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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 | EVIA /LEBA |
| Activity | Regulated markets/Exchanges/Trading Systems |
| Are you representing an association? |[x]
| Country/Region | Europe |

**Introduction**

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

<ESMA\_COMMENT\_CD\_00>

TYPE YOUR **General Comments**

The members of the European Venues and Intermediaries Association and the London Energy Brokers Association operate MTFs and OTFs across several EU member states which admit a range of commodity and energy forward contracts. Whilst many of these “physical forwards” benefit from the exemptive relief provided for under PERG C6, this does not cover all physical forwards. Of the non-exempt instruments, some are CCP cleared by third party CCPs and others are uncleared.

There is some duality or overlap of reporting and post-trade obligations between each of MiFID2, REMIT and EMIR which disbenefit from different definitions and terminology.

In considering the review of the technical standards stemming from changes to MiFID2 in the Capital Markets Recovery Package adopted by the co-legislators in December 2020 and published in the Official Journal on 26 February 2021; we would like to draw attention to the requirements for Trading Venues to submit position reports for uncleared derivatives and for physical forwards.

As ESMA are aware, MTFs/OTFs do not operate as vertical exchanges and have no sight of the CCP clearing operation for those contracts which are cleared, whilst most derivatives which they admit are anyway physically delivered forwards, usually traded as spreads, options and packages. Therefore no “Open Interest” is generated. Rather the forward positions are incorporated in the counterparties’ balance sheets and subject to margin according to the contract details and the appropriate capital treatment.

Whilst the majority of contracts arranged and executed by member MTFs and OTFs fall under the PERG C6 exemptions and are therefore out of scope of most of the rules under consideration in this paper, that is by no means all of them. Indeed, ESMA has stipulated that no MiFID MTF / OTF can be in the position of solely admitting contracts covered by relevant PERG exemptions, C6, C7 and C10.

To date under MiFID2, NCAs have therefore not required position reporting to be made by MTFs and OTFs (as they have no sight of the participants’ open positions and also the contracts can concatenate and are fungible and transportable and often also combustible.)

"RTS21a" & “ITS4” - Scope and applicability:

1. Is there a simple exemption for non-cleared commodity derivatives from position reporting?
2. Do we interpret the exemption from the [Art 83 rule](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0565&from=EN) (which is based on 20 open position holders exist on the TV...) to negate the requirement for "Open Interest" reporting?
3. Are there broader waivers by the NCAs so that TVs have not just ended up adding daily trading volumes ?
4. Could this CP be a revision opportunity need to address this rather better than recital 18 which is anyway unclear to that point?
5. Where does ESMA consider the balance of Level1 Articles versus Level 2 technical standards or any derogation to harmonised guidance should exist on this matter?

TEXT HERE

<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, EVIA/LEBA considers these new hedging exemptions to be appropriate.

<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>

Yes, EVIA/LEBA considers these wider qualifications for positions to qualify as risk-reducing to be appropriate because this now more closely approaches the effect of the “commercial purposes” implementation of MiFID 1.

<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>

Whilst, EVIA/LEBA notes the intent, a simpler self-attestation, and one applying across a broader sub asset class would provide a better premise for the technical standard to be harmonised across the EU and made comparable without. NCAs shall always hold the capacity to make more detailed or thematic investigations.

<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>

Yes, EVIA/LEBA agrees with these provisions, but notes that we have never yet witnessed any “mandatory liquidity provision onto trading venues” in a meaningful sense, whether in commodities or more broadly. Rather market making schemes are more flexible over longer defined periods of time and hold many caveats. Therefore, the application language should perhaps be altered to align with the schemes offered by the trading venues.

<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>

No EVIA/LEBA disagrees. ESMA’s proposal on qualifying positions pre-supposes a non-competitive world of only CCP cleared contracts. Clearly this is far from the case for commodity derivatives markets in the EU. Therefore paragraphs [35] & [36] should be altered to specify only CCP cleared derivative contracts.

<ESMA\_QUESTION\_CD\_05>

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

<ESMA\_QUESTION\_CD\_06>

No comment as our members are trading venues.

<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>

No EVIA/LEBA disagrees because, following from our general comments, because ESMA’s proposal needs to either be specific towards those commodity derivatives that are novated into a CCP and therefore create Open Interest, or ESMA needs to clarify its definition of commodity derivatives such that they solely include CCP cleared contracts. Clearly physical forward positions may be known, quantified and reported by the end user on a daily basis; but no trading venue could have any knowledge of the end user’s risk positions.

Currently therefore a quasi-version of duplicative transaction reporting occurs which takes no account of subsequent netting, shipping, sales or onwards processing of the delivered commodities. Clearly it is equally true that any concept of spread positions in fungible commodity forwards does not make sense in the proposed regime, where legs may be netted or onwards transacted or otherwise subject to any lifecycle event.

<ESMA\_QUESTION\_CD\_07>

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

<ESMA\_QUESTION\_CD\_08>

No EVIA/LEBA disagrees because, following from our comments above, ESMA’s proposal needs to either be specific towards those agricultural commodity derivatives that are novated into a CCP and therefore create “Open Interest”,

<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>

No EVIA/LEBA disagrees because, following from our general comments, because ESMA’s proposal needs to either be specific towards those commodity derivatives that are novated into a CCP and therefore create Open Interest, or ESMA needs to clarify its definition of commodity derivatives such that they solely include CCP cleared contracts.

<ESMA\_QUESTION\_CD\_09>

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

<ESMA\_QUESTION\_CD\_10>

Yes, EVIA/LEBA agrees with the approach towards deliverable supply.

<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>

No EVIA/LEBA disagrees because our members’ MTF and OTF trading venues are not vertically integrated into CCP Clearing Houses. Some forwards are cleared, whilst others are physically delivered. Noting also that ESMA has only this week disapplied the MiFID2 protections to ensure “open access”. ESMA’s approach disregards those commodity derivatives which are not exempt under the first leg of PERG C6.

Following from our previous comments, because ESMA’s proposal needs to either be specific towards those commodity derivatives that are novated into a CCP and therefore create Open Interest, or ESMA needs to clarify its definition of commodity derivatives such that they solely include CCP cleared contracts.

The outcome from ESMA’s approach is to encourage multilateral trading to be characterised as “Off Venue,” to be traded outside the EU, or to be traded under singular exchange rules creating an absence of competition, a failure to innovate, singular systematic risk and high-priced traded data under IPR protections.

<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 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>

No EVIA/LEBA disagrees because, following from our general comments, because ESMA’s proposal needs to either be specific towards those commodity derivatives that are novated into a CCP and therefore create Open Interest, or ESMA needs to clarify its definition of commodity derivatives such that they solely include CCP cleared contracts.

<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>

No EVIA/LEBA disagrees because the proposal should be constrained to only those contracts admitted solely to an RM which specify CCP Clearing in their definitions. We also note that the application of the term “Spot Month” does not correspond to the use of that term in other regulations, notably REMIT; and it has an attenuated meaning for physical forward contracts.

<ESMA\_QUESTION\_CD\_14>

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

<ESMA\_QUESTION\_CD\_15>

No EVIA/LEBA disagrees because the proposal should be constrained to only those contracts admitted solely to an RM which specify CCP Clearing in their definitions. Physical forwards which are not subject to the exemptions under PERG C6 and C7 have no “Open Interest.”

<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>

No EVIA/LEBA disagrees because the proposal should be constrained to only those contracts admitted solely to an RM which specify CCP Clearing in their definitions. Physical forwards which are not subject to the exemptions under PERG C6 and C7 have no sight of the positions resulting from trading on the MTF / OTF nor do they hold any “Open Interest.”

<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>

No EVIA/LEBA disagrees because the suggestion to introduce accountability levels should be constrained to only those contracts admitted solely to an RM which specify CCP Clearing in their definitions. Physical forwards which are not subject to the exemptions under PERG C6 and C7 have no sight of the positions resulting from trading on the MTF / OTF nor do they hold any “Open Interest.”

<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>

See answer to Q17.

<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>

See answer to Q17.

<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>

For commodity derivatives that are not CCP Cleared by an EU CCP, EVIA/LEBA believes that the current transaction reporting regime provides all the necessary information to NCAs and that no TV approach to position management controls is feasible. Furthermore there may be duplicative procedures under both EMIR and REMIT which again should constitute grounds for the disapplication of any MiFID requirements beyond the conduct of business and orderly markets requirements.

<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>