.

<ESMA\_QUESTION\_CD\_04>

EFET agrees with the ESMA proposal on the application procedure for mandatory liquidity provision exemption, as we consider that the information requested is necessary to prove the nature and purpose of the positions.

<ESMA\_QUESTION\_CD\_04>

1. : Do you agree with ESMA’s proposal on qualifying positions? If not, please elaborate and provide an alternative proposal.

<ESMA\_QUESTION\_CD\_05>

EFET agrees with the ESMA proposal on qualifying positions.

<ESMA\_QUESTION\_CD\_05>

1. : Do you agree with ESMA’s proposed definition of financial entities? If not, please elaborate.

<ESMA\_QUESTION\_CD\_06>

EFET agrees with the ESMA proposal for definition of financial entities.

<ESMA\_QUESTION\_CD\_06>

1. : Do you agree with ESMA’s proposal regarding the aggregation and netting of positions in a commodity derivative? If not, please elaborate and provide an alternative proposal where available.

<ESMA\_QUESTION\_CD\_07>

EFET partially agrees with the ESMA proposal.

We support the deletion of the reference to “the same commodity derivative” in Article 3(1) of RTS 21 and the treatment of positions of commodity derivatives that are based on the same underlying and share almost the same specifications as the principal or main commodity derivative traded on the same trading venue, such as "minis" and "balmos".

However, EFET disagrees with the explicit reference to “spread contracts”. The spread contracts are NOT actual contracts, but rather trading strategies whereby the two legs consist of outright contracts that are executed at the same time. Each of the legs already falls under the position limit for the outright contract. Consequently, we urge the Agency to remove the reference to spreads in Art. 3 (2) or RTS 21a.

<ESMA\_QUESTION\_CD\_07>

1. : Do you agree with ESMA’s proposal for significant volumes? If not, please elaborate.

<ESMA\_QUESTION\_CD\_08>

EFET agrees with the ESMA proposal for significant volumes.

<ESMA\_QUESTION\_CD\_08>

1. : Do you agree with ESMA’s proposal? If not, please elaborate and provide an alternative proposal where available.

<ESMA\_QUESTION\_CD\_09>

EFET strongly disagrees with this proposal for the methodology for determining the baseline figure for spot month limits. We believe that deliverable supply is the appropriate proxy to look at someone’s ability to corner a market; while open interest is not. It is crucial that the baseline of the position limit is a proper reflection of a position holder’s ability to corner market.

Markets for which deliverable supply is substantially higher than open interest are typically small markets for which exchange trading has not been fully developed yet. Consequently, more trading is taking place outside that market. Using open interest could hamper the development of that exchange traded market, without providing any regulatory benefits. This outcome is compounded by the fact that there is no increased risk of market cornering.

Additionally, if a low limit is set in these cases, it will not be possible for small markets to increase trading, develop and become more liquid. It would actually be counterproductive, as an illiquid market is more easily manipulated that a liquid one. Therefore, we suggest using the deliverable supply as the baseline for the spot month in all cases.

<ESMA\_QUESTION\_CD\_09>

1. : Do you agree with ESMA’s proposal? If not, please elaborate.

<ESMA\_QUESTION\_CD\_10>

To ensure that the methodology works for all asset classes, EFET suggests taking the same approach as it is being proposed for determining the open interest figure in Article 14 of draft RTS 21a, i.e., the NCAs calculates deliverable supply "over a representative period of time" which would depend on the characteristics of the commodity derivative.

<ESMA\_QUESTION\_CD\_10>

1. : Do you agree with ESMA’s proposals regarding Article 14 of RTS 21a? If not, please elaborate and provide alternative proposals.

<ESMA\_QUESTION\_CD\_11>

EFET partially supports the ESMA proposal.

We agree to calculate open interest "over a representative period of time", which would depend on the characteristics of the commodity derivative. However, we believe the same flexibility is needed in special circumstances, as outlined in Art. 14 par. 2.

We disagree with the use of position reporting data insofar as it relates to reported economically equivalent OTC positions (EEOTC). EFET is not aware of any EEOTC contract having been identified by an NCA or ESMA, due to the narrow definition of EEOTC. Position reports based on the interpretation of the definition by a small minority of market participants should not be taken as evidence of EEOTC and, thus, should NOT be used as basis for inclusion in the open interest calculation.

<ESMA\_QUESTION\_CD\_11>

1. : Do you see merit in the new approach considered by ESMA for new and less liquid agricultural commodity derivatives? If not, please elaborate and provide an alternative proposal.

<ESMA\_QUESTION\_CD\_12>

No applicable to EFET, no comment.

<ESMA\_QUESTION\_CD\_12>

1. : Do you agree with ESMA’s proposal regarding Article 19 of RTS 21a? If not, please elaborate.

<ESMA\_QUESTION\_CD\_13>

EFET is supportive of clarifying in Art. 19 par. 3, that where the open interest is significantly lower than the deliverable supply, NCAs shall adjust the other months’ position limit upwards to avoid the risk of unduly constraining trading.

However, as mentioned in our answer to Q9, we do not see an increased risk of market manipulation and, consequently, we disagree with the need to adjust the spot month position limit downwards. This situation is inherent to markets for which exchange trading has not developed yet. The proposal would hamper the development of such illiquid markets, without providing any benefit.

<ESMA\_QUESTION\_CD\_13>

1. : Do you agree with ESMA’ proposal regarding the upward adjustment factor to be used in case of a small number of market participants or less than three investment firms acting as market makers? If not, please elaborate and provide an alternative proposal.

<ESMA\_QUESTION\_CD\_14>

EFET agrees with the ESMA proposal regarding the upward adjustment factor.

<ESMA\_QUESTION\_CD\_14>

1. : Do you agree with ESMA’s proposed amendments to ITS 4? If not, please elaborate.

<ESMA\_QUESTION\_CD\_15>

EFET agrees with the proposal to delete securitized derivatives from ITS 4.

<ESMA\_QUESTION\_CD\_15>

1. : Do you agree with ESMA’s suggestion to introduce such ongoing position monitoring requirement in the draft RTS? If not, please elaborate.

<ESMA\_QUESTION\_CD\_16>

EFET agrees with the proposal for trading venues to have arrangements in place for the ongoing monitoring of positions.

However, the level at which monitoring requirements and accountability levels should apply, i.e., persons with close links, is a foreign concept for EU commodity derivative trading venues, which have no access to such information. In addition the concept of close links can cause other issues as often companies which fall into the category of close links run their trading independently to avoid market abuse risks (passing on of inside information). It is therefore highly recommended that ESMA uses the existing reporting formats, which include information on end position holder and parent undertaking.

<ESMA\_QUESTION\_CD\_16>

1. : Do you agree with ESMA’s suggestion to introduce accountability levels as part of position management controls? Do you agree with ESMA’s assessment that accountability levels would be of particular relevance for physically settled commodity derivatives? If not, please elaborate and provide alternative proposals.

<ESMA\_QUESTION\_CD\_17>

EFET is supportive of trading venues having position management in place, but it is deeply concerned that the proposal in its current form will create considerable burdens for both the trading venues and market participants. Positions are already monitored and investigated as part of sophisticated market surveillance arrangements, for example under MAR and REMIT.

Therefore, we believe that the only way for the accountability levels to properly function would be on the condition that discretion is given to the trading venues to determine on which contracts to set those accountability levels, when to actively monitor them (spot month and/or other month or even closer to delivery) and whether indeed to request additional information if an accountability level is exceeded. Without such discretion, the position management controls will put a heavy burden on both the exchanges’ market surveillance departments and trading participants’ compliance departments.

As a practical solution, EFET recommends that in Art. 2 par. 1, 2 and 3, as well as the second part of paragraph 4, the words “shall” are replaced by “may”. Providing the trading venues with the discretion to set those accountability levels as they deem it necessary and appropriate would be in line with the CFTC rulemaking on position management controls, as well as with MiFID II Art. 57 par. 8, which lays down the powers for trading venues to establish position management controls.

<ESMA\_QUESTION\_CD\_17>

1. : In your view, how should accountability levels be set for the spot month and the other months? Based on which methodology or criteria? Should all types of positions count towards the accountability levels?

<ESMA\_QUESTION\_CD\_18>

EFET considers that positions qualifying as reducing risks directly related to commercial activities and transactions entered into to fulfil obligations to provide liquidity should not count towards the accountability levels.

In order to be exempted for these transactions counting for position limits, market participants have to send to NCAs detailed information regarding said positions. It would be redundant to send again this same information regarding the nature and purpose of the position to the trading venues.

<ESMA\_QUESTION\_CD\_18>

1. : Do you agree with ESMA’s suggestion to introduce requirements for the review of accountability levels? Do you also agree with ESMA’s proposal regarding reporting requirements to the NCA on accountability levels? If not, please elaborate.

<ESMA\_QUESTION\_CD\_19>

Open

<ESMA\_QUESTION\_CD\_19>

1. : In your view, what other types of position management controls could be further specified in the draft RTS?

<ESMA\_QUESTION\_CD\_20>

As previously explained in Q17, EFET does not consider that any position management controls, beyond those already proposed, should be further introduced by ESMA. Instead, trading venues should have the discretion to introduce relevant measures, if and where necessary.

<ESMA\_QUESTION\_CD\_20>

**Cost Benefit Analysis**

**CBA Q1**: This first question aims at identifying the category of firm/entity you belong to. Please provide the total notional amount traded in commodity derivatives traded on a trading venue (and EEOTC contracts where relevant in 2020 in thousand euros and the related total number of trades in the relevant boxes).

<ESMA\_QUESTION\_CD\_21>

TYPE YOUR TEXT HERE

|  |  |  |  |
| --- | --- | --- | --- |
| Category  | Number of employees | Total notional amount traded in 2020 in thousand euros  | Number of trades in 2020 |
| Trading venue | [1-50] |  |  |
| [51-250] |  |  |
| [251-500] |  |  |
| >500 |  |  |
| Financial entity  | [1-50] |  |  |
| [51-250] |  |  |
| [251-500] |  |  |
| >500 |  |  |
| Non-financial entity | [1-50] |  |  |
| [51-250] |  |  |
| [251-500] |  |  |
| >500 |  |  |

<ESMA\_QUESTION\_CD\_21>

**CBA Q2**: for Financial entities: Do you intend to apply for an exemption for risk-reducing positions related to the commercial activities of the commercial entity of the group? What percentage of your positions do these risk-reducing positions account for?

<ESMA\_QUESTION\_CD\_22>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CD\_22>

**CBA Q3**: Do you intend to apply for an exemption for positions resulting from transactions undertaken to fulfil mandatory liquidity provision? What percentage of your positions do these positions account for?

<ESMA\_QUESTION\_CD\_23>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CD\_23>

**CBA Q4**: Is there any specific provision in draft RTS 21a that you would expect to be a source of significant cost? If so, please elaborate.

<ESMA\_QUESTION\_CD\_24>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CD\_24>

**CBA Q5**: Taking into account the size of your firm, would you qualify overall compliance costs with draft RTS 21a as low, medium or high?

<ESMA\_QUESTION\_CD\_25>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CD\_25>

**CBA Q6**: Is there any specific provision in the draft RTS on position management controls that you would expect to be a source of significant cost? If so, please elaborate.

<ESMA\_QUESTION\_CD\_26>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CD\_26>

**CBA Q7**: Taking into account the size of your firm, would you qualify overall compliance costs with amended the draft RTS on position management controls as low, medium or high?

<ESMA\_QUESTION\_CD\_27>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CD\_27>