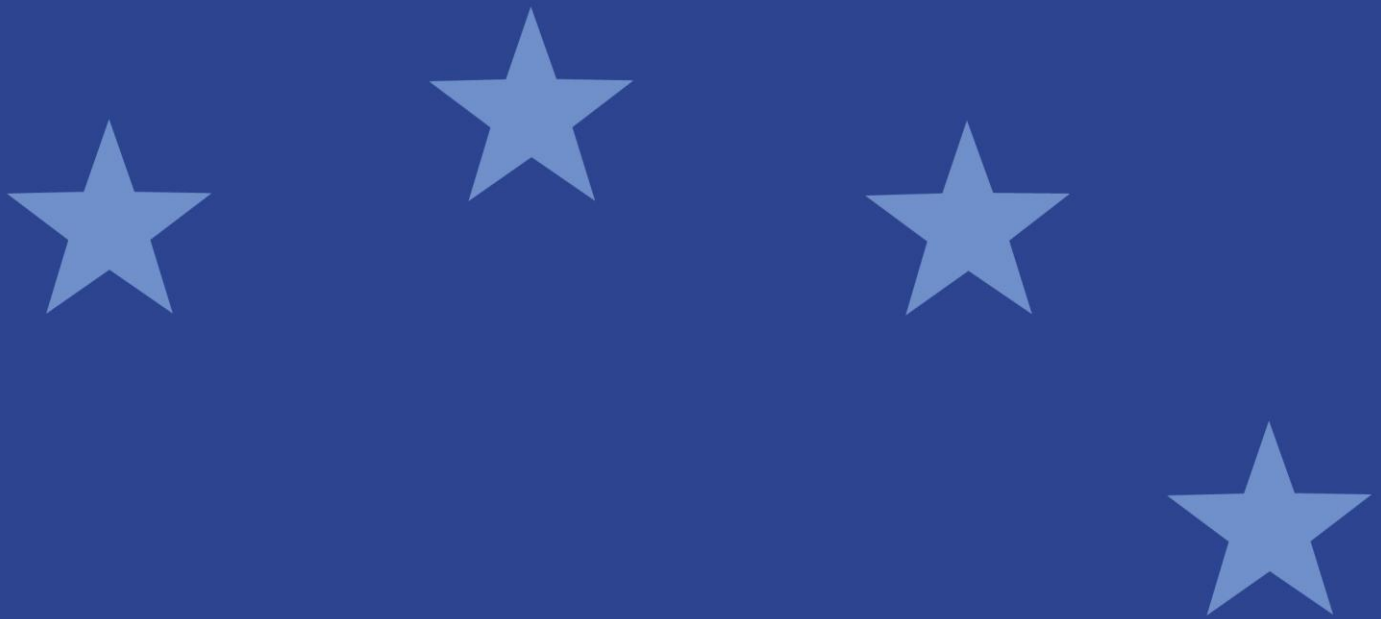




European Securities and
Markets Authority

Consultation Paper

Technical standards for commodity derivatives



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:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. 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 under the heading 'Your input – Consultation Paper on the impact of position limits and position management and on weekly position reports'.

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 publicly 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

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.

Table of Contents

1	Executive Summary	6
2	Introduction	8
	Part I: Draft RTS 21a	10
2.1	Background/mandate	10
3	Exemption from position limits for risk-reducing positions held by financial entities	10
3.1	Background/mandate	10
3.2	Analysis and proposals	11
3.2.1	Aggregation of positions (Article 3(5) of RTS 21a).....	11
3.2.2	Financial entities' positions qualifying as risk reducing (Article 7(2) and (4) of draft RTS 21a).....	12
3.2.3	Application procedure for the exemption from position limits for financial entities (Article 8(3), (4) and (7) of RTS 21a)	12
4	Exemption from position limits for positions resulting from liquidity provision.....	14
4.1	Background/mandate	14
4.2	Analysis and proposals	14
4.2.1	Aggregation of positions (Article 3(6) of RTS 21a).....	14
4.2.2	Application for the exemption from position limits (Article 9 of RTS 21a)	15
4.2.3	Positions qualifying as resulting from transactions entered into to fulfil mandatory liquidity provision (Article 10 of RTS 21a)	15
5	Other Amendments to RTS 21	16
5.1	Chapter I - General Provisions	16
5.1.1	Definitions (Article 2 of RTS 21a)	16
5.2	Chapter II – Method for calculating the size of the net position of a person	17
5.2.1	Aggregation and netting of positions in a commodity derivative (Article 3 of draft RTS 21a).....	17
5.2.2	Significant volumes (Article 5 of draft RTS 21a)	18
5.3	Chapter III – Methodology for Competent Authorities to calculate position limits	19
5.3.1	Methodology for determining the baseline figure for spot month limits (Article 11 of draft RTS 21a).....	19
5.3.2	Deliverable supply (Article 12 of draft RTS 21a)	19
5.3.3	Open interest (Article 14 of draft RTS 21a).....	20
5.3.4	New and less liquid agricultural commodity derivatives (Article 17 of draft RTS 21a)	21

5.3.5	The overall open interest (Article 19 of draft RTS 21a)	22
5.3.6	The number of market participants (Article 20 of draft RTS 21a)	22
5.3.7	Other adjustment factors	23
Part II: Amendments to ITS 4		23
5.4	Background/mandate	23
5.5	Analysis and proposals	24
5.5.1	Hedging exemption for financial counterparties from the position limit regime	24
5.5.2	Liquidity provision exemption from the position limit regime	26
5.5.3	Exclusion of securitised derivatives from the position limit regime	26
Part III: Draft RTS on position management controls		27
5.6	Background/mandate	27
5.7	Analysis and proposals	28
5.7.1	Position management on non-EU venues	28
5.7.2	Proposals	30
6	ANNEXES	34
6.1	Annex I: Cost Benefit Analysis	34
6.1.1	Draft RTS 21a	35
6.1.2	Draft RTS on position management controls	42
6.2	Annex II: Summary of questions.....	48
6.3	Annex III: Draft RTS and ITS.....	51
6.3.1	Draft RTS 21a	51
6.3.2	Amendment to ITS 4	73
6.3.3	Draft RTS on position management controls	79

Acronyms used

CBA	Cost Benefit Analysis
CCA	Central Competent Authority
CP	Consultation Paper
EEOTC	Economically Equivalent OTC Contracts
ESMA	European Securities and Markets Authority
EC	European Commission
EU	European Union
ITS 4	Commission Implementing Regulation (EU) 2017/1093 of 20 June 2017 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators
MiFID II	Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349)
MiFIR	Regulation (EU) No 600/2014 of the European Parliament and of the Council on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84)
MTF	Multilateral Trading Facility
NCA	National Competent Authority
NFE	Non-Financial Entity
OTC	Over-The-Counter
RTS	Regulatory Technical Standard
RTS 21	Commission Delegated Regulation (EU) 2017/591 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives

1 Executive Summary

Reasons for publication

The Capital Markets Recovery Package adopted by the co-legislators in December 2020 and published in the Official Journal on 26 February 2021 introduces significant changes to the MiFID II commodity framework, including to the position limit regime.

This consultation paper (CP) seeks stakeholders' views on the Regulatory Technical Standards (RTS) that ESMA is required to develop pursuant to empowerments under Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis ("the amending Directive") and on an amendment suggested to ITS 4 as a consequence of the exclusion of securitised derivatives from the scope of position limits. Under Articles 10 and 15 of Regulation (EU) No 1095/2010 of the European Parliament and Council establishing ESMA (ESMA Regulation), ESMA needs to conduct a public consultation before submitting draft RTS or ITS to the Commission.

ESMA is also publishing in Annex I of this document a preliminary cost-benefit analysis of the incremental obligations arising from the proposed RTS based on qualitative assessment that stakeholders are encouraged to supplement with their comments and supporting data, where available.

Contents

Following the introduction to the report in Section 2, In Part I of the CP, ESMA sets out its proposal for the RTS on the application of position limits to commodity derivatives (RTS 21a). Draft RTS 21a includes the proposals arising from ESMA empowerments to develop draft RTS to determine procedures for financial entities undertaking hedging activities and for liquidity providers to apply for an exemption from position limits. Draft RTS 21a, which will be repealing RTS 21, also retains the provisions of RTS 21 that are not impacted by the changes made to the position limit regime.

In Part II of the CP, ESMA explains the amendment it considers necessary to ITS 4 as a consequence of the exclusion of securitised derivatives from the scope of position limits.

Finally, Part III of the CP contains ESMA's proposal for RTS on position management controls.

Next Steps

ESMA will consider the responses received to this CP, finalise draft RTS 21a and ITS 4 as well as the draft RTS on position management controls and submit a final report to the European Commission for endorsement by November 2021.

2 Introduction

1. On 24 July 2020, the Commission adopted a Capital Markets Recovery Package as part of the Commission's overall coronavirus recovery strategy with the aim of making it easier for capital markets to support European businesses to recover from the crisis. The Recovery Package included targeted amendments to the Prospectus Directive, MiFID II and securitisation rules. The Recovery Package notably includes amendments to the MiFID II commodity derivatives framework to help the development of energy markets in the EU as well as to allow European companies to cover their risks, while safeguarding the integrity of commodity markets, especially for agricultural products. On 10 December 2020, the European Parliament and the Council reached a political agreement on a compromise text which was ultimately signed on 16 February 2021 and published in the Official Journal on 26 February 2021. The new provisions will start applying on 28 February 2022, after transposition into national law by Member States.
2. The key changes to the MiFID II provisions regarding commodity derivatives introduced by the Recovery Package relate to the ancillary activity test and to the scope of application of position limits.
3. Pursuant to amended Article 2(4) of MiFID II, the criteria to be applied for the ancillary activity test will be specified in a separate delegated act to be adopted by the EC by 31 July 2021, taking into account inter alia the newly introduced threshold of net exposure in cash-settled OTC commodity derivatives, emission allowances and derivatives thereof.
4. In Article 57 of MiFID II, the scope of the position limit regime is substantially reduced and limited to agricultural commodity derivatives and critical or significant commodity derivatives. Under Article 57(1) of MiFID II, critical or significant commodity derivatives are defined as commodity derivatives where the sum of all net positions of end position holders constitutes the size of their open interest and is at a minimum of 300 000 lots on average over a one-year period. All commodity derivatives remain however subject to position reporting. Securitised derivatives based on commodities are excluded from the position limit and position reporting framework. No draft RTS is required to be developed with respect to critical or significant commodity derivatives. ESMA is only required to draw up a list of such contracts, which ESMA will do in due course.
5. Additional exemptions from position limits are introduced by the changes to the MiFID II provisions. The positions resulting from transactions undertaken to fulfil mandatory liquidity provisions in a commodity derivative on a trading venue do not count towards the position limit set for that commodity derivative. The hedging exemption for non-financial counterparties is extended to positions held by, or on behalf of, a financial entity that is part of a predominantly commercial group and is acting on behalf of a non-financial entity of the predominantly commercial group, where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity. ESMA is empowered to develop draft RTS to specify the procedure to apply for those exemptions.

6. In addition, to ensure that a more harmonised and convergent implementation of the position management controls is put in place by trading venues in accordance with Article 57(8) of MiFID II, ESMA is empowered to develop draft RTS to specify the content of position management controls, thereby taking into account the characteristics of the trading venues concerned.
7. Finally, ITS 4 on the format of position reports by investment firms and market operators has to be amended to reflect the fact that securitised derivatives are no longer within the position reporting regime.
8. This CP seeks stakeholders' views on the draft RTS and ITS proposed by ESMA.
9. Part I of the CP deals with the draft RTS on the calculation methodology for position limits ("RTS 21a") which is to replace current RTS 21). Draft RTS 21a includes various sets of provisions. Firstly, as the empowerments given to ESMA by Article 57(1) of MiFID II to develop draft RTS to specify the procedure for a financial entity to apply for a hedging exemption and for persons to apply for a liquidity provision exemption deal with issues closely linked to the application of position limits to commodity derivatives, ESMA has decided to execute those two empowerments in draft RTS 21a rather than by drafting two separate RTS. Secondly, draft RTS 21a includes proposed amendments to current RTS 21 either as a direct consequence of the changes made to the MiFID II provisions (i.e. at Level 1) or suggested by ESMA at its own initiative based on the experience in the first three years of MiFID II application. Thirdly, whilst draft RTS 21a will replace the current RTS 21, it retains those of the RTS 21 provisions that are unaffected by the changes made to the MiFID II provisions regarding commodity derivatives..
10. Part II of the CP presents the amendments ESMA considers necessary to Table 2 of Annex II of ITS 4 on the format of position reports by investment firms and market operators as a consequence of the exclusion of securitised derivatives from the scope of the position limit regime.
11. Part III of the CP presents the draft RTS on position management controls.
12. A preliminary cost-benefit analysis of draft RTS 21a and the draft RTS on position management controls can be found in Annex I while the draft legal texts resulting from the proposals discussed in Part I, II and III of the CP are provided in Annex III.
13. Based on the responses and feedback received to this CP, ESMA will prepare a final report for submission to the Commission. Respondents to this consultation are encouraged to provide relevant information, in particular quantitative data, to support their arguments or proposals and help further complement the cost-benefit analysis (CBA). Specific questions are included in the CBA section and we would welcome feedback on those. This quantitative data should allow for a proper assessment of the materiality of the issues for the respective market participants and an assessment of the potential impacts of the proposed changes to the legal texts.

Part I: Draft RTS 21a

2.1 Background/mandate

Article 57(3)

“ESMA shall [...] develop a draft regulatory technical standard to determine the calculation methodology that competent authorities are to apply when establishing the spot month position limits and other months’ position limits for physically settled and cash settled commodity derivatives based on the characteristics of the relevant derivative concerned [..].

14. ESMA is required to develop a draft RTS on the calculation methodology for position limits. As the two other empowerments to draft RTS to determine a procedure for applying for the liquidity provision exemption and for the risk-reducing exemption are closely related to the methodology for establishing position limits, ESMA has included the proposals regarding those two more specific draft RTS in the more broadly encompassing draft RTS 21a on the calculation methodology for position limits.
15. Draft RTS 21a builds on RTS 21. Three categories of amendments are being suggested in draft RTS 21a compared to RTS 21. The first one relates to the empowerments described above and are discussed in section 3 and 4. Some other amendments are a direct consequence of Level 1 changes such as the deletion of certain adjustment factors or the exclusion of securitised derivatives from the scope of position limits. Finally, some amendments are being introduced at ESMA’s initiative based on the experience gained over the last few years with the existing methodology. Those last two categories of amendments are discussed in section 5.

3 Exemption from position limits for risk-reducing positions held by financial entities

3.1 Background/mandate

Article 57(1) third sub-paragraph

“ESMA shall develop draft regulatory technical standards to determine a procedure by which a financial entity that is part of a predominantly commercial group may apply for a hedging exemption for positions held by that financial entity that are objectively measurable as reducing risks directly relating to the commercial activities of the non-financial entities of the group.”

Article 57(12)

“ESMA shall develop draft regulatory technical standards to determine:

(a) the criteria and methods for determining whether a position qualifies as reducing risks directly relating to commercial activities; [...]

(e) the methodology for aggregating and netting OTC and on-venue commodity derivatives positions to establish the net position for purposes of assessing compliance with the limits. [...]

3.2 Analysis and proposals

16. Non-financial entities (NFEs) are currently the only persons eligible for a hedging exemption from position limits for the positions held that are objectively measurable as reducing risks directly related to their commercial activities. The creation of a limited exemption from position limits for positions held by financial entities that are objectively measurable as reducing risks directly related to the commercial activities of NFEs within predominantly commercial groups led to three new specific provisions in RTS 21a compared to RTS 21: i) a clarification for the aggregation and netting of positions, ii) the definition of qualifying positions and iii) the determination of the application procedure.

3.2.1 Aggregation of positions (Article 3(5) of RTS 21a)

17. Article 3(3) of RTS 21 currently provides that positions held by an NFE that are objectively measurable as reducing risks do not count towards the determination of the net position of the NFE. Taking into account the extension of the hedging exemption from position limits to financial entities within predominantly commercial group, a new Article 3(5) is introduced in RTS 21a to clarify that positions held by a financial entity in commodity derivatives that are objectively measurable as reducing risks directly related to the commercial activities of NFEs in a predominantly commercial group, as approved by the competent authority pursuant to Article 7(2) and (4) of RTS 21a, shall not be aggregated for the purposes of comparing the net position of that financial entity with the limits for that commodity derivative.

Q1: Do you agree with ESMA's proposal regarding the impact of the new hedging exemption on the aggregation of positions? If not, please elaborate.

3.2.2 Financial entities' positions qualifying as risk reducing (Article 7(2) and (4) of draft RTS 21a)

18. Article 7 of RTS 21 currently sets out the criteria to be met by a position held by an NFE to qualify as a position that is objectively measurable as reducing risks directly related to the commercial activities of the NFE.
19. The Level 1 text extends the exemption from position limits to the positions held by a financial entity that is objectively measurable as reducing risks directly related to the commercial activities of the NFEs in a predominantly commercial group. In ESMA's view, there are many similarities in the positions eligible to a hedging exemption, be they held by an NFE or a financial entity, and this should be reflected in the newly introduced definition of qualifying positions held by a financial entity.
20. Under Article 7(2) of RTS 21a, the circumstances under which a position held by a financial entity in relation to the commercial activities of the NFEs of the group may qualify as risk-reducing therefore replicate the circumstances set out in Article 7(1) regarding the positions held by NFEs. Likewise, Article 7(4) of RTS 21a sets out requirements regarding the information to be included in the financial entity's internal policies and the availability of a sufficiently disaggregated view of the hedging portfolios, in line with the provisions set out in Article 7(3) for NFES.

Q2: Do you agree with ESMA's proposal for positions qualifying as risk-reducing? If not, please elaborate and provide an alternative proposal.

3.2.3 Application procedure for the exemption from position limits for financial entities (Article 8(3), (4) and (7) of RTS 21a)

21. The procedure for NFEs to apply for a hedging exemption for qualifying positions is currently set out in Article 8 of RTS 21. When considering the procedure for financial entities to apply for a hedging exemption for positions held that are objectively measurable as reducing risks directly related to the commercial activities of the NFEs of the predominantly commercial group, ESMA assumed that the application procedure for the NFEs' hedging exemption is already familiar to non-financial groups. ESMA therefore considers that it would be more straightforward for both market participants and NCAs to draft a hedging application procedure for financial entities that would mirror the application procedure for NFEs to the extent possible.
22. Like NFEs, the financial entity holding a qualifying position must apply for an exemption from position limits to the NCA which sets the position limit for that commodity derivative as that NCA will be the one receiving daily position report from the financial entity (Article 8(3) of RTS 21a).

23. As regards the information to be submitted by the financial entity to the NCA at the time of application, it should be noted that the newly introduced hedging exemption for financial counterparties aims at addressing the specific circumstances where a financial entity is acting as the market facing entity of a non-financial group. This exemption for financial counterparties is therefore not intended to result in the broadening of the scope of the hedging exemption but rather as a transfer of the hedging exemption potentially available to NFEs to the financial entity of the group. To ensure that this rationale is met, the information submitted to the NCA should demonstrate that the parent undertaking has entrusted to the financial entity the trading of commodity derivatives traded on a trading venue and their economically equivalent OTC contracts to reduce the exposure and risks in the commercial activities of the non-financial entities of the predominantly commercial group.
24. Further adjustments to the application procedure for NFEs are also needed in Article 8(4) of RTS 21a to cater for the fact that the financial entity will have to demonstrate that the position reduces risks directly related to the commercial activities of the non-financial entities of the group, and not of its own commercial activity.
25. The application file should continue to include a description of the nature and value of the NFE's commercial activities in the commodity derivative for which an exemption sought is relevant. Information should also be provided on the exposures and risks in the commodity which the NFE has or expects to have as a result of its commercial activities and which are or would be mitigated by the use of commodity derivatives.
26. As the financial entity in the predominantly commercial group will be the market facing entity of the group, it will be for the applying financial entity to provide a description of the nature and value of its activities in the relevant commodity derivatives and an explanation of how its use of commodity derivatives directly reduces the exposures and risks in the commercial activities of the NFEs of the predominantly commercial group.
27. ESMA proposes to retain the same 21 calendar day period for the NCA to approve or reject the financial entity's application and notify its decision to the applicant. ESMA also proposes to retain the same procedure as currently set out in Article 8(4) of RTS 21 in case of a significant change in the NFE's commercial activities or in the financial entity's trading activities in commodity derivatives and the change having an impact on the information provided at the time of application.

Q3: Do you agree with ESMA's proposal on the application procedure for financial entities?? If not, please elaborate and provide an alternative proposal.

4 Exemption from position limits for positions resulting from liquidity provision

4.1 Background/mandate

Article 57(1), third sub-paragraph

“ESMA shall develop draft regulatory technical standards to determine a procedure setting out how persons may apply for an exemption for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue.”

Article 57(12)

“ESMA shall develop draft regulatory technical standards to determine [...]

(e) the methodology for aggregating and netting OTC and on-venue commodity derivatives positions to establish the net position for purposes of assessing compliance with the limits. [...]”

4.2 Analysis and proposals

28. As explained in Recital 13 of the draft RTS, the introduction of an exemption from position limits for positions resulting from transactions entered into to fulfil mandatory liquidity provisions on a trading venue aims at allowing liquidity providers to effectively fulfil their role without being hampered in doing so by position limits. ESMA understands that “the transactions entered into to fulfil obligations to provide liquidity on a trading venue” referred to in the empowerment are the same as the transactions excluded from the calculation of the ancillary activity test under Article 2(4)(c) of MiFID II, i.e. “(c) transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue, where such obligations are required by regulatory authorities in accordance with Union law or with national laws, regulations and administrative provisions, or by trading venues.”

29. The creation of this exemption in Level 1 led to the execution of the two empowerments set out in the third sub-paragraph of Article 57(1) and Article 57(12)(e) of MiFID II regarding i) the aggregation and netting of positions ii) the determination of the application procedure and, iii) the definition of qualifying positions.

4.2.1 Aggregation of positions (Article 3(6) of RTS 21a)

30. Article 3(6) of RTS 21a clarifies that positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue, in accordance with Article 10 of RTS 21a, as approved by the relevant NCA pursuant to Article 9 of RTS 21a, shall not be

aggregated for the purposes of comparing the net position of that person with the limits for that commodity derivative.

4.2.2 Application for the exemption from position limits (Article 9 of RTS 21a)

31. ESMA proposes that the procedure to apply for a position limit exemption in the context of mandatory liquidity provision on a trading venue (“liquidity provision exemption”) draws on the current procedure for NFEs to apply for a hedging exemption but with adapted information to be provided at the time of application to cater for the different circumstances.
32. Application would be made to the NCA that sets the position limit for the commodity derivative for which mandatory liquidity is provided on a trading venue as this is the NCA receiving position reports from the liquidity provider.
33. As one of the key eligibility criteria for the exemption is that the person providing liquidity in commodity derivatives on a trading venue is under the obligation to do so, as opposed to acting on a voluntary basis, the information provided to the NCA at the time of application should include the legal basis for this mandatory liquidity provision and the agreement signed with the trading venue setting out the liquidity provision obligations to be met by the applicant on the trading venue per commodity derivative. The information provided in the application file should also enable the NCA to understand the nature and value of the person’s activities in the trading of the relevant commodity derivative pursuant to mandatory liquidity provision activities and of the expected resulting positions.
34. As for the other applications for exemption from position limits, the NCA should approve or reject the application within 21 calendar days. Significant changes in the nature and value of the person’s trading activities in the relevant commodity derivative that impact the information provided at the time of application should lead that person to submit a new application if it intends to continue using it. This will ensure that the positions reported as exempted from position limits remain consistent with the information available to the NCA on the person’s trading activities pursuant to mandatory liquidity provision.

Q4: 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.

4.2.3 Positions qualifying as resulting from transactions entered into to fulfil mandatory liquidity provision (Article 10 of RTS 21a)

35. In order to ensure a uniform application of the procedure set out in Article 9 of RTS 21a, ESMA considers that it is necessary that the concept of a “qualifying position” for the purpose of this provision should also be defined in RTS 21a. ESMA proposes that a position held by a person in a commodity derivative traded on a trading venue qualifies as resulting from transactions undertaken by the person to fulfil mandatory liquidity provision obligations where the position directly results from transactions in a commodity derivative undertaken in compliance with the written agreement entered into with the trading venue

and is identified as such by the trading venue, in accordance with the second paragraph of Article 48(3) of MiFID II. It would be for the liquidity provider to ensure that its own records of transactions undertaken to comply with the written agreement entered into with the trading venue are consistent with the trading venue's records.

36. The person's internal policies should be such as to ensure that the positions resulting from transactions undertaken to fulfil mandatory liquidity provision can be properly identified. To that end, those internal policies should describe the link between the position held in a commodity derivative and the transactions undertaken to fulfil mandatory liquidity provisions as well as the measures adopted to ensure that any position not resulting from mandatory liquidity provision transactions or serving a different purpose can be clearly identified.

Q5: Do you agree with ESMA's proposal on qualifying positions? If not, please elaborate and provide an alternative proposal.

5 Other Amendments to RTS 21

37. This section of the CP focusses on the other changes to RTS 21 introduced in draft RTS 21a. Those changes may either be a direct consequence of the amending Directive or result from the experience gained by ESMA with the implementation of the RTS 21 methodology over the last few years. As part of the former, all references to commodity derivatives defined under point (c) of Article 4(1)(44) of MiFID II, i.e. to securitised derivatives, have been deleted.

5.1 Chapter I - General Provisions

5.1.1 Definitions (Article 2 of RTS 21a)

38. The second sub-paragraph in Article 57(1) of the amended MiFID II introduces an exemption from position limits that is specific to financial entities. Only financial entities will be able to apply for that exemption in accordance with the procedure set out in Article 8(3), (4) and (7) of RTS 21a. There is therefore a need to define financial entities in draft RTS 21a.
39. Article 2 of existing RTS 21 defines NFEs as legal or natural persons other than the ones listed below in the Article. Article 2 of RTS 21a builds on the RTS 21 list of NFEs but turns it into a positive list of legal or natural persons defined as financial entities. Article 2 of draft RTS 21a also clarifies that a third-country entity would be considered as a financial entity if it would require authorisation under any of the aforementioned legislation if it were based in the Union and subject to Union law. NFEs are then in turn defined as legal or natural persons not qualifying as financial entities.

Q6: Do you agree with ESMA's proposed definition of financial entities? If not, please elaborate.

5.2 Chapter II – Method for calculating the size of the net position of a person

5.2.1 Aggregation and netting of positions in a commodity derivative (Article 3 of draft RTS 21a)

40. Draft RTS 21a would make two sets of amendments to Article 3 of RTS 21.
41. The first one is a direct consequence of the amending Directive and relates to the deletion of the concept of “the same commodity derivative” in Article 57(6) of MiFID II. Under previous Article 57(6) of MiFID II, when the same commodity derivative would be traded in significant volumes on trading venues in more than one jurisdiction, the central competent authority (CCA) would set a single position limit to be applied on all trading in that contract.
42. Amended Article 57(6) of MiFID II provides that a single position limit is set by the CCA where agricultural commodity derivatives traded in significant volumes and critical or significant commodity derivatives based on the same underlying and sharing the same characteristics are traded on trading venues in more than one jurisdiction.
43. The reference to “the same commodity derivative” in Article 3(1) of RTS 21 has therefore been deleted. Instead, the aggregation of positions in a commodity derivative in Article 3(1)(b) of draft RTS 21a includes positions held in “commodity derivatives that are based on the same underlying and that share the same characteristic in accordance with paragraph 6 of Article 57 of MiFID II”.
44. The other amendment proposed by ESMA regarding the aggregation of positions is based on the experience gained over the last few years suggesting that the net position of a person in a commodity derivative and the position limit setting process may require a more nuanced approach, notably for spread contracts and for commodity derivatives that are only a fraction of a principal or main contract traded on the same trading venue.
45. Spread contracts are instruments which are based solely on the value of the difference between two (or more) underlying reference instruments whose characteristics may vary in type, grade, location, time of delivery or otherwise. An issue arises due to the admitting of these spread contracts to trade, despite being comprised of two constituent instruments that will (for the most part) receive their own position limit.
46. The use of ‘spread contracts’ is to gain exposure to the value of the difference between two different reference instruments. Trading venues offer these contracts in pre-packaged form that allows the user to more readily, and ‘safely’ enter and exit spread positions. Having entered into a spread position, market participants (and venues) typically disaggregate spread contracts and assess the resulting positions individually to get an overall view of the portfolio risk. By retaining the ability to trade the same instruments via both outright contracts and spreads subject to different position limits, it would be possible to game the regime and circumvent the individual commodity derivative limits.

47. To avoid this scenario, ESMA issued a Q&A setting out that position limits should apply to outright contracts and that the use of spread contracts should be included in the limits set for those outright contracts so that the Level 1 goal can be met. However, ESMA considers that it would increase legal certainty if this approach is set out in Level 2 and therefore proposes to introduce it in Article 3(2) of RTS 21a.
48. A similar issue arises with 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”. A mini contract is traded on the same trading venue as the principal contract, but in a smaller lot size. The two contracts share all other specifications and are priced off the same underlying commodity. A balmo (‘balance-of-the month contract’) can be entered into on any day of the spot month of the principal contract and is settled on the last trading day of that month. The balmo shares contract specifications with the whole month contract (the principal) and is priced off the same underlying. The mini and balmo contracts provide commercial participants with the flexibility to ‘fine tune’ their hedging needs with regards to the size of the hedge and the duration of the hedge respectively.
49. ESMA is of the view that aggregating balmo and mini positions will avoid the creation of multiple limits for identical commodities potentially undermining the overall intentions of the regime. It will allow for a single centralised and representative position to be calculated from the report of positions held by the participant and a single clear position limit for the market, enhancing the approach already established with the aggregation of positions under Article 57 of MiFID II. Aggregating positions in mini and balmo contracts with positions in the principal contract will also increase insight into trading activity and would be consistent with the regime’s objectives of transparency and accountability.

Q7: 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.

5.2.2 Significant volumes (Article 5 of draft RTS 21a)

50. As a direct consequence of the amending Directive (see also paragraph 41), the reference to “Same commodity derivatives” has been deleted in Article 5 of RTS 21a. The definition of a commodity derivative “traded in significant volumes on a trading venue” has been adjusted to refer to an agricultural commodity derivative where the average daily open interest exceeds 20,000 lots in the spot month and other months’ combined. The former threshold of 10,000 lots has been adjusted upwards to 20,000 lots to be consistent with the proposal made in Article 17 of draft RTS 21a for new and less liquid agricultural commodity derivatives (see below).

Q8: Do you agree with ESMA’s proposal for significant volumes? If not, please elaborate.

5.3 Chapter III – Methodology for Competent Authorities to calculate position limits

Section I – Determination of baseline figures

5.3.1 Methodology for determining the baseline figure for spot month limits (Article 11 of draft RTS 21a)

51. Under Article 9(1) of RTS 21, the baseline figure for the spot month position limit is set at 25% of deliverable supply, and 20% for certain commodity derivatives with an underlying that qualifies as food intended for human consumption. Taking into account the relevant adjustment factors, the baseline figure can then be adjusted upward or downward in accordance with Article 14 of RTS 21. NCAs can notably adjust the baseline figure down to 5% (and 2.5% for certain commodity derivatives with an underlying that qualifies as food intended for human consumption) of deliverable supply.
52. However, ESMA experienced that where the level of deliverable supply for a commodity derivative is significantly higher than the level of open interest, such as for instance in many power commodity derivatives, the methodology above for setting the spot month limit appears ineffective. Even when the baseline is adjusted downward to the maximum extent possible, i.e. to 5 or 2.5% of deliverable supply, the level of the spot month limit often remains above the spot month open interest, and sometimes above the overall open interest in that commodity derivative. The spot month limit is therefore deprived of any material effect, in contrast to the objectives of position limits set out in Article 57(1) of MiFID II.
53. In order for the spot month position limits to be effective and meaningful in all circumstances, ESMA proposes to set out in Article 11(1) of RTS 21a that, where the deliverable supply is significantly higher than the open interest, the NCA should set the baseline for the spot month limit as 25% of the open interest. The same approach would apply for setting the baseline for commodity derivatives with an underlying that qualifies as food for human consumption under Article 11(4) of RTS 21a. Once the baseline for the spot month limit has been determined, the NCA should then consider the relevant adjustment factors available in draft RTS 21a, including to ensure that the spot month limit is consistent with the objectives of Article 57 of MiFID II.

Q9: Do you agree with ESMA's proposal? If not, please elaborate and provide an alternative proposal where available.

5.3.2 Deliverable supply (Article 12 of draft RTS 21a)

54. Under Article 10(2) of RTS 21, the reference to be used to determine the deliverable supply for a commodity derivative is the average monthly amount of the underlying commodity available for delivery over the one year period immediately preceding the determination of the position limit.

55. When reviewing the deliverable supply figures provided by NCAs in the notification of position limits, ESMA however noted that public data sources are often not available for the one year period immediately preceding the determination of the position limit. ESMA therefore proposes to clarify in Article 12(2) of RTS 21a that the deliverable supply should be determined by reference to the average monthly amount of the underlying commodity available for delivery based on the most recent available data covering a one year period immediately preceding the determination.

Q10: Do you agree with ESMA's proposal? If not, please elaborate.

5.3.3 Open interest (Article 14 of draft RTS 21a)

56. Under Article 12 of RTS 21, the open interest in a commodity derivative must be calculated by aggregating the number of lots that are outstanding on trading venues at a point in time. Based on experience, ESMA proposes to introduce three clarifications in the calculation of open interest in Article 14(1) of RTS 21a.

57. Firstly, as position limits apply to commodity derivatives traded on a trading venue and EEOC contracts, it is appropriate that the reference amount used for setting those limits also include open interest in EEOC contracts, which is now spelled out in Article 14(1) of RTS 21a.

58. Secondly, ESMA noted that the calculation of open interest was not harmonised across NCAs, with some NCAs referring to gross open interest and others to net open interest. In addition, different data sources were being used. To ensure a more harmonised approach to applying position limits, ESMA agreed with NCAs that the open interest should be calculated on a net basis, based on position reporting data. As the Level 1 text refers to the "net open interest" in a commodity derivative to assess whether that commodity derivative qualifies as critical or significant, it is appropriate that the same open interest calculation methodology applies to all commodity derivatives subject to position limits, including agricultural commodity derivatives. Furthermore, ESMA considers that the calculation of open interest based on position reporting data provides the most accurate and reliable figure while promoting convergence in the setting of position limits by NCAs. Article 14(1) of RTS 21a therefore clarifies that the net open interest in a commodity derivative must be determined based on position reporting data.

59. Finally, whilst Article 12 of RTS 21 refers to the aggregation of the number of lots in a commodity derivative that are outstanding "at a point in time", this single reference point does not appear to allow to appropriately capture the trading characteristics of a commodity derivative, including potential seasonality effects or rapid changes in trading patterns. ESMA is therefore of the view that it would be more appropriate for the open interest to be calculated "over a representative period of time" which would depend on the characteristics of the commodity derivative. For instance, where trading in a commodity derivative is subject to seasonality effects, a sufficiently long period of time should be considered to remove this data bias. Where trading in a commodity derivative is in a rapid upward, or

downward, phase, a shorter reference period may be more appropriate for the calculation of open interest to better capture market trends.

60. ESMA also proposes to introduce a second paragraph in Article 14 of RTS 21a to cater for the calculation of open interest in certain specific circumstances. As experienced over the last three years, following a merger or other corporate events, a commodity derivative may be transferred from one trading venue to another. Alternatively, a new commodity derivative may be admitted to trading on a trading venue to gradually replace an existing one, in case for instance of a change in the underlying index. In both circumstances, considering the newly launched commodity derivative as a “new” contract for position limit purposes would not allow to appropriately capture potential trading interests in that contract and would hamper the adequate development of this contract. ESMA is therefore of the view that when first setting a position limit for such commodity derivative, the NCA should be able to take into consideration the open interest in that commodity derivative on the former trading venue or in the commodity derivative to be gradually replaced.

Q11: Do you agree with ESMA’s proposals regarding Article 14 of RTS 21a? If not, please elaborate and provide alternative proposals.

Section II – Factors relevant for the calculation of position limits

5.3.4 New and less liquid agricultural commodity derivatives (Article 17 of draft RTS 21a)

61. Agricultural commodity derivatives remain subject to position limits, independently of the level of open interest and ESMA has given further consideration to the methodology for setting position limits for new and less liquid commodity derivatives currently set out in Article 15 of RTS 21.

62. In Article 17 of RTS 21a, ESMA is considering to simplify the methodology for new and less liquid agricultural commodity derivatives and use the same *de minimis* position limit for all agricultural commodity derivatives with an overall open interest below 20,000 lots over a consecutive three-month period. For those commodity derivatives, the position limit would be set at 10,000 lots for the spot month and 10,000 lots for the other months. The aim of this new approach to *de minimis* position limits for new and less liquid agricultural commodity derivatives would be to allow those contracts to grow and stabilise, without hindering market participants to trade from the start or shortly after for fear of breaching overly restrictive limits. When an agricultural commodity derivative has gathered sufficient trading interest and the open interest has exceeded 20,000 lots, the NCA would then determine bespoke position limits for the contract, in accordance with the methodology set out in RTS 21a.

Q12: 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.

5.3.5 The overall open interest (Article 19 of draft RTS 21a)

63. Based on the experience gained with the issuance of opinions on the position limits notified by NCAs, ESMA is of the view that further clarification should be introduced in the adjustment factors currently set out in Article 18(2) and (3) of RTS 21 which are based on a comparison between the size of deliverable supply and open interest.
64. Where the open interest is significantly higher than the deliverable supply, ESMA considers useful to clarify in Article 19(2) of RTS 21a that it is the other months' limit that must be adjusted downwards so as to avoid a cliff-edge effect with the spot month limit which is based on deliverable supply. That cliff-edge effect should not be addressed by adjusting the spot month limit upwards due to an increased risk of market cornering in such circumstances.
65. Where the open interest is significantly lower than the deliverable supply, ESMA is of the view that the other months' limit should be adjusted upwards to avoid the risk of unduly constraining trading. In contrast, as deliverable supply is significantly higher than open interest, the spot month limit based on deliverable supply that results from the baseline is expected to exceed the open positions held by market participants in the spot month. To avoid that the spot month is deprived of any effect and to ensure that it does prevent market participants from building a dominant position that would be contrary to the objective of preventing market abuse and ensuring orderly, the spot month limit should be adjusted downwards. This is clarified in Article 19(3) of RTS 21a.

Q13: Do you agree with ESMA's proposal regarding Article 19 of RTS 21a? If not, please elaborate.

5.3.6 The number of market participants (Article 20 of draft RTS 21a)

66. Under Article 19(2) of RTS 21, the NCA may increase the spot month and the other months' limit up to 50% when there are less than ten market participants holding a position in a commodity derivative or when there are less than three investment firms active as a market maker in a commodity derivative. However, those specific circumstances do not establish a reason for an upward adjustment on their own.
67. ESMA is however of the view that a small number of market participants justifies increasing the position limits up to 50% of the reference amount on their own, even without additional available upward adjustment factors. When the number of market participants trading a given commodity derivative is low, one of those market participants is more likely to reach a position representing a significant share of the overall open interest than in case of a more widespread participation without the intention of building a dominant position. NCAs should therefore have the possibility to increase the position limit based on that sole circumstance.
68. As regards market makers, real-economy firms seeking to hedge their positions are typically on one side of the market and investment firms on the other side. Where there are

only very few market makers, they may be prevented from providing liquidity to the market and fully playing their role in the development of a commodity derivative by restrictive position limits. ESMA however notes that the newly introduced exemption from position limits for positions resulting from transactions undertaken to fulfil mandatory liquidity provision addresses many of the concerns that Article 19(2)(b) of RTS 21 was seeking to address and the role of market makers is less critical for the most liquid contracts. However, ESMA is also aware that in some contracts, liquidity may be provided by persons that do not operate under formal liquidity provision agreements. Based on the above, ESMA proposes that NCAs should be able to adjust the position limit upward up to 50% of the reference amount when the commodity derivative is an agricultural commodity derivative with a net open interest below 300,000 lots and when there are less than three market makers in that agricultural commodity

69. Those two proposals are reflected in Article 20(2) of RTS 21a which provides that “[...] NCAs shall **adjust the position limit upwards** [...]” (a) where there are less than ten market participants or (b) where the commodity derivative is an agricultural commodity derivative with a net open interest below 300,000 lots and there are less than three investment firms acting market makers in that agricultural commodity derivative.

Q14: 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.

5.3.7 Other adjustment factors

70. The maturity of the commodity derivative and the volatility in the relevant markets no longer appear as adjustment factors in the Level 1 empowerment given to ESMA to develop a methodology to be applied by NCAs when establishing position limits. Those adjustment factors have therefore been deleted in RTS 21a.

Part II: Amendments to ITS 4

5.4 Background/mandate

Article 58(5), first sub-paragraph

“ESMA shall develop draft implementing technical standards to determine the format of the reports referred to in point (a) of paragraph 1 and of the breakdowns referred to in paragraph 2.”

71. Article 58(1)(a) of MiFID II requires Member States to ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives or emission

allowances or derivatives thereof makes public a weekly report with the aggregate positions held by the different categories of persons for the different commodity derivatives or emission allowances or derivatives thereof traded on their trading venue (“weekly reports”). The weekly reports are communicated to the NCAs and to ESMA, and ESMA proceeds with a centralised publication thereof.

72. Article 58(2) of MiFID II sets obligations for investment firms trading commodity derivatives or emission allowances or derivatives thereof when traded outside a trading venue (EEOTC) to submit daily reports to the competent authority (“daily reports”). Investment firms have the duty to provide the information in Article 58(2) of MiFID II in relation to the positions of their clients and the clients of those clients until the end client is reached.
73. Weekly and daily reports shall differentiate between positions which “in an objectively measurable way reduce risks directly relating to commercial activities” and other positions.
74. Article 58(5) of MiFID II mandated ESMA to draft implementing technical standards to determine the format of the reports and how the breakdown of the positions should be performed. Based on this empowerment, ESMA developed ITS 4¹, which sets out the format of position reports to be used by investment firms and market operators. The following section analyses possible amendments to ITS 4 to reflect the new exemptions from the position limits regime resulting from the amending Directive.

5.5 Analysis and proposals

5.5.1 Hedging exemption for financial counterparties from the position limit regime

75. The amending Directive introduces a hedging exemption from the position limit regime for financial entities that are part of a predominantly commercial group and are acting on behalf of a non-financial entity of the predominantly commercial group, where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity.
76. MiFID II states that the weekly and daily reports shall differentiate between risk-reducing positions and other positions (third subparagraph of Article 58(4) of MiFID II). No amendments have been introduced here by the amending Directive.
77. ESMA notes that the wording “reduce risks directly relating to commercial activities” encompasses both the hedging activity of non-financial counterparties (existing exemption), and the new hedging exemption available to financial counterparties acting on behalf of a non-financial entity.

¹ COMMISSION IMPLEMENTING REGULATION (EU) 2017/1093 of 20 June 2017 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators

78. Therefore, it is necessary to ensure that in ITS 4, the risk-reducing positions of financial entities that are part of a predominantly commercial group and are acting on behalf of a non-financial entity, are reflected in both daily and weekly reports.

5.5.1.1 Impact on weekly reports under Article 58(1)(a)

79. With respect to weekly reports, ESMA notes that the distinction between hedging and non-hedging positions was introduced to enhance transparency to the public on speculative trading activity. This policy objective should be fulfilled when the speculative trading activity stems from financial and from non-financial counterparties. To that effect, ESMA is of the view that the published weekly reports should provide the same level of transparency: it should be possible to identify hedging versus non-hedging positions, irrespective of the type of counterparty (financial or non-financial) undertaking the activity.

80. In ITS 4, Table 1 of Annex I already includes a breakdown for “Risk Reducing directly related to commercial activities”. Currently, this line is expected to be populated only in the case of non-financial entities. Once the amending Directive takes effect, the same line could be used by financial entities. Hence, there is no need to amend Annex I of ITS 4 in this respect.

5.5.1.2 Impact on daily reports under Article 58(2)

81. With respect to daily reports, competent authorities should be provided with the information related to the use of the hedging exemption by financial counterparties to enable monitoring of compliance with the position limit regime, as they currently do with regards to non-financial counterparties.

82. In Table 2 of Annex II of ITS 4, there is a field labelled “Indicator of whether the position is risk reducing in relation to commercial activity”. While currently this field is only used for the purpose of the existing hedging exemption for non-financial entities, ESMA suggests that the same field should be used for the purpose of the upcoming hedging exemption for financial entities.

83. In addition, in Table 2 of Annex II of ITS 4, the column “Details to be reported” related to the hedging field reads as follow: “Field to report whether the position is risk reducing in accordance with Article 7 of Delegated Regulation (EU) 2017/591.” (RTS 21)

84. Article 7 of RTS 21 will be amended to include a new definition specifically related to the hedging exemption for financial counterparties (see Section 3.2.2). As a result, the only necessary change to Table 2 of Annex II of ITS 4 in that respect would be to replace the reference to RTS 21 with the reference to the new RTS 21a.

5.5.2 Liquidity provision exemption from the position limit regime

85. The amending Directive introduces an exemption from the position limit regime for financial and non-financial counterparties for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue².
86. The section of MiFID II establishing the obligation to distinguish between hedging and non-hedging transactions in the weekly or daily reports (third sub paragraph of Article 58(4) of MiFID II) has not been modified in the amending Directive. As a result, there is no explicit reference in Level 1 requiring the identification of positions resulting from liquidity provision in the daily or weekly reports.
87. ESMA has not identified any clear benefit of making the positions benefitting from the liquidity provision exemption visible in the weekly reports. Such distinction would introduce implementation costs for the reporting counterparties, NCAs and ESMA, with no discernible benefit in terms of transparency for the public.
88. As the exemption for positions resulting from mandatory liquidity provision only applies to liquidity provided on a trading venue, there is no need either to introduce this exemption in daily reports.

5.5.3 Exclusion of securitised derivatives from the position limit regime

89. The amending Directive introduces an exemption from the position limit regime for securitised derivatives³. As a result, all references to securitised derivatives must be deleted from ITS 4.
90. The amendments proposed to ITS 4 are visible in red in Annex II, Section 6.3.2.

Q15: Do you agree with ESMA's proposed amendments to ITS 4? If not, please elaborate.

² Positions held by financial and non-financial counterparties for positions that are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4) of MiFID II.

³ Securities as referred to in point (c) of point (44) of Article 4(1) of MiFID II which relate to a commodity or an underlying as referred to in Section C.10 of Annex I thereof.

Part III: Draft RTS on position management controls

5.6 Background/mandate

Article 57(8) of MIFID II, second sub-paragraph

“ESMA shall develop draft regulatory technical standards to specify the content of position management controls, thereby taking into account the characteristics of the trading venues concerned”.

91. The Recovery Package requires ESMA to develop a draft RTS to specify the content of position management controls, taking into account the characteristics of the trading venues concerned, in order to diminish the significant dissimilarities currently existent in the way positions are managed by trading venues and increase its harmonisation across the EU.

92. Under Article 57(8), first sub-paragraph, of MiFID II, as amended by the Recovery Package:

“Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives applies position management controls, including powers for the trading venue to:

- (a) monitor the open interest positions of persons;
- (b) obtain information, including all relevant documentation, from persons about the size and purpose of a position or exposure entered into, information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market, including, where appropriate, positions held in commodity derivatives that are based on the same underlying and that share the same characteristics on other trading venues and in economically equivalent OTC contracts through members and participants;
- (c) request a person to terminate or reduce a position, on a temporary or permanent basis, and to unilaterally take action to ensure the termination or reduction of the position where the person does not comply with such request; and
- (d) require a person to provide, on a temporary basis, liquidity back into the market at an agreed price and volume with the express intent of mitigating the effects of a large or dominant position.”

93. Furthermore, as per Article 57(9) of MiFID II, position management controls must be transparent and non-discriminatory, specifying how those controls are applicable to persons and taking into account the nature and composition of market participants and the usage of the contracts submitted to trading.

94. The trading venue must communicate the details on position management controls to the NCA. In turn, the NCA must inform ESMA which will publish and maintain a database⁴ with the summaries of such position management controls, as defined by Article 57(10) of MiFID II.

5.7 Analysis and proposals

95. For the purpose of this CP, ESMA has considered the position management controls implemented by some non-EU commodity derivative markets, including where those position management controls run in parallel with position limits set by the regulatory authority.

5.7.1 Position management on non-EU venues

5.7.1.1 CFTC rules for position limits and position management

96. As a reminder, on 15 October 2020, the CFTC established federal spot month speculative position limits for derivative contracts associated with 16 physical commodities, and amended single-month and all-months-combined federal limits for most of the nine agricultural contracts currently subject to federal position limits. Under the final rule, federal non-spot month position limits were not extended to the sixteen new physical commodities.

97. The new rule became effective on 15 March 2021 with a phased-in compliance schedule. On January 1, 2022, (1) federal speculative position limits will apply for the first time to 16 core referenced futures contracts on certain agricultural, metals and energy commodities, and (2) exchanges must establish speculative position limits for referenced contracts and must impose speculative position limits or position accountability levels for physical commodity contracts not subject to federal speculative position limits outside of the spot month.

98. The existing federal speculative position limits function in parallel to exchange-set position limits and/or exchange-set position accountability limits required by designated contract market (“DCM”) Core Principle 5.

99. DCM Core Principle 5 provides that “To reduce the potential threat of market manipulation or congestion (especially during trading in the delivery month), the board of trade shall adopt for each contract of the board of trade, as is necessary and appropriate, position limitations or position accountability for speculators. Position limits generally cannot be exceeded absent an exemption, whereas position accountability allows an exchange to establish a level at which market participants, including those participants who do not qualify for an exemption, are required to: Provide position information to the exchange prior

⁴ https://www.esma.europa.eu/sites/default/files/library/position_management_controls.xls

to increasing a position above the accountability level; halt further position increases; and/or reduce positions in an orderly manner.”.

100. For physically settled contracts that are not subject to federal position limits, an exchange is required to set spot month limit, approved by the CFTC. Outside of the spot month, an exchange has additional flexibility to set either position limits or position accountability levels.

101. ESMA has also considered how the limits described in the previous paragraphs are applied across some of the US trading venues trading commodity derivatives. For instance, the Chicago Mercantile Exchange (CME) implements position management controls by setting position limits and position accountability levels⁵ for selected products traded on the exchange. Exchange-set position limits, as discussed above, are applied to various physical commodity contracts offered for trading, including agricultural contracts such as corn, soybean, wheat and oat and metal contracts. Such limits cannot be exceeded unless a market participant has an approved exemption. Exceeding the limits without an exemption is considered a violation of the exchange rules.

102. The CME also applies position accountability levels. Such levels might be exceeded by market participants. Nevertheless, the exchange can ask to a market participant who exceeds accountability levels to provide information relating to its position, and in cases where deemed necessary the position holder might be asked not to further increase the positions, to comply with any exchange imposed limit on the size of the position and/or reduce the position. Participants are expected to comply with such exchange requests and may otherwise face disciplinary action.

5.7.1.2 Position management at ICE Futures Europe (IFEU) and London Metal Exchange (LME)

103. ESMA also considered the arrangements in place at some significant UK commodity derivatives exchanges where position management controls had been in place for many years, including before the application of MiFID II.

104. Position management controls at ICE Futures Europe (IFEU), include exchange set position limits, accountability levels, delivery limits and expiry limits⁶, which apply to selected contracts. Exchange set position limits are mandatory position limits, below the MiFID II position limits, which apply to contracts that are also listed in the US, such as the ICE WTI Futures contract or the ICE Heating Oil Futures where those exchange limits become binding three days prior to expiry. Such limits cannot be exceeded by market participants, unless they obtain an exemption from the exchange.

105. Accountability levels are, as for the CME, levels of positions set by the exchange for the spot month and/or for all months. Such levels can be exceeded by market participants

⁵ <https://www.cmegroup.com/rulebook/files/cme-group-Rule-562.pdf>

⁶ https://www.theice.com/publicdocs/futures/Position_and_Expiry_Limit_and_Accountability_Levels.pdf

but exceeding them might trigger an information request by the exchange requiring further details from the position holder as to the nature and rationale for the position. When the exchange deems this necessary it can direct position holders not to increase the position or to reduce it below the relevant accountability level.

106. IFEU also applies delivery limits to selected physically settled contracts and expiry limits to some others. Expiry limits are limits unilaterally imposed by the exchange for a set period prior to expiry (e.g. the last five trading days leading to expiry). Delivery limits apply to the final position. Expiry and delivery limits are binding and cannot be exceeded unless the market participant obtains an exemption from the exchange. Accountability levels do not apply to contracts subject to delivery or expiry limits but, the exchange might request information to market participants in case of concerns regarding the size of a position.

107. The LME implements accountability levels, exchange set position limits as well as warrant reporting and lending rules that are unique to trading characteristics on the LME.

5.7.2 Proposals

108. In its recent MiFID II Review Report on position limits and position management controls⁷ ESMA suggested that, should the scope of commodity derivatives subject to position limits be significantly reduced as suggested, there would be merit in further clarifying the position management controls expected to be implemented by trading venues. As noted in its report, ESMA fully appreciates that trading venues are already required to ensure fair and orderly trading in accordance with MiFID II and that their market monitoring and surveillance departments' mission statement is to ensure compliance with all other relevant requirements under MiFID II/MiFIR, MAR and REMIT where applicable. However, ESMA notes that position management controls aim at addressing the specific challenges arising from commodity derivatives trading. ESMA also notes that position management controls by trading venues are not intended to mirror the position limits set by NCAs as they serve a separate purpose. As a reminder, ESMA clarified its MiFID II Q&A that the application of position limits under Article 57(1) MiFID II is the responsibility of the NCA.

109. ESMA is therefore considering proposing to introduce in Level 2 the following arrangements to be implemented by trading venues trading commodity derivatives, taking into account the characteristics of the commodity derivatives traded. Those proposals are reflected in the draft RTS on position management controls available in Annex III.

110. ESMA wishes to highlight that those proposals are based on preliminary considerations and appreciates that more work will be needed to reach a final proposal. ESMA would therefore particularly welcome comments and proposals from stakeholders on this part of the CP towards meaningful and pragmatic position management controls.

⁷ https://www.esma.europa.eu/sites/default/files/library/esma70-156-2311_mifid_ii_review_report_position_limits.pdf

a. General monitoring obligations

111. As recalled above, Article 57(8)(a) of MiFID II refers to the monitoring of positions as one of the position management controls to be implemented by trading venues. ESMA is of the view that such monitoring of positions should take place on an ongoing basis and apply to positions under common ownership or controls held in each commodity derivative available for trading on that venue. Such ongoing monitoring of positions, and the understanding of changes thereof, in all commodity derivatives available for trading appear as a prerequisite to other effective and meaningful arrangements contributing to orderly markets in commodity derivatives.
112. ESMA therefore proposes to specify that the ongoing monitoring of positions held by persons with close links should be part of the position management controls implemented by trading venues, as reflected in Article 1 of the draft RTS on position management controls. The term “Persons with close links” refers to Article 4(35) of MiFID II.

Q16: Do you agree with ESMA’s suggestion to introduce such ongoing position monitoring requirement in the draft RTS? If not, please elaborate.

b. Accountability Levels

113. In line with the empowerment set out in the second sub-paragraph of Article 57(8) of MiFID II, the need to specify the content of position management and the need to take into account the characteristics of the trading venues concerned when specifying the content of position management controls, ESMA has considered whether it would be appropriate that further position management controls are put in place by trading venues when trading specific commodity derivatives.
114. In doing so, ESMA has considered the risk profile of the various types of commodity derivatives available for trading to assess whether some of them would most notably deserve enhanced attention by trading venues as part of their position management controls.
115. As already mentioned in its review report on commodity derivatives, and while recognising that risks to orderly markets also exist for cash-settled contracts where the position holder would have the capacity to influence the price of the underlying, ESMA’s analysis is that such risks are more salient for physically-settled commodity derivatives. As noted in the 2011 IOSCO Principles for the Regulation and Supervision of Commodity Derivatives Markets⁸ IOSCO “The trading of physical commodity derivatives differs fundamentally from the trading of financial-based derivatives in that the actual supply of the underlying physical commodity is restricted to a finite supply”. This unique characteristics makes physically settled commodity derivatives more susceptible to disorderly trading practices such as market squeezes or market cornerings where

⁸ <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD358.pdf>

counterparties would make use of a dominant position to secure the price of a commodity derivative or of the underlying commodity at an artificial level.

116. In order to further ensure that the build-up of positions in physically settled commodity derivatives that could result in price distortion or otherwise impact orderly markets is properly identified and addressed, ESMA considers it would be appropriate to specify in the RTS on position management controls the circumstances where trading venues should notably exercise the power set out in Article 57(8)(b) of MiFID II to require additional information on the positions held in those commodity derivatives and take appropriate action as necessary in accordance with Article 57(8)(c) and (d) of MiFID II.
117. ESMA therefore suggests that trading venues should be required to set out accountability levels in the spot month and in the other months at least for each physically-settled commodity derivative made available for trading, as reflected in Article 2 of the draft RTS on position management controls. Trading venues should also consider whether it is appropriate to set accountability levels for the other commodity derivatives available for trading. Accountability levels would refer to a level of net position held by persons with close links that the trading venue may consider as a potential source of concern or trigger alarm. Where the accountability level would be exceeded, the trading venue would have to make use of the power set out in Article 57(8)(b) of MiFID II and require additional information on the purpose and rationale of the position held.
118. After assessing the information received, and where necessary, the trading venue would make use of the powers set out in Article 57(8) (c) and (d), i.e. require the position holders to reduce their positions or provide liquidity back to the market at a given price and time if fitted to the characteristics of the trading venue. However, ESMA notes that members, as well as their clients, could hold positions that are in excess of the accountability levels and that a request for information on the rationale of the position does not necessarily trigger a formal action from the venue where the trading venue' potential concerns would have been addressed by the information received..
119. ESMA is of the view that accountability levels should be calibrated taking into account the characteristics of the physically settled contract traded and of the underlying commodity, as well as the contract trading characteristics. As a preliminary consideration, ESMA would also suggest that accountability levels may or may not differ for the spot and for the other months and that positions under common control or ownership should be aggregated for the purpose of the calculation of accountability levels.
120. At this stage, ESMA would be minded to keep an open approach to the methodology to be used by trading venues for setting accountability levels in the RTS. However, ESMA also considers that there would be value in developing some further guidance on the methodology, taking into account the characteristics of the in-scope commodity derivatives, to contribute to a harmonised approach and level playing field across trading venues. ESMA intends to conduct further work in this area but would already welcome suggestions from stakeholders on how accountability levels should be set.

Q17: 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.

Q18: 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?

121. With a view to ensure that position management controls are effectively applied, ESMA considers that trading venues should evaluate on a regular basis the appropriateness of their accountability levels. When assessing whether those limits are adequate and effective in relation to the nature of the derivative contract concerned, trading venues should revise such limits in case any relevant changes have occurred. ESMA is therefore proposing to introduce under Article 3 of the draft RTS on position management controls general accountability levels’ review requirements for trading venues.

122. To ensure that NCAs receive adequate information on the position management controls in place, ESMA is also of the view that trading venues should communicate to their NCA the details of the methodology used for setting accountability levels.

123. Similarly, ESMA is proposing that trading venues submit to their NCA on a yearly-basis details of how accountability levels were applied in practice, including (i) how many times those were exceeded, (ii) how many further information requests were made by the trading venue (iii) the follow-up actions taking by the trading venue.

Q19: 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.

Q20: In your view, what other types of position management controls could be further specified in the draft RTS?

6 ANNEXES

6.1 Annex I: Cost Benefit Analysis

High level cost-benefit analysis

124. This section provides a high-level cost-benefit analysis (CBA) of draft RTS 21a and the draft RTS on position management controls. A more detailed CBA will be published together with the final draft RTS and ESMA's Final report. ESMA intends to include in the final CBA some quantitative data to provide a more refined assessment of the impact of the draft RTS on market participants. To that end, market participants are invited to respond to the questions below. In accordance with Article 15(1), second subparagraph of Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁹, ESMA will not provide a CBA for the amendments suggested to ITS 4 as it considers a CBA would disproportionate considering the scope and impact of those amendments.

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 EEOCT contracts where relevant in 2020 in thousand euros and the related total number of trades in the relevant boxes).

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		

⁹ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

Non-financial entity	[1-50]		
	[51-250]		
	[251-500]		
	>500		

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?

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?

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.

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?

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.

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?

6.1.1 Draft RTS 21a

6.1.1.1 Introduction

125. Draft RTS 21a determines a standard calculation methodology that competent authorities are to apply when establishing position limits for commodity derivatives based on the characteristics of the relevant derivative concerned. Draft RTS 21a also includes the empowerment received by ESMA to determine a procedure for financial counterparties to apply for a hedging exemption, subject to certain conditions, and for persons to apply for an exemption from position limits for mandatory liquidity provision.

126. Draft RTS 21a will be repealing existing RTS 21 and will retain the provisions in existing RTS 21 that are unaffected by the Level 1 changes to the position limit regime or by other changes suggested by ESMA at its own initiative. As ESMA already provided a CBA for existing RTS 21 in Annex II of ESMA Final Report on Draft Regulatory and Implementing

Technical Standards MiFID II/MiFIR Standards¹⁰, this CBA therefore focusses on the provisions newly introduced in RTS 21a compared to existing RTS 21.

6.1.1.2 Baseline

127. From a legal perspective, the baseline to consider is:

128. Article 57(1)(b) of MiFID II which introduces an exemption from position limits for positions held by, or on behalf of, a financial entity that is part of a predominantly commercial group and is acting on behalf of a non-financial entity of the predominantly commercial group, where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity;

129. Article 57(1)(c) of MiFID II which introduces an exemption from position limits for positions held by financial and non-financial counterparties for positions that are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4) of MiFID II;

130. Article 57(1) of MiFID II which requires NCAs, in line with the methodology for calculation determined by ESMA, to establish and apply position limits on the size of a net position which a person can hold at all times in commodity derivatives traded on trading venues and EEOTC contracts and Article 57(3) of MiFID II setting out the factors to be taken by ESMA when determining the methodology for setting position limits.

6.1.1.3 Stakeholders

131. The stakeholders identified are: NCAs, financial entities and NFEs trading agricultural commodity derivatives and/or critical or significant contracts.

- NCAs: NCAs will need to have arrangements in place to review applications for the new exemptions from position limits introduced in Article 57(1) of MiFID II. They will also need to review existing procedures for the aggregation of positions held by a person with a view to monitoring compliance of position limits to exclude positions covered by those new exemptions. NCAs will also have to take into account the revised adjustment factors when setting position limits. On the other hand, NCAs will only have to set position limits for a much smaller number of contracts.

- Financial entities: A financial entity within a predominantly commercial group will be able to apply for a hedging exemption for positions held by that financial entity that are objectively measurable as reducing risks directly relating to the commercial activities of the non-financial entities of the group. Financial entities will also be able to apply for an

¹⁰ https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1464_annex_ii_-_cba_-_draft_rts_and_its_on_mifid_ii_and_mifir.pdf

exemption for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue.

- NFEs: Like financial entities, NFEs will also be able to apply for an exemption for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue.

6.1.1.4 Cost Benefit Analysis

We provide below an analysis of the costs and benefits that could arise from the provisions in draft RTS 21a that would be new or amended compared to existing RTS 21.

Hedging exemption for financial entities in predominantly commercial groups

Policy Objective	Ensuring that financial entities in predominantly commercial groups that act as the market facing entity of the group can smoothly apply for an exemption from position limits for risk-reducing positions directly relating to the commercial activities of the non-financial entities of the group.
Technical Proposal	<p>The procedure to apply for the above exemption and the definition of qualifying positions would be very similar to the existing application procedure and definition of qualifying positions for NFEs holding risk-reducing positions in relation to their commercial activities.</p> <p>Once the NCA has approved the application, the risk-reducing positions held by the financial entity will not count towards the position limits set for that commodity derivative.</p>
<i>Benefits</i>	<p>Provides clarity and certainty on the criteria needed to determine when a position reduces risks directly related to the commercial activities of the NFEs of the group. Including this into internal policies avoids ad-hoc decisions on which types of derivatives are used to reduce risks directly related to such commercial activity.</p> <p>Provides clarity and certainty on the information to be provided to the NCA when applying for the exemption as well as timeline for approval or rejection by the NCA.</p>
<i>Cost to regulator:</i>	NCAs may incur staff compliance costs as they will have to verify the information provided by financial entities to determine whether the position qualifies as reducing risks related to the commercial activities of the NFEs of the predominantly commercial group and to process the application procedures.

- <i>One-off</i>	NCA's may also incur one-off IT costs to review existing procedures for the aggregation of positions held by a financial entity with a view to monitoring compliance of position limits to exclude hedging positions.
- <i>On-going</i>	Those costs are expected to be non-significant as the number of financial entities eligible to the hedging exemption should be rather limited.
<i>Compliance cost:</i>	Financial entities trading commodity derivatives eligible to the hedging exemption may incur one-off staff costs to apply for the exemption. They may also incur IT compliance costs to adjust position reporting to the new exemption.
- <i>One-off</i>	Those costs are expected to be non-significant
- <i>On-going</i>	
<i>Cost to other stakeholders</i>	None identified
<i>Indirect costs</i>	None identified

Exemption for positions directly resulting from transactions undertaken to fulfil mandatory liquidity provision

Policy Objective	Ensuring that persons providing liquidity to the market under mandatory liquidity agreement can smoothly apply for an exemption from position limits for positions directly resulting from such liquidity provision.
Technical Proposal	<p>The procedure to apply for the above exemption would be close to the existing application procedure for NFEs but with a significant adjustment to the information to be provided to the NCA at the time of application to justify eligibility to the exemption, focussing on the liquidity provision activity of the applicant and resulting positions.</p> <p>Once the NCA has approved the application, the person's positions resulting from mandatory liquidity provision will not count towards the position limits set for that commodity derivative.</p>
<i>Benefits</i>	Provides clarity and certainty on the information to be provided to the NCA when applying for the exemption as well as timeline for approval or rejection by the NCA.

	Provides clarity and certainty on the criteria needed to determine what is a qualifying position.
<p><i>Cost to regulator:</i></p> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>NCA's may incur staff compliance costs to process the application procedures and assess the information provided by financial entities or NFEs at the time of application or updated afterwards.</p> <p>NCA's may also incur one-off IT costs to review existing procedures for the aggregation of positions held by a person benefiting from a liquidity provision exemption with a view to monitoring compliance with position limits.</p>
<p><i>Compliance cost:</i></p> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>Financial entities and NFEs may incur one-off staff costs to apply for the exemption.</p> <p>They may also incur IT compliance costs to adjust position reporting to the new exemption.</p>
<i>Cost to other stakeholders</i>	None identified
<i>Indirect costs</i>	None identified

Aggregation and netting of positions (Article 3 of draft RTS 21a)

Policy Objective	Ensuring that the aggregation of positions in spread contracts and in commodity derivatives that are only a fraction of a principal or main contract traded on the same trading venue prevents circumventing the individual commodity derivative limits and challenging the overall intentions of the position limit regime.
Technical Proposal	Include in the aggregate position held by a person in a commodity derivative traded on a trading venue the position resulting from the disaggregation of the components of a spread contract traded on the same trading venue and the positions in commodity derivatives traded on the same trading venue that are a sub-set of the principal contract with regards to their size or pricing period maturity.
<i>Benefits</i>	Allow for a single centralised and representative position to be calculated from the report of positions held by the participant and a single clear position limit for related contracts traded on the same trading venue.

	Increase insight into a person's trading activity, in line with the position reporting regime's objectives of transparency and accountability.
<i>Cost to regulator:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	NCA's may also incur one-off staff and IT costs to review existing procedures for the aggregation of positions held by a person benefiting from a liquidity provision exemption with a view to monitoring compliance with position limits.
<i>Compliance cost:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>Persons trading spreads contracts or commodity derivatives that are a sub-set of commodity derivatives traded on the same trading venue may incur on-off staff and IT costs to adjust position reporting to the revised aggregation of positions.</p> <p>Trading venues may incur one-off staff and IT costs to adjust reports sent to NCA's to the revised aggregation of positions.</p>
<i>Cost to other stakeholders</i>	None identified
<i>Indirect costs</i>	None identified

Amendments with regards to baseline figure calculation (Articles 11, 12 and 14 of draft RTS 21a)

Policy Objective	Ensuring that the reference amount used as a basis for calculation of position limits allows the limits to be effective given the level of trading in a commodity derivative. Also ensuring that the calculation of the open interest is consistent among different trading venues.
Technical Proposal	The baseline figure used for commodity derivatives contracts with very large level of deliverable supply should be the open interest. The calculation of open interest is clarified, and the source of data used unified among NCA's.
<i>Benefits</i>	Provides clarity and certainty on the methodology of calculation of open interest. Ensures the level playing field of the position limits where the similar contracts are traded on more than one trading venue and ensures effective position limits for contracts with very high deliverable supply.

<i>Cost to regulator:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	NCA's may incur one-off costs of reviewing the existing procedures and setting up the relevant reports on the basis of position reporting data.
<i>Compliance cost:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	None identified.
<i>Cost to other stakeholders</i>	None identified
<i>Indirect costs</i>	None identified

New and less liquid agricultural commodity derivatives (Article 17 of draft RTS 21a)

Policy Objective	Ensures an effective process for position limits in case of agricultural contracts, with de minimis limits applying to new growing contracts.
Technical Proposal	The new and less liquid agricultural commodity contract will have new higher de minimis position limits until they reach the relevant thresholds of standard position limits.
<i>Benefits</i>	Will allow new and less liquid agricultural contracts to develop.
<i>Cost to regulator:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	NCA's may also incur one-off staff costs to review existing procedures for the position limits setting process. Those costs should not be significant given the previous experiences with the regime.
<i>Compliance cost:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	None identified.
<i>Cost to other stakeholders</i>	None identified

<i>Indirect costs</i>	None identified
-----------------------	-----------------

Amendments with regards to adjustment factors (Articles 19 and 20 of draft RTS 21a)

Policy Objective	Provides more clarity on the application of the relevant adjustment factors by the NCAs with regards to the overall open interest and the number of market participants.
Technical Proposal	The circumstances when adjustment factors can be used have been clarified when the size of the open interest and deliverable supply are significantly different. Upward adjustment based on the number of market participants or investment firms acting as market makers has also been clarified.
<i>Benefits</i>	Provides more clarity and certainty with regards to the adjustment factors to be used when setting position limits. Will contribute to a more harmonised approach across NCAs.
<i>Cost to regulator:</i> - <i>One-off</i> - <i>On-going</i>	NCAs may also incur one-off staff costs to review existing procedures for the position limits setting process. Those costs should not be significant given the previous experiences with the regime.
<i>Compliance cost:</i> - <i>One-off</i> - <i>On-going</i>	None identified.
<i>Cost to other stakeholders</i>	None identified
<i>Indirect costs</i>	None identified

6.1.2 Draft RTS on position management controls

6.1.2.1 Introduction

132. The draft RTS on position management controls executes the empowerment received by ESMA to specify the content of position management controls, taking into account the characteristics of the trading venues concerned.

6.1.2.2 Baseline

133. From a legal perspective, the baseline to consider is;

134. The first sub-paragraph of Article 57(8) of MiFID II, as amended by Directive (EU) 2021/338 of the European Parliament and of the Council¹¹ requiring trading venues trading commodity derivatives to apply position management controls. Those controls must include, at least, the powers to:

- (a) monitor the open interest positions of persons;
- (b) obtain information from persons about the size and purpose of a position as well as information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market including, where appropriate, positions held in commodity derivatives that are based on the same underlying and that share the same characteristics on other trading venues and in economically equivalent OTC contracts through members and participants;
- (c) request a person to terminate or reduce a position, on a temporary or permanent basis, and to unilaterally take action to ensure the termination or reduction of the position where the person does not comply with such request; and
- (d) require a person to provide, on a temporary basis, liquidity back into the market at an agreed price and volume with the express intent of mitigating the effects of a large or dominant position.

135. The second sub-paragraph of Article 57(8) of MiFID II, as amended by Directive (EU) 2021/338 of the European Parliament and of the Council mandating ESMA to develop draft RTS to specify the content of position management controls, thereby taking into account the characteristics of the trading venues concerned.

6.1.2.3 Stakeholders

136. The stakeholders identified are: trading venues trading commodity derivatives, market participants trading commodity derivatives and NCAs.

- *Trading venues*: Trading venues trading commodity derivatives would be the most impacted by the draft RTS on position management controls. First, they will need to ensure that appropriate systems for ongoing monitoring of positions held by persons with close links are in place. Second, trading venues trading physically settled commodity will need to set up and review accountability levels for those commodity derivatives as well as

¹¹ Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

request and assess additional information when those levels are exceeded on the position held and report to their NCA on an annual basis.

- *Market participants*: Market participants trading the commodity derivatives mentioned above would have to answer additional information request from trading venues in case where accountability levels would be exceeded.

- *NCA*s: The impact on NCA is less significant as competent authorities should only receive information from trading venues on the methodology used for setting up accountability levels and an annual summary on their practical application.

6.1.2.4 Cost Benefit Analysis

We provide below an analysis of the costs and benefits that could arise from the provisions in draft RTS on position management controls.

General monitoring obligations (Article 1 of the draft RTS on position management controls)

Policy Objective	Ensuring that trading venues trading commodity derivatives are continuously monitoring open interest in commodity derivatives with the objective of contributing to orderly markets.
Technical Proposal	On-going monitoring by trading venues of positions held in commodity derivatives available for trading by persons under close links.
<i>Benefits</i>	<p>The on-going monitoring of positions will allow trading venues to identify potential sources of concerns with regards to orderly markets without delay.</p> <p>The draft RTS provides further clarity and legal certainty on the monitoring of positions that trading venues are expected to carry out and will further contribute to ensuring a harmonised approach across trading venues.</p>
<i>Cost to regulator:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>NCA may incur surveillance costs to ensure that trading venues comply with the requirement set out in the draft RTS.</p> <p>Those costs are expected to be non-significant.</p>
<i>Compliance cost:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>Trading venues may incur one-off IT and staff compliance costs to adjust the procedures and systems in place for the monitoring of positions to comply with the requirements set out in Article 1 of the draft RTS.</p>

	Those costs are expected to be non-significant as trading venues are already required to monitor positions.
<i>Cost to other stakeholders</i>	None identified
<i>Indirect costs</i>	None identified

Accountability levels setting (Article 2 and Article 3(1) of the draft RTS on position management controls)

Policy Objective	Ensure that trading venues identify large positions notably in commodity derivatives that are physically delivered that may be a source of concern with regards to the objective of ensuring orderly markets and take appropriate action without delay.
Technical Proposal	For at least physically settled commodity derivatives, trading venues are to determine, and periodically review, a level of positions in the spot month and in the other month that, when exceeded, will require the trading venue to exercise its power to obtain additional information on the position held and, where appropriate, to request a person to terminate or reduce a position or provide liquidity back to the market on a temporary basis.
<i>Benefits</i>	<p>Contributes to ensuring that trading venues can promptly identify positions the size of which may be a source of concern with regards to ensuring orderly markets and orderly settlement and will take appropriate action without delay.</p> <p>Provides more clarity and legal certainty on how and when trading venues are expected to use the powers set out in Article 57(8) of MiFID II especially for physically settled commodity derivatives, whilst retaining some discretion for the trading venue in the determination of the accountability levels based on the characteristics of the commodity derivatives traded.</p> <p>Will further contribute to ensuring a harmonised approach across trading venues.</p>
<i>Cost to regulator:</i> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	None identified

<p><i>Compliance cost:</i></p> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>Trading venues may incur one-off compliance costs to determine the level of positions in the spot month and in the other months' that will trigger an additional information taking into account the characteristics of the commodity derivative traded. They may also incur one-off IT costs to adjust monitoring systems so that positions exceeding the level set are immediately identified. On-going IT costs may be incurred for the periodic review the levels set to ensure they remain effective.</p> <p>Trading venues may incur on-going staff compliance associated with processing additional information requests when the levels set are exceeded, deciding on appropriate follow-up actions where necessary and ensuring that market participants comply with the decision made.</p>
<p><i>Cost to other stakeholders</i></p>	<p>Members of the trading venues and other market participants may incur staff costs to answer the additional information requests from trading when exceeding accountability levels.</p> <p>They may incur IT costs to adjust systems and procedures to the accountability levels set by the trading venue.</p> <p>Those costs are not expected to be significant.</p>
<p><i>Indirect costs</i></p>	<p>None identified</p>

Reporting to NCAs (Article 3 (2) and (3) of the draft RTS on position management controls)

<p>Policy Objective</p>	<p>Providing greater transparency to NCAs on the position management controls implemented by trading venues.</p>
<p>Technical Proposal</p>	<p>Trading venues should share the methodology used to determine the levels of positions triggering an additional information request with their NCAs and submit an annual report on the implementation of this position management control.</p>
<p><i>Benefits</i></p>	<p>Ensures greater transparency towards NCAs on the implementation of position management controls.</p> <p>Provides an opportunity to the NCA to engage into a dialogue with the trading venue on the methodology used for setting accountability levels and on the follow up actions undertaken as appropriate when those levels have been exceeded.</p>

<p><i>Cost to regulator:</i></p> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>NCA's may incur staff costs for reviewing the information submitted by trading venues and take action where needed.</p>
<p><i>Compliance cost:</i></p> <ul style="list-style-type: none"> - <i>One-off</i> - <i>On-going</i> 	<p>Trading venues may incur on-going staff costs to prepare the report to be submitted to NCA's on an annual basis.</p>
<p><i>Cost to other stakeholders</i></p>	<p>None identified</p>
<p><i>Indirect costs</i></p>	<p>None identified</p>

6.2 Annex II: Summary of questions

Part I

Q1: Do you agree with ESMA's proposal regarding the impact of the new hedging exemption on the aggregation of positions? If not, please elaborate.

Q2: Do you agree with ESMA's proposal for positions qualifying as risk-reducing? If not, please elaborate and provide an alternative proposal.

Q3: Do you agree with ESMA's proposal on the application procedure for financial entities?? If not, please elaborate and provide an alternative proposal.

Q4: 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.

Q5: Do you agree with ESMA's proposal on qualifying positions? If not, please elaborate and provide an alternative proposal.

Q6: Do you agree with ESMA's proposed definition of financial entities? If not, please elaborate.

Q7: 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.

Q8: Do you agree with ESMA's proposal for significant volumes? If not, please elaborate.

Q9: Do you agree with ESMA's proposal? If not, please elaborate and provide an alternative proposal where available.

Q10: Do you agree with ESMA's proposal? If not, please elaborate.

Q11: Do you agree with ESMA's proposals regarding Article 14 of RTS 21a? If not, please elaborate and provide alternative proposals.

Q12: 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.

Q13: Do you agree with ESMA's proposal regarding Article 19 of RTS 21a? If not, please elaborate.

Q14: 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.

Part II

Q15: Do you agree with ESMA’s proposed amendments to ITS 4? If not, please elaborate.

Part III

Q16: Do you agree with ESMA’s suggestion to introduce such ongoing position monitoring requirement in the draft RTS? If not, please elaborate.

Q17: 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.

Q18: 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?

Q19: 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.

Q20: In your view, what other types of position management controls could be further specified in the draft RTS?

CBA

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 EOTC contracts where relevant in 2020 in thousand euros and the related total number of trades in the relevant boxes).

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		

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?

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?

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.

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?

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

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?

6.3 Annex III: Draft RTS and ITS

6.3.1 Draft RTS 21a

COMMISSION DELEGATED REGULATION (EU) .../...

of []

supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives and procedures for applying for exemption from position limits and repealing Commission Delegated Regulation (EU) 2017/s

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU¹², and in particular Article 57(1), (3) and (12) thereof,

Whereas:

(1) In order to ensure a harmonised approach to applying position limits to commodity derivatives in the Union, a methodology should be specified for calculating those limits. The methodology should prevent regulatory arbitrage and promote consistency whilst providing competent authorities with sufficient flexibility to take into account the variations among different commodity derivatives markets and the markets in the underlying commodities. The methodology for calculating the limits should allow competent authorities to balance the objectives of setting limits at a level sufficiently low to prevent persons holding positions in those commodity derivatives from abusing or distorting the market against the objectives of supporting orderly pricing and settlement arrangements, developing new commodity derivatives and enabling commodity derivatives to continue to support the functioning of commercial activities in the underlying commodity market.

(2) In order to clearly identify a limited number of concepts stemming from Directive 2014/65/EU, as well as to specify technical terms necessary for this Regulation, a number of

¹² OJ L 173, 12.6.2014, p. 349

terms should be defined to ensure uniform application. As a procedure is set up by which a financial entity that is part of a predominantly commercial group may apply for a hedging exemption for positions held by that financial entity that are objectively measurable as reducing risks directly relating to the commercial activities of the non-financial entities of the group, it is necessary to define the legal and natural persons qualifying as financial entities.

(3) Long and short positions in a commodity derivative of market participants should be netted off against each other to determine the effective size of a position a person controls at any point in time. The size of a position held through an option contract or a commodity derivative traded on the same trading venue that is a sub-set of the principal contract should be calculated on a delta equivalent basis. To allow for a comprehensive, centralised and representative overview of a person's activity, and to prevent circumventing the objective of the position limit set for the principal contract, the aggregate position held by a person in a commodity derivative traded on a trading venue should also include the position resulting from the disaggregation of the components of a spread contract traded on the same trading venue and the positions in commodity derivatives traded on the same trading venue that are a sub-set of the principal contract with regards to their size (minis), or pricing period maturity, such as balance-of-the-month (balmos) contracts .

(4) Directive 2014/65/EU requires that any positions held by other persons on behalf of a person should be included in the calculation of that person's position limit and for position limits to be applied at both an entity level and at a group level and it is therefore necessary to aggregate positions at a group level. It is appropriate to only provide for aggregation at the group level if a parent undertaking can control the use of positions. Accordingly, parent undertakings should aggregate positions held by their subsidiaries with any positions that the parent entity holds directly, in addition to the subsidiaries aggregating their own positions. Such aggregation can lead to positions calculated at the level of the parent undertaking which are larger or, due to a netting of long and short positions held by different subsidiaries, lower than at individual subsidiary level. Positions should not be aggregated at the level of the parent undertaking if the positions are held by collective investment undertakings which hold those positions on behalf of their investors rather than on behalf of their parent undertakings in cases where the parent undertaking cannot control the use of those positions for its own benefit.

(5) Agricultural commodity derivatives should only be considered as trading in significant volume on a trading venue if they exceed the liquidity threshold specified in this Regulation for a sufficient period of time.

(6) Where an over-the-counter (OTC) contract is valued on the same underlying commodity that is deliverable at the same location and with the same contractual conditions and if it is having a highly correlated economic outcome to a contract traded on a trading venue, it should be deemed economically equivalent regardless of small differences in the contractual specifications concerning the lot sizes and the date of delivery. Also differences in post trade

risk management arrangements, such as clearing arrangements, should not be barriers to declaring such contracts as economically equivalent. In order to prevent inappropriate netting of potentially dominant positions traded on a trading venue by the use of bilateral arrangements in OTC contracts and to ensure an efficient operation of the position limits regime in practice it is necessary for commodity derivatives traded OTC to be considered economically equivalent to trading venue contracts only in limited circumstances. To deter avoidance of position limits and to enhance the integrity of the position limit regime it is necessary that a definition of an economically equivalent OTC contract is narrowly framed so that it does not permit a person to net an OTC position against multiple other positions and that the exercise of discretion in the consistent choice of positions against which it is netted is limited to the specific circumstances where an OTC contract is economically equivalent to more than one commodity derivative traded on a trading venue in the EU.

(7) In order to establish which positions in commodity derivatives are objectively measurable as reducing risks directly relating to commercial activity, certain criteria should be provided, including the use of the accounting definition of a hedging contract based on International Financial Reporting Standards (IFRS) rules. That accounting definition should be also available to non-financial entities even though they do not apply IFRS rules at an entity level.

(8) Additionally, non-financial entities should be able to use risk management techniques to mitigate their overall risks arising from their commercial activity or that of their group including risks arising from several geographic markets, several products, time horizons or entities ('macro or portfolio hedging'). Likewise, financial entities within predominantly commercial groups should be able to use risk management techniques to mitigate the overall risks arising from the commercial activity of the non-financial entities of the group. When a non-financial entity or a financial entity uses macro or portfolio hedging, it may not be able to establish a one-to-one link between a specific position in a commodity derivative and a specific risk arising from the commercial activity that the commodity derivative is intended to hedge. A non-financial entity or a financial entity may also use a non-equivalent commodity derivative to hedge a specific risk arising from commercial activity of the non-financial entity where an identical commodity derivative is not available or where a more closely correlated commodity derivative does not have sufficient liquidity ('proxy hedging'). In such cases, risk management policies and systems should be able to prevent non-hedging transactions from being categorised as hedging and should be able to provide for a sufficiently disaggregate view of the hedging portfolio so that speculative components are identified and counted towards the position limits. Positions should not qualify as reducing risks related to commercial activity solely on the grounds that they have been included as part of a risk-reducing portfolio on an overall basis.

(9) A risk may evolve over time and, in order to adapt to the evolution of the risk, commodity derivatives initially executed for reducing risk related to commercial activity, may have to be offset through the use of additional commodity derivative contracts that close out

those commodity derivative contracts that have become unrelated to the commercial risk. Additionally, the evolution of a risk that has been addressed by the entering into of a position in a commodity derivative for the purpose of reducing risk should not subsequently give rise to the re-evaluation of that position as not being a privileged transaction *ab initio*.

(10) Financial and non-financial entities should be able to apply for the exemption in relation to hedging of commercial activities before entering into a position. The application should give the competent authority a clear and concise overview of the commercial activities of the non-financial entities in respect of an underlying commodity that are intended to be hedged, the associated risks and how commodity derivatives are utilised to mitigate those risks. Position limits apply at all times and should the exemption ultimately not be granted by the competent authority, the financial or the non-financial entity as the case may be should reduce any position in excess of a limit accordingly and may face supervisory measures in respect of a breach of a limit. Financial and non-financial entities should re-assess their activities periodically to ensure that the continued application of the exemption is justified.

(11) Financial and non-financial entities should be able to apply for the exemption in relation to positions resulting from the mandatory provision of liquidity on trading venues before those transactions are undertaken. The application should give the competent authority a clear and concise overview of the mandatory liquidity provision framework under which those persons operate, the person's activities in the trading of commodity derivatives in accordance with the written agreement entered into with the trading venue and of the resulting open positions. Position limits apply at all times and should the exemption ultimately not be granted by the competent authority, the non-financial or financial entity should reduce any position in excess of a limit accordingly and may face supervisory measures in respect of a breach of a limit. Non-financial and financial entities should re-assess their activities periodically to ensure that the continued application of the exemption is justified.

(12) The spot-month period, which is the time period immediately before delivery at expiry, is specific to each commodity derivative and may not correspond to exactly one month. Spot month contracts should therefore refer to the contract that is the next contract in that commodity derivative to mature. Restricting the positions a person may hold in the period during which delivery of the physical commodity is to be made limits the quantity of the underlying deliverable supply each person may make or take delivery of, thereby preventing the accumulation of dominant positions by individuals which may enable them to squeeze the market through restricting access to the commodity. The standard baseline for the spot month position limit for both physically and cash settled commodity derivatives should therefore be computed as a percentage of the deliverable supply estimate. Competent authorities should be able to implement a schedule of decreasing position limits ranging from the point in time when a contract becomes a spot month contract until maturity in order to more precisely ensure that position limits are adequately set throughout the spot month period and to ensure orderly settlement.

(13) Where there is relatively little derivative trading compared with the deliverable supply of a commodity, open interest will be smaller in comparison with deliverable supply. In such circumstances, even using the lowest percentage of the deliverable supply in the methodology may not allow the competent authorities to set a spot month limit that is consistent with the objective of ensuring orderly pricing and settlement conditions and preventing market abuse. To ensure that those objectives are met, when the deliverable supply for a commodity derivative is substantially higher than the total open interest, competent authorities should determine the baseline figure for the spot month limit in that commodity derivative as a percentage of the total open interest in that commodity derivative and then proceed with the relevant adjustment factors.

(14) The other months' position limit is applied across all maturities other than the spot month. The standard baseline for the other months' position limits for both physically and cash settled commodity derivatives should be computed as a percentage of the total open interest. The distribution of positions across the other months' of a commodity contract is often concentrated in the months closest to maturity. Therefore, total open interest provides a more appropriate baseline for setting position limits than using a figure averaged across all maturities. As open interest may change significantly over a short period of time, the open interest should be calculated by the competent authorities over a period of time that adequately reflects the commodity derivative trading characteristics. That reference period should notably account for seasonality of trading of a contract.

(15) To ensure that the position limits established by competent authorities are based on a comprehensive representation of the overall open positions held in a commodity derivative, the open interest calculated by the competent authority should include both the outstanding positions on the trading venue where the commodity derivative is traded and the outstanding positions in economically equivalent OTC contracts reported to the competent authority.

(16) The standard baseline of 25% of deliverable supply and of open interest has been set with reference to the experience of other markets and other jurisdictions. The baseline should be adjusted by competent authorities to enable it to be reduced to 5% of deliverable supply and open interest (or 2.5% in the case of some agricultural commodity derivatives) and to be increased up to 35% of deliverable supply and open interest should the characteristics of the market require it in order to support the orderly settlement and functioning of the contract and its underlying market. Since any adjustment to the baseline figure applies only where, and for so long as, objective characteristics of the market require it, temporary adjustments to the baseline should be therefore possible. Competent authorities should ensure that an adjustment downwards of the baseline is affected whenever it is necessary to prevent dominant positions and to support orderly pricing in the commodity derivative and in the underlying commodity. For derivatives without a tangible underlying the deliverable supply cannot be used to establish a position limit. Therefore, competent authorities should be able to enhance or adjust the

methodologies to determine position limits for these commodity derivatives based on different parameters the use of open interest also for the spot month.

(17) There may be circumstances where a commodity derivative admitted to trading on a trading venue was formerly traded on another trading venue or on a third-country trading venue. In order to allow for the smooth transfer of open interest in the formerly traded contract to the newly traded one, the open interest in the formerly traded contract should be taken into account by the competent authority when establishing the initial position limits for the newly admitted to trading commodity derivative. Other circumstances may arise where two commodity derivatives are traded on the same trading venue and open interest in one contract is expected to move to another one due a to change in that contract's characteristics, such as a change in the underlying index or bidding zone. When establishing the position limits for the developing contract, the competent authority should take into account the open interest in the previous contract to also allow for the smooth transfer of open interest from one contract to the other.

(18) Certain commodity derivatives, in particular based on power and gas, provide that the underlying be delivered constantly over a specified period of time such as day, month, or year. Moreover, certain contracts with longer delivery periods such as year or quarter may be automatically substituted by related contracts of shorter delivery periods such as quarter or month (cascading contracts). In these cases, a spot month position limit for the contract to be substituted prior to delivery would be inappropriate, as such limit would not cover the expiry and physical delivery or cash settlement of the contract. To the extent that delivery periods of contracts for the same underlying overlap, a single position limit should apply to all the related contracts in order to properly take into account the positions across those contracts which may potentially be delivered. To facilitate this, related contracts should be measured in units of the underlying and aggregated and netted accordingly.

(19) For certain agricultural commodity derivatives, which have a material impact on consumer food prices, the methodology enables a competent authority to set a baseline and position limit beneath the minimum of the general range where it finds evidence of speculative activity impacting significantly on prices.

(20) The competent authority should assess whether the factors listed under paragraph 3 of Article 57 of Directive 2014/65/EU necessitate adjustment of the baseline in order to set the final level of the position limit. The assessment should take into account these factors as relevant for the particular commodity derivative in question. The methodologies should provide a direction of how to set the limit without taking away the ultimate decision on an appropriate position limit for a commodity derivative from the competent authority in order to prevent market abuse. The factors should give important indications to the competent authorities and also to ESMA to facilitate forming its opinions and ensuring an adequate alignment of position limits across the Union.

(21) Position limits should not create barriers to the development of new agricultural commodity derivatives and should not prevent less liquid sections of the agricultural commodity derivative markets from working adequately. The methodology should take into account the time required to develop and attract liquidity to both new and existing commodity derivatives and, in particular, for agricultural commodity derivatives that may support risk management in bespoke or immature markets or seek to develop new hedging arrangements in new commodities. Equally, there are agricultural commodity derivative contracts which may never attract sufficient participants or liquidity to enable the effective application of position limits without the risk of participants regularly and inadvertently breaching the limit and consequently disrupting the pricing and settlement of those commodity derivatives. In order to address these risks to the efficient functioning of markets, the position limit for the spot month and for other months is set at a fixed level of 10,000 lots until the open interest in the agricultural commodity derivative exceeds a threshold of 20,000 lots.

(22) The number, composition, and the role of market participants in a commodity derivative can influence the nature and the size of positions that certain market participants hold in the market. For some commodity derivatives, certain market participants might hold a large position which reflects their role in the buying and selling of, and the delivery of, the commodity when they are on the opposite side of the market to the majority of other market participants providing liquidity or risk management services for the underlying commodity market.

(23) The supply, use, access to, and availability of the underlying commodity are characteristics of the underlying commodity market. Through the assessment of more granular components of these characteristics, such as perishability of the commodity and method of transportation, the competent authority can determine the flexibility of the market and adjust position limits appropriately.

(24) For some commodity derivatives there may be a large discrepancy between open interest and deliverable supply. This may occur where there is relatively little derivative trading compared with the deliverable supply, in which case open interest will be smaller in comparison with deliverable supply, or, for example, where a particular commodity derivative is widely used to hedge many different risk exposures and deliverable supply is therefore smaller in comparison with open interest. Such significant discrepancies between open interest and deliverable supply justify adjustments from the baseline applicable to the other months' limit upwards or downwards in order to avoid a disorderly market when the spot month approaches. More specifically, when open interest is significantly higher than deliverable supply, the other months' limit should be adjusted downwards to avoid a cliff-edge effect with the spot month limit that is based on deliverable supply. It would not be appropriate to adjust the spot month limit upward in such circumstances considering the risk of market cornering. When deliverable supply is significantly higher than open interest, the other months' limit should be adjusted upwards to avoid the risk of unduly constraining trading. As deliverable supply is significantly higher than open interest, the spot month limit based on deliverable supply that results from the

baseline is expected to exceed the open positions held by market participants in the spot month. To ensure that the spot month limit does not prevent market participants from building a dominant position and that the objective of preventing market abuse and ensuring orderly pricing, as required by Article 57(1) of Directive 2014/65/EU are effectively achieved, the spot month limit should be adjusted downwards.

(25) With the same objective of limiting disorderly markets as the spot month approaches because of large discrepancies between calculations of deliverable supply and open interest, deliverable supply is defined to include any substitute grades or types of a commodity that can be delivered in settlement of a commodity derivative contract under the terms of that contract.

(26) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(27) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council¹³.

(28) The legislation of the European Parliament and of the Council on markets in financial instruments set out in Directive 2014/65/EU, as amended by Directive (EU) 2021/338 of the European Parliament and of the Council¹⁴, applies from 28 February 2022. To ensure consistency and legal certainty, this Regulation should apply from the same date;

HAS ADOPTED THIS REGULATION:

CHAPTER I GENERAL PROVISIONS

Article 1 Subject matter

¹³ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

¹⁴ Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

This Regulation lays down rules for the calculation of the net position held by a person in a commodity derivative, the methodology for calculating the position limits on the size of that position and the procedure for applying for exemptions to position limits.

Article 2 ***Definitions***

For the purposes of this Regulation, the following definitions shall apply:

- 1, financial entity' means any of the following:
 - (a) an investment firm authorised in accordance with Directive 2014/65/EC,
 - (b) a credit institution authorised in accordance with Directive 2013/36/EU of the European Parliament and of the Council¹⁵,
 - (c) an insurance undertaking authorised in accordance with Directive 73/239/EEC¹⁶,
 - (d) an assurance undertaking authorised in accordance with Directive 2002/83/EC of the European Parliament and of the Council¹⁷,
 - (e) a reinsurance undertaking authorised in accordance with Directive 2005/68/EC of the European Parliament and of the Council¹⁸,
 - (f) a UCITS and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC of the European Parliament and of the Council¹⁹,
 - (g) an institution for occupational retirement provision within the meaning of Article 6(a) of Directive 2003/41/EC of the European Parliament and of the Council²⁰,
 - (h) an alternative investment fund managed by AIFMs authorised or registered in accordance with Directive 2011/61/EU of the European Parliament and of the Council²¹,

¹⁵ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

¹⁶ First Council Directive of 24 July 1973 on the coordination of laws regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance.

¹⁷ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

¹⁸ Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance.

¹⁹ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

²⁰ Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision

²¹ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers.

(i) a CCP authorised in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council²²,

(j) a central securities depository authorised in accordance with Regulation EU No 909/2014 of the European Parliament and of the Council²³

A third-country entity is a financial entity if it would require authorisation under any of the aforementioned legislation if it were based in the Union and subject to Union law.

2. “non-financial entity” means a legal or natural person other than a financial entity.

A third-country entity is a non-financial entity if it would fall under the definition of “non-financial entity if it were based in the Union and subject to Union law.

3. ‘spot month contract’ means the commodity derivative contract in relation to a particular underlying commodity whose maturity is the next to expire in accordance with the rules set by the trading venue.

4. ‘other months’ contract’ means any commodity derivative contract that is not a spot month contract.

5. “lot” means the unit of trading used by the trading venue on which the commodity derivative trades representing a standardised quantity of the underlying commodity.

CHAPTER II

METHOD FOR CALCULATING THE SIZE OF THE NET POSITION OF A PERSON

Article 3

(Article 57(1) of Directive 2014/65/EU)

Aggregation and netting of positions in a commodity derivative

1. The net position of a person in a commodity derivative shall be the aggregation of:
 - (a) its positions held in that commodity derivative traded on a trading venue and in economically equivalent OTC contracts pursuant to Article 6;
 - (b) where the commodity derivative is an agricultural commodity derivative traded in significant volume in accordance with Article 5, its position held in agricultural commodity derivatives based on the same underlying and sharing the same

22 Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

23 Regulation 2014/909/EU of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories.

characteristics traded in significant volumes on other venues and subject to the position limits set by the central competent authority;

(c) where the commodity derivative is a critical or significant contract, its positions held in critical or significant contracts based on the same underlying and sharing the same characteristics traded on other venues and subject to the position limits set by the central competent authority.

2. The positions held in a commodity derivative traded on a trading venue referred to in point (a) of paragraph 1 shall include the positions held in the disaggregated component of a spread contract and in other closely related commodity derivatives that are a fraction of the value of a corresponding standard futures contract or whose pricing period is defined as the selected start date to the end of the contract month of the standard futures contract traded on the same trading venue.

3. Where a person holds both long and short positions in any of the commodity derivatives referred to in paragraphs 1 and 2, the person shall net those positions to determine its net position for that commodity derivative.

4. Positions held by a non-financial entity in commodity derivatives that are objectively measureable as reducing risks in accordance with Article 7(1) and (3) , as approved by the competent authority pursuant to Article 8(1) and (2) , shall not be aggregated for the purposes of comparing the net position of that non-financial entity with the limits for that commodity derivative.

5. Positions held by a financial entity in commodity derivatives that are objectively measureable as reducing risks in accordance with Article 7(2) and (4), as approved by the competent authority pursuant to Article 8(3) and (4), shall not be aggregated for the purposes of comparing the net position of that financial entity with the limits for that commodity derivative.

6. Positions held by a person in commodity derivatives that result from transactions undertaken on trading venues to fulfil liquidity provision obligations in accordance with Article 10, as approved by the competent authority pursuant to Article 9, shall not be aggregated for the purposes of comparing the net position of that person with the limits for that commodity derivative.

7. A person shall determine separately the net position it holds in a commodity derivative for both the spot month contracts and the other months' contracts.

Article 4

(Article 57(1) of Directive 2014/65/EU)

Method of calculating positions for legal entities within a group

1. A parent undertaking shall determine its net position by aggregating the following positions in accordance with Article 3:

- (a) its own net position;
- (b) the net positions of each of its subsidiary undertakings.

2. By way of derogation to paragraph 1, the parent undertaking of a collective investment undertaking or, where the collective investment undertaking has appointed a management company, the parent undertaking of that management company shall not aggregate the positions in commodity derivatives in any collective investment undertaking where it does not in any way influence the investment decisions in respect of opening, holding or closing those positions.

Article 5

(Article 57(6) of Directive (EU) No 2014/65/EU)

Significant volumes

1. An agricultural commodity derivative shall be considered to be traded in a significant volume on a trading venue when the trading in the commodity derivative on that trading venue over a consecutive three month period exceeds an average daily open interest of 20,000 lots in the spot and other months' combined.

2. The trading venue where the largest volume of trading in commodity derivatives based on the same underlying and sharing the same characteristics takes place shall be the trading venue that over one year has the largest average daily open interest.

Article 6

(Article 57(1) of Directive 2014/65/EU)

OTC contracts economically equivalent to commodity derivatives traded on trading venues

An OTC derivative shall be considered economically equivalent to a commodity derivative traded on a trading venue where it has identical contractual specifications, terms and conditions, excluding different lot size specifications, delivery dates diverging by less than one calendar day and different post trade risk management arrangements.

Article 7

(Article 57(1) of Directive 2014/65/EU)

Positions qualifying as reducing risks directly related to commercial activities

1. A position held by a non-financial entity in commodity derivatives traded on trading venues or in economically equivalent OTC contracts pursuant to Article 6 qualifies as reducing risks directly relating to the commercial activities of that non-financial entity where by itself, or in combination with other derivatives in accordance with paragraph 3 ('position in a portfolio of commodity derivatives'), the position meets one of the following criteria:

- (a) it reduces the risks arising from the potential change in the value of assets, services, inputs, products, commodities or liabilities that the non-financial entity or its group owns, produces, manufactures, processes, provides, purchases, merchandises, leases, sells, or incurs or reasonably anticipates owning, producing, manufacturing,

processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business;

(b) it qualifies as a hedging contract pursuant to International Financial Reporting Standards (IFRS) adopted in accordance with Article 3 of Regulation (EC) No 1606/2002 of the European Parliament and Council.

2. A position held by a financial entity in commodity derivatives traded on trading venues or in economically equivalent OTC contracts pursuant to Article 6 qualifies as reducing risks directly related to the commercial activities of the non-financial entities of a predominantly commercial group in accordance with point (b) of Article 57(1) of Directive 2014/65/EU where by itself, or in combination with other derivatives in accordance with paragraph 3 (position in a portfolio of commodity derivatives), the position meets one of the criteria mentioned in point (a) or (b) of paragraph 1.

3. For the purposes of paragraph 1, a position qualifying as risk-reducing taken on its own or in combination with other derivatives is one for which the non-financial entity or the person holding the position on behalf of that entity:

(a) describes the following in its internal policies:

- (i) the types of commodity derivative contracts included in the portfolios used to reduce risks directly relating to commercial activity and their eligibility criteria;
- (ii) the link between the portfolio and the risks that the portfolio is mitigating;
- (iii) the measures adopted to ensure that the positions concerning those contracts serve no other purpose than covering risks directly related to the commercial activities of the non-financial entity, and that any position serving a different purpose can be clearly identified;

(b) is able to provide a sufficiently disaggregated view of the portfolios in terms of class of commodity derivative, underlying commodity, time horizon and any other relevant factors.

4. For the purposes of paragraph 2, a position qualifying as risk-reducing taken on its own or in combination with other derivatives is one for which the financial entity complies with the conditions set out in point (a) and (b) of paragraph 3.

Article 8

(Article 57(1) of Directive 2014/65/EU)

Application for the exemption from position limits for positions qualifying as reducing risks directly related to commercial activities

1. A non-financial entity holding a qualifying position in a commodity derivative shall apply for the exemption referred to in point (a) of the second subparagraph of paragraph 1 of

Article 57 of Directive 2014/65/EU to the competent authority which sets the position limit for that commodity derivative.

2. The person referred to in paragraph 1 shall submit to the competent authority the following information which demonstrates how the position reduces risks directly relating to the non-financial entity's commercial activity:

- (a) a description of the nature and value of the non-financial entity's commercial activities in the commodity to which the commodity derivative for which an exemption is sought is relevant;
- (b) a description of the nature and value of the non-financial entity's activities in the trading of and positions held in the relevant commodity derivatives traded on trading venues and in their economically equivalent OTC contracts;
- (c) a description of the nature and size of the exposures and risks in the commodity which the non-financial entity has or expects to have as a result of its commercial activities and which are or would be mitigated by the use of commodity derivatives;
- (d) an explanation of how the non-financial entity's use of commodity derivatives directly reduces its exposure and risks in its commercial activities.

3. A financial entity holding a qualifying position in a commodity derivative shall apply for the exemption referred to in point (b) of the second subparagraph of paragraph 1 of Article 57 of Directive 2014/65/EU) to the competent authority which sets the position limit for that commodity derivative.

4. The person referred to in paragraph 3 shall submit to the competent authority:

- (a) appropriate information which demonstrates that the parent undertaking has entrusted to the financial entity the trading of commodity derivatives traded on a trading venue and their economically equivalent OTC contracts to reduce the exposure and risks in the commercial activities of the non-financial entities of the predominantly commercial group;
- (b) the following information which demonstrates how the position reduces risks directly relating to the commercial activity of the non-financial entities of the same predominantly commercial group
 - (i) a description of the nature and value of the non-financial entities' commercial activities in the commodity to which the commodity derivative for which an exemption is sought is relevant;
 - (ii) a description of the nature and size of the exposures and risks in the commodity which the non-financial entities have or expect to have as a result of the non-financial entities' commercial activities which are or would be mitigated by the use of commodity derivatives;

- (iii) a description of the nature and value of the financial entity's activities in the trading of and positions held in the relevant commodity derivatives traded on trading venues and in their economically equivalent OTC contracts;
- (iv) an explanation of how the financial entity's use of commodity derivatives directly reduces the exposure and risks in the non-financial entities' commercial activities.

5. The competent authority shall approve or reject the application within 21 calendar days after it has received the application and shall notify the applicant of its approval or rejection of the exemption.

6. The non-financial entity shall notify the competent authority if there is a significant change to the nature or value of the non-financial entity's commercial activities or its trading activities in commodity derivatives and the change is relevant to the information set out in point (b) of paragraph 2 and shall submit a new application for the exemption if it intends to continue to use it.

7. The financial entity shall notify the competent authority if there is a change to the information set out in point (a) of paragraph 4 or a significant change to the nature or value of the non-financial entity's commercial activities or the financial entity's trading activities in commodity derivatives and the change is relevant to the information set out in point (b)(iii) of paragraph 4 and shall submit a new application for the exemption if it intends to continue to use it.

Article 9

(Article 57(1) of Directive 2014/65/EU)

Application for the exemption from position limits for mandatory liquidity provision

1. A person holding a qualifying position in a commodity derivative shall apply for the exemption referred to in point (c) of the second subparagraph of the first paragraph of Article 57 of Directive 2014/65/EU to the competent authority which sets the position limit for that commodity derivative.

2. The person referred to in paragraph 1 shall submit to the competent authority the following information which demonstrates how the positions result from transactions entered into to fulfil obligations to provide liquidity in that commodity derivative on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4).

- (a) the list of commodity derivatives in which that person provides liquidity on a trading venue in accordance with point (b) and (c);
- (b) the provisions under which that person is required by a regulatory authority to provide liquidity in a commodity derivative on a trading venue, where applicable;
- (c) the agreement signed with the trading venue setting out the liquidity provision obligations to be met by the person on the trading venue per commodity derivative;

(d) a description of the nature and value of the person's mandatory liquidity provision activities in the relevant commodity derivative and of the expected resulting positions thereof;

(e) any position limit that may have been set in its internal policy per commodity derivative for such mandatory liquidity provision.

3. The competent authority shall approve or reject the application within 21 calendar days after it has received the application and shall notify the person of its approval or rejection of the exemption.

4. The person shall notify the competent authority if there is a significant change to the nature or value of the person's trading activities in commodity derivatives and the change is relevant to the information set out in paragraph 2 and shall submit a new application for the exemption if it intends to continue to use it.

Article 10

(Article 57(1) of Directive 2014/65/EU)

Positions qualifying as resulting from mandatory liquidity provision

1. For the purpose of paragraph 1 of Article 9, a position held by a person in a commodity derivative traded on a trading venue qualifies as resulting from transactions undertaken to fulfil mandatory liquidity provision obligations where the position directly results from transactions in a commodity derivative undertaken in compliance with the written agreement entered into with the trading venue and identified as such by the trading venue.

2. For the purpose of paragraph 1 of Article 9, a qualifying position resulting from mandatory liquidity is one for which the person holding the position describes the following in its internal policies

(a) the types of commodity derivatives included in the portfolios in which mandatory liquidity provision is provided;

(b) the link between the position held in a commodity derivative and the transactions undertaken to fulfil mandatory liquidity provisions in that derivative in accordance with paragraph 1;

(c) the measures adopted to ensure that any position not resulting from transactions undertaken to fulfil mandatory liquidity provision or serving a different purpose can be clearly identified.

CHAPTER III METHODOLOGY FOR COMPETENT AUTHORITIES TO CALCULATE POSITION LIMITS

SECTION 1 Determination of baseline figures

Article 11

(Article 57(4) of Directive 2014/65/EU)

Methodology for determining the baseline figure for spot month limits

1. Competent authorities shall determine a baseline figure for the spot month position limit in a commodity derivative by calculating 25% of the deliverable supply for that commodity derivative. Where the deliverable supply is substantially higher than the total open interest, competent authorities shall determine the baseline figure for the spot month limit by calculating 25% of the open interest in that commodity derivative.
2. The baseline figure shall be specified in lots.
3. Where a competent authority establishes different position limits for different times within the spot month period, those position limits shall decrease on an incremental basis towards the maturity of the commodity derivative and shall take into account the position management arrangements of the trading venue.
4. By way of derogation to paragraph 1, competent authorities shall determine the baseline figure for the spot month position limit for any derivative contract with an underlying that qualifies as food intended for human consumption with a total combined open interest in spot and other months' contracts exceeding 50,000 lots over a consecutive three month period by calculating 20% of the deliverable supply in that commodity derivative. Where deliverable supply is substantially higher than total open interest, competent authorities shall determine the baseline figure for the spot month limit for such a contract by calculating 20% of the open interest in that commodity derivative.

Article 12

(Article 57(3) of Directive 2014/65/EU)

Deliverable supply

1. Competent authorities shall calculate the deliverable supply for a commodity derivative by identifying the quantity of the underlying commodity that can be used to fulfil the delivery requirements of the commodity derivative.
2. Competent authorities shall determine the deliverable supply for a commodity derivative referred to in paragraph 1 by reference to the average monthly amount of the underlying commodity available for delivery based on the most recent available data covering a one year period immediately preceding the determination.
3. In order to identify the quantity of the underlying commodity meeting the conditions of paragraph 1, competent authorities shall take into account the following criteria:
 - (a) the storage arrangements for the underlying commodity;

- (b) the factors that may affect the supply of the underlying commodity.

Article 13

(Article 57(4) of Directive 2014/65/EU)

Methodology for determining the baseline figure for other months' limits

1. Competent authorities shall determine a baseline figure for the other months' position limit in a commodity derivative by calculating 25% of the open interest in that commodity derivative.
2. The baseline shall be specified in lots.

Article 14

(Article 57(3) of Directive 2014/65/EU)

Open interest

1. Competent authorities shall calculate the net open interest in a commodity derivative by aggregating the number of lots of that commodity derivative that are outstanding on trading venues and reported positions in economically equivalent OTC contracts over a representative period of time. Competent authorities shall calculate the net open interest in a commodity derivative based on position reporting data.
2. By way of derogation to paragraph 1, when trading in a commodity derivative is transferred from one EU or third country trading venue to an EU trading venue following a merger or other corporate event or from one existing commodity derivative to a commodity derivative newly admitted to trading on the same trading venue, the competent authority shall calculate the open interest in that commodity derivative by taking into account the open interest on the former venue or in the former commodity derivative for a six-month period. The competent authority shall then calculate the open interest in accordance with paragraph 1.

Article 15

(Article 57(4) of Directive (EU) No 2014/65/EU)

Methodology for determining the baseline figure in respect of certain contracts

1. By way of derogation to Article 11, competent authorities shall determine the baseline figure for the spot month position limits for cash settled spot month contracts which are under C(10) of Annex I to Directive 2014/65/EU and which have no measurable deliverable supply of their underlying commodities by calculating 25% of the open interest in those commodity derivative contracts.
2. By way of derogation to Articles 11 and 13, where a commodity derivative provides that the underlying is delivered constantly over a specified period of time, the baseline figures calculated pursuant to Articles 11 and 13 shall apply to related commodity derivatives for the

same underlying to the extent that their delivery periods overlap. The baseline figure shall be specified in units of the underlying.

SECTION II

Factors relevant for the calculation of position limits

Article 16

(Article 57(3) of Directive 2014/65/EU)

Assessment of factors

Competent authorities shall set the spot month and other months' position limits for a commodity derivative by taking the baseline figure determined in accordance with Articles 11, 13 and 15 adjusting it according to the potential impact of the factors referred to in Articles 18 to 21 on the integrity of the market for that derivative and for its underlying commodity to a limit:

- (a) between 5% and 35%; or
- (b) between 2.5% and 35%, for any derivative contract with an underlying that qualifies as food intended for human consumption with a total combined open interest in spot and other months' contracts exceeding 50,000 lots over a consecutive three-month period.

Article 17

(Article 57(3)(g) of Directive 2014/65/EU)

New and less liquid agricultural commodity derivatives

1. By way of derogation to Article 16, for agricultural commodity derivatives traded on a trading venue with a total combined open interest in spot and other months' contracts not exceeding 20,000 lots over a consecutive three month period, competent authorities shall set the spot month and other months' limit of positions held in those commodity derivatives at 10,000 lots.

2. The trading venue shall notify the competent authority when the total open interest of any commodity derivative referred to in paragraph 1 reaches 20,000 lots over a consecutive three-month period. Competent authorities shall review the position limit upon receiving such notifications.

Article 18

(Article 57(3)(b) of Directive 2014/65/EU)

Deliverable supply in the underlying commodity

Where the deliverable supply in the underlying commodity can be restricted or controlled or if the level of deliverable supply is low relative to the amount required for orderly settlement competent authorities shall adjust the spot month position limit downwards. Competent authorities shall assess the extent to which this deliverable supply is used also as the deliverable supply for other commodity derivatives.

Article 19

(Article 57(3)(c) of Directive 2014/65/EU)

The overall open interest

1. Where there is a large volume of overall open interest, competent authorities shall adjust the position limit downwards.
2. Where the open interest is significantly higher than the deliverable supply, competent authorities shall adjust the other months' position limit downwards.
3. Where the open interest is significantly lower than the deliverable supply, competent authorities shall adjust the other months' position limit upwards and the spot month position limit downwards.

Article 20

(Article 57(3)(e) of Directive 2014/65/EU)

The number of market participants

1. Where the daily average number of market participants holding a position in the commodity derivative over a period of one year is high the competent authority shall adjust the position limit downwards.
2. By way of derogation to Article 16, competent authorities shall adjust the position limit upwards and set the spot month and other months' position limit between 5% and 50% of the reference amount if:
 - (a) the average number of market participants holding a position in the commodity derivative in the period leading up to the setting of the position limit is lower than 10; or
 - (b) where the commodity derivative is an agricultural commodity derivative with a net open interest below 300,000 lots, the number of investment firms acting as a market maker in accordance with Article 4(1)(7) of Directive 2014/65/EU in the commodity derivative at the time the position limit is set or reviewed is lower than 3.

For the purposes of the first subparagraph, competent authorities may establish different position limits for different times within the spot month period, the other months' period or for both periods.

Article 21

(Article 57(3)(f) of Directive 2014/65/EU)

Characteristics of the underlying commodity market

1. Competent authorities shall take into account how the characteristics of the underlying commodity market impact on the functioning and trading of the commodity derivative and on the size of the positions held by market participants, including having regard to the ease and speed of access which market participants have to the underlying commodity.
2. The assessment of the underlying commodity market referred to in paragraph 1 shall take into account:
 - (a) whether there are restrictions on the supply of the commodity, including the perishability of the deliverable commodity;
 - (b) the method of transportation and delivery of the physical commodity, including the following:
 - (i) whether the commodity can be delivered to specified delivery points only;
 - (ii) the capacity constraints of specified delivery points.
 - (c) the structure, organisation and the operation of the market, including the seasonality present in extractive and agricultural commodity markets whereby physical supply fluctuates over the calendar year;
 - (d) the composition and role of market participants in the underlying commodity market, including consideration of the number of market participants which provide specific services that enable the functioning of the underlying commodity market such as risk management, delivery, storage, or settlement services;
 - (e) macroeconomic or other related factors that influence the operation of the underlying commodity market including the delivery, storage, and settlement of the commodity;
 - (f) the characteristics, physical properties and lifecycles of the underlying commodity.

Article 22

Entry into force and application

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 28 February 2022.



This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission

The President

[On behalf of the President]

[Position]

6.3.2 Amendment to ITS 4

COMMISSION IMPLEMENTING REGULATION (EU) .../...

of []

amending Implementing Regulation (EU) 2017/1093 of 20 June 2017 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU²⁴, and in particular Article 58(5), third subparagraph, thereof,

Whereas:

- (1) Directive (EU) 2021/338 of the European Parliament and of the Council²⁵ provides for amendments to Directive 2014/65/EU as regards, in particular, position reporting under Article 58 of Directive 2014/65/EU.
- (2) According to Article 58 of Directive 2014/65/EU, as amended by Directive (EU) 2021/338, position reporting does not apply any longer to securities referred to in point (c) of point (44) of Article 4(1) that relate to a commodity or an underlying as referred to in Section C.10 of Annex I.‘;’) of Directive 2014/65/EU. Therefore, references to those derivatives in Commission Implementing Regulation (EU) 2017/1093 should be deleted.
- (3) This Regulation is based on the draft implementing technical standards submitted to the Commission by the European Securities and Markets Authority.
- (4) ESMA has conducted open public consultations on the draft implementing technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council.²⁶

²⁴ OJ L 173, 12.6.2014, p. 349

²⁵ Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

²⁶ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

- (5) The legislation of the European Parliament and of the Council on markets in financial instruments set out in Directive 2014/65/EU, as amended by Directive (EU) 2021/338 of the European Parliament and of the Council²⁷, applies from 28 February 2022. To ensure consistency and legal certainty, this Regulation should apply from the same date;

HAS ADOPTED THIS REGULATION:

Article 1

Table 2 of Annex II to Implementing Regulation (EU) 2017/1093 is replaced by the text in this Annex to this Regulation.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 28 February 2022

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission

The President

[On behalf of the President]

[Position]

²⁷ Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

ANNEX

“Table 2

Table of fields to be reported for all positions across all maturities of all contracts for the purposes of Article 2

FIELD	DETAILS TO BE REPORTED	FORMAT FOR REPORTING
Date and time of report submission	Field to be populated with the date and time on which the report is submitted.	{DATE_TIME_FORMAT}
Report reference number	Field to be populated with the unique identifier given by the submitter unambiguously identifying the report to both submitter and receiving competent authority.	{ALPHANUM-52}
Date of the trading day of the reported position	Field to be populated with the date on which the reported position is held at the close of the trading day on the relevant trading venue.	{DATEFORMAT}
Report status	<p>Indication as to whether the report is new or a previously submitted report is cancelled or amended.</p> <p>Where a previously submitted report is cancelled or amended, a report which contains all the details of the original report and using the original Report Reference Number should be sent and the ‘Report status’ should be flagged as ‘CANC’.</p> <p>For amendments a new report that contains all the details of the original report and using the original Report Reference Number with all necessary details amended should be sent and the ‘Report status’ should be flagged as ‘AMND’.</p>	<p>‘NEWT’ — New</p> <p>‘CANC’ —Cancellation</p> <p>‘AMND’ — Amendment</p>
Reporting entity ID	The identifier of the reporting investment firm. Field to be populated with the Legal Entity Identifier code (LEI) for legal entities or {NATIONAL_ID} for natural persons not having an LEI.	<p>{LEI}</p> <p>or</p> <p>{NATIONAL_ID} — Natural persons</p>

Position holder ID	Field to be populated with the Legal Entity Identifier code (LEI) for legal entities or {NATIONAL_ID} for natural persons not having an LEI. (Note: if the position is held as a proprietary position of the reporting firm, this field shall be identical to field 'Reporting entity ID').	{LEI} or {NATIONAL_ID} — Natural persons
Email address of position holder	Email address for notifications of position-related matters.	{ALPHANUM-256}
Ultimate parent entity ID	Field to be populated with the Legal Entity Identifier code (LEI) for legal entities or {NATIONAL_ID} for natural persons not having an LEI. Note: this field may be identical to field 'Reporting entity ID' or 'Position holder ID' if the ultimate parent entity holds its own positions, or makes its own reports.	{LEI} or {NATIONAL_ID} — Natural persons
Email address of ultimate parent entity	Email address for correspondence in relation to aggregated positions.	{ALPHANUM-256}
Parent of collective investment scheme status	Field to report on whether the position holder is a collective investment undertaking that makes investment decisions independently from its parent as set out by Article 4(2) of the Commission Delegated Regulation (EU) 2017/594 [RTS21a] ⁽¹⁾ .	'TRUE' — the position holder is a collective investment undertaking that makes independent investment decisions 'FALSE' — the position holder is not a collective investment undertaking that makes independent investment decisions
Identification code of contract traded on trading venues	Identifier of the commodity derivative, emission allowance or derivative thereof. See field 'Trading venue identifier' for treatment of OTC contracts that are economically equivalent to contracts that are traded on trading venues.	{ISIN}
Venue product code	Field to be populated with a unique and unambiguous alphanumeric identifier utilised by the trading venue grouping together contracts with different maturities and strike prices in the same product.	{ALPHANUM-12}

Trading venue identifier	<p>Field to be populated with the ISO 10383 segment MIC for positions reported in respect of on-venue contracts. Where the segment MIC does not exist, use the operating MIC.</p> <p>Use MIC code 'XXXX' for off-venue positions in economically equivalent OTC contracts.</p> <p>Use MIC code 'XOFF' for listed derivatives or emission allowances traded off-exchange.</p>	{MIC}
Position type	<p>Field to report whether the position is in either futures, options, emission allowances or derivatives thereof; commodity derivatives defined under point (c) of Article 4(1)(44) of Directive 2014/65/EU of the European Parliament and of the Council⁽²⁾ or any other contract type.</p>	<p>'OPTN' — Options, including separately tradable options on FUTR, SDRV or OTHR types, excluding products where the optionality is only an embedded element</p> <p>'FUTR' — Futures</p> <p>'EMIS' — Emission allowances and derivatives thereof</p> <p>'SDRV' — Commodity derivatives defined under point (c) of Article 4(1)(44) of Directive 2014/65/EU</p> <p>'OTHR' — any other contract type</p>
Position maturity	<p>Indication of whether the maturity of the contract comprising the reported position relates to the spot month or to all other months. Note: separate reports are required for spot months and all other months.</p>	<p>'SPOT' — spot month, including all positions in position types EMIS and SDRV</p> <p>'OTHR' — all other months</p>

<p>Position quantity</p>	<p>Field to be populated with the net position quantity held in the commodity derivative, emission allowances or derivatives thereof expressed either in lots, when the position limits are expressed in lots, or units of the underlying.</p> <p>This field should be populated with a positive number for long positions and a negative number for short positions.</p> <p>If the position is in commodity derivatives defined under point (c) of Article 4(1)(44) of Directive 2014/65/EU this field shall be populated with the number of units held.</p>	<p>{DECIMAL-15/2}</p>
<p>Notation of the position quantity</p>	<p>This field shall be populated with the units used to report the position quantity.</p>	<p>'LOTS' — if the position quantity is expressed in lots</p> <p>{ALPHANUM-25} — a description of the units used if the position quantity is expressed in units of the underlying</p> <p>'UNIT' — if the position quantity is expressed in units</p>
<p>Delta equivalent position quantity</p>	<p>If the Position Type is 'OPTN' or an option on 'EMIS', then this field shall contain the delta-equivalent quantity of the position reported in the 'Position Quantity' field.</p> <p>This field should be populated with a positive number for long calls and short puts and a negative number for long puts and short calls.</p>	<p>{DECIMAL-15/2}</p>
<p>Indicator of whether the position is risk reducing in relation to commercial activity</p>	<p>Field to report whether the position is risk reducing in accordance with Article 7 of Delegated Regulation (EU) 2017/594[RTS21a].</p>	<p>'TRUE' — the position is risk reducing</p> <p>'FALSE' — the position is not risk reducing</p>

”

6.3.3 Draft RTS on position management controls

COMMISSION DELEGATED REGULATION (EU) .../...

of []

supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of position management controls by trading venues

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU²⁸, and in particular Article 57(8), fourth subparagraph, thereof,

Whereas:

(1) In order to ensure a more harmonised approach to applying position management controls to commodity derivatives in the Union, the content of the position management controls that trading venues should have in place should be specified, taking into account the characteristics of the trading venues concerned. Those position management controls should prevent regulatory arbitrage and promote consistency while providing trading venues with sufficient flexibility to take into account the differences among various commodity derivatives markets and the markets in the underlying commodities.

(2) It is important that trading venues which trade commodity derivatives have in place and apply effective position management controls to prevent and address disorderly trading, support orderly pricing and settlement conditions and ensure the efficiency of markets.

(3) Effective position management controls should be based on the ongoing monitoring by the trading venue of positions held in a commodity derivative under common ownership or control.

(4) In order to ensure that the price discovery process is not unduly influenced by the existence of a position and to identify the build-up of concentrations of positions that could result in price distortion, market manipulation or other abusive trading practices, trading venues should be aware of large positions held under common ownership or control and the reasons for holding these positions at least in physically settled commodity derivatives considering the specific risks to orderly markets that may arise from large positions in such commodity

²⁸ OJ L 173, 12.6.2014, p. 349

derivatives. Trading venues should also consider identifying large positions held under common ownership or control in other commodity derivatives available for trading where appropriate.

(5) The determination of what constitutes a large position should be made by the relevant trading venue taking into account the size and composition of the market in question. For that purpose, trading venues should establish qualitative or quantitative criteria that are used to identify such large exposures and should have procedures in place to identify all positions held by any person which breach such pre-determined accountability levels. Where such levels are breached, the trading venue should seek to understand the rationale for the build-up of that large position and take appropriate actions where necessary, including in accordance with Article 57(8)(c) and (d) of Directive 2014/65/EU²⁹.

(6) It is important that the accountability levels set remain adequate and effective to serve their intended purpose and that the competent authority is informed of the methodology used for setting and updating those accountability levels.

(7) This Regulation is based on the draft regulatory technical standards submitted by the European Securities and Markets Authority (ESMA) to the Commission.

(8) ESMA has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council³⁰.

(9) The legislation of the European Parliament and of the Council on markets in financial instruments set out in Directive 2014/65/EU, as amended by Directive (EU) 2021/338 of the European Parliament and of the Council³¹, applies from 28 February 2022. To ensure consistency and legal certainty, this Regulation should apply from the same date;

HAS ADOPTED THIS REGULATION:

Article 1
General monitoring obligations

²⁹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

³⁰ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

³¹ Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

Trading venues shall have arrangements in place for the ongoing monitoring of positions held by persons with close links in each commodity derivative traded on their trading venues.

Article 2 **Accountability levels**

1. As part of their position management controls, trading venues trading commodity derivatives shall set accountability levels in the spot month as defined in Article 2(3) of Commission Delegated Regulation [RTS 21a] and in the other months as defined in Article 2(4) of Commission Delegated Regulation [RTS 21a] at least for the physically settled commodity derivatives made available for trading.
2. For the purpose of paragraph 1, an accountability level is the level of the net position held in a commodity derivative by persons with close links that, when exceeded, shall trigger an additional information request by the trading venue. as to the nature and purpose of the position
3. When a net position held by persons with close links in a commodity derivative referred to in paragraph 1 exceeds the accountability level set for the spot month or for the other months in accordance with paragraph 1, the trading venue shall exercise the power set out in point (b) of the first subparagraph of Article 57(8) of Directive 2014/65/EU to obtain any additional information as to the nature and purpose of the position held in that commodity derivative.
4. The trading venue shall assess the information provided and, where appropriate, exercise the powers set out in points (c) and (d) of the first subparagraphs Article 57(8) of Directive 2014/65/EU.

Article 3 **Review and Reporting Accountability levels**

1. Trading venues shall, on a regular basis, evaluate the adequacy and effectiveness of the accountability levels established pursuant to paragraph 1 of Article 2.
2. The trading venue shall communicate to the competent authority the methodology used for setting the accountability levels referred to in paragraph 1 of Article 2.
3. The trading venue shall inform the competent authority of the additional information requests made in accordance with paragraph 3 of Article 2 and, where applicable, of the actions taken in accordance with paragraph 4 of Article 2 on an annual basis.

Article 4 **Entry into force and application**



This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 28 February 2022.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Commission

The President

[On behalf of the President]

[Position]

