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Targeted consultation on the review of the functioning of commodity derivatives markets and certain aspects relating to spot energy markets

Fields marked with * are mandatory.

Introduction

Commodity derivatives are key instruments for market participants to hedge their exposures in the underlying commodity markets (energy, agricultural commodities, metals, etc.). Those markets are characterised by the participation of mainly non-financial entities. Such entities include physical commodity producers, utilities, large energy-intensive corporations, physical commodity traders, etc., that are directly dependent on those markets to mitigate the risks entailed by their commercial activity.

The proper functioning of commodity derivatives markets plays an important role for the stability and prosperity of the EU economy and, as regards energy derivatives markets, for the affordability of energy in the Union and the efficient functioning of the market. Markets for commodity derivatives in the EU are therefore subject to an extensive set of rules that cater for the specific nature and relevance of those instruments to the EU economy.

Akin to, but not strictly speaking considered to be commodities, emission allowances (EUAs) have been added to the financial rulebook upon the adoption of MiFID II (Markets in Financial Instruments Directive) as from January 2018. Since then, the majority of provisions applicable to commodity derivatives also apply to EUAs and/or derivatives thereof. For the sake of conciseness, readers of this consultation paper should consider EUAs and EUA derivatives to be included when referring to commodity derivatives. Stakeholders are however invited to outline specificities for trading of emission allowances and derivatives thereof, where relevant, in their answers throughout the questionnaire.

Article 90(5) of MiFID, as amended in February 2024, requires the Commission, after consulting the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA) and the Agency for the Cooperation of Energy Regulators (ACER), to present a report to the European Parliament and the Council with a comprehensive assessment of the markets for commodity derivatives, EUAs or derivatives on EUAs. The report shall assess, for each of the following elements, their contribution to the liquidity and proper functioning of European markets for commodity derivatives, EUAs or derivatives on EUAs:

a. the position limit and position management controls regimes relying on data provided by competent authorities to ESMA in accordance with Article 57(5) and (10) of MiFID

b. the elements referred to in the second and third subparagraphs of Article 2(4) of MiFID and the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level pursuant to the Commission Delegated Regulation (EU) 2021/1833, taking into account the ability to enter into transactions for effectively reducing risks directly relating to the commercial activity or treasury financing activity, the application of requirements from 26 June 2026 for investment firms specialised in commodity derivatives or EUAs or derivatives thereof as set out in Regulation (EU) 2019/2033 and requirements for financial counterparties as set out in Regulation (EU) 648/2012

c. the key elements to obtain a harmonised data set for transactions by the commodity derivative market to a single collecting entity. The relevant information on transaction data to be made public and its most appropriate format.

Energy derivatives, which may be either physically or financially settled, are considered wholesale energy products under the EU Regulation on wholesale energy market integrity and transparency (REMIT). REMIT establishes rules prohibiting abusive practices affecting wholesale energy markets which are coherent with the rules applicable in financial markets and with the proper functioning of those wholesale energy markets, whilst taking into account their specific characteristics. REMIT also provides for the monitoring of wholesale energy markets by the Agency for the Cooperation of Energy Regulators (ACER) in close collaboration with national regulatory authorities (NRAs). For such monitoring, REMIT ensures that ACER also receives structural data on capacity and use of facilities for production, storage, consumption or transmission of energy.

The recent energy crisis peaking in the summer 2022 and the extreme volatility observed in energy markets over that period have sparked a renewed debate on the proper functioning of those markets and on the appropriateness of the applicable rulebooks.

In March 2023, as part of its response to the crisis, the Commission proposed, a reform of the REMIT framework, which entered into force in May 2024 (the revised REMIT). The reform makes market monitoring of wholesale energy markets more effective, enhances their transparency, and strengthens investigatory and sanctioning powers by regulators against market abuse.

The above-mentioned crisis was also discussed in the recent report by Mario Draghi on *The future of European competitiveness*, published in September 2024. The report includes a significant number of recommendations linked to the functioning of energy spot and derivatives markets, as a means to ensure the European industry access to affordable energy and enhance its competitiveness (see section 6 for detail).

The outcome of this consultation serves several objectives

- Firstly, it will feed into the MiFID report exercise, with a view to making the EU commodity derivatives markets more efficient and resilient, ultimately delivering benefits to the real economy, and bearing in mind the Commission's general objective to reduce regulatory burden on EU firms

- Secondly, it will allow the Commission to collect evidence to feed into broader reflections on the wholesale energy and related financial markets that may inform future policy choices in this area

- Where appropriate, this may call for legislative amendments of the relevant legislation, including MiFID and REMIT

- The solutions under consideration may in some cases be specifically targeted at certain types of contracts or commodities. It could, for example, be possible to identify specific solutions as regards gas-related contracts (as opposed to other commodities)

This consultation is launched in conjunction with the action plan on affordable energy adopted by the Commission on [DATE + PLACEHOLDER TO ALIGN WITH WORDING OF THE APAE].

This consultation seeks stakeholders’ feedback on a broad range of issues, including:

- data aspects relating to commodity derivatives
- the ancillary activity exemption (AAE)
- position management and position reporting
- position limits
- circuit breakers
- and other elements stemming from the Draghi report on EU competitiveness

Who should respond to this consultation

This consultation will be open for a duration of 8 weeks, until 23 April 2025.

This consultation is addressed to commodity market participants in the European Union, regardless of where such market participants are domiciled or where they have established their principal place of business, securities markets supervisors and commodity regulators. Commodity exchanges, clearing counterparties (CCPs) active in the clearing of commodity futures and commodity clearing houses are also invited to participate, as well as trade repositories and registered reporting mechanisms.

Please note: In order to ensure a fair and transparent consultation process **only responses received through our online questionnaire will be taken into account** and included in the report summarising the responses. Should you have a problem completing this questionnaire or if you require particular assistance, please contact fisma-commodities@ec.europa.eu.

More information on

- this consultation
- the consultation document
- Investment services and regulated markets
- the protection of personal data regime for this consultation

About you

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* Language of my contribution

- Bulgarian
- Croatian
- Czech
- Danish

☑ I agree with the personal data protection provisions

1. Data aspects

1.1 Commodity derivatives reporting and transparency under the financial rulebook

Commodity derivatives trading is subject, under the current financial rulebook, to three main pieces of legislation relating to transparency and reporting: the Markets in Financial Instruments Directive (Directive (EU) 2014/65, MiFID), the Markets in Financial Instruments Regulation (Regulation (EU) 600/2014, MiFIR) and the European Infrastructure Market Regulation (Regulation (EU) 648/2012, EMIR).

While reporting to trade repositories under EMIR captures all commodity derivatives transactions involving at least one EU counterparty, reporting requirements under MiFID/MiFIR differ depending on the type of data, the addressee and whether the trade takes place on a trading venue or not. MiFIR also contains details on the conditions under which transaction-related data in financial instruments is to be transparently disseminated to the public.

MiFID provides that information on positions is to be reported daily to National Competent Authorities (NCAs) by trading venues as regards market participants active on their venue (MiFID Article 58(1)). Market participants are in turn required to report daily to the trading venue on their positions in derivative contracts traded on that venue (MiFID Article 58(3)). Lastly, investment firms are due to report positions in economically equivalent overt-the-counter (OTC) contracts to NCAs on a daily basis (MiFID Article 58(2)). All such position reporting requirements are further discussed under section 3.

MiFIR, in turn, provides that:

- all transactions in commodity derivatives taking place on a trading venue are to be reported by investment firms (or, if market participants are not investment firms, by the investment firm operating the venue on which the market participants executed the transaction) to NCAs pursuant to Article 26
- transactions in commodity derivatives carried out outside a trading venue are not subject to systematic transaction reporting to NCAs. However, investment firms are required to keep the relevant data relating to all orders and transactions in commodity derivatives which they have carried out at the disposal of the NCA for five years, pursuant to Article 25
- all transactions in commodity derivatives taking place on a regulated market are subject to publication of data on price, volume and time of transactions pursuant to Article 10 (post-trade transparency)
- regulated markets are required to disclose current bid and offer prices, as well as the depth of trading interests, relating to commodity derivatives traded on their venue (pre-trade transparency), pursuant to Article 8a(1)
- trading in commodity derivatives occurring on a Multilateral Trading Facility (MTF) or an Organised Trading Facility (OTF) is not subject to pre- nor post-trade transparency, pursuant to Article 8a(2). It is worth reminding that all physically-settled wholesale energy contracts traded on an OTF are subject to the 'C6 carve-out' (wholesale energy products that are (i) mandatorily physically settled and (ii) traded on an OTF are subject to a carve-out from MiFID and are not considered financial instruments. They are commonly referred to as 'C6 carve-out instruments'), which scopes those contracts out of the financial rulebook
- as regards the interaction between the upcoming consolidated tape and commodity derivatives, the consolidated tape does not include pre- nor post-trade information on commodity derivatives

1.2 Commodity derivatives reporting and transparency under REMIT

Energy commodity spot and derivatives trading is also subject, under the current energy rulebook, to two main pieces of legislation relating to transparency and reporting: the Wholesale Energy Market Integrity and Transparency Regulation (Regulation (EU) 1227/2011, REMIT) and REMIT Implementing (Regulation (EU) 1348/2014).

The reporting framework under REMIT and its implementing Regulation currently provides that:

- any transactions related to wholesale energy products, including matched and unmatched orders to trade, that are placed on an organised marketplace (OMP) should be reported to ACER. These are currently reported to ACER on a daily basis, with a delay of one day
- in addition, any transactions related to wholesale energy products that are concluded outside of an OMP, i.e., OTC, are also reportable under REMIT. Those transactions are currently reported with up to one month delay from the date they were concluded
- the aforementioned data reporting also relates to trading from non-EU market participants, who engage in the trading of wholesale energy products, as defined in Article 2(4) of REMIT

The information that is reported to ACER is also shared with the NRAs. The REMIT Implementing Regulation is currently under revision.

REMIT also provides that reporting obligations under REMIT are considered fulfilled when the abovementioned transactions have been reported under financial legislation by market participants, third parties acting on behalf of a market participant, trade reporting systems, or OMPs, trade-matching systems or other persons professionally arranging or executing transactions.

Lastly, the revised REMIT establishes an obligation to set data sharing mechanisms between various regulators, including ACER, ESMA, Eurofisc, the European Commission, NRAs, NCAs national competition authorities and other relevant authorities in the Union. That information exchange framework aims to ensure that the information ACER receives through the reporting requirements under REMIT can be used for the tasks of the other regulators mentioned above.

1.3 Data sharing between energy and securities markets supervisors

The current regulatory set up leads to a multiplication of reporting channels, to which only the relevant regulators have systematic access. ACER and consequently the (energy) NRAs are the recipients of data relating to wholesale energy products, while ESMA and the NCAs receive the data reported under the financial rulebook. This means that, currently, data reported under REMIT do not necessarily make their way to financial regulators and vice versa. For instance, NCAs and ESMA do not have systematic access to data relating to 'C6 carve-out' products and other spot market products, which is reported to ACER. This creates a data gap that may affect ESMA's and NCAs' ability to understand and therefore adequately supervise the markets that fall under financial legislation. Moreover, diverging reporting standards between products subject to REMIT reporting and those reported under MiFIR/EMIR, despite sometimes being closely related (e.g., a futures contract traded on an exchange and subject to the financial rulebook reporting vs a physically-settled forward contract traded on an OTF reported under REMIT), add to further complexifying reporting procedures and the consolidation and analysis of data.

This section therefore seeks to identify areas where reporting should be streamlined and/or better harmonised, bearing in mind the Commission's burden reduction objective. It also seeks to explore whether the creation of a single reporting mechanism for spot and derivative energy products (i.e., not concerning other commodities nor EUAs) could improve the situation on access to relevant data for supervisors on both sides. In that regard, trade repositories, which already collect data on all derivatives transactions (whether OTC or venue-traded), and Registered Reporting Mechanisms (RRMs), which play a similar role under REMIT, could play the role of single access point for all reporting related to energy-related products, spot or derivatives. A third entity, consolidating the data from trade repositories and RRMs would be an alternative option. ESMA, ACER, NRAs, NCAs and, where relevant, the European Commission, would have equal access to such data. Access to such consolidated data by trading venues in the context of their position management controls mandate could also be explored – see section 2.3.

Lastly, this central data collection mechanism could also serve as a one-stop-shop for data reporting by market participants active on both types of markets, thus alleviating the reporting burden for energy traders (which often need to report under MiFID/MiFIR, EMIR and REMIT). This would also necessitate establishing common reporting standards based on harmonised data formats and protocols between products across the spot/derivatives spectrum, which would eliminate unnecessary diverging reporting requirements and simplify the data landscape for reporting market participants and supervisors alike.

Questions related to section 1

Question 1. Do you believe that REMIT reporting, on the one hand, and MiFID/MiFIR/EMIR reporting, on the other hand, should be streamlined and/or more harmonised?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Could you point to specific reporting items that need to be streamlined/aligned, and how?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

FIA and ISDA (the "Associations") note that transaction reporting is a significant and growing burden on firms. The EU reporting regime has developed over time in piecemeal fashion, and we believe that there is scope to streamline requirements to remove duplication, reduce unnecessary burden and reconsider areas where the cost of reporting exceeds the supervisory benefit.

However, we are concerned that recent reviews and efforts to harmonise reporting regimes in the EU have had the undesirable consequence of placing additional burden on market participants by adding new fields and format changes to reporting requirements.

As a case in point, the consultation on MiFIR RTS 22 proposes to almost double the number of reportable fields, which appears to contradict the ambition espoused in parallel by the simplification and burden reduction agenda.

While we agree with the principle that reporting should be streamlined and harmonised, we are deeply concerned that efforts to achieve this without thorough analysis of the data regulators currently receive across all regimes and asset classes, vs what is truly needed to perform their supervisory duties, will result in still more burden being placed upon market participants.

We urge the Commission, ESMA and ACER to pause all current activity relating to reporting reviews and their implementation, unless such analysis is carried out and holistic requirements can be developed, with burden reduction as a guiding principle.

In parallel, we strongly encourage further collaboration between supervisory bodies to allow full access to data across regimes, without placing additional requirements upon market participants to achieve this. For example, while order-related data reported under REMIT cannot be obtained from data reported under EMIR or MiFID/MiFIR, order-related data does exist within Exchange order book records.

Regarding the provision intended to avoid double reporting under REMIT, we do not believe this to be effective, due to differences between EMIR and REFIT in each of reporting eligibility, format requirements, mechanisms and delegation. Instead, to mitigate double-reporting under REMIT, EMIR and MiFID/MiFIR in the medium term, we recommend that the scopes of the regimes are revised to reduce overlap as far as possible, and to amend the reporting waterfall to clarify where the reporting responsibility lies – potentially introducing a ‘Designated Publishing Entity’ type regime to determine whether market participant or OMP should submit a transaction report.

As part of a medium-term review, the Associations encourage the Commission, ESMA and ACER to consider all sources of data to which they have access to ensure that reporting obligations on firms are proportionate and restricted to data that is unavailable from other sources. This would ease the burden on firms and reduce associated costs without compromising data to which regulators have access. For example, we note that under UK REMIT, Ofgem monitors trading in wholesale energy markets using data collected from Organised Market Places (OMPs). Other data is available via Elexon and TSOs.

Additionally, the Associations strongly encourage the Commission, ESMA and ACER to adopt measures for machine readability and semantic accuracy (i.e., regulatory reporting requirements as code), that will significantly simplify reporting and the implementation of future reporting reviews. We point to current developments in the UK as an indication of how this can be achieved.

Finally, as part of the analysis of current versus desired state, we encourage the Commission, ESMA and ACER to consider the benefits of agreeing a common dataset, to be reported once in compliance with multiple reporting regimes; and how such an end state might be achieved in the longer term.

To summarise, the Associations consider a three-phase approach is necessary:

- As an immediate step, impose a pause on further changes to reporting regimes, as well as reporting changes that are currently under way but not yet in force (key examples are REMIT II and MiFIR RTS 22)
- In the medium term: (a) embark on a wide-ranging analysis of what is necessary for supervision vs what is currently reported across all regimes/ available from other sources, with a fundamental emphasis on simplification, rationalisation and discarding duplicative reporting; (b) implement a centralised data collection entity as a layer above existing reporting repositories (RRMs, ARMs and TRs), with access available to all regulators; (c) progressively adopt measures such as machine readability and semantic accuracy
- In the longer term, move towards a “report once to a single reporting repository” framework across all regimes.

Question 2. Reporting under MiFID/MiFIR/EMIR, on the one hand, and REMIT, on the other hand, can vary in terms of format and transmission protocols.

In your view, which reporting standards and protocols should be used as reference (REMIT or MiFID/MiFIR/EMIR) if formats and reporting protocols were to be made uniform?

Please also provide, if possible, information on one-off costs and long-term savings from such harmonisation.

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations strongly believe that questions of how best to standardise reporting formats and transmission protocols should be addressed as part of much deeper and wider analysis as proposed in our response to Q1.

The Associations reiterate that any currently proposed changes, including to format and transmission protocols, should be paused; and that any future changes to format and transmission protocols should result from a holistic review across regimes.

Any such review should consider which format and transmission protocol best serve the adoption of machine readability and semantic accuracy. We refer to the three-phase approach we describe in our response to Q1.

Taking into consideration some of the costs associated with reporting under the various reporting regimes:
• REMIT reporting consists of RRM costs and REMIT fees (based on the number of trades reported, see details here: REMIT Fees | https://www.acer.europa.eu/remit/about-remit/remit-fees). If ACER were to amend the reporting requirements as outlined in our response to Q1 above, this would significantly reduce the cost burden for firms.
• MiFID transaction reporting cost consists of firms' own reporting solution cost as well as costs associated with reporting to an Approved Reporting Mechanism (ARM), where applicable.
• MiFID position reporting cost consists of firms' own reporting solution cost and relatively small charge from the trading venues.
• EMIR reporting cost consists of firms' own reporting solution cost and Trade Repository charges based on the number of trades per month, and additional venue cost for delegating the ETD trades reporting to venues. Firms usually provide free delegated reporting for their clients.

Question 3. Do you believe that a centralised data collection mechanism for collecting data related to REMIT and MiFID/MiFIR/EMIR reporting would alleviate the current reporting burden on market participants?

- (●) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain how could it be alleviated and what level of possible cost savings could result from such exercise (order of magnitude), distinguishing one-off costs and recurring compliance costs (for instance, per year).

Please also explain how you would structure such a possible centralised data collection mechanism (both in terms of data collection and dissemination/access) in a way that, on the one hand, would limit the costs of its set-up (i.e., using to the maximum the existing functionalities of trade repositories/RRMs) and, on the other hand, limit any possible one-off costs of adjustment for reporting entities?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations agree that a centralised data collection mechanism has the potential to reduce the regulatory burden on market participants and reduce some of the costs associated with complying with regulatory reporting.
A single centralised data collection mechanism for all European transaction reporting regimes could be beneficial for market participants, provided its implementation does not require further integration effort by reporting entities.

However, consistent with our answers to Q1 & 2 above, our members are deeply concerned that hasty implementation of such a mechanism will, to the contrary, once again impose further burden on market participants.

We consider that if such a mechanism were to be implemented prior to any holistic review as proposed in our response to Q1, this should take the form of a layer above existing data repositories, with consumption of the data from the various repositories and its normalisation being the responsibility of whichever supervisory body is tasked with its implementation.
The Associations note that today, each reporting flow is different:

- Remit reporting flow is from OMP to RRM to ACER.
- EMIR reporting is transmitted to Trade Repositories.
- MiFIR transaction reporting is from reporting firms (or ARMs if outsourced) to home NCAs and TREM (data sharing with other NCAs).

Therefore, it can be seen that the effort that would be required market participants to modify their reporting frameworks to report directly to a centralised data collection mechanism would be significantly amplified. Again, this would be contrary to the burden reduction agenda.

Instead, regarding the structure of the centralised data mechanism, we propose keeping the submissions as-is today, with submissions to the TR/ARM/RRM by market participants through existing channels and protocols (e.g. XML submissions), as described in our response to Q1. Functionalities offered today by reporting repositories (e.g. trade state report, and pairing and matching reports) should remain, and ultimately those same functionalities should be provided across all regimes through the centralised data mechanism. For example, the same functionalities available through DTCC as a TR for EMIR, should be available for REMIT reporting.

This solution would limit the cost of implementation to that for the centralised data mechanism and existing reporting repositories to progressively onboard reporting regimes, without major format and pass-through changes needing to be implemented by reporting parties.

The centralised data mechanism could then provide reports both by regime, and across regime.

We also note that longer term, any eventual move to a “report once” framework, as contemplated in our response to Q1, would, by definition, be to a single data repository. The centralised data mechanism described above would be the logical starting point for that single data repository.

Question 4. Do you believe that data sharing through the abovementioned centralised mechanism consolidating the data would improve supervision by NCAs, NRAs, ESMA and ACER?

- (selected) Yes
- No
- Don’t know / no opinion / not applicable

Please explain in which way it would improve supervision by NCAs, NRAs, ESMA and ACER:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

A centralised data collection mechanism would help to improve data quality and minimise errors and/or inaccuracies in reported data, for the consumption of the regulators, which could improve market abuse and systemic risk detection and supervision. Improved data quality could result in less supervisory requests for additional information. Additionally, the various regulators engaged in this effort, could collaborate to create synergies in their data quality analysis, completeness of reporting across regimes, and a review of exclusion of dual/duplicative reporting under REMIT and EMIR. Combining single format reporting and a single data repository also has the potential to make the regulators’ requests and reviews more comprehensive by nature, allowing them to identify potential gaps faster and combine forces across regulatory bodies to enhance market abuse detection capabilities.

However, as stated consistently in our previous questions, we strongly oppose the implementation of any such mechanism in a way that adds to the burden on market participants.

Question 5. In the event that the centralised reporting mechanism is deemed an appropriate measure, by what entity should energy spot and derivatives markets data be consolidated?

Please select as many answers as you like

- [ ] by trade repositories
- [ ] by RRM
- [ ] by a new type of entity in charge of consolidating data collected by trade repositories and RRMs
- [x] some other entity

Please specify to what other entity(ies) you refer in your answer to question 5:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As proposed in our responses to Q1 & 3, a new specialised entity could be created specifically for the task of consolidating data collected by trade repositories and RRMs, provided its integration with existing regulatory frameworks is managed without requiring action from market participants.

The main scope of the mandate of this entity would be to streamline data consolidation without creating additional data collection requirements or duplicating reporting obligations for market participants. This new entity should, therefore, exclusively act as an aggregator of the data already submitted to these repositories

and mechanisms, ensuring that the data is complete, harmonised, and readily accessible to physical and financial regulators.
Placing the obligation to integrate this entity with existing regulatory frameworks on the supervisory body tasked with its implementation would allow the data it collects to be consumed as each new framework is integrated, without disruption to existing reporting activities.

Longer term, should a “report once” framework as contemplated in our answer to Q1 prove to be feasible, this entity could serve as the repository for such a reporting framework, as suggested in our response to Q3.

This can be seen as implementing option (c) in the second of our proposed three phases, which in turn could eventually evolve into option (d) in the third phase.

Please explain your answer to question 5:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 6. Do you believe there is a better alternative to a central data collection mechanism for improving collection and sharing of data collected under REMIT and MiFID/MiFIR/EMIR?

- (x) Yes
- ( ) No
- ( ) Don’t know / no opinion / not applicable

Please describe this better alternative:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See our answers to Questions 1, 3 and 5.

Question 7. In the event that the centralised reporting mechanism is deemed inappropriate, should an alternative approach be considered whereby NCAs have systematic access to the ACER central REMIT database, and vice-versa?

- ( ) Yes

- [x] No
- [ ] Don’t know / no opinion / not applicable

Please explain your answer to question 7:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations reiterate that a primary consideration should be to avoid requiring any further implementation and ongoing effort from market participants.

If some other approach can be devised to enable supervisory authorities to have systematic reciprocal access to each other’s databases, without imposing additional burden on market participants, this would be acceptable.

Question 8. Do you believe that the rules on pre- and/or post-trade transparency (i.e., public dissemination of information on quotes and transactions) of commodity derivatives under MiFID/MiFIR should be amended, notably to include commodity derivatives traded on an MTF or an OTF

It is worth noting that making commodity derivatives subject to pre-trade transparency would imply that commodity derivatives would be included in the consolidated tape for OTC derivatives.

- [ ] Yes
- [x] No
- [ ] Don’t know / no opinion / not applicable

Please explain why you think these rules should not be amended:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations strongly oppose the extension of pre- and post-trade transparency under MiFIR to commodity derivatives traded on MTFs and OTFs.

Exchange traded commodity derivatives are already subject to pre- and post-trade transparency under (respectively) MiFIR Articles 8a and 10.

Prior to the MiFIR Review, commodity derivatives traded on MTFs and OTFs were in scope of pre- and post-trade transparency precisely by virtue of being traded on these trading venues. The Review concluded (in Regulation (EU) 2024/791, Recital 8) that the scope of derivatives transparency should not rely on the concept of “traded on a trading venue” due to the lack of fungibility of these contracts. Instead, transparency requirements should only apply to those derivatives that are sufficiently standardised for the data published in relation to them to be meaningful for market participants beyond the contracting parties. Other than exchange-traded derivatives, it was deemed that only derivatives that are subject to the clearing obligation

under EMIR should be subject to transparency requirements, plus credit default swaps that reference global systemically important banks (G-SIBs), and only where these are centrally cleared. It should be noted that the G-SIB criterion results in a small number of contracts that are highly standardised and homogeneous, irrespective of whether they are traded on or off venue. It should be further noted the MiFIR review acknowledged that the liquidity of a class of instruments should be a material factor in the transparency or otherwise of that class of instruments, as poorly calibrated transparency for illiquid instruments causes undue risk to liquidity providers. Only derivatives that are subject to the clearing obligation under EMIR have the requisite level of standardisation and liquidity to make it truly appropriate that they should be subject to transparency requirements under MiFIR. It should also be noted that the scope of transparency for interest rate derivatives is even further restricted to the most liquid and standardised currency and tenor combinations that are in scope of the clearing obligation. These criteria are codified under MiFIR Article 8a (2).

Therefore, any commodity derivatives traded on MTFs and OTFs should only be considered for inclusion within the scope of pre- and post-trade transparency requirements under MiFIR at such time as, and to the extent that, such commodity derivatives have been included in the scope of the clearing obligation under EMIR. This relates to the need to factor in counterparty credit-risk considerations, which mandatory clearing addresses, as otherwise derivatives may be legitimately subject to different pricing depending on a counterparty's credit risk profile. However, in order to mandate clearing of products such products must be suitable for mandatory clearing hence subject to sufficient standardisation and liquidity. As of now, regulators have not expanded mandatory clearing beyond certain interest rate and credit derivatives, as no other derivatives have been assessed as suitable.

The Associations would submit that the general criteria required to bring financial instruments into the scope of transparency under MiFIR should apply equally to any transparency regime under REMIT, were this to be introduced: namely, a high degree of standardisation and liquidity. With respect to REMIT products, it is not clear what applying pre or post transparency requirements would achieve or be used for, e.g. investor protections are not really required as they are largely professionally traded (i.e. wholesale energy products).

Question 9. Do you believe that the consolidated tape should include pre- and /or post-trade data on exchange-traded commodity derivatives (i.e. commodity derivatives traded on regulated markets)?

- ( ) Yes
- (x) No
- ( ) Don't know / no opinion / not applicable

Please explain your answer to question 9:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations note that under MiFIR, there is no provision for a consolidated tape for exchange-traded derivatives of any type. There is only a consolidated tape for OTC derivatives specified, and that is restricted to post-trade data and will likely only cover certain interest rate swaps. Consolidated tapes have been the focus of the recent MiFIR Review, with a view to address fragmented trading in securities. With respect to ETD traded commodity derivatives, fragmentation is not as severe as in security markets hence

the objective of consolidated tapes may not apply to ETD commodity derivatives markets. Furthermore, OTC pricing makes use of highly liquid reference contracts (such as the TTF) based on transaction data hence any application to OTC derivatives may also be of no added value.

Question 10. The recent MiFIR review has extended reporting requirements for transactions in some OTC derivatives that are executed outside of a trading venue. This extension does not concern commodity derivatives.

Do you believe that transactions in OTC commodity derivatives that are executed outside of a trading venue should be subject to systematic reporting to NCAs under MiFIR?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Please explain why you think these transactions should not be subject to systematic reporting to NCAs under MiFIR:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations note that transactions in certain OTC derivatives that are executed outside of a trading venue were already in scope of transaction reporting prior to the MiFIR Review, and remain in scope post the Review, under Article 26(2)(b) and (c). These are transactions in a financial instrument where the underlying is a financial instrument that is traded on a trading venue, or where the underlying is an index or a basket composed of financial instruments that are traded on a trading venue (collectively often referred to as "uTOTV" instruments). This would include transactions in commodity derivatives executed outside of a trading venue if they were to meet these criteria.

The Associations therefore understand this question to refer to those transactions brought into scope under MiFIR Article 26(2)(d), which in turn brings into scope those OTC derivatives identified in Article 8a(2).

The rationale for restricting the scope of OTC derivatives executed off-venue under MiFIR Article 26(2)(d) is the same as one part of the reason for restricting the scope of OTC derivatives to be made transparent under Article 8a(2): namely, the lack of value of reporting of non-standardised instruments.

The Associations are not opposed in principle to the scope of transaction reporting under MiFIR being further extended, provided that, as envisaged in the MiFIR review, the scope remains restricted to instruments standardised to a degree sufficient to make the data consequently gathered in transaction reports of value; and provided that any extension aligns with the Commission's own objectives of simplification and burden reduction.

However, the scope of transaction reporting of OTC derivatives under MiFIR Article 26 must not be extended by simply increasing the scope of transparency for OTC derivatives under MiFIR Article 8a, unless those OTC derivatives meet the criteria for inclusion in the scope of transparency under its own merits, as outlined in our answer to Question 8.

To simply add additional OTC commodity derivatives into Article 8a(2) for the purposes of their consequent inclusion in Article 26(2)(d) would cause undue risk to the providers of liquidity in those OTC commodity derivatives.

In addition, many energy derivatives traded over the counter are physically settled and are already subject to reporting under both EMIR and REMIT. Current exemptions already apply under EMIR to avoid double reporting between EMIR and REMIT. We believe adding another requirement under MiFIR will just add another layer of reporting without real benefit to the regulator, as they will already receive the reporting data under both EMIR and REMIT reporting regimes.

Question 11. Do you believe ESMA has sufficient access to transaction data from trading venues and from market participants reported to NCAs?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Please explain what are the consequences of this situation and how you believe this should be tackled:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While the Associations believe that all the data ESMA should need is available through transaction reporting from trading venues and market participants via various regimes, at both execution and clearing level for both cash and physical delivered products, we do not have visibility of what access ESMA has to all these data.

We recommend that this is examined as part of the wide-ranging review we propose in our answer to Q1, and that any gaps are addressed as an outcome of that review.

2. Ancillary activity exemption

Commodity derivatives markets are characterised by the prominent participation of 'commercial entities' (i.e., entities whose main business does not involve engaging in the provision of financial services), who rely on derivative markets to hedge their positions in the underlying physical markets or, in some cases, take advantage of market moves to generate profit. Those non-financial entities represent around two-thirds of natural gas futures markets participants (see ESMA's preliminary data report on the introduction of the market correction mechanism), and around 60% on wheat futures markets (see the analysis of MIFID II position data on commodity derivatives: who are the market participants and what is their weight in the matif grain derivatives segment), in terms of positions in the respective markets. Some non-financial entities also act as market makers, and are also usually active on both physical/spot and derivatives markets.

The so-called Ancillary Activity Exemption (AAE) set out in Article 2(1), point (j), of MiFID currently exempts certain non-financial market participants that engage in commodity derivatives trading from obtaining a MiFID authorisation if this trading activity is done on own account and not linked to the execution of client orders, or if it provides investment

services in commodity derivatives or emission allowances or derivatives thereof to customers or suppliers of their main business. Such exemption is also only granted provided that the activity is considered “ancillary” to their main business, individually and on an aggregate basis.

Three alternative tests allow to determine whether a firm’s activity is ancillary to its main business:

- the *de minimis test*, for entities whose net outstanding notional exposure in commodity derivatives or emission allowances or derivatives thereof for cash settlement traded in the Union, excluding commodity derivatives or emission allowances or derivatives thereof traded on a trading venue, is below an annual threshold of EUR 3 billion
- the *trading test*, for entities whose size of activities relating to commodity derivatives accounts for 50% or less of the total size of the other trading activities of the group
- the *capital employed test*, for entities whose estimated capital employed for carrying out their activities relating to commodity derivatives accounts for not more than 50% of the capital employed at group level for carrying out the main business

The qualification as investment firm under MiFID has broad implications, as it does not only imply the application of the MiFID organisational and operational requirements (and the associated supervisory role and sanctioning powers of NCAs), but also entails a qualification as financial counterparty under Regulation (EU) 648/2012 (EMIR), notably with the associated requirements in terms of exchange of bilateral margins when engaging in derivatives trading, and the application of the prudential regime under Regulation (EU) 2019/2033 (Regulation on the prudential requirements of investment firms, IFR) and Directive (EU) 2019/2034 (Directive on the prudential requirements of investment firms, IFD), including the associated capital and liquidity requirements. It is however noteworthy that a number of key requirements under the financial rulebook are applicable to all persons, regardless of whether they qualify as investment firms. This includes requirements relating to market abuse and position limits.

In 2021, the Capital Markets Recovery Package (CMRP) introduced a number of changes in order to reduce some of the administrative burdens that experienced investors face in their business-to-business relationships, and to provide opportunities to nascent commodities markets to further develop, deepen, and improve their liquidity. Regulation (EU) 2021/338 has simplified the test for the AAE, through the introduction of the abovementioned exposure-based *de minimis* threshold. The obligation for market participants to notify every year their fulfilment of the AAE criteria has also been removed, and replaced by a possibility for NCAs to require information on an ad-hoc basis.

Questions related to section 2

In providing your answers under this section, please specify, to the extent relevant, **whether your assessment would differ depending on the type of commodity concerned** (agricultural, gas, electricity) or when considering EUA markets specifically.

Question 12. The exception under Article 2(1), point (d), of MiFID sets out the conditions under which entities that deal on own account in financial instruments *other* than commodity derivatives are exempted from a MiFID license. In particular, this exemption does not require that this activity is ancillary to the entity's main business, unlike what is required for entities dealing on own account in commodity derivatives under point (j) of the same Article. However, the exemption under Article 2(1), point (d), is subject to different limitations.

Do you believe persons dealing on own account in commodity derivatives should be treated the same way, with a view to benefit from a MiFID exemption, as persons dealing on own account in other financial instruments, in particular in not requiring that trading activities are ancillary to a main business?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Please explain your answer to question 12:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The limitations of the exemption in Article 2 (1) (d) would represent a significant reduction of the exemption scope for commodity firms compared to the current scope of the AAE.

If commodity firms had to solely rely on the own account exemption in Article 2(1) (d), their ability to participate in commodity markets would be negatively impacted, because of that exemption's exclusion of market makers and members of a trading venue. This would effectively mean that entities who wanted to hedge using commodity derivatives could only trade with a bank or an authorised investment firm, as its customer. In practice, given the costs and resources involved in becoming an authorised investment firm, this would likely lead to shrinkage in the number of hedge providers available to EU non-financials and, accordingly, increase hedging costs and underlying commodity and related real economy costs for EU entities, placing them at a competitive disadvantage to peers in other jurisdictions (which would include all of the key competing commodity trading/ financial markets jurisdictions (e.g. UK, US, Switzerland and Singapore).

Some non-financial entities are vital market makers in commodities markets. In most cases, the commodity sector and commodity derivative trading is not a core activity for banks. As such, placing heavier reliance on the banking sector to provide hedging services to EU commodity market participants (including e.g. utilities, industrial entities, manufacturers and logistics providers, etc.) would increase market stability risk (in addition to increasing costs). Banks may choose (or be directed) to scale back, or cease, such activity for various reasons – as we have seen happen periodically over the past 15 years. In these circumstances, non-financial entities play a vital role in hedge provision in markets where they are consistently present, as this

activity is ancillary to their core commercial activities (i.e. their main business). If these firms were no longer permitted to act as market makers without losing their ability to rely on an exemption from the requirement to become an authorised investment firm, this could result in such firms ceasing this activity, leading to much less liquid EU commodity markets.

Not having sufficient non-bank liquidity to step in if banks were to reduce such activities would cause liquidity to dry up and leave industry, manufacturing, airlines etc without the ability to hedge their risks effectively, increasing the risk of failure/ increasing prices. A sufficient level of hedging offerings is unlikely to be achieved if non-financial companies had to withdraw from this market due to the own account exemption limiting such activity. The consequence would be less liquidity, more expensive hedging and ultimately, higher prices for end-consumers of commodities.

Equally, non-financial market participants are participating on commodity trading venues for the purpose of entering into hedging and non-hedging transactions. Such activity would not be exempted from a MiFID licensing requirement if those commodity firms had to solely rely on the own account exemption under Article 2(1)(d). This could drive firms who would otherwise qualify for this exemption to conduct more activity on a bilateral basis outside trading venues, increasing counterparty credit risk and potentially reducing utility of the price discovery function of on-venue trading.

Question 13. Under Article 2(1), point j of MiFID, an entity can provide investment services other than dealing on own account in commodity derivatives or emission allowances or derivatives thereof to its customers or suppliers of its main business without a MiFID authorisation, provided that the provision of such investment services is ancillary to its main activity.

Do you believe that this exemption as regards the provision of investment services to customers or suppliers is fit for purpose?

- (x) Yes
- ( ) No
- ( ) Don’t know / no opinion / not applicable

Please explain why you believe that this exemption is fit for purpose:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe the current exemption in Article 2(1)(j) is fit for purpose with regards to the provision of investment services to customers and suppliers.

This exemption allows energy market participants to provide hedging services to the customers or suppliers of their, or their group’s main business (e.g. industrial producers), which is important for the EU industrial sector, as well as any other sector that uses, produces, processes, transports or consumes commodities of any kind) to efficiently mitigate their commodity price risks. Hedging allows market participants, such as energy buyers, to reduce their financial exposure in situations of volatile and increasing market prices near physical delivery. This includes, for example, industrial consumers such as those from the energy-intense aluminium or steel production require a high degree of cost certainty for their commodity inputs (e.g., power

or gas).

Energy trading supports the buy-side in securing the adequate level of supply volumes required ahead of the time of the physical delivery. This provides energy buyers, such as companies from the chemical, aluminium or steel industry, with a long-term planning perspective for their own business activities (which in turn is beneficial to the wider economy by receiving goods ordered in time and at reasonable prices).

Further, the AAE and the participation of commodity firms in derivatives markets supports the energy transition. The availability of market-based opportunities to reduce risks (such as renewable PPAs (physical or financial/synthetic), and futures contracts) in liquid wholesale markets becomes increasingly important as requirement to attract new investments and make them bankable. To facilitate such hedging deals, renewable investors need energy market participants on the other market side that are willing to offer hedging products and take risk into their portfolio ("warehousing") or externalise/ hedge their own risks by aggregating and trading them on wholesale energy markets. Therefore, the provision of hedging instruments is important for renewable investors to guarantee stable long-term income and allow financing of renewables investments.

Question 14. Do you currently benefit from the AAE?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Which part of the test is the most relevant for you/do you rely on?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Some of the Associations' members are benefitting from the AAE. Different members are using different limbs of the test.

Question 14.1 Did the CMRP make it easier for you to benefit from the AAE?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain your answer to question 14.1:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The CMRP simplified the tests within the exemption and formulated them in such a way that they were no longer reliant upon market size data (previously published by ESMA). It did not soften the scope of the exemption (i.e. the changes were not a widening of the exemption for more companies to benefit from), but rather, the administrative burden when running the tests was reduced for both ESMA and commodity market

participants. The current tests are very clear and provide legal certainty. Since the introduction of MiFID II, the Associations' members had found the market share test challenging to complete, not least because it required ESMA data that market participants were unable to obtain themselves, whereas relying on estimates created legal uncertainty. Once ESMA stopped publishing this market size data, the market share test was no longer fit for purpose. This was remedied in the CMRP.

The importance of the amendments to the AAE in the CMRP was recognised by the Commission itself in Directive (EU) 2021/338, which noted that "It is crucial to support the recovery from the severe economic shock caused by the COVID-19 pandemic through the introduction of limited targeted amendments to existing Union financial services law. The overall aim of those amendments should therefore be to remove unnecessary red tape and introduce carefully calibrated measures that are deemed effective in order to mitigate the economic turmoil."

Question 15. More generally, how do you assess the impact of the CMRP amendments and their application by NCAs on your activity, if any?

Could you provide estimates of any cost savings and clarify their sources?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The simplification of the tests, especially the removal of the market share test with different thresholds for different commodity products and data that had to be published by ESMA, lead to a reduction of costs in human resources and administrative burden for commodity firms. It also removed the need to rely on data to be published by third parties, providing more certainty and the ability for commodity firms to be able to perform the tests in a timely manner and conduct their business, including taking trading and investment decisions, with increased certainty as to their ability to maintain their current regulatory status without being at the mercy of changing market liquidity levels/ depth of participation.

The Associations' members further associate the changes introduced by CMRP with increased clarity, stability, legal certainty, and liquidity. If the AAE were reopened, this would have potential to undo good work.

- The removal of the notification requirement through CMRP makes the exemption self-executing while still requiring those relying on it to provide information / evidence to NCAs on request.
- The removal of the market share test has the benefit of the exemption being based on quantitative measures which can measured against using data that market participants already have. This approach provides certainty, including the ability to plan and monitor, and decreases the risk that external events could drive a need to become an authorised investment firm because of changes in the size of trading activity in European commodity markets (e.g. during COVID or the gas supply squeeze following the Russian invasion of Ukraine).

Question 16. What impact do you believe the alleviations brought to the AAE by the CMRP had on the liquidity and depth of EU commodities markets, if any?

Could you provide any order of magnitude, for instance in terms of open interest, volumes, number and diversity of participants, bid/ask spreads, etc.?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe that the legal certainty offered by the AAE rules helped to sustain the investment from commodity firms into the European markets, therefore maintaining an important level of liquidity alongside limiting market volatility, energy security and risk management services to wholesale customers. Further, providing a stable, legally certain and administratively simple regulatory environment aids the competitiveness of the EU.

The current regulatory MiFID framework for commodity trading promotes stable, functioning and liquid commodity markets. By fostering liquidity, facilitating effective price signals, and encouraging investments in renewables and LNG infrastructure, energy trading not only safeguards consumer welfare but also promotes a sustainable and secure energy future for the European Union. Increased liquidity reduces price volatility. Safeguarding this through appropriate and proportionate regulatory measures is key for preserving market liquidity, enhancing EU competitiveness, providing a stable market environment to facilitate growth and investment, and maintaining a level playing field at the international level. This holds true in particular for the AAE, which exempts commodity market participants satisfying the relevant conditions from the requirement to become an authorised MiFID investment firms and the associated prudential capital requirements. Without the AAE, the regulatory environment for commodity firms in the EU would be significantly more onerous than that in other competing jurisdictions (e.g. the UK, Switzerland, the US and Singapore).

Question 17. What is the most effective and efficient method to ensure that supervisors can monitor compliance with the requirements of the AAE?

In particular, do you believe the abolishment of systematic (annual) notification from beneficiaries of the AAE to NCAs should be maintained or should these notifications be re-introduced? Please explain. Could you quantify costs if they were to be reintroduced?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Yes, the abolishment of the annual notification requirement should be maintained. If supervisors are concerned about a lack of transparency regarding who participates in commodity markets, we support the sharing of available data between authorities. For example, the hedge/spec reporting under EMIR should provide a detailed picture which commodity firms are participating in derivatives markets. In addition, ESMA or NCAs may wish to make spot checks on some of the larger commodity firms to verify their conclusion that they may benefit from the AAE.

If, however, the notification requirements were introduced, the main concern is not related to costs but rather

the complexity and administrative challenges of the old system. NCAs in the EU took different approaches whether they a) required an annual notification, b) in which format this should be provided, c) in which language this needed to be provided, and d) in some cases a company had to provide more than one notification to different NCAs when active on commodity markets in a number of EU jurisdictions.

Any notification requirement should be simplified, e.g. limited to one notification per company in a simple format.

Question 18. In general, do you believe that the existing AAE criteria are fit for purpose and allow to adequately identify when a trading activity in the commodity derivatives markets is ancillary to another activity (i.e., allows to bring the right type of entities into the MiFID regulatory perimeter)?

- (x) Yes
- ( ) No
- ( ) Don’t know / no opinion / not applicable

Please explain your answer to question 18:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations remain supportive of the AAE as amended during the quick-fix.

The 3 alternative tests (de-minimis test, trading test, and capital employed test) are appropriate and proportionate tests to identify when a trading activity in the commodity derivatives markets is ancillary to the main commercial business of energy market participants. The calculations under these tests are clear, legally certain and relatively simple. We consider the thresholds of these tests to be appropriate. Reopening the legislative debate on these tests or considering an alternative approach so soon after amending them risks undermining confidence in the stability of the commodities markets in the EU and may cause some firms to postpone or reconsider potential trading or investment decisions due to the uncertainty of their future regulatory status.

We further refer to our response to Q16.

Question 19. In which of the following aspects – if any – does the current scope of the AAE raise issues?

Please select as many answers as you like

- [ ] adequate conduct supervision of firms active in commodity derivatives markets and enforcement of the financial rulebook (e.g., for the purpose of monitoring market abuse)
- [ ] fair competition between market participants
- [ ] impact on energy prices

- [ ] liquidity of the commodities derivatives market
- [ ] safeguarding prudential and resilience aspects of firms benefitting from the AAE
- [ ] ability to monitor and identify future risks to financial stability (e.g., related to interconnectedness and contagion)

Please explain your answer to question 19:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations maintain their support for the current AAE. The following points illustrate how the current AAE and regulations already applicable to commodity firms address each of the items highlighted in the question.

a. Non-financial entities ("NFEs") active on commodity and commodity derivatives markets are subject to REMIT, MAR, EMIR and MiFID II, providing for comprehensive reporting, market transparency, market integrity, supervision and enforcement, thus addressing regulatory concerns articulated during the energy crisis. The regulation of trading activities at exchange level through position limits and accountability levels, dynamic circuit breakers, regulation of algorithmic trading, and central clearing of exchange traded derivatives all support orderly and functioning commodity markets. The status of a commodity firm as NFE or investment firm, has no bearing on its obligations under the Market Abuse Regulation.

b. It is key that the EU's commodity market is competitive compared to third country markets. The current EU framework for commodity trading is based on the G20 commitments and compared to other key jurisdictions (such as the US, UK, Switzerland and Singapore). It is important for EU growth and competitiveness to maintain a level playing field for EU commodity market participants ("CMPs"). European regulation for commodity trading is aligned with principles acknowledged on a global level and thus is currently able to compete at international level.

A MiFID investment firm status for CMPs has no comparison in other leading markets and would put EU firms at a clear competitive disadvantage. It would not only impose disproportionate prudential requirements, but also negate that the business model and trading activities of CMPs are materially different to those of financial entities. The primary purpose of most trading for NFEs is to mitigate their own commercial, liquidity, cashflow and other risks from e.g. energy generation, production of commodities, and consumption, or transportation, storage and optimisation, to managing risks associated with physical assets through hedging and own-account trading. In contrast to companies from the financial sector, NFEs do not use retail/ end-customer money (savings, pension funds, etc.) for their trading which would require investor and customer protection. Finally, the default of a (major) energy firm would neither pose a security to energy supply nor a systemic risk to the wider economy or financial markets.

c. The current regulatory framework fosters liquid and functioning physical and financial commodity markets. This enables the formation of accurate and reliable prices, establishes fundamental price signals and creates trust in commodity markets. This essential role of commodity trading ensures an affordable energy supply across Europe. Actions taken by energy traders during the energy crisis have helped dampen price moves, they identify mispricing and are able to correct inefficiencies.

d. The AAE ensures that CMPs can contribute to liquid, competitive and efficient commodity markets, impacting overall market efficiency, and ensuring a competitive environment and level-playing field with orderly formed prices are available to market participants in a transparent and non-discriminatory manner.

e. There are no apparent concerns regarding the capitalization or liquidity of CMPs that would justify the imposition of mandatory prudential and liquidity regulation under the IFR/IFD. CMPs operate a centralised and comprehensive risk management on both their physical and financial activities. During the energy crisis energy market participants expanded their (cash liquidity) risk management strategies and tools beyond previous industry standards. This includes, inter alia, liquidity forecasting, real time reporting, central steering and cash secured through bank loans and capital market bonds. Therefore, they were able to match the frequent and higher margin calls at exchanges. An extension of the AAE would likely be counterproductive to the broader policy efforts to enhance liquidity preparedness of non-banks, as addressed in the FSB workstream on liquidity and margin preparedness. The application of prudential requirements to energy firms could amplify liquidity stress rather than safeguard financial stability.

f. CMPs are already subject to a wide set of regulations, e.g. various comprehensive reporting obligations under MiFID, REMIT and EMIR. In addition, based on recently introduced provisions in amendments to those and other regulations, the competent authorities will be able to exchange reported data. Thus, authorities have access to a comprehensive data set, which enables them to assess financial stability. However, we believe data sharing could be more efficient and streamlined (see our responses to Q1-7).

Question 20. Do you believe the *de minimis* test should be broadened by counting the following towards the EUR 3 billion threshold?

	Yes	No	Don't know - No opinion - Not applicable
trading activity in derivatives traded on a trading venue?	○	●	○
trading activity in physically-settled derivatives?	○	●	○

Please explain your answer to question 1:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations' members believe the de minimis test is appropriately calibrated as it stands and should not be broadened.

Trading activity in financially and physically settled derivatives traded on a trading venue should not be taking into account towards the de-minimis threshold, because:

• It would complicate the test substantially and contradict the intention of CMRP to simplify the tests. The decision to include OTC trading under CMRP was to remove unnecessary red tape and reduce regulatory complexity (see Directive (EU) 2021/338, Recital 1 and 2). Also, the Clean Industrial Deal aims to simplify regulation.

- Exchange traded derivatives are centrally cleared and margined and hence trading on exchanges raises no systemic credit risk concerns.
- Other jurisdictions with liquid energy commodity markets, such as the U.S., have comparable simple tests whether a non-financial firm is treated like a financial counterparty under financial regulation and these tests also do not take into account exchange traded derivatives (see Swap Dealer Test under U.S. Dodd-Frank-Act).
- The 3bn threshold would need to be adjusted if exchange traded derivatives were taken into account, as the current threshold would be significantly too low and, without adjustment, would drive trading into the OTC space away from exchanges. This would undermine one of the benefits of MiFID/MiFIR to incentivise exchange trading to minimise risk and increase transparency.

The trading activity in physically settled OTC derivatives should not be taken into account for the de-minimis threshold, because:

- Bilateral OTC transactions that can be physically settled and that are entered into for commercial purposes (e.g. delivery or supply of energy) are not defined as financial instruments under Section C.7 of Annex I of MiFID, and therefore are not in scope of the MiFID/MiFIR regime. Section C.6 of Annex I of MiFID similarly excludes physically settled gas and power derivatives from the definition of financial instruments and therefore from the scope of MiFID/MiFIR (the “C6 carve-out”). We refer to our answers to Q 32 and 55.
- Other jurisdictions with liquid energy commodity markets, such as the U.S., with comparable tests whether a non-financial firm is treated like a financial counterparty under financial regulation also do not take into account physically-settled OTC transactions (see Swap Dealer Test under U.S. Dodd-Frank-Act.
- The 3bn threshold would need to be increased substantially, as the inclusion of physically-settled OTC would lead to the inclusion of non-financial commercial transactions that are not commodity derivates. Consequentially, this change would bring various non-financial firms from the real economy sector (e.g. energy intensive industry sectors like chemistry, steel and aluminium smelters) into the scope of the investment firm regime, because their commercial gas and power supply and delivery contracts would count against the thresholds, if they are not a hedging transaction. Further, energy suppliers could be drawn into the investment firm regime if their supply contracts are not considered a hedging transaction.

These outcomes would contradict the intention of MiFID/MiFIR to focus on financial activities and not to cover commercial activities of the real economy. Altogether this would lead to higher energy prices and make the EU a less competitive market for commodity trading compared to the markets in other jurisdictions (e.g. US, UK).

Question 21. The *de minimis* test threshold is based on exposure in commodity derivatives ‘traded in the Union’. Is this criterion on the location of trades fit-for-purpose?

- (x) Yes
- ( ) No
- ( ) Don’t know / no opinion / not applicable

Please explain your answer to question 21:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Basing the de minimis test on commodity derivatives “traded in the Union” is appropriate because:

• Applying the test to commodity derivatives traded in the Union is sufficiently wide. It includes all transactions by an EU supervised/established entity wherever the actual trade may have taken place, and whoever the counterparty is. On that basis, applying the test to commodity derivatives traded in the Union is sufficiently wide to capture all relevant activity.

• This criterion is meant to limit the application of MiFID/MiFIR to instances where there is a connection to the EU. The AAE test is only available to non-financial firms established in the EU, which enter into financially settled OTC derivatives with EU and non-EU counterparties. Therefore, the scope of transactions taken into account should remain as “traded in the Union”.

• An extension of MiFID/MiFIR to financial OTC commodity derivatives traded by firms established in third-country jurisdictions like the U.S. or Switzerland and thus traded outside of the Union, would lead to the extraterritorial application of the MiFID/MiFIR regime. We believe such extension is not appropriate as such activity is already governed by local laws and regulations of the third country. Application of EU law in those jurisdictions could lead to duplicative or conflicting regulation.

• Depending on the definition of “OTC”, an expansion to transactions outside of the Union could also lead to trading activity on non-EU venues in jurisdictions not to be considered equivalent to come into scope of the thresholds. For reasons set out in our response to Q20, this would have a significant impact on non-financial companies relying on the exemption, even more so if activity on trading venues globally is brought into scope.

Question 22. Currently, the *de minimis* test threshold under MiFID is calculated on a net basis (i.e., by averaging the aggregated month-end net outstanding notional values for the previous 12 months resulting from all contracts). However, other jurisdictions use a gross trading activity threshold instead.

Do you believe that it would be more appropriate for the *de minimis* test threshold under MiFID to be calculated on a gross basis, so as to measure absolute trading activity?

- [ ] Yes
- [x] No
- [ ] Don’t know / no opinion / not applicable

Please explain your answer to question 22:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The de minimis test threshold under MiFID should continue to be calculated on a net basis, because:

• Using a gross basis would make the AAE substantially more complex to calculate. Under the

Commission Delegated Regulation (EU) 2021/1833 the de-minimis test and the capital employed test are both subject to the same calculation methods with regard to the netting of exposures. The net outstanding notional values under the de-minimis test shall be determined pursuant to the netting methodology for the capital employed test. This avoids that non-financial firms have to run different calculations for the same purpose.

• The calculations under EMIR are also done on a net-basis, thus creating operational efficiencies as internal systems are set up on a net-basis.

• Buying and selling to the same counterparty does not increase market exposure.

• Having to apply different calculations would contradict the intended simplicity of this test. CMRP introduced this methodology with a view to remove unnecessary red tape and reduce regulatory complexity (see Directive (EU) 2021/338, Recital 1 and 2). Also, the Clean Industrial Deal aims at the simplification of regulation.

• The only jurisdiction that we are aware of using a gross basis is the US. In all other main jurisdictions for commodity traders (e.g. the EU, UK, Switzerland, Singapore) this is done on a net-basis. If the US rules are used as comparison, the whole test needs to be taken into account, not just one of its elements. For example, under the Swap Dealer Test of the U.S. Dodd-Frank Act, only dealing activities are considered and own account trading activities are not relevant. Should de EU de-minimis test be amended to apply a gross-basis, then in consequence own account activities should be excluded, the threshold should be raised, and any other consequential impact needs to be carefully analysed.

Question 23. Currently, MiFID contains a single *de minimis* test threshold for all types of commodities derivatives.

Do you believe the *de minimis* test threshold should differ depending on the type of commodity derivative market considered (e.g., energy derivatives vs agricultural derivatives)?

- ○ Yes
- ● No
- ○ Don’t know / no opinion / not applicable

Please explain your answer to question 23:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe the current single de-minimis threshold in its current form is appropriate. Introducing different thresholds per asset class of commodity derivatives would complicate the test and counter the intention of the CMRP to simplify the regime. The de minimis test was introduced with smaller, less complex market participants in mind – asking them to calculate using several thresholds would re-introduce additional complexity and be operationally more challenging.

Some transactions would also be difficult to classify as falling within one or another threshold, e.g.

renewables may start out as agricultural product but then change into an energy product (such as biofuel /biomass).

Question 24. Currently the *de minimis* test threshold under MiFID is calculated including trading in commodity derivatives for an entity's own account. However, other jurisdictions exclude those transactions, and focus on dealing for the benefit of a third-party.

Do you believe the *de minimis* test should continue to include, or instead exclude, all trading activity carried out for an entity's own benefit (proprietary trading), so as to only rely on dealing activities for the benefit of a third party /client?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain why and how the threshold should be adapted:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe that the de minimis test threshold should continue to include own account trading, provided no other changes are made to the AAE.

The current AAE regime, including the de minimis test, is appropriately calibrated and supports liquid, competitive and efficient wholesale commodity trading markets. Such markets also secure an affordable, secure and sustainable energy supply for European industrial and private end-consumers.
If, however, the de-minimis test is tightened in any way, e.g. from a net to a gross calculation like the Swap Dealer Test in the US (see our concerns regarding this approach in our response to Q22), then consequentially, other aspects of the US test would need to be considered, such as removing own account trading from the de minimis test, same as in the US.

Equally, if the scope of the current AAE were tightened, e.g. by removing one of the test alternatives, lowering the thresholds or including ETD or physical transactions into the calculations, then we believe own account trading should be excluded from the de minimis threshold.

Question 25. Considering the introduction of the *de minimis* test following the CMRP, and with a view to further simplifying the AAE, do you believe that the AAE could be made less complex by:

			Don't know -

	Yes	No	No opinion - Not applicable
abolishing the trading test	○	◉	○
abolishing the capital employed test	○	◉	○
through other types of amendments	○	◉	○

Please explain your answer to question 25:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not believe that any of the currently available tests should be abolished. Our members are relying on a variety of the tests, depending on their corporate and trading structure. The current tests are sufficiently simple, provide the legal certainty required to be effectively used and are appropriately calibrated.

If you think **abolishing the trading test** would not make the AAE less complex, do you believe this test continues to be adequately calibrated?

- ◉ Yes
- ○ No
- ○ Don’t know / no opinion / not applicable

Please explain why you think the **trading test** continues to be adequately calibrated?

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not believe that any of the currently available tests should be abolished. Our members are relying on a variety of the tests, depending on their corporate and trading structure. The current tests are sufficiently simple, provide the legal certainty required to be effectively used and are appropriately calibrated.

If you think **abolishing the capital employed test** would not make the AAE less complex, do you believe this test continued to be adequately calibrated?

- ◉ Yes
- ○ No
- ○ Don’t know / no opinion / not applicable

Please explain why you think the capital employed test continues to be adequately calibrated?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not believe that any of the currently available tests should be abolished. Our members are relying on a variety of the tests, depending on their corporate and trading structure. The current tests are sufficiently simple, provide the legal certainty required to be effectively used and are appropriately calibrated.

Question 26. If your entity currently benefits from the AAE, and should your entity not be in a position to benefit from the AAE following a review of the criteria, could you please provide an assessment of the impact of being qualified as investment firm on your operations, and on your ability to maintain active participation in commodity derivatives markets?

If possible, please include a quantitative assessment of the costs incurred by such a qualification and all its implications.

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

A tightening of the AAE would lead to some commodity firms having to become MiFID II authorised to be able to continue their current business from the EU. If the costs of the consequences of authorisation outweigh the benefits of trading from an EU-based entity, this may lead them to reassess their EU footprint and activities and consider other jurisdictions. We fear that proposing changes to the regime during stressed market conditions would lead to significant negative consequences for commodity markets such as a further reduction in liquidity, especially during stressed market conditions.

Consequences of a MiFID authorisation include the following:

- It triggers burdensome and costly requirements under financial regulation, e.g. capital and margining /collateralisation requirements, which makes supporting the development of Euro dominated EU commodity markets much more challenging, in contradiction to the EU's efforts to make the European Union a competitive region.
- A commodity firm would also become a financial counterparty under EMIR, triggering mandatory margin requirements for OTC trades when trading with other financial counterparties or NFC+, resulting in additional collateralisation requirements for individual market participants, which can be substantial.
- It would likely force a number of firms to curtail or stop their EU trading activity, or, where possible, to trade directly on bilateral OTC markets or via other international markets in such a way that they would not need to become authorised MiFID investment firms or to minimise the costs and resources impact of such a requirement and ensure they are not placed at a competitive disadvantage to other firms operating in/ from less restrictive and costly jurisdictions. The consequential fall in liquidity of EU27 commodity markets would significantly increase the costs of risk management for the real economy and severely hamper the ability to hedge the commercial risks efficiently.

- It would also not achieve lower energy prices, which seems to be the intention of the Draghi report and the Clean Energy Deal on affordable energy prices, nor would it have removed the high volatility or reduced energy prices. Rather, it would have exacerbated the energy crisis, in particular the (cash) liquidity stress of firms. The ultimate net result would be higher end consumer gas and power prices. Illiquid wholesale markets would reduce market competition and efficiency in production and retail markets and prices for consumers and industry can be expected to increase as a result. This would have the effect of making various commercial activities involving e.g. energy product import, production, processing, generation and product manufacturing and transportation more risky and costly to hedge, making the EU a less attractive place to invest in such activities than other, less costly and restrictive jurisdictions.
- Higher risk, constrained investment capital and poor market price signals would significantly undermine investment, production and consumption decisions and reduce security of supply. Investment firms fall under the full scope of IFD/IFR, which means liquid assets of a commodity firm would be tied up in order to satisfy prudential obligations. Amounts required to be held as prudential capital and the initial and variation margin payments would be unavailable for long-term capital-intense activities such as the development of gas fired power plants and renewable power generation investments (e.g., offshore wind farms) where considerable lead time (i.e. multiple years) is often involved before commencement of delivery to generate revenue. Consequently, this would reduce the ability for firms to invest in the decarbonisation of the European economy and endanger the long-term goal of the "European Green Deal" of the EU Commission. We believe that money tied up with the regulatory capital and margining requirements would be much better used in the investment in energy infrastructure and decarbonisation projects to make the EU energy sector sustainable in alignment with the "European Green Deal".
- Despite increased costs and higher risks, a tightening of the AAE would not lead to an improvement of the risk profile or integrity of the energy and financial markets. Energy markets are already effectively regulated, transparent and subject to the same high standards of conduct and integrity and are not of systemic relevance for the wider financial markets.
- There are numerous additional consequences, including comprehensive licensing and organisational requirements, conduct of business rules, reporting obligations and IT upgrades. It would require commodity firms to reconsider their whole (group) structure, further adding to ongoing compliance costs.

Question 27. To what extent do you believe the application of IFR/IFD prudential requirements, including those resulting from relevant Level 2 measures, as well as dedicated prudential supervision on all energy commodity derivatives traders, would have avoided or at least partially avoided the liquidity squeeze that such market participants suffered from during the 2022 energy crisis?

To what extent would it have limited the need for public intervention providing some of them with the necessary liquidity to meet requirements on margin calls?

Please substantiate your answer with quantitative elements, to the extent possible.

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Commodity firms are distinguishable from banks and financial institutions and commodity markets have special characteristics that are not catered for by the regime for financial firms. IFR/IFD prudential requirements should not be applied to commodity firms. It has been recognised that prudential regimes designed for financial firms are inappropriate for commodity firms due to differences in operations and risk profiles. Any proposal to develop suitable prudential rules for commodity firms would require a long-term, in-depth study involving relevant sectoral DGs and robust data-backed consideration of impacts on security of supply and consumer costs.

The need for such requirements is not evidenced by analyses done following the energy crisis. E.g., the FSB report on the financial stability aspects of commodities markets, does not indicate systemic risk during the energy crisis. It found that, despite price volatility, increased margin calls, and increased liquidity demand, commodity markets (other than the LME nickel market crisis, which was specific in nature) remained resilient through the 2020 and 2022 shocks, markets continued to function and there was little impact on the rest of the financial system.

Gas and power prices and volatility increased during the energy crisis along with liquidity requirements to address the more frequent and higher margin calls. Supply shocks for gas and power, in combination with a high concentration of gas supply, were the root cause for these price and volatility spikes and the liquidity squeeze.

The 2022 energy crisis provided a successful stress test for the proper function and resilience of energy markets. Market participants quickly identified and undertook adequate remedial actions to manage the increased cash liquidity risk and hence were able to mitigate respectively to fulfill the sharp increase in collateral requirements ("margin calls") at energy exchanges:

- Energy market participants quickly deployed emergency measures in response to the energy crisis, in particular higher netting effects through consolidation at fewer CCPs, reduced or closed positions on exchanges and move positions to OTC markets.
- In addition, energy market participants have further expanded their (cash liquidity) risk management strategies and tools beyond previous industry standards, including liquidity forecasting, real time reporting, central steering and cash secured through bank loans and capital market bonds.

While there were cases of commodity firms struggling with margin calls, these were isolated occurrences, owed to the individual circumstances of the relevant firm.

The application of IFR/IFD prudential rules would not have avoided the liquidity squeeze. On the contrary, commodity firms operating as investment firms would limit market resilience and would have worsened the energy crisis and liquidity squeeze, because:

- Investment firm status would result in material and disproportionate capital requirements.
- Under EMIR, an investment firm status would imply that energy market participants gain status as "Financial Counterparty" under EMIR resulting in additional cash burden under mandatory OTC collateralisation for derivatives.

Considering these consequences of becoming an investment firm, the Associations conclude that larger energy traders would have either faced liquidity issues or would have had to exit the market at stress times, thus further reducing liquidity in the energy wholesale market which was already low during the energy crisis (for exactly this reason). In turn, this would have deteriorated the quality of the price signal and made it more difficult to find counterparties for risk management (e.g., hedging assets or retail customer contracts). In particular, it would imply that energy firms would no longer have been in a position to trade-off their market, cash liquidity and credit risks according to their individual needs and preferences, which was a key mitigating measure during the energy crisis.

Question 28. If a review of the AAE were to lead to more entities being in scope of MiFID (and also thereby in scope of IFR/IFD):

Question 28.1 Do you believe that the current categorisation in IFR/IFD (i.e., three categories of investment firms) should apply to those entities? Should instead a *sui generis* category be created for those entities newly covered by prudential requirements?

- Yes
- No (selected)
- Don't know / no opinion / not applicable

Question 28.2 Do you see merit in a decoupling, such that it triggers the application of MIFID (including its relevant provisions on supervision), without bringing those firms directly in scope of IFR/IFD (i.e. prudential regulation)?

- Yes
- No (selected)
- Don't know / no opinion / not applicable

Question 28.3 Do you consider that all or only some MiFID requirements should apply?

- Yes
- No (selected)
- Don't know / no opinion / not applicable

Please explain which requirements should be retained (e.g. 'fit-and-proper' assessment)?

If possible, please estimate the costs of compliance with those requirements of MiFID.

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Please explain your answer to question 28:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

28.1: None of the IFR/IFD requirements should apply as they were introduced for financial entities and are designed to address risks posed by Investment Firms providing Investment Service and Activities to clients or financial markets. IFR/IFD does not adequately address the unique challenges faced by commodity and emissions allowance dealer investment firms within industrial (non-financial) groups. For example, balance sheet measures to determine the “class” of investment firms are wholly inappropriate for commodity firms, many of whom have substantial fixed assets. We also do not believe that a new sui-generis category for commodity derivatives trader should be introduced under IFR/IFD. The primary purpose of trading for non-financial commodity market participants is to mitigate their own commercial risks from energy generation, production of commodities, and consumption, and to manage risks associated with physical assets through hedging and own-account trading. In contrast to companies from the financial sector, NFEs do not use end-customer money (savings, pension funds, etc.) which would require investor and customer protection. The default of a (major) energy firm trading on commodity derivatives markets would neither pose a security to energy supply nor a systemic risk to the wider economy or the wider financial markets. There are no apparent concerns with regards to capitalization or liquidity of commodity market participants that would justify the imposition of mandatory prudential and liquidity regulation under the IFR/IFD. Commodity market participants operate a centralised and comprehensive risk management in place on both their physical and financial activities on commodity markets. In particular, during the energy crisis energy market participants expanded their (cash liquidity) risk management strategies and tools beyond previous industry standards. This includes, inter alia, liquidity forecasting, real time reporting, central steering and cash secured through bank loans and capital market bonds. They were able to match the frequent and higher margin calls at exchanges.“ Prudential requirements for commodity firms have been discussed multiple times over the years. For example, the Committee of European Securities Regulators (“CESR”) and the Committee of European Banking Supervisors (“CEBS”) in their technical advice issued in 2008 (CESR/08/752), noted: “CESR/CEBS believe that application of the CRD requirements (including the large exposures regime) to specialist commodity derivatives firms would be disproportionate and would lead to regulatory failure” [p.3 and para. 107 p. 32]. In the same technical advice the CESR and the CEBS stated that “regulation brings net economic benefits only where it addresses potential market failures” (para. 75) and that “extending CRD may not take fully into account the particularities of specialist commodity derivatives firms”, including the fact that “systemic risks arising from specialist commodity derivatives firms appear to be lower than those stemming from credit institutions and ISD investment firms and therefore do not warrant the same degree of prudential regulation” (para. 81). In para. 235, they note “that the activities of specialist commodity derivatives firms do not generate significant systemic concerns. By imposing increased costs and operational burdens, these firms will face a significant competitive disadvantage against global counterparts operating in less restrictive jurisdictions. This could lead to capital flight, reduced hedging, and higher commodity prices for European consumers. Moreover, diverting essential capital away from investments in supply chain infrastructure and the energy transition threatens Europe's energy security and climate goals. Such regulations may even increase financial system risk by forcing firms to rely more heavily on external financing, margin transformation, and liquidity provisioning. Any threat to liquidity, such as imposing additional prudential regulations on commodities firms that are not currently subject to such requirements, should be approached with extreme caution and justified by clear evidence of systemic risk or significant market failures that such requirements would mitigate, which does not appear to be borne out by analysis done to date. Please also refer to our response to Q27.

28.2: Commodity market participants should not be treated as investment firms under MiFID. Also see our response to Q26.

28.3: CMPs should not be treated as investment firms under MiFID. Article 90(5) of MiFID requests that the MiFID II review must be performed in a holistic manner, considering the impact of IFR/ IFD and EMIR on

(energy) commodity derivative traders. The EU Commission is currently reviewing the regime for specialized commodity derivatives traders under IFR/IFD. The consequences of any potential future investment firm status for CMPs should only be assessed following completion of this review.

Question 29. Assuming a review of the AAE that would tighten the access to the exemption, what would you expect to see in terms of effects on trading and liquidity?

What about the opposite scenario (meaning a widening of the exemption)?

Please explain, providing if possible quantitative analysis (in terms of impact on open interest, volumes, number and diversity of participants, bid/ask spreads.):

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The current AAE is appropriately calibrated and adequate.

Any tightening of the current AAE potentially means that commodity market participants could become an investment firm under MiFID II and consequential obligations under other EU legislation. Market activity and commodity firms could shift away from the EU into other regions where they would not be treated as financial firms with all consequences such status entails.

Such a shift could lead to:
- Lower market liquidity and less efficient market outcomes with higher and more volatile prices.
- Deteriorated price signal leading to inefficient resource allocation, including new investments
- Less product offering for EU consumers.
- A risk that energy markets participants and real economy industrials cannot adequately hedge their commercial risks (e.g., for energy market participants the physical assets, for real economy industrials (energy intensive industry) the energy needs).
- Reduced competition between remaining energy market participants
- Lower resilience of energy market participants to withstand and mitigate external shocks. In particular, investment firm status hinders trading off market vs. cash liquidity vs. credit risk (which has been a core mitigating measure in the energy crisis)
- Higher barriers to entry.

We would also make the important point that there are risks associated with over-reliance on the banking sector to provide hedging services in the commodities sector (which would be required if commodity firms were to reduce or cease such activity in the EU response to a tightening of the AAE) - this is not a core sector for banks and they can take decisions to exit commodity markets, either for strategic reasons or due to pressure or a direction to do so from regulatory authorities. Not having sufficient non-bank liquidity to step in were this to occur would cause liquidity to dry up and leave industry, manufacturing, airlines etc without the ability to hedge their risks effectively, increasing the risk of failure/ increasing prices.

In summary, it would make the EU a less competitive commodity derivatives market.

Please also see our response to Q26.

Question 30. What do you believe would be the expected effect(s) of a reviewed AAE on commodities prices (e.g., energy, agricultural commodities), depending on the changes implemented (tightening or loosening of the AAE)?

Please explain:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We reiterate that the current AAE is appropriately calibrated.

Please also see our response to Q26 and Q29.

3. Position management and position reporting

Position management and position reporting are two key features of the MiFID framework that allow trading venues to maintain orderly trading, and NCAs to monitor market trends and prevent potential market manipulation. They are also instrumental in the enforcement of position limits, for those contracts that are subject to them.

3.1 Position management

Article 57(8) of MiFID requires that exchanges and other trading venues trading in commodity derivatives have arrangements in place to monitor the open interest positions of persons trading on their venue.

It notably allows trading venues:

- to request information from market participants on 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
- to request a person to terminate or reduce positions, or to take direct action in case the person does not comply with said request
- to request a person to provide liquidity back into the market to mitigate the impact of a large or dominant position

3.2 Position reporting under MiFID

3.2.1 Reporting from market participants to trading venues

Position management controls are complemented by position reporting requirements included in Article 58(3) of MiFID which aim, among others, at providing trading venues with the necessary information to implement their position

management mandate. Market participants are thereby required to submit to the trading venues they are trading on the details of their positions held in the contracts traded on that venue.

However, currently trading venues do not have access to a full set of information on the positions that their market participants build in OTC derivative instruments related to the same market/underlying. Notably, they do not get information on positions in OTC or C6 carve-out contracts that are connected to the venue-traded contract considered, despite the fact that market participants can build significant positions through OTC transactions. Currently, positions in the OTC derivatives are obtained on an ad hoc basis[1]. However, the recent events that occurred at the London Metal Exchange (LME) suggest that positions obtained through OTC contracts can have a significant and direct impact on orderly trading on trading venues and on the functioning of markets in general.

Trading venues also do not receive any position reporting from market participants on positions in the same contract opened through trading on a different venue (in situations where the same contract is traded on different venues, as is the case for Dutch Title Transfer Facility (TTF) gas futures). This can notably cause difficulties in enforcing position limits, as positions in the same and economically equivalent OTC contracts are to be aggregated regardless of where the positions have been built (all venues + economically equivalent OTC contracts), to effectively assess whether an entity breaches the position limit or not.

This section therefore explores whether it is necessary, for the effective enforcement of position management controls by trading venues, that operators of such venues gather comprehensive and more systematic data on positions of market participants, beyond those traded on their venue, including those traded OTC. Potential solutions could be specific to certain types of contracts or commodities (e.g., gas).

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[1] According to MiFID Article 57(8), point (c), in the context of their position management controls, venues are entitled to '*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*'. Moreover, according to MiFID Article 58(3), market participants are required to report to the trading venue, at least on a daily basis, their positions held through contracts traded on that trading venue.

3.2.2 Reporting from market participants and trading venues to NCAs

Similarly, securities markets supervisors do not receive exhaustive information over all positions of market participants. Currently, pursuant to Articles 58(1) and (2) of MiFID, securities markets supervisors only gather information on venue-traded instruments (via the trading venues) and in economically equivalent OTC contracts (via investment firms directly). Currently, position reporting to NCAs does not comprise positions in the spot underlying market, nor positions in physically-settled wholesale energy contracts contracts traded on an OTF (i.e., C6 carve-out products).

3.3 Exposure reporting under REMIT

The revised REMIT introduced for the first time an obligation for market participants to report their exposures, detailed by product, including the transactions that occur OTC.

The Commission is currently in the process of detailing such reporting obligations in the REMIT Implementing Regulation.

Questions related to section 3

In providing your answers under this section, please specify, to the extent relevant, **whether your assessment would differ depending on the type of commodity concerned** (agricultural, gas, electricity) or when considering EUA markets specifically.

Question 31. Currently, under MiFID, reporting from market participants to trading venues on the positions held in instruments traded on those venues is performed by market participants themselves.

Do you believe that this reporting could be carried out by clearing members, as it is the case in other jurisdictions, so as to reduce the burden on individual market participants and to enhance accuracy and completeness of reporting?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Please explain your answer to question 31:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Members consider that as clearing members currently have to provide similar reporting to exchanges, it should be feasible for them to also provide position reporting as required under MiFID.

However, bearing in mind other questions regarding reporting of final end users in this consultation, we note that clearing members are not in possession of this information. Should the disclosure of end user identities be identified as a key requirement, then transferring reporting obligations to clearing members may mitigate against that. If such obligations are to be imposed, then clearing members should have responsibility for the accuracy and completeness of reporting. While clearing members undertake such reporting in the US, this would be a new requirement for clearers and market participants in the EU and would require a transitional period and would require implementation and set up costs by both market participants and clearers at a time when market participants are bearing the costs and burden of other regulatory change, so we would urge careful consideration of the timing of imposition of any such obligation.

Question 32. In which of the following cases should venues trading in commodity derivatives receive the full set of information on positions of market participants trading on their venues?

Please select as many answers as you like

- [x] positions held in critical or significant contracts based on the same underlying and sharing the same characteristics, traded on other trading venues
- [ ] OTC contracts that relate to the same underlying
- [ ] related C6-carve-out contracts
- [ ] positions in the underlying spot market

Please explain how the information can be collected by trading venues and reported in the most cost-efficient way:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Despite ticking the box on sharing of data between venues, as this is required to open a response box, the Associations oppose any obligation on members of trading venues to provide the full set of position data for any of the listed cases on a regular or systematic basis as part of the standard position reporting requirements.

There are multiple issues that make this impractical, and in some cases entirely impossible. These include competition and antitrust concerns (given that trading venues are operated by different and often competing commercial enterprises), confidentiality obligations and statutory or other regulatory limitations imposed by overseas public bodies on various market participants. The imposition of the obligation to provide such information to trading venues on a systematic, ongoing basis would be onerous on, and costly for, market participants, exacerbating the intense demand on resources (both economic and manpower-related) at a time when they are already implementing other regulatory requirements and have just implemented EMIR REFIT. We do not see what the benefit would be of trading venues receiving such information.

For example, positions held on other trading venues should not be made available to another EU trading venue. Commodity exchanges are commercial organisations and information on trading positions could give exchanges a commercial advantage. As such, information should only be required under strict circumstances and with the proviso that there are adequate safeguards to prevent the information being used in any way for commercial gain.

Instead, the Associations consider that a more viable and practical approach would be for trading venues to have the discretion to require this information from their members where they have concerns about specific OTC positions related to a contract traded on their venue , under specified circumstances, for example where there is a tangible risk of a disorderly market or in extreme stressed market scenarios. This should operate subject to the constraints of both statutory or other regulatory limitations imposed by overseas public bodies, and competition law, with adequate safeguards to prevent this information being used by other parties for commercial gain, and be limited to:

- positions held in critical or significant contracts based on the same underlying and sharing the same characteristics as the respective contract, that are traded on other trading venues
- OTC contracts that relate to the same underlying as the specific contract

Further, if regulators are concerned about positions held by non-EU entities, cross-jurisdictional issues, we believe it is the regulator role and responsibility to liaise with other regulators to obtain this data.

FIA and ISDA members note that it would not be possible to apply this requirement to C6-carve-out contracts under MiFID as it stands. While it may appear superficially attractive to amend MiFID to include these contracts as financial instruments by including them in the scope of Annex I Section C , we caution against doing this without a thorough review of what the other consequences would be of bringing them into the wider scope of MiFID and MiFIR and across all other regulations that cross-refer to the definition of financial instruments. This would also include the duplication of various regulatory requirements when such contracts fall within the scope of REMIT II.

Spot markets are not in the remit of either FIA or ISDA, and therefore we are unable to respond on that point.

Please specify what your preferred option would be:

- imposing additional reporting requirements on market participants (to trading venues)
- achieving this through alternative means, such as by leveraging on the existing supervisory reporting channels (e.g., reporting to trade repositories or RRMs)
- resorting to the single data collection mechanism as referred to in section 1
- don't know / no opinion / not applicable

Please clarify how your favourite option could be achieved and, if possible, please estimate the cost of additional data collection/reporting, to the extent relevant, for reporting entities.

Please identify whether this could lead to any double reporting under the (revised) REMIT (and as will be further detailed in the revised REMIT Implementing Regulation)?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 33. With a view to enhancing the supervision of commodity derivatives markets, do you believe that both energy (where relevant) and securities markets supervisors (ACER, NRAs, ESMA, NCAs, collectively competent authorities) should have access to information on market participants active in derivates markets as regards their positions in:

	Yes	No	Don't know - No opinion - Not applicable
C6-carve-out contracts	◉	○	○
the underlying spot market	◉	○	○

Please explain whether your reply differs depending on the type of underlying commodity considered:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

No.

Please specify what your preferred option would be:

- ○ imposing additional reporting requirements on market participants (to competent authorities)
- ○ through alternative means, such as by leveraging on the existing supervisory reporting channels, when they exist (e.g., REMIT reporting)
- ● as regards energy derivatives, by granting competent authorities access to the single data collection mechanism as referred to in section 1
- ○ don’t know / no opinion / not applicable

Please explain how the information can be collected by competent authorities and reported in the most cost-efficient way:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We would support information sharing between energy and securities market supervisors, as we believe this can enhance regulators’ understanding of the commodities market business and be beneficial for effective supervision, but we are opposing any additional requirements that may arise from this data transmission. Market participants are already making both their physical and financial trading information in energy products available to the relevant regulatory bodies.

We note that there are arrangements in place to allow data sharing, such as the memorandum of understanding between ACER and ESMA of 6 March 2023.

We consider that these arrangements are sufficient and that any such sharing of information should be with respect to instruments that fall under the jurisdiction of both the energy regulators and financial services regulators e.g. gas and power derivatives. We are concerned regarding the sharing of data regarding C6 carve out contracts and the spot market between ACER/ NRAs and ESMA/ NCAs to the extent they do not relate to instruments or regulation within the jurisdiction of ESMA/NCAs blurs the distinction between REMIT II and financial services regulation. Our members do not believe that additional reporting requirements are needed for this purpose, such additional requirements would carry a risk of duplicating reporting. Instead, supervisory reporting channels could be expanded and/or competent authorities should be granted access to a single data collection mechanism.

We also refer to our response to Q1.

Question 34. With a view to enhancing the supervision of wholesale energy markets, do you believe that energy markets supervisors (ACER, NRAs) should have access to information on market participants active in wholesale energy markets as regards their positions in instruments subject to position reporting under MiFID?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain whether your reply differs depending on the type of underlying commodity considered:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

No.

Please specify what your preferred option would be:

- ( ) imposing additional reporting requirements on market participants (to trading venues)
- ( ) achieving this through alternative means, such as by leveraging on the existing supervisory reporting channels (e.g., reporting to trade repositories or RRMs)
- (x) by resorting to the single data collection mechanism as referred to in section 1
- ( ) don't know / no opinion / not applicable

Please explain how the information can be collected by ACER/NRAs and reported in the most cost-efficient way:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We refer to our response to Q1 and Q33.

Please explain your answer to question 34:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We refer to our response to Q1 and Q33.

Question 35. The reporting of positions in economically equivalent OTC contracts under Article 58(2) of MiFID applies to investment firms only.

Do you believe this requirement should be extended to all persons (like the position limit regime)?

- Yes
- (selected) No
- Don't know / no opinion / not applicable

Please explain your answer to question 35:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We are reiterating, that OTC derivative contracts are being already reported as part of other obligations, by the same regulator, ESMA, under EMIR, and we do not see the necessity of adding more operational burden and regulatory requirements, which we believe will not in any way enhance market transparency nor limit market abuse risks.

Question 36. In your view, is the current definition of 'economically equivalent OTC derivatives' under MiFID fit for purpose?

- (selected) Yes
- No
- Don't know / no opinion / not applicable

Please explain your answer to question 36:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not believe that any changes are required.

Question 37. MiFID requires that position reporting specifies the end-client associated to the positions reported. However, the legal construction of the current position reporting framework entails that, for positions held by third-country firms, such third-country firms are to be considered the end-client. This prevents the disaggregation of positions held by those third-country firms, and therefore the identification of the end-clients related to those positions.

Does the lack of visibility by NCAs and/or by trading venues of the positions held by the beneficial owner (end client) when that position is acquired via a third-country firm raise issues in terms of proper enforcement of position limits and, in the case of trading venues, of their position management mandate?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain your answer to question 37:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations believe that the first part of this question is for NCAs to respond to.

In respect of the second part of this question, we understand the European Commission's objective of improving transparency in commodity derivatives markets and recognise the importance of effective position reporting frameworks.

However, we do not believe that requiring non-EU firms to disclose the identity of their end-clients is feasible in practice.

Firstly, such a requirement would raise significant legal and confidentiality concerns. Many non-EU jurisdictions have strict client confidentiality, data privacy, and banking secrecy laws that may prevent firms from disclosing the identities of underlying clients - even to regulatory authorities outside their jurisdiction. Imposing such a requirement would place non-EU firms in a position where they may be unable to comply without breaching their domestic legal obligations.

Secondly, the current position reporting regime already allows for the identification of significant positions at the level of the non-EU entity. Where appropriate, national competent authorities (NCAs) can already request further information through cooperation agreements or bilateral arrangements with non-EU regulators or firms. This is a more proportionate and targeted approach than imposing a blanket reporting obligation on all non-EU firms.

Finally, introducing such a requirement could discourage non-EU participation in EU commodity derivatives markets, reducing liquidity and impairing the price discovery function.

Should the position reporting framework be amended to specify that non EU-country firms also have to report who is the end-client linked to the position they hold in venue-traded commodity derivatives and/or economically equivalent OTC derivatives?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

No.

4. Position limits

Article 57 of MiFID contains a number of rules that constrain the size of a net position which a person can hold at all times in certain commodity derivatives contracts. Position limits in MiFID do not apply to EUAs nor to derivatives on EUAs.

As the initially introduced position limit regime under MiFID had proved to be overly restrictive, negatively affecting the development of in particular new commodity derivatives markets, notably energy derivatives, the CMRP adopted in 2021 introduced significant alleviations to that regime. In particular, it reduced the scope of contracts subject to position limits only to agricultural commodity derivatives and to significant or critical commodity derivatives. Contracts are considered significant or critical when the size of their open interest is at a minimum 300,000 lots on average over one year.

Position limits for each of those contracts are set by NCAs, following principles set out in MiFID Level 2 legislation (Delegated Regulation (EU) 2022/1302), and following an opinion by ESMA. Positions in venue-traded and in economically equivalent OTC contracts are aggregated.

Position limits do not apply to contracts entered into for hedging purposes by non-financial entities (so-called ‘hedging exemption’). The CMRP extended the hedging exemption to positions taken by financial entities that are part of a predominantly commercial (i.e., non-financial) group, where the positions taken by those financial entities seek to reduce risks linked to the operations of commercial activities of the non-financial entity in the group. The CMRP also extended the exemption on position limits resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue (the ‘liquidity provision exemption’). Those two extensions were introduced with a view to further support the deepening of commodity – notably energy – derivatives markets in the Union.

Persons holding qualifying positions that wish to benefit from one of the abovementioned exemptions need to submit a formal request to the NCA that sets the position relevant for the considered commodity derivative contract.

The position limits regime also only applies to contracts that fall within the realm of the financial rulebook, and therefore excludes ‘C6 carve-out’ products.

This should be assessed against the background that, in other jurisdictions , trading venues play an overall greater role in the tailoring, application and monitoring of position limits. For instance, for those contracts not subject to federal

position limits set by the Commodities and Futures Trading Commission (CFTC), trading venues are free to set the position limits they see fit. Similarly, exchanges play a greater role in granting hedging and other exemptions to market participants, applying the conditions set out in the CFTC order.

4.1 Particular case of natural gas derivatives

In the Union, TTF natural gas futures are currently the only listed non-agricultural futures contract subject to position limits. The TTF contract currently has a position limit of 25 050 960 MWh for the spot month and 153 017 049 MWh for other months (see ESMA's opinion of 1 July 2024 on position limits on ICE Endex Dutch TTF and EEX gas contracts). The position limits are expressed in MWh as the contracts available for trading, and covered by these limits, have different lot sizes (see ESMA's opinion of 20 December 2022 on position limits on ICE Endex Dutch TTF gas contracts.). The position limits apply irrespective of whether the contract is held to delivery or offset or settled prior to delivery. The position limit for TTF futures corresponds to 15% of the deliverable supply of natural gas to the Netherlands for the spot month, and 12.5% for other months.

In contrast, the laws governing the Henry Hub futures in the US have different position limits for physically settled and cash-settled derivatives. There is an initial 2000 contract limit for physically settled contracts, which can be combined with up to 8000 cash-settled contracts (2000 per exchange (cash-settled Henry Hub contracts are traded on three exchanges in the US) + 2000 in the OTC market). 2000 contracts at Henry Hub amounts to 25% of the deliverable supply at the Henry Hub. The differing limits for physically settled and cash-settled contracts are justified by the need to protect the physical delivery in the delivery month by avoiding that players take too large positions into the physical market. On the other hand, market participants that hold no physically settled contracts at all are allowed to increase their positions in cash-settled contracts. This is a specific rule for natural gas contracts called the “conditional spot month limit exemption” that increases the position limit for cash-settled contracts to 10 000 contracts.

Currently, there are no position limits in REMIT. However, as mentioned above, the position limit framework as set out in MiFID currently applies to TTF natural gas futures, as for the moment this is the only derivative contract that falls into the category of “significant” or “critical” commodity derivative.

In providing your answers under this section, please specify, to the extent relevant, whether your assessment would differ depending on the type of commodity concerned (agricultural, gas, electricity) or when considering EUA markets specifically.

Questions related to section 4

In providing your answers under this section, please specify, to the extent relevant, **whether your assessment would differ depending on the type of commodity concerned** (agricultural, gas, electricity) or when considering EUA markets specifically.

Question 38. What is your general assessment of the impact of position limits on the liquidity of commodity derivatives contract that are subject to them?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The current system of position limits works well and we believe is proportionate – it allows trading and hedging of risks, while preventing market abuse.

Stricter limits, i.e. limits that are set too low, would prevent market participants from managing their own risk or offering risk management services to their clients and could have a detrimental impact on market liquidity, which is critical to well-functioning EU energy markets. As a result, liquidity would be negatively impacted.

See also our response to Q41.

Question 39. What is your general assessment of the impact of position limits on the ability of commercial (non-financial) entities to hedge themselves?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The current hedging exemption from position limits works well. The Associations support its retention in its current form, along with the current definition of hedging, which should also not be amended.

A lack of available exemptions, combined with position limits set restrictively low, would discourage participation in use of certain contracts all together – COMEX Aluminium is one example.

Question 40. Do you believe that position limits under MiFID, as amended by the CMRP, have achieved their purpose of preventing market abuse and maintaining orderly trading?

- ○ Yes
- ○ No
- ● Don’t know / no opinion / not applicable

Please explain your answer to question 40:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Local/National regulators should be the ones assessing the effectiveness of position limits on preventing market abuse.

Question 41. In your view, what was the impact of the reforms introduced by the CMRP (reduction of the scope of contracts subject to position limits, broadening of the hedging exemption to some financial entities, introduction of the liquidity provision exemption) on the liquidity and reliability of EU energy derivatives markets?

Please include any quantified impact in terms of open interest, volumes, number and diversity of participants, bid/ask spreads, etc.

In particular, do you believe that the extra flexibility introduced had an impact on market participants' ability to access hedging tools in smaller, less liquid markets (e.g., local electricity or gas hubs):

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The reforms to position limits introduced by the CMRP had a positive impact on contract growth and liquidity.

We agree with the assessment of the Commission on page 18 of this Targeted Consultation on Commodity Markets on page 18, which says " As the initially introduced position limit regime under MiFID had proved to be overly restrictive, negatively affecting the development of in particular new commodity derivatives markets, notably energy derivatives, the CMRP adopted in 2021 introduced significant alleviations to that regime." The position limits regime under the original MiFID II, which applied to all commodity derivatives, had a negative impact on liquidity, especially for new and nascent contracts or fast growing contracts. Specifically, for the development of new products and further growth of the existing illiquid commodity derivative markets, the pre-CMRP position limits regime had proven to be a barrier. Fast growing markets in particular had suffered from (1) an increasingly restrictive limit as open interest increased and (2) inflexible treatment in terms of their categorization under the position limits framework, and (3) inaccurate reflection of the underlying physical markets.

For specific examples, how stricter exemptions or a wider scope would negatively impact contract growth and liquidity in the EU, please also see the joint FIA/ISDA/AFME response to ESMA's 2019 call for evidence on position limits: https://www.fia.org/fia/articles/fia-isda-gmfa-comment-position-limits-europe
In addition, available data from European energy exchanges strongly suggest that the MiFID II Quick Fix reforms introduced under the Capital Markets Recovery Package (CMRP) had a positive impact on liquidity and market participation across EU gas hubs. Although graphical representations cannot be provided via the response form, the underlying data show a clear upward trend in open interest across several key hubs following the reforms.

Key observations include:
- A marked increase in open interest was recorded at major European gas hubs, including TTF (Netherlands), THE (Germany), PEG (France), PSV (Italy), ZTP (Belgium), PVB (Spain), CEGH VTP (Austria), and CZ VTP (Czech Republic). This rise occurred shortly after the ESMA forbearance statement and the application of the Quick Fix measures, indicating a strong temporal correlation between regulatory changes and increased trading activity.
- The growth in open interest points to improved hedging opportunities, particularly for commercial participants who were previously constrained by restrictive position limits. The expanded hedging exemption

and the introduction of a liquidity provision exemption appear to have enabled more effective risk management.

• Smaller and less liquid hubs—such as CZ VTP, ZTP, and PSV—showed especially significant gains in open interest, suggesting that the reforms helped broaden access to energy derivatives markets beyond the largest trading venues.

• The data also indicate renewed market confidence and broader participation, with more diverse actors entering the market. This enhances both price discovery and resilience in the face of future market shocks.

• Increased complexity of the regime: Introducing a mandatory requirement for OTC position reporting to trading venues would run counter to the European Commission's objectives of simplifying and reducing the burden of regulatory reporting. Such a measure would force market participants to navigate multiple, and potentially conflicting, reporting regimes, resulting in greater administrative burdens and operational inefficiencies. Furthermore, exchanges already have the authority to request information on OTC positions related to positions held on their venue. This calls into question the added value of the proposed requirement, given the significant costs it would impose on investment firms, underlying clients, and trading venues, all of whom would need to develop new systems to create, report, and manage this data.

In summary, the MiFID II Quick Fix reforms have contributed meaningfully to strengthening liquidity, improving hedging efficiency, and fostering a more inclusive and robust energy derivatives landscape in Europe.

Question 42. Do you believe that the current criterion to determine whether a contract is a 'significant or critical contract' is fit for purpose, and why?

- (●) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain your answer to question 42:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Yes, we believe the current criterion is principally fit for purpose.

However, we believe the criterion could be refined and defined as a collaborative effort between regulators, trading venues and market participants to determine the volume and period of time of position limit that are relevant for specific contracts, with a view to determine position limit based on a mixture of liquidity needs and market abuse sensitive limitations.

Question 43. In your view, under the current position limit regime, could there still be scope for traders of some commodity contracts (spot or derivative) to use their positions in commodity derivatives with a view to unfairly influence prices or secure the price at an artificial level?

- (●) Yes
- ( ) No

Don’t know / no opinion / not applicable

Please indicate which types of commodity derivatives are particularly exposed to such risks, and whether any changes to the current position limits regime could address these situations.

Please also indicate whether such changes could also affect the orderly price formation process for said contracts:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Article 57.1 (a) of MiFID II specifies that one of the objectives of the position limits regime is to prevent market abuse. However, because of its very nature, it can only prevent certain types of market abuse, that is in relation to positions such as abusing a dominant position by cornering the market. The main regulatory tool to prevent and address all types of market abuse, going beyond positions and extending to market manipulation and insider trading is the Market Abuse Regulation for financial instruments (and certain related spot markets) and REMIT II for wholesale energy products.

We consider that the combination of MAR, REMIT II and the position limit regime under MIFID II is sufficient to combat the risk of unfairly influencing prices or securing the price an artificial level.

Trading venues have considerable experience in operating a position management system. Long before the application of MiFID II, they had developed a comprehensive, risk-based regime based on position, delivery and expiry limits with regards to commodity derivatives traded on their markets. These regimes are calibrated to prevent market abuse in the manner described above, support orderly markets and ensure orderly delivery while allowing new products to be developed. Since January 2018, they have been operated by trading venues in parallel with position limits set by the relevant National Competent Authorities (“NCAs”) under MiFID II.

In the opinion of FIA and ISDA members, a properly calibrated position management regime, such as the current one introduced by CMRP, can play an important role in preventing certain types of market abuse. However, the Associations do not consider the MiFID II position limits regime to have contributed to preventing market abuse in trading commodity derivatives on trading platforms. Rather, this has been achieved by the pre-existing position management regimes managed by trading venues as well as their market supervision and surveillance systems, the latter being implemented to prevent and detect market abuse in line with requirements of the Market Abuse Regulation and REMIT II. Please also see the joint FIA /ISDA/AFME response to ESMA’s 2019 call for evidence on position limits: https://www.fia.org/fia/articles/fia-isda-gmfa-comment-position-limits-europe

Further, we note that non-critical or significant commodity derivatives are not only subject to position reporting and management, but also other MiFID obligations such as transparency and transaction reporting. Therefore, any concerns about high market concentration can be detected by ESMA and NCAs, irrespective of MiFID prescribed position limits.

MiFID II’s main aim is to safeguard market integrity. The ability of position limits to support this aim has been subject to extensive discussions among regulators, policymakers, and industry practitioners in recent years. For example, ESMA in their final report from April 2020 , noted in section 3.2 that rather than being the main

objective, preventing market abuse is only an indirect potential consequence of the position limits regime. In the same section, ESMA stated that "the extent to which position limits contribute to preventing market abuse appears less apparent".

Question 44. Contracts with the same underlying and same characteristics subject to position limits are sometimes traded on several trading venues.

Do you believe that the level of the position limit for those contracts should be set at European level (e.g., by ESMA), as opposed to the NCA responsible for the supervision of the main trading venue for that contract?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Do you believe ESMA should be in charge of monitoring and enforcing the position limits for those contracts?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Please explain your answers to question 44:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The level of position limits should be set by the authority that is closer to the market, i.e. under the current rules, the NCA where the larger volume is traded. If, however, the larger volume shifts from one trading venue to another resulting in a change of NCA that would set the limit, a transition period should apply before the new NCA sets the limit to avoid a negative impact on the market. If ESMA were to set the limit, it would be less flexible and take longer to adapt to changes in the underlying market, which could exacerbate volatility or a stressed market.

The current example of a contract spread across two trading venues is TTF and we believe the current position limit setting process by the NCA for this contract is working well.

Question 45. Some jurisdictions only apply position limits to physically-settled futures. Once captured by the position limits, cash-settled versions of those contracts however also count towards the position limits. This means that futures that are not physically-settled (e.g., futures on power) cannot be captured by the position limit regime in those jurisdictions.

Do you believe that position limits in the EU should only apply to futures contracts that are physically-settled?

- ◯ Yes
- ◉ No
- ◯ Don't know / no opinion / not applicable

Please explain what would be the benefits or risks linked to the implementation of such an approach in the EU?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations support retaining the current position limits regime with regards to physical and cash settled contracts.

Question 46. Do you perceive an advantage or disadvantage of having separate position limits for physically and cash settled futures contracts for natural gas contracts, as is the case for Henry Hub futures in the US?

- ◯ Yes
- ◉ No
- ◯ Don't know / no opinion / not applicable

Do you perceive an advantage or disadvantage of having separate position limits for physically and cash settled futures contracts for other contracts?

- ◯ Yes
- ◉ No
- ◯ Don't know / no opinion / not applicable

Please explain your answer to question 46:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations support retaining the current position limits regime with regards to physical and cash settled contracts. We believe there is no need to split the limits, provided the rules on how to aggregate cash and physically settled contracts falling under a limit is clear.

Question 47. Do you believe that the methodology and the level of the limits set by NCAs, for contracts subject to position limits, is adequate?

- (selected) Yes
- No
- Don't know / no opinion / not applicable

Please explain your answer to question 47:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe the current methodology is adequate and would caution against changes.

In 2020/21, ESMA and the European Commission extensively reviewed the position limits regime in the context of the MiFID Quick-fix amendments. Prior to the final Level 1 amendments, ESMA issued a call for evidence, publicly consulted stakeholders, and issued the ESMA final report on position limits and position management of April 2020. The report explains the need for a nuanced application of the position limit regime, i.e. by applying limits to well-developed 'critical and significant' contracts but not to nascent or illiquid contracts. In its final report of 19 November 2021 , ESMA proposed such changes to the RTS 21 on position limits and the co-legislators adopted the according CDR (EU) 2022/1302, which entered into force in August 2022. Hence, stakeholders and ESMA only recently and consistently argued that the application of position limits to all commodity derivatives would have adverse impacts on the functioning and development of niche markets and act as a barrier for new contracts. In this context, it should be noted that attractive commodity markets would also bolster the EU's strategic autonomy objectives.

Question 48. The Draghi report refers to the possibility to set stricter position limits, including by differentiating them by types of traders.

Do you believe that position limits should be differentiated, depending on the type of traders/trading activity involved?

- Yes
- (selected) No
- Don't know / no opinion / not applicable

Please explain your answer to question 48:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Introducing different levels of limits depending on types of traders would introduce another layer of complexity that we believe is not supported by any additional benefits. Types of trading are already effectively differentiated through the exemptions regime. Given that the existing levels of position limits are effective, as expressed elsewhere in our response, it follows that there is no need to further differentiate within the application of those limits.

The Associations question which specific risk the Draghi report would seek to eliminate by introducing stricter limits given that the current regime, recently reformed under CMRP in 2021, is working effectively in combination with trading venue rules. No evidence of market abuse was provided in the Draghi report and as we pointed out in our response to Q41, position management and the requirements under the Market Abuse Regulation and REMIT are more effective in preventing market abuse than position limits. We consider that setting stricter limits could have a detrimental impact on liquidity and competitiveness.

Trading venues, through their position management tools, e.g., their setting of accountability levels or supervision of exemptions, are able to detect changes in the typical trading activity of an exchange member and are thus much more likely to detect market abuse than a position limit set by a regulator would. E.g., when granting an exemption, a trading venue would take into account the size, scale and type of the trader applying for the exemption in relation to a particular contract. As such, the exchange rules, rather than EU position limit rules, contribute to keeping commodity markets orderly and stable.

We further note comments raised by market participants during the Better Regulation review, which lead to changes to the position limits regime from its all-encompassing scope to the current rules. These comments should be taken into account in any decisions regarding changes to the current scope of position limits:

“Respondents to the consultation note that the position limit regime had a material negative effect on exchange-traded new and illiquid contracts and the ability of exchanges to develop new benchmark contracts in the EU. Users, market operators and regulators agree that while the position limit regime has worked for mature benchmark contracts, it introduced adverse effects on the development of new, illiquid and liquid non-benchmark contracts. Due to overly restrictive (de minimis) limits and the inflexibility in the current regime, market participants are discouraged from on-venue trading which negatively impacts the orderly pricing of contracts and transparency in the market.” See: Summary Report of the Public Consultation on the Review of MiFID II/MiFIR by the European Commission: https://ec.europa.eu/info/law /better-regulation/have-your-say/initiatives/12167-Review-of-the-regulatory-framework-for-investment-firms-and-market-operators-MiFID-2-1-/public-consultation_en

We agree with the assessment of the Commission on page 18 of this Targeted Consultation on Commodity Markets, which says “ As the initially introduced position limit regime under MiFID had proved to be overly restrictive, negatively affecting the development of in particular new commodity derivatives markets, notably energy derivatives, the CMRP adopted in 2021 introduced significant alleviations to that regime.” Fast growing markets had suffered from (1) an increasingly restrictive limit as open interest increased, (2) inflexible treatment in terms of their categorization under the position limits framework, and (3) inaccurate reflection of the underlying physical markets.

For specific examples, how stricter exemptions or a wider scope would negatively impact contract growth and liquidity in the EU, please also see the joint FIA/ISDA/AFME response to ESMA’s 2019 call for evidence on position limits: https://www.fia.org/fia/articles/fia-isda-gmfa-comment-position-limits-europe

If stricter limits were introduced or if the scope of contracts to which position limits apply is extended, then consequential changes would have to follow, such as increasing the limits themselves and the introduction of additional exemptions (e.g. a pass-through hedging exemption for financial market participants) to avoid a negative impact on the growth of markets, liquidity, competitiveness of the EU and end-consumer prices.

Stricter limits also carry the risk that market participants could move positions, and thus liquidity, to venues outside of the EU or into OTC markets.

Question 49. Do you believe that the current exemptions from position limits as set out in MiFID, notably the hedging exemption, are fit-for-purpose?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain why you believe the current exemptions from position limits are fit-for-purpose:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We agree with the current exemptions from position limits and do not see the need for amendments. We also support the current MiFID definition of hedging and recommend that it be retained.

We believe exemptions from position limits are crucial, particularly in critical contracts and/or physically delivered contracts to ensure efficient price discovery by commercial participants.

If stricter position limits were introduced or the scope of contracts to which limits apply expanded, then consequentially, this would impact the ability of market participants to hedge (which is crucial for energy market participants, as explained in responses to questions in Section 2). In this case, the Associations would recommend a pass-through hedging exemption which allows financial firms that facilitate hedging activity to do so without breaching a position limit. This will help remove barriers that may prevent a financial firm from being able to facilitate hedging activity by a non-financial firm, which in turn supports the provision of liquidity to the market. Restrictions on market participants' ability to provide liquidity can exacerbate risks during times of market stress.
The exemption should be available where
a. the financial firm enters into an OTC position with a non-financial firm which is conducting hedging activity and the financial firm offsets the OTC position by entering into an in-scope commodity derivative contract; or
b. the financial firm enters into an in-scope commodity derivative contract with a non-financial firm where the non-financial firm is using the hedging exemption."

The US also offers hedging exemptions, predicated on the type of transaction being hedged rather than on a particular type of participant. Exemptions in the US are approved by exchanges and are reported to the CFTC monthly.

What changes to such exemptions would you propose?

Are there certain markets where such exemption from position limits are more /less justified and is there merit to differentiate between types of commodity markets?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 50. Do you believe that the hedging exemption is sufficiently monitored by the competent supervisors?

- ○ Yes
- ○ No
- ◉ Don't know / no opinion / not applicable

Question 51. Do you believe that trading venues should play a greater role in granting hedging or liquidity provision exemptions from position limits to market participants?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Please explain your answer to question 51:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

No, the Associations believe that the current regime works. As NCAs set the limits, they should also grant the exemptions. We only see a case for trading venues having a role should changes be made to the regime as referred to in our response to Q53.

Question 52. Some jurisdictions allow supervisors and/or trading venues to grant ad hoc exemptions outside of the legally enumerated cases for exemptions for some contracts, if they perceive that the request is legitimate.

Do you believe the EU should also introduce such a flexibility for supervisors and/or trading venues?

- ○ Yes
- ◉ No

- Don’t know / no opinion / not applicable

Please explain why you think the EU should not introduce such a flexibility?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not see the need to introduce ad hoc exemptions into legislation, but we do not have a strong opinion on this.

Question 53. Do you believe that trading venues:

	Yes	No	Don't know - No opinion - Not applicable
a) should be given more responsibility in setting position limits in general, for those contracts that are by law subject to position limits (i.e., commodity derivative contracts that qualify as significant and critical or are not agricultural derivative contacts), instead of competent authorities?		X	
b) should be in charge of setting position limits for non-spot month versions of contracts subject to position limits, thereby applying regulator-set position limits only to spot month contracts, as seen in other jurisdictions?		X	
c) should be required or rather given a possibility to set their own position limits for contracts that are not subject to position limits by law?		X	

Please explain the potential advantages or disadvantages of option a):

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

FIA and ISDA believe the position limits regime works well and does not require any amendments.

However, if the Commission envisages changes to the current rules, we would be supportive of the following:

a. FIA and ISDA members support a more dynamic approach, which would see the transfer of responsibility away from NCAs setting position limits back to the position prior to MiFID II, when trading venues had increased responsibility for setting controls to ensure orderly trading, settlement and delivery, subject to oversight by NCAs/ESMA. Trading venues are best placed to conduct these tasks given that they are closer to the markets and have operated sophisticated, effective and successful position management

regimes since long before the prescriptive position limits regime under MiFID II came into force.

Position management regimes operated by exchanges are proportionate and efficient. They focus on a limited number of benchmark contracts and the time period right before expiry rather than on the entire maturity curve. This approach (in addition to other measures) has contributed to preventing market abuse and excessive speculation which could negatively impact global prices, while at the same time allowing new products to develop.

Trading venues successfully operate position management regimes that predate the MIFID II position limit regime. For example under the Position Management structure, the default situation for all futures contracts is that there is no pre-set limit on the size of position that may be held. Exceptions to this general approach exist at the exchange's discretion and limits may be assigned to individual contracts. These are typically determined, revised, and applied by the venue where, in its view, it would improve market order, orderly delivery, or for any other market reason. The overarching principle is that the potential adverse impact of a position should be evaluated not against a fixed limit, but according to the risk that it represents to orderly trading. This risk is sometimes, but not always necessarily, a function of the size or open interest share of the position. Similarly, positions below a trading venue's limit, or those which appear comparatively modest compared to other market participants' positions, are not always necessarily low risk.

An effective, trading venue administered position management regime can take all of these factors into account and provide a more holistic and flexible approach compared to a regime of strict position limits. It can allow for changes in deliverable supply, which can be reflected dynamically, taking into account the nature of the market, the prevailing market conditions and the individual trader.

Trading venues monitor positions and have the rulebook tools to intervene, whether based upon or pre-defined thresholds or on an ad hoc basis, on any large or unusual position. Clearing houses also have extensive position management tools. Trading venues' position management activities are already required to comply with their obligations to maintain orderly markets and occur under the oversight of ESMA and NCAs. These position management structures were considered sufficient and effective prior to the introduction of the complex and rigid position limits regime under MiFID II.

In order to ensure consistent implementation across various trading venues, we suggest for ESMA to set out certain principles:

- provide trading venues with discretion to set accountability levels as and where they deem it necessary and appropriate to do so (under the oversight of their regulators), which is in line with MiFID II Art. 57(8) laying down the powers for trading venues to establish position management controls set out in guidance what outcomes trading venues should achieve through their internal position management and controls, in line with outcomes already set out in the ESMA's principles and objectives (e.g. market conduct and market integrity) and regulations such as MAR which address market integrity and market manipulation issues;
- have flexibility as a guiding principle and focus on outcomes rather than detailing inputs and processes as well as being aligned with global best practice reflecting the global nature of these markets, thus avoiding imposing unnecessary burdens on trading venues and market participants while ensuring a more dynamic regime which would benefit those who rely on commodity markets to manage the price risk inherent in their business in the underlying physical markets; and clarify the ability for venues to take account of OTC contracts and restrict this to what is absolutely necessary to maintain orderly markets on that venue, discouraging gold-plating of the basic requirements and making it clear that trading venues are not required to monitor OTC contracts.

Please explain the potential advantages or disadvantages of option b):

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The power to set position limits should rest with the same entity/authority to ensure a consistent methodology and certainty for market participants.

Please explain the potential advantages or disadvantages of option c):

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

It is important to note that positions are already monitored and investigated as part of sophisticated market surveillance arrangements, for example under MAR and REMIT II. Therefore, we caution the Commission not to mandate a highly prescriptive process with little room for trading venues' discretion. We believe that the only way for accountability levels to properly function would be on the condition that discretion is given to the trading venue to determine on which contracts to set those accountability levels, when to actively monitor them (spot month and/or other month or even closer to delivery) and whether indeed to request additional information if an accountability level is exceeded. If not, the position management controls will put a heavy burden on both the venues' market surveillance departments and trading participants' compliance departments.

Question 54. Do you believe that the current regulatory set-up sufficiently allows to enforce position limits on non EU-country market participants?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain your answer to question 54:

5000 character(s) maximum
including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We believe the regulator receives sufficient information and is adequately armed to enforce position limits on non-EU country market participants, including data equivalence accesses granted by other regulatory bodies.

Question 55. Do you believe that the position limits regime should also apply to 'C6 carve-out' products?

- ( ) Yes
- (x) No
- ( ) Don't know / no opinion / not applicable

Please explain your answer to question 1:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations do not support a position limit being applied to C6 carve out products. We note that these are already subject to market abuse prohibitions and transaction reporting under the recently amended version of REMIT (REMIT II), as well as transparency requirements under the Transparency Regulation (543 /2013). This has required firms and venues to implement preventative and detective controls, including monitoring and surveillance systems and submit suspicious transaction reports. We consider that the existing regime is sufficient to mitigate and address market abuse risk, particularly since it has been amended under REMIT II and ACER has been given new powers. We question which risk would be addressed by the imposition of position limits and also believe that there are significant obstacles to applying a position limits regime to C6-carve-out products.

Moreover, developing a position limit under REMIT would be highly inefficient and would only result in creating additional requirements with potential different calculations. We do not see how that would benefit the regulator, and additionally it would create more divergence between the EU and UK rules and thus reduce the EU market's competitiveness.

We consider that the special characteristics that apply to wholesale energy products as stated in the ESMA report on the review of position limits in 2020 continue to justify their non-inclusion under the MIFID II position limits regime: "they are used to hedge commercial risks (production and supply) related to underlying physical assets by energy producers and industrial firms; (2) they are not used by financial institutions for speculative purposes; (3) they are considered public goods and have limited possibilities of storage; (4) trading takes place between professional counterparties; (5) most transactions are physically settled as they involve the delivery of the underlying gas or electricity by means of scheduling or nominating to the designated delivery point."https://www.esma.europa.eu/sites/default/files/library/esma70-156-2311_mifid_ii_review_report_position_limits.pdf

As referred to in our answer to Q32, we have strong concerns about identifying them as financial instruments under MiFID Annex I Section C, and thus including them in the wider scope of MiFID and MiFIR, as this would blur the existing delineation between the regulation of physical and financial energy markets. We reiterate that a thorough review of the possible effects of including these instruments in the wider scope of MiFID and MiFIR should be carried out before doing this, to avoid unintended (and potentially severely adverse) consequences.

We are also concerned that if this was to be done under a parallel position limits regime that was implemented under REMIT II, great care would need to be taken to avoid duplication and possibly conflicting limits under MiFID for contracts with the same underlying.

Finally, given the heterogeneity of contracts across OTFs, we question how this could be implemented effectively.

Question 56. Do you believe that energy and financial regulators should cooperate in the process of setting position limits for wholesale energy products?

- Yes

- [x] No
- [ ] Don’t know / no opinion / not applicable

Please explain your answer to question 56:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See our response to Q55.

5. Circuit breakers

Circuit breakers aim to avoid excessive volatility, maintain orderly trading and ensure a sound price discovery mechanism. The Union’s regulatory framework (Article 48 of MiFID) requires that trading venues have arrangements in place that allow them to temporarily halt or constrain derivatives trading. Those “circuit breakers” can take the form of either price collars, which are a mechanism to reject orders outside certain price bands, or temporary trading halts. The MiFID circuit breakers apply to the trading of any financial instrument, including energy derivatives.

Circuit breakers can be defined as specific instruments on futures markets which restrict the maximum price fluctuation of a commodity in a given amount of time. A price limit is enacted when the price of a futures contract moves a certain predefined amount (expressed in absolute or relative terms) above or below the reference price. Dynamic circuit breakers are based on a dynamic reference price which evolves very frequently (e.g., less than a second) during the trading day, and are especially useful in avoiding erroneous orders from affecting price formation. Static circuit breakers are circuit breakers using a static reference price, intended as a price that is updated less often compared to the dynamic one but at least on a daily basis. When the futures price moves beyond the upper price limit, the market is “limit up” and market participants can only trade at the limit price or below. When the price moves below the lower price limit, the market is “limit down” and market participants can only trade at the limit price or above.

In December 2022, as part of the emergency measures taken to address the energy crisis, an intra-day volatility management mechanism (IVM) was introduced in the Union framework. Council Regulation (EU) 2022/2576, which applied until 31 December 2024, required that trading venues ensure that the intra-day price volatility management mechanism prevents excessive movements of prices within a trading day for energy-related commodity derivatives, without preventing the formation of reliable end-of-day closing prices. The setting of the exact parameters (breadth of the price bands, frequency at which price boundaries are renewed, etc.) of the IVMs are left to trading venues, taking due account of the liquidity and volatility profiles and other specificities of the considered energy-related commodity derivatives. Trading venues have been given the option to either implement new circuit breakers, or integrate IVMs in existing circuit breakers.

The MiFID/MiFIR review concluded in 2023 further strengthened the EU framework applicable to circuit breakers, notably by requiring that ESMA further details the principles underpinning the setting up of those circuit breakers, and by specifying that those circuit breakers should also apply in emergency situations – as opposed to only in cases of significant price movements. New transparency requirements have also been inserted. Those rules ensure that trading venues maintain discretion on the design of the circuit breakers, which are expected to be tailored to the specificities of the instruments considered and their liquidity profile. Those provisions apply across asset classes, and do not concern commodity derivatives markets only. ESMA is expected to submit regulatory technical standards (RTSs) to the Commission on this matter by 29 March 2025, further specifying the technical requirements for those circuit breakers (e.g., use of static and/or dynamic circuit breakers, transparency requirements, etc.).

Trading venues in other jurisdictions have introduced circuit breakers on energy markets that are akin to more static circuit breakers (rolling 60-minute lookback window), while circuit breakers for certain agricultural commodities take the shape of price limits set for the entire trading day. Those circuit breakers in those same jurisdictions, however, generally do not seem to apply to spot month contracts, in order not to affect orderly price discovery.

Questions related to section 5

In providing your answers under this section, please specify, to the extent relevant, **whether your assessment would differ depending on the type of commodity concerned** (agricultural, gas, electricity) or when considering EUA markets specifically.

Question 57. What is your assessment of the effectiveness of IVMs and of their enforcement by NCAs (or the adaptation of existing circuit breakers following the adoption of Council Regulation (EU) 2022/2576) in avoiding excessive price volatility of energy-related derivatives during a trading day?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We acknowledge IVMs were introduced as a targeted and precautionary measure to address the risk of excessive intraday volatility in energy-related derivatives markets. Although we have limited evidence to make an accurate assessment, we believe that the IVMs have played their role effectively in avoiding excessive intraday price volatility since the adaptation of existing circuit breakers following the adoption of Council Regulation (EU) 2022/2576).

Question 58. Do you believe trading venues should be permanently required to implement static circuit breakers to further restrain excessive daily volatility for commodity derivatives specifically, as a complement to circuit breakers already implemented?

- ○ Yes
- ● No
- ○ Don’t know / no opinion / not applicable

What would be the associated advantages and disadvantages?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not believe that trading venues should be permanently required to implement static circuit breakers for commodity derivatives. Instead, venues should retain the discretion to implement static circuit breakers where appropriate , based on the specific characteristics of the products they offer. This is consistent with the approach outlined in the 3rd consultation package of Level 2 MiFIR/MiFID II Review, under which trading venues would be expected to justify to their NCAs why they chose not to implement static circuit breakers.

Static circuit breakers, which reference fixed points such as the prior day’s settlement price, are potentially ill-suited to energy markets where price formation is driven by fast-moving supply and demand dynamics,

geopolitical shocks, and global events. Their rigidity can disconnect derivatives pricing from the physical market, impairing price discovery and risk management, and potentially prompting market participants to shift liquidity to less transparent venues.

In contrast, dynamic circuit breakers, which adjust in real time, are better suited to managing volatility in these markets.

Please explain your answer to question 58:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 59. What should be the effect of hitting those static price bands (should this trigger for instance trading halts or order rejection mechanisms)?

In your view, what are the pros and cons of each mechanism?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We do not believe that static price bands could be appropriate for all energy or commodity derivative products. Given the fundamental economics and volatility drivers of these markets, static bands, particularly those referencing previous day's prices, might fail to reflect sudden shifts in supply and demand conditions, leading to misalignment between derivatives prices and underlying market fundamentals. In such situations, static mechanisms risk freezing market activity at a time when price discovery is most needed.

We believe the use of dynamic circuit breakers to be more appropriate, as these controls are more responsive to real-time market developments and generally better suited to the specific characteristics of energy and commodity markets. These mechanisms allow price formation to continue, even in volatile conditions, while still providing a buffer against disorderly movements. They also help ensure that commodity derivatives remain reliable instruments for hedging.

Question 59.1 If you favour trading halts, what duration do you recommend for an appropriate trading halt that is long enough for market participants to assess the situation and their position in the derivatives market and for the market to 'cool off'?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Regarding the appropriate response when price bands are hit, we believe short trading halts, when used, should be rare, clearly defined, and as brief as possible, lasting minutes rather than hours. Prolonged halts or order rejection mechanisms may disrupt risk management, increase uncertainty, and impair market confidence, especially during periods of stress.

Question 59.2 Would your assessment differ according to the type of underlying commodity considered?

- ○ Yes
- ● No
- ○ Don't know / no opinion / not applicable

Please explain your answer to question 59.2:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Question 60. Do you see any risk in static circuit breakers applying to spot month contracts, considering possible implications on physical delivery, as well as possible valuation challenges and divergences between spot and futures prices?

- ● Yes
- ○ No
- ○ Don't know / no opinion / not applicable

Please explain your answer to question 60:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

We see risks in applying static circuit breakers to spot month contracts. As noted earlier, static price bands may fail to reflect sudden changes in supply and demand, especially in physically settled contracts that are more sensitive to short-term market conditions. This can impair price discovery, disrupt the convergence between futures and spot prices, and create valuation and margining challenges. In extreme cases, it may hinder physical delivery. Given these risks, particularly in volatile energy and commodity markets, we believe dynamic circuit breakers are better suited to maintaining orderly trading while allowing prices to reflect real-time.

Question 61. Do you perceive that implementing static price bands would risk moving trading to OTC markets?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

What would be possible mitigants to prevent such migration?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations believe price controls that limit price discovery for a too long period will also limit participants to hedge risk on trading venues. This will almost certainly incentivise some market participants, who need to hedge risks, to migrate to bilateral OTC trading.

Question 62. Do you believe the dynamic static breakers implemented by trading venues in general function adequately?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain the challenges and please indicate any potential improvements to their functioning:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

It might be worth exploring aligning controls parameters and methodology between the derivatives and spot markets. Both are extremely correlated and unsynchronised price controls could prove challenging in certain situations.

Question 63. Do you believe energy exchanges trading in spot energy products or C6 carve-out products should also implement mechanisms similar to circuit breakers?

- ( ) Yes
- (x) No
- ( ) Don't know / no opinion / not applicable

Please explain your answer to question 63:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Currently, there is no evidence to show that activation of additional trading halts would reduce volatility and calm markets, rather the reverse is possible.
European exchanges are currently well equipped with volatility safeguards, with tools developed over many years and well understood by the market.
Further, see response to Q62.

6. Elements covered by the Draghi report

This section proposes to explore the measures set out in the Draghi report which are not otherwise covered by the review items in the review clause under Article 90(5) of MiFID. This section focuses on energy commodities (thereby not concerning derivatives on other commodities, EUAs and derivatives on EUAs), so as to reflect the specific focus of the Draghi report.

6.1. Obligation to trade in the EU

The Draghi report calls for trading activities in energy derivatives to ‘be undertaken by companies trading in the EU’. This recommendation can be understood as requiring that energy derivatives trading relevant to the EU/for EU delivery should occur in the EU only.

The report however also widens its recommendation to a fall-back scenario whereby “as a minimum, all market participants (irrespective of domicile) need to report their trades (and positions) to the regulators in the EU” (see page 30 of the report). The report does not clarify what instruments should be subject to such reporting. Questions relating to potential data gaps are addressed under section 1.

Questions related to section 6.1

In providing your answers under this section, please specify, to the extent relevant, **whether your assessment would differ depending on whether natural gas or electricity is concerned**.

Question 64. Do you believe a general obligation to trade in the EU should be introduced?

- ○ Yes
- ● No
- ○ Don’t know / no opinion / not applicable

Please explain your answer to question 64:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations strongly oppose an obligation to trade commodity derivatives on EU trading venues. We note that a similar proposal for a strict location policy, under REMIT, was rejected in 2024 by the Parliament

and the Council.

OTC commodity derivatives do not have the requisite level of standardisation and liquidity to support their inclusion in the MiFIR derivatives trading obligation.

It is a fundamental criterion of the derivatives trading obligation that instruments in scope for that obligation must also be subject to the clearing obligation under EMIR, as specified in MiFIR Art. 28(2a).

Clear criteria are set out in EMIR to determine which derivatives contracts should fall in scope of the clearing obligation, which are their level of standardisation, their volume and liquidity, and the availability or fair, reliable and generally accepted pricing information for that contract. For a new contract to be added to the clearing obligation, ESMA must consult and submit a draft RTS to the Commission. This ensures that only those OTC derivatives contracts that are suitable for mandatory clearing are included in the scope of the clearing obligation.

Equally, clear criteria are set out in MiFIR to determine which of those OTC derivatives contracts that are subject to the clearing obligation should also be subject to the trading obligation, including the liquidity of the contract. Again, ESMA must consult and submit a draft RTS for a new contract to be brought into the scope of the derivatives trading obligation; and again, this ensures that only sufficiently liquid OTC derivatives contracts are included.

The Associations are of the firm view that currently, no OTC commodity derivatives contracts meet the criteria for inclusion in the scope of the clearing obligation, much less the scope of the derivatives trading obligation. Circumventing the guardrails specified in EMIR and MiFIR to add OTC commodity derivatives contracts into the scope of the derivatives trading obligation would carry a high level of risk of adverse impact to this market.

OTC commodity derivatives contracts should only be considered for inclusion in the derivatives trading obligation once they have been included in the scope of the clearing obligation in accordance with Article 5 of EMIR. They should then only be included in the scope of the derivatives trading obligation in accordance with Article 32 of MiFIR.

It should also be noted that there is a reporting fall-back option mentioned in the consultation; assuming this applies to products with physical delivery in the EU then this is already covered under REMIT. Further, the recent revisions to REMIT strengthened the ability of ACER to request information from market participants, for the purpose of fulfilling its obligations (Art 13b - Request for information). There is also a registration requirement on non-EU firms and a requirement on them to report all trades and positions in wholesale energy products (and derivatives on them, where not already reported under EMIR/ MiFIR).

Question 65. If such a general obligation were to be introduced, please set out any possible impact on EU market participants' ability to hedge, notably with non-EU counterparties:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

Including OTC commodity derivatives contracts in the scope of the derivatives trading obligation would be highly likely to adversely impact the ability of EU market participants to hedge with both EU and non-EU counterparties. It could increase costs and reduce liquidity if trading on non-EU venues for those not covered by the obligation or products that are not covered by the obligation is more efficient, and impact

competitiveness. Furthermore, liquidity could increase in adjacent trading venues e.g. the UK which in turn could attract certain companies to leave EU trading venues for certain products.

As non-EU firms, such as the Nordic power market participants, are an integral part of the market and play a crucial role in providing physical energy and liquidity in the main EU energy market, restrictions on access to trade with EU market participants outside of an EU trading venue for these firms would negatively impact the market liquidity and EU's security of supply in particular in gas and LNG markets. Market access restrictions would therefore reduce the ability of EU based firms to effectively hedge their energy price risks.

Question 66. If such an obligation were to be introduced, please set out any possible impact on market participants and the functioning, depth and liquidity of the markets concerned:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As outlined in our answer to Q65, the Associations would expect the ability of EU market participants to be hampered by the inclusion of OTC commodity derivatives in the derivatives trading obligation.

This would in turn impact the ability of market participants to provide liquidity and make markets, directly increasing bid/offer spreads.

6.2. The Market Correction Mechanism and other dynamic caps

The Market Correction Mechanism (MCM) was introduced by Council Regulation (EU) 2022/2578 in the context of the 2022 energy crisis. It aimed at limiting excessive energy prices in contexts where TTF natural gas derivative prices (i) exceed EUR 180 per MWh, and (ii) exceed by more than EUR 35 a representative price for global LNG. Under those circumstances, the MCM required that regulated markets on which TTF futures are traded to reject orders that are above the specified limits. The MCM differs from traditional circuit breakers to the extent that the bidding limits are not set by reference to prices/bids observed on venue, but by reference to external prices (in the case of the MCM, by reference to a basket of prices reflecting global natural gas prices).

Following the adoption of the MCM, both ACER and ESMA have issued reports setting out the effects of the MCM:

- ESMA's preliminary data report on the introduction of the market correction mechanism - 23 January 2023
- ESMA's effects assessment of the impact of the market correction mechanism on financial markets - 1 March 2023
- ACER's preliminary data report on market correction mechanism - 23 January 2023
- ACER's effects assessment report on market correction mechanism - 1 March 2023

Those reports indicated that the MCM did not to have a discernible gas market impact, owing to gas prices being significantly below MCM trigger levels. Both agencies' reports however point to a number of risks, for instance in terms of a shift to less transparent and uncleared OTC trading, in terms of challenges linked to the adaptation of risk models and margin calls by Central Counterparties (CCPs), and in terms of potential hikes in margin calls, in terms of physical flow developments. Some stakeholders however claim that the MCM provided a helpful shield against extremely high prices.
As of 1 May 2023, the MCM applied to all gas virtual trading points. The MCM then expired on 31 January 2025.

The Draghi report suggests that dynamic caps, building on the experience of the MCM, are made a permanent feature of the EU rulebook on energy spot and derivatives trading (spot and derivatives), to ensure that derivatives prices do not significantly diverge from global energy prices, as has been seen during the 2022 energy crisis.

Questions related to section 6.2

In providing your answers under this section, please specify, to the extent relevant, **whether your assessment would differ depending on whether natural gas or electricity is concerned**.

Question 67. Do you believe that MCM is a useful tool to limit the episodes of excessive – and significantly diverging from global markets – prices in the EU?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Please explain your answer to question 67:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

A price cap undermines the risk management function of European energy markets. When triggered, the price cap would artificially constrain the value of energy derivatives, decoupling them from the price of the underlying physical market where supply/demand dynamics may have shifted. This disconnection would impair the ability of market participants to effectively manage these underlying price risks. A cap on a price would also translate into a cap for variation margin at clearing houses. CCPs use Variation Margin ("VM") to ensure no clearing participant builds up uncollateralised exposures and is based on settlement prices of the exchange or CCP. If this price is capped, VM is also capped and CCPs might end up with under-collateralised clearing participants compared to the real risk. However, it is unclear yet how CCP might derive appropriate prices when the cap mechanism is activated which increases uncertainty. To mitigate for such risk, CCPs will have to increase margin requirements substantially resulting in increased costs and liquidity challenges for market participants and hedging business which will naturally move to other venues or contracts or OTC. To the extent that counterparties moving to hedge their risk bilaterally with OTC counterparties are not required by regulation to meet collateral requirements, this trading activity may not be collateralised to the extent it is in a cleared environment, implying increased counterparty risk. Indeed, there may be lower risk appetite and higher risk limits, which may create challenges for counterparties to hedge risk appropriately. This will increase price volatility and will make the European energy markets less attractive and may reduce the number of market participants.

Regulatory stability and predictability are central to market participants' behaviour on long-term energy markets. Since the start of 2025 uncertainty around whether EU countries will abide by their gas storage filling targets for 2025 demonstrates this effect. If market participants exit or market participation reduces due to the uncertainty introduced by a price cap, liquidity in the markets will diminish. This reduction in liquidity will result in wider bid-ask spreads. Further, to account for the greater risk associated with the increased volatility, margin requirements will increase. Ultimately, these costs increases will be borne by consumers.

In short, a price cap does not decrease the global market price of energy, but may create upward price pressure and increased price volatility in Europe.

Further, research by European regulators and the academic community has demonstrated that the temporary price cap, or Market Correction Mechanism (MCM), implemented during the energy crisis, did not succeed in reducing volatility or lowering gas prices. (See: John W. Goodell, Constantin Gurdgiev, Andrea Paltrinieri & Stefano Pisera. Do price caps assist monetary authorities to control inflation? Examining the impact of the natural gas price cap on TTF spikes. Energy Economics (2024); Randy Priem. A market correction mechanism regulation as a consequence of the 2021–2023 energy crisis. Journal of World Energy Law and Business (2024); Ebbe Rogge. The European energy crisis, the Dutch TTF, and the market correction mechanism: a financial markets perspective. Journal of World Energy Law & Business (2024).)

However, the serious risks associated with such price control mechanisms were widely recognized and remained relevant until the recent discontinuation of the MCM.

Question 68. Building on the experience of the MCM, do you think dynamic caps based on external prices (whether in the shape of the MCM or in another shape) would help avoid situations where EU energy spot or derivatives prices significantly diverge from global energy prices, and should therefore be codified in legislation?

- ○ Yes
- ◉ No
- ○ Don’t know / no opinion / not applicable

If you think it is not a useful tool, please explain why, and specify, if relevant, to what extent you believe price divergences between EU prices and international prices can be warranted:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See our responses to Q67 and 69.

An efficiently functioning, interconnected and liquid energy market with free and transparent price formation for competing energies from diverse domestic and global supplies, intelligent demand-side solutions, and a stable legislative framework will best ensure cost-efficient, secure supplies to consumers. It is essential that the regulation does not undermine the successful establishment of the integrated EU energy market. Direct government interventions into functioning markets (particularly on a wholesale level), including into market-based price formation, may have unintended long-term consequences and should be avoided.

For example, there were reasons why prices diverged, including localised network constraints that restricted the flow of gas. Other reasons for a divergence could be technical constraints at LNG import terminals and other outages.

Question 69. Do you believe that the MCM or other dynamic caps could have an impact on the attractiveness and/or stability of EU commodity derivatives markets?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

Please explain how the MCM or other dynamic caps could have an impact:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

A price cap presents significant threats to Europe's financial stability. The European Central Bank (ECB) has expressed concerns that the design of the previously implemented MCM jeopardised financial stability in the euro area. The design of this price cap mechanism could increase volatility and trigger higher margin calls, placing undue strain on central counterparties' ability to manage financial risks. This may also incentivise market participants to migrate from regulated trading venues to non-centrally cleared over-the-counter (OTC) markets. ESMA also foresees that when prices would approach the artificial limit, a swift and significant shift of trading would likely occur to outside the EU.

In the energy crisis, these financial stability risks associated with the MCM and the market destabilising consequences of increased margin requirements, as outlined above, fortunately did not materialise, mainly because gas prices dropped well below the activation conditions of this mechanism before it became active in February 2023. This decrease in gas prices, coupled with reduced market volatility, instead allowed central counterparties (CCPs) to lower margin requirements. However, we may not be so fortunate next time.

Commodity markets, such as the gas market, play a crucial role in sourcing gas to Europe, managing gas portfolios, and ensuring the efficient allocation of supply.

Physical markets are inherently subject to strong price fluctuations, driven by supply and demand imbalances that must be resolved in near real-time (and which can be significantly affected by geopolitical factors). A liquid and well-functioning financial market provides essential stability instruments to manage these risks efficiently, facilitating long-term gas contracts and supporting investment in energy infrastructure.

Implementing an artificial price cap would not address the underlying changes in global gas valuations driven by evolving supply and demand dynamics. Instead, it would likely harm the trust into TTF and prompt the global gas community to shift towards other, unrestrained and therefore more representative reference prices, which are primarily located outside of the EU.

If the price of gas is artificially capped below market value, Europe no longer offers a competitive price to attract LNG shipments, which would jeopardise short-term supply. In fact, recent reports indicate that LNG cargoes have been redirected to Europe when needed, but this trend could easily reverse under a capped price. (See: Financial Times. "LNG tankers change course to Europe as gas storage levels drop", 23 January 2025. https://www.ft.com/content/36707962-a09f-426a-bd56-a18363b35a4b)

Moreover, imposing a price cap could jeopardise long-term supply as it would undermine Europe's credibility as a serious customer in the global gas market. The artificial price controls would make Europe a less attractive and reliable partner for suppliers, who may prefer markets where they can sell gas at competitive,

market-driven prices. We would like to point out that as of 5 February 2025, Europe has contracted only 26% of needed LNG supplies through 2040 (considering Fit for Fifty-five natural gas demand outlook): 31 LNG contracts amounting to 649Bcm, which is in stark contrast to 117 LNG contracts concluded by Asia amounting to 1,519Bcm. (See: Rystad Energy research and analysis, GasMarketCube, European Commission, UK BEIS. Only includes SPA signed in 2022, 2023, 2024 and up to 3rd February 2025 (for deliveries by 2040); MoUs and HoAs are excluded.)

Further, artificial prices could impact the long-term investments in new infrastructure needed to extract and transport energy.

Please also refer to our response to Q 67.

Question 70. What is your assessment of the impact of a triggering of the MCM on trading conditions and financial stability?

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

See our previous answers to Q67 and 69.

The ECB has said : "the ECB considers that the current design of the proposed market correction mechanism may, in some circumstances, jeopardise financial stability in the euro area. The mechanism's current design may increase volatility and related margin calls, challenge central counterparties' ability to manage financial risks, and may also incentivise migration from trading venues to the non-centrally cleared over-the-counter (OTC) market." (See: European Central Bank (ECB), 'Opinion of the European Central Bank of 2 December 2022 on a proposal for a Council regulation establishing a market correction mechanism to protect citizens and the economy against excessively high prices' (CON/2022/44).)

Question 71. Are you aware of any impact on margins (or other trading costs) of the mere existence of the MCM, notwithstanding the fact that the mechanism has never been triggered?

- ○ Yes
- ● No
- ○ Don't know / no opinion / not applicable

Please explain your answer to question 71:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

However, we believe there could be an impact on margins in the event that the market approaches the trigger conditions or if market participants anticipate that the MCM may be triggered.

Also see our response to Q70 and the ECB's comments with respect to the MCM's potential effect on margin.

6.3. Application of organisational and operational requirements to the spot market

The 2022 gas market events showed the strong interconnectedness of spot/physical and futures markets in the energy realm – as is the case for other markets. The market for energy derivative contracts is subject to stringent MiFID rules. However, unlike other derivatives markets, the market for underlying spot energy products is subject to a less expansive rulebook, despite many similarities between markets for spot and future contracts. The Draghi report suggests that the alignment between the two sets of rulebooks governing the spot and derivatives markets would help prevent the contagion of systemic risks from spot to financial markets.

More concretely, the Draghi report mentions that some basic requirements of the MiFID 'trading rule book' could be extended to spot markets. This could in particular entail two types of measures:

a. rules imposed on trading venues

b. and rules imposed on market participants themselves

Spot energy exchanges and actors active on those exchanges are mainly governed by REMIT. Currently, REMIT does not provide for organisational and operational requirements on OMPs (akin to MiFID trading venues) and market participants similar to those included in MiFID. This consultation seeks to obtain information on whether the introduction of such requirements in the REMIT framework would be useful.

6.3.1. Organisational requirements at trading venue level

Article 53 of MiFID on access to regulated markets requires exchanges to establish, implement and maintain transparent and non-discriminatory rules, based on objective criteria, governing access to or membership of the regulated market. In particular, such exchange rules should ensure that market participants trading on the venue satisfy certain organisational requirements and are competent traders. Those provisions are currently not part of the rulebook governing the functioning of spot energy trading venues.

Furthermore, regulated markets under MiFID are required to set up and implement rules on professional standards on the staff of the investment firms or credit institutions that are operating on the market, which includes checking that market participants, inter alia (Article 53(3)):

- are of sufficient good repute
- have a sufficient level of trading ability, competence and experience
- have, where applicable, adequate organisational arrangements
- have sufficient resources for the role they are to perform, taking into account the different financial arrangements that the regulated market may have established in order to guarantee the adequate settlement of transactions

6.3.2. Organisational requirements at market participant level

MiFID contains a number of safeguards, in the shape of organisational requirements, ensuring that investment firms actually manage their operations in a professional manner (namely, so-called 'fit-and-proper' requirement). They ensure that the firm has a proper understanding of the activities it engages in and the market it interacts with, and that this is reflected in the way the firm is managed. This includes, for instance:

- the obligation for investment firms to have a management body that oversees and is accountable for the implementation of the governance arrangements that ensure an effective and prudent management of the investment firm in a manner that promotes the integrity of the market and the interest of potential clients (Article 9 (3) of MiFID). This includes approving and overseeing the knowledge and expertise required by the personnel, and the procedures and arrangements for the provision of services and activities, taking due account of the nature of the firm's activities (Article 9(3), point a). The management body is also in charge of carrying out appropriate stress testing, if appropriate (Article 9(3), point b)
- competent authorities are required to refuse or withdraw authorisation from an investment firm whose management body is not of sufficient good repute, or does not possess sufficient knowledge, skills and experience, or if there are objective and demonstrable grounds for believing that the management body of the firm may pose a threat to its effective, sound and prudent management and to the adequate consideration of the interest of its clients and the integrity of the market (Article 9(4))
- investment firms should have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment (Article 16(5))

6.3.3. Other relevant rules governing market integrity and transparency

Beyond those organisational requirements, other aspects of the financial rulebook covering market transparency (e.g., pre- and post-trade transparency) and market integrity (circuit breakers, position management controls, emergency intervention powers by trading venues to ensure orderly trading) could potentially be of relevance to the operation of spot markets. Those items have been covered under the relevant sections above.

Questions related to section 6.3

In providing your answers under this section, please specify, to the extent relevant, **whether your assessment would differ depending on whether natural gas or electricity is concerned**.

Question 72. Do you believe that requirements similar to some/all organisational requirements imposed on MiFID firms as market participants should also be imposed on market participants in spot energy markets, without requalifying those entities as investment firms?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Please explain your answer to question 72:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

While the normal remits of FIA and ISDA do not extend to spot markets, our members (which include entities that participate in both derivatives and spot markets) have expressed strong views that the organisational requirements imposed on MiFID firms should not replicated for participants in spot markets.

Imposition of organisational requirements on market participants and trading venues would negatively impact the EU's international competitiveness. For firms who decide to remain in the EU and comply with the new organisational requirements, this will impose substantially higher compliance costs, creating barriers to

trading and growth. However, many firms will likely choose to move their operations to other jurisdictions with less restrictive requirements, worsening liquidity in the EU and in turn driving firms to trade outside of the EU. This would further reduce protections available for market participants. In relation to Q74, our view is that spot commodity markets operated well and in an orderly fashion during the energy crisis – the imposition of organisational requirements across the whole spot commodities industry to address "at least some atypical trading behaviours" would be a disproportionate response.

Those participants in spot markets that are financial firms will already be subject to MiFID organisational requirements.

Such requirements are not appropriate for commercial firms in general, and would place an undue regulatory burden on smaller commercial firms.

There is no clear articulation of the issue that the application of such rules is intended to solve.

It is important to understand that spot markets and derivative markets serve different purposes. While spot markets serve primarily immediate asset transactions, derivative markets provide tools for managing price risk and hedging against future spot price fluctuations. This leads to differences in the timing of transactions (immediate/prompt vs. future delivery), pricing mechanisms (current market vs. future expectations), etc. It is therefore only logical that spot markets and derivatives markets, as well as their market participants, have their own specific regulatory framework. It can be anticipated that a broad-brush application of financial services legislation to energy spot market participants would lead to unnecessary, duplicative, and potentially harmful requirements.

It should also be noted that under REMIT II the STOR regime has been enhanced and organisational requirements regarding algorithmic trading and direct electronic access are comparable to rules under MAR /MIFID.

The Associations also stress that we are fundamentally opposed to spot commodities being brought into the scope of financial instruments as defined in MiFID Annex I Section C.

Question 73. Do you believe that key rules similar to those applicable to MiFID trading venues should also apply to spot energy exchanges, and why?

- ○ Yes
- ● No
- ○ Don't know / no opinion / not applicable

Please explain your answer to question 73:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The normal remits of FIA and ISDA do not extend to spot markets.

However, we note that imposition of these requirements would adversely impact the European Union's international competitiveness.

In line with our answer to Q72, whilst spot markets can take inspiration from the robust arrangements of

MiFID on a case-by-case basis and to the extent this fits the respective markets, a broad-brush application of financial services legislation would not be appropriate. A lack of a tailored approach could lead to unnecessary, duplicative, and potentially harmful requirements.

Important to note is that extensive regulation already applies to spot market venues. In the case for power, for example, the spot market legislative framework also includes the Electricity Directive & Regulation, the Capacity Allocation and Congestion Management Network Code (CACM) and other legislative acts. From our experience, these bespoke regulatory environments – also differentiating the nature of gas and power physical spot markets – are relevant and necessary to ensure an orderly functioning.

Question 74. Do you believe that the application of rules similar to the ones included in MiFID to spot energy market participants could have helped preventing at least some atypical trading behaviours (e.g., lack of forward hedging, trading on weekends) during the energy crisis, and limited repercussions on derivative markets?

- ○ Yes
- ◉ No
- ○ Don't know / no opinion / not applicable

Please substantiate your answer to question 72:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

As mentioned in our response to Q72, the normal remits of FIA and ISDA do not extend to spot markets.

However, those of our members that also participate in spot markets have expressed strong views that circuit breakers and position limits would be deleterious to spot markets.

The Associations also question why "atypical" trading behaviour should be seen as inherently problematic. Regardless of the market, circumstances tend to drive trading behaviour. If what is being referred to is abusive behaviour, we note that spot markets are regulated under REMIT, which addresses such behaviour.

We also note that spot commodity markets operated well and in an orderly fashion during the energy crisis, and as such, consider that imposition of such rules would be disproportionate.

There is no clear articulation of the issue that the application of such rules is intended to solve. The Associations are of the view that no new rules should be considered without a clear statement of the issue they are seeking to address and how the proposed measures are expected to achieve this.

It also should be noted that energy market-related rules have been tightened since the 2022 crisis (e.g. in respect of market behaviour under REMIT II). These changes should be given sufficient time for their impact to be properly assessed.

The physical nature of spot energy market trading that involves close to real-time market/ network balancing requirements and constantly changing demand/supply balances – including over weekends - has the potential to result in legitimate trading behaviour which, when viewed from a purely financial perspective,

could be seen as atypical but which is a necessary part of physical gas and power markets.

As stated in our response to Q72 and Q73, we are fundamentally opposed to spot commodities being brought into the scope of financial instruments as defined in MiFID Annex I Section C.

Question 75. The revised REMIT clarified that benchmarks used in wholesale energy products are captured by the market abuse-related provisions in that Regulation.

Do you believe that this is sufficient to ensure the integrity of such benchmarks, and avoid risks of manipulation?

- (x) Yes
- ( ) No
- ( ) Don't know / no opinion / not applicable

If you think this is not sufficient, please explain whether you would see merit in establishing rules similar to those imposed on benchmarks used in financial instruments and financial products under Regulation (EU) 2016 /1011, and why:

5000 character(s) maximum

including spaces and line breaks, i.e. stricter than the MS Word characters counting method.

The Associations consider the provisions in REMIT are sufficient to ensure the integrity of benchmarks used in wholesale energy products, and to prevent their manipulation.

We also note that Regulation (EU) 2016/1011 was widely recognised as being onerous having too great a reach, as evidenced by its revision, which has recently been adopted by the European Council. We oppose any extension of this regulation to include benchmarks used in wholesale energy products. We also urge great caution in creating a parallel regulation to capture these benchmarks, only for any such regulation to likewise subsequently be found to be disproportionate.

No changes should be considered without a clear statement of the issue they are seeking to address and how the proposed changes could achieve this. In any event, no changes should be considered until the clarification in REMIT II has been given sufficient time for its impact to be assessed.

6.4. Enhanced supervisory cooperation in the energy area

The events of summer 2022 on energy spot and derivatives markets have shown the close interconnectedness of the two markets. This interlinkage is however not reflected in the fragmented supervision of these markets. Instead, supervision is split at national level between NRAs and NCAs (if not, in certain cases, regional authorities), as well as between ACER and ESMA at European level. The interlinkages between spot and derivatives markets suggest that more enforcement cooperation could be warranted.

The Draghi Report recommends to further integrate regulatory and supervision frameworks, notably through a deepening of the cooperation between ACER and ESMA building on exchanges of information. To achieve this, the report suggests the creation of a coordination body comprised of energy and derivative markets regulators at the European level (ACER and ESMA), which should coordinate the supervision of spot and derivatives markets. The supervisory college would remove possible overlap, duplication or potential conflicts of supervision between energy and financial regulators. The report also suggests that this college could help remove layers of intermediate supervision at the national and sometimes regional levels. This supervisory college would have both the investigative and policy powers necessary to prevent, detect and prosecute anticompetitive conduct, market abuse and other practices which disrupt orderly trading in energy (see page 30 of the report).

One of the main objectives of the revised REMIT is to enhance cooperation in the energy area, as recommended by the Draghi Report. As mentioned above, the revised REMIT includes numerous provisions that not only enhance cooperation and information exchanges between EU bodies and national regulators in the field of energy, financial and competition in the context of potential REMIT breaches, but also provide for the possibility of general information exchanges among the aforementioned authorities (see Article 10, paragraphs (1) and (2) of revised REMIT).

Questions related to section 6.4

In providing your answers under this section, please specify, to the extent relevant, **whether your assessment would differ depending on whether natural gas or electricity is concerned**.

Question 76. Do you agree that the current situation leads to a complex supervisory scenario between various national and sometimes regional supervisors which may slow down reactions in times of crisis?

- ○ Yes
- ○ No
- ◉ Don’t know / no opinion / not applicable

Question 77. The Benchmark Regulation (Regulation (EU) 2016/1011) sets the regulatory and supervisory regime for commodity benchmarks used in financial instruments or financial products. Those benchmarks usually at least partially refer to market dynamics in the underlying physical commodity market.

Do you believe that, when it comes to energy benchmarks, there is adequate cooperation between energy markets supervisors and securities markets supervisors?

- ○ Yes
- ○ No
- ◉ Don’t know / no opinion / not applicable

Additional information

Should you wish to provide additional information (e.g. a position paper, report) or raise specific points not covered by the questionnaire, you can upload your additional document(s) below. **Please make sure you do not include any personal data in the file you upload if you want to remain anonymous**.

The maximum file size is 1 MB.
You can upload several files.
Only files of the type pdf,txt,doc,docx,odt,rtf are allowed

Useful links

More on this consultation (https://finance.ec.europa.eu/regulation-and-supervision/consultations-0/targeted-consultation-review-functioning-commodity-derivatives-markets-and-certain-aspects-relating_en)

Consultation document (https://finance.ec.europa.eu/document/download/1f0a18f3-b3dd-4a0f-9ddd-4838645d3a86_en?filename=2025-commodity-derivatives-markets-consultation-document_en.pdf)

More on investment services and regulated markets (https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/financial-markets/securities-markets/investment-services-and-regulated-markets_en)

Specific privacy statement (https://finance.ec.europa.eu/document/download/80808b0f-93bd-4a5a-bfb8-3fcf47226e15_en?filename=2025-commodity-derivatives-markets-specific-privacy-statement_en.pdf)

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