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REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

on the Commission's assessment of the markets for commodity derivatives, for emission allowances and for derivatives of emission allowances, pursuant to Article 90(5) of the Markets in Financial Instruments Directive (MiFID II) (Directive (EU) 2014/65), as amended in February 2024

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LIST OF ABBREVIATIONS

AAE: Ancillary Activity Exemption

ACER: Agency for the Cooperation of Energy Regulators

CDR 2022/1299: Commission Delegated Regulation (EU) 2022/1299

CFTC: Commodities and Futures Trading Commission

CMRP: Capital Markets Recovery Package (Directive (EU) 2021/338)

EEOTC: economically equivalent over-the-counter contract

EMIR: European Market Infrastructure Regulation (Regulation (EU) 648/2012)

ESMA: European Securities and Markets Authority

EU: European Union

EUA: European Union allowance under the EU Emissions Trading System

ETS: EU emissions trading system

IFD: Directive on the prudential requirements of investment firms (Directive (EU) 2019/2034)

IFR: Regulation on the prudential requirements of investment firms (Regulation (EU) 2019/2033)

MiFID II: Markets in Financial Instruments Directive (Directive (EU) 2014/65)

MiFIR: Markets in Financial Instruments Regulation (Regulation (EU) 600/2014)

NCA: national competent authority

NRA: national regulatory authority

OTC: over-the-counter

PMC: position management controls

REMIT: Wholesale Energy Market Integrity and Transparency Regulation (Regulation (EU) 1227/2011)

TFEU: Treaty on the Functioning of the European Union

TTF: Title Transfer Facility

TV: trading venue

1. INTRODUCTION

Commodity derivatives are key instruments for market participants to hedge their exposures in the underlying commodity markets (e.g., energy, agricultural commodities, metals). Those commodity markets are characterised by the participation of mainly nonfinancial entities. Such entities mostly include physical commodity producers, utilities companies, large energy-intensive non-financial corporations and physical commodity traders that are directly dependent on commodity derivatives 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 EU and the efficient functioning of the market. The Commission's Clean Industrial Deal ([1]) and Action Plan for Affordable Energy ([2]), adopted in February 2025, thereby highlights the role of efficient markets, including derivatives markets ([3]). Furthermore, the commodity derivatives regime is a critical component of European financial markets, providing market participants with the ability to manage risks and invest in a range of commodity derivatives, including emission allowances (EUAs) and derivatives of emission allowances. Markets for commodity derivatives in the EU are therefore subject to an extensive set of rules that cater for the specific nature of those instruments and their relevance to the EU economy.

The European Commission submits this report to the European Parliament and the Council pursuant to Article 90(5) of the Markets in Financial Instruments Directive (MiFID II) (Directive (EU) 2014/65). In preparing this report, in line with the requirement set out in Article 90(5) of MiFID II, the Commission requested input from the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA), and the Agency for the Cooperation of Energy Regulators (ACER). The requested input was submitted by ESMA and ACER. EBA informed the European Commission that their input on commodity markets would require a more in-depth analysis and was therefore not included in its response to the Commission's Call for Advice for the purposes of the reports on the prudential requirements applicable to investment firms ([4]). Therefore, this report does not incorporate the EBA's input.

The European Commission also consulted market participants via a targeted consultation which was open for a period of eight weeks from February to April 2025 ([5]). Overall, 94 responses were received, out of which 67 from the industry (including 12 exchanges and their associations) and 12 from public authorities and market regulators. In preparing this report, the Commission carefully considered those responses and reviewed the relevant data and market trends to supplement its assessment.

([1]) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52025DC0085
([2]) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52025DC0079&qid=1741780110418
([3]) Both the Clean Industrial Deal and the Action Plan for Affordable Energy refer to the Gas Market Task Force set up by the Commission, which scrutinised, among others, the functioning of the market for gas derivatives.
([4]) CfA_IFR and IFD review - final.pdf
([5]) Targeted consultation on the review of the functioning of commodity derivatives markets and certain aspects relating to spot energy markets 2025 - Finance

In accordance with the requirement set out in Article 90(5) of MiFID II, the report assesses, for each of the following elements, its contribution to the liquidity and proper functioning of European markets for commodity derivatives, EUAs or derivatives of 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 II;

(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 Commission Delegated Regulation (EU) 2021/1833 ([2]), taking into account (i) the ability to enter into transactions for effectively reducing risks directly relating to the commercial activity or treasury financing activity; (ii) 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; (iii) 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, and the relevant information on transaction data to be made public and its most appropriate format.

In addition, the Draghi report published in September 2024 made certain proposals for changes in the regulatory framework governing commodity derivatives markets.

2. DATA ASPECTS RELATING TO COMMODITY DERIVATIVES

Background

Commodity derivatives trading is subject to transparency and reporting requirements under MiFID II, MiFIR and EMIR. Those rules do not discriminate on the basis of the underlying commodity. Furthermore, energy commodity derivatives are also subject to reporting requirements (although with provisions to avoid double reporting) under Regulation (EU) No 1227/2011 (REMIT).

While reporting to trade repositories under EMIR captures all commodity derivatives transactions involving at least one EU counterparty, reporting requirements under MiFID II/MiFIR differ depending on the type of data, the entity receiving the reported data and whether the trade takes place on a trading venue. MiFIR also contains details on the conditions under which some pre-trade (order) and transaction related data in financial instruments is to be disseminated- to the public. MiFID II 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 ([6]). Market participants are in turn required to report daily to trading venues their positions in derivative contracts traded

([6]) Article 58(1) of MiFID II.

on that venue ([7]). Lastly, investment firms should report positions in economically equivalent over-the-counter (OTC) contracts to the relevant NCA ([8]) on a daily basis ([9]).

REMIT, as amended by Regulation (EU) No 2024/1106 (REMIT II) and REMIT Implementing Regulation (EU) 1348/2014 (REMIT IR) introduced detailed reporting requirements for transactions and orders to trade linked to wholesale energy products ([10]).

REMIT II, which entered into application in May 2024, established an obligation to set data sharing mechanisms between various regulators, including ACER, ESMA, Eurofisc, the European Commission, national regulatory authorities (NRAs), NCAs and other relevant authorities in the EU. In addition, because REMIT covers energy derivatives as wholesale energy products, specific provisions under REMIT II prevent double reporting under both the financial rulebook and under REMIT II. REMIT II thereby provides that persons that have reported transactions in accordance with MiFIR or EMIR should not be subject to double reporting obligations relating to those transactions ([11]).

The current regulatory framework results in multiple reporting channels, with data access limited to specific regulators. For example, ACER and NRAs receive data on wholesale energy products (in addition to some financial data via access to EMIR trade repositories data for wholesale energy products that also qualify as financial instruments), while ESMA and NCAs receive financial data. This separation means that the data available to energy supervisors does not always reach financial regulators, and vice versa, which can hinder cross-market supervision. For instance, ESMA and NCAs lack systematic access to data on 'C6 carve-out' products and spot market products reported to ACER. Additionally, differing reporting standards between MiFIR/EMIR and REMIT II complicate reporting and data analysis, even for related products.

The stakeholder consultation dealt with multiple data aspects. It investigated whether ESMA had sufficient access to transaction data via NCAs.It also explored areas where information-sharing and access to relevant information could be improved or streamlined and if the reporting could be better harmonised across both the financial and energy rulebooks. A possible option discussed in the consultation was the creation of a centralised data collection mechanism for spot and derivative contracts. The consultation further sought to clarify whether, in the context of a centralised data collection mechanism, the reporting of the relevant data should be performed by (i) trade repositories, (ii) registered reporting mechanisms (RRMs), (iii) a third entity which would also consolidate the relevant data received from trade repositories and RRMs, ensuring equal access to all regulators, such as ESMA, ACER, NRAs, NCAs, and the Commission, or (iv) any other entity. Lastly, the consultation included questions as to whether the central data collection mechanism could also serve as a one-stop-shop for data reporting by market participants active on both commodities physical/spot and derivatives markets, thus alleviating the reporting burden for commodities traders. Finally, the consultation inquired whether an alternative approach to the centralised collection mechanism should be considered,

([7]) Article 58(3) of MiFID II.
([8]) To the NCA of the most liquid market for the commodity derivative which the OTC contract is equivalent to.
([9]) Article 58(2) of MiFID II.
([10]) Article 2(4) of REMIT II.
([11]) Article 6(5) of the REMIT IR further provides that "Where persons have reported details of transactions in accordance with Article 26 of Regulation (EU) No 600/2014 or Article 9 of Regulation (EU) No 648/2012 their obligations in relation to reporting those details under Article 8(1) of Regulation (EU) No 1227/2011 shall be considered as fulfilled".

according to which NCAs would have systematic access to ACER's database and vice versa.

Lastly, the 2024 Draghi Report recommended collecting transaction and position data related to OTC energy derivatives. The Commission notes that EMIR already includes the reporting of all transactions in derivatives, including OTC transactions, that involve at least one EU counterparty. In contrast, when it comes to position data, and as noted in Section 4 of this report, entities that are not investment firms are not currently required to report OTC positions to EU regulators ([12]).

Feedback from stakeholders and assessment

On the harmonisation of reporting, more than half of the respondents agreed that reporting, for example on transactions, under REMIT II and MiFID II/MiFIR/EMIR should be streamlined, and that double reporting should be eliminated. They nonetheless emphasised that each of the financial and energy reporting framework serves different purposes and has unique characteristics and cautioned against immediate changes to the respective reporting regimes, also considering the implementation costs such changes may result in. Due to the costs that could be incurred in this process, participants held that an impact assessment and a cost-benefit analysis should be conducted before starting any harmonisation work. Nine industry representatives, of which three trading venues and one exchanges association in favour of harmonisation, explicitly argued for a gradual, step-by-step approach, starting with improving data-sharing among regulatory authorities, before an overhaul of the existing reporting requirements is considered. Several respondents on the supervisory/regulatory side suggested that common reporting data fields in both energy and financial data should be found, including the use of common unique identifiers, based on global standards.

The Commission acknowledges that the overhaul of reporting standards, while likely to bring long-term benefits in the form of a simplified framework, entails changes to reporting formats with the attendant adaptation costs in the short term. Moreover, this could complicate the reporting of other classes of derivatives under EMIR, as EMIR reporting is not limited to commodity derivatives.

The stakeholders were divided on the idea of creating a centralised data collection mechanism. Half of the respondents were of the view that such a centralised mechanism could facilitate reporting, provided that it builds on the existing infrastructure and does not introduce new data requirements or additional layers of complexity or costs. In contrast, the other half feared implementation costs and pointed to markets' inherently different features, which warrant the different reporting regimes currently in place. Two regulators stated that a centralised reporting approach would give NCAs, NRAs, ESMA, and ACER access to the same comprehensive and consolidated dataset, giving them a holistic supervisory view of both physical and derivatives markets.

Alternatively, even among those in favour of such a centralised mechanism, suggestions were made to leverage and mirror the existing REMIT II provisions, which provide for extensive cooperation and information exchange mechanisms across different regulators, in the financial rulebook to improve data flow between ACER and financial authorities (and vice-versa) as a more cost-efficient solution. Such an approach would also avoid ad hoc requests. Stakeholders therefore were more open to the idea of improving data sharing among regulators than to implementing an entirely new mechanism. The Commission

([12]) Unless they transact via an EU investment firm, in which case the investment firm reports on their behalf.

concurs that more systematic and institutionalised data sharing and mutual access to data by both financial and energy supervisors would be highly desirable.

When considering changes to pre- and post-trade transparency rules (notably as regards trading activity on multilateral trading facilities (MTFs) and organised trading facilities (OTFs)), 70% of the respondents opposed any amendment to the current rules citing the potential exposure of participants with respect to their hedging strategies, and the unique nature of commodities markets. Some respondents pointed out that before the MiFIR review ([13]), commodity derivatives traded on MTFs and OTFs were subject to pre- and post-trade transparency precisely by virtue of being traded on those trading venues. The review concluded 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. Respondents maintained that transparency requirements should only apply to derivatives that are sufficiently standardised for the data published in relation to them to be meaningful for market participants. The Commission acknowledges that, in any event, trading activity in commodity derivatives is currently marginal on OTFs (0.3% of traded volumes in 2024) ([14]), and nonexistent on MTFs ([15]).

44 out of 48 respondents expressing views on this topic opposed the inclusion of pre- and/or post-trade data on exchange-traded commodity derivatives in the consolidated tape. Many of them noted that, unlike OTC derivatives, exchange traded derivatives are traded on regulated markets, meaning pricing and trading volumes are already publicly available, and that trading activity is concentrated in a very small number of regulated markets (thereby limiting the added value of a consolidated tape for this asset class). Only four participants from the energy sector expressed support for the idea of including pre- and/or post-trade data on exchange-traded commodity derivatives in the consolidated tape.

Conclusions of the Commission's assessment

The Commission acknowledges that the current reporting framework for commodity derivatives is complex. This is particularly true for energy commodity derivatives, as both the underlying spot market and energy derivatives are subject to dedicated reporting obligations under REMIT II, while the latter are also reported under the financial framework (unlike other types of commodity derivatives that are only reported under financial legislation). While REMIT II includes provisions to prevent double reporting, as mentioned above, there may still be room for increasing efficiencies in the existing reporting processes.

While the harmonisation of reporting standards and streamlining of reporting requirements would help simplify the relevant frameworks, reduce the burden on firms and rationalise data used by supervisors, this would require a thorough assessment of the necessary amendments to the relevant legislation and of the associated costs both for market participants and supervisors/regulators. Similarly, the creation of a single reporting mechanism, while overall desirable as end-result, could raise significant challenges in

([13]) Regulation (EU) 2024/2809 of the European Parliament and of the Council of 23 October 2024 amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises

([14]) This is also due to the fact that physically-settled contracts traded on OTFs are carved out from financial legislation, and are therefore not considered financial instrument ('C6 carve-out products').

([15]) Source: ESMA data.

terms of implementation costs and potential difficulty in differentiating commodity derivatives reporting from the reporting of other derivatives.

Under a possible gradual approach, short-term measures could be explored to facilitate data-sharing between authorities and improve the interoperability of data sets. This could include the institutionalisation of data exchanges between financial and energy regulators, with systematic access granted to respective supervisory data, eliminating the need for ad hoc access requests. The Commission could also explore the adoption of unique identifier formats for transactions reported under both financial and energy frameworks.

Lastly, as regards pre- and post-trade transparency requirements, the Commission is of the opinion that the current framework ensures a sufficient level of public information and, therefore, no changes are warranted in that regard. These conclusions also apply to EUAs and EUA derivative contracts.

3. THE ANCILLARY ACTIVITY EXEMPTION

Role and functioning

Commodity derivatives markets are characterised by the prominent participation of entities whose main business does not involve the provision of financial services but 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.

The non-financial entities represent around -two thirds of natural gas futures market participants ([16]), and around 60% of wheat futures market participants ([17]) in terms of positions held in their respective markets. Some non-financial entities also act as market -makers and may also be active on both physical/spot and derivatives markets. The ancillary activity exemption (AAE) set out in Article 2(1), point (j), of MiFID II currently exempts certain non-financial market participants that engage in commodity derivatives trading from the requirement to obtain a MiFID II authorisation (and the associated compliance requirements) 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, provided that the activity is considered 'ancillary' to their main business, whether individually or on an aggregate basis.

Three alternative tests under MiFID II are used to determine whether a firm's activity is ancillary to its main business. Meeting any one of those tests is sufficient to benefit from the exemption:

- 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 EU, excluding commodity derivatives or emission allowances or derivatives thereof traded on a trading venue, is below an annual threshold of EUR 3 billion;

([16]) esma70-446-775_preliminary_data_report_on_mcm.pdf
([17]) 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?

- 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.

It should be noted that all of the above thresholds exclude trading activity linked to hedging.

Qualifying as an investment firm under MiFID II has broad implications. It does not only imply the application of the MiFID II 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 should be noted, however, that a number of key requirements under the financial rulebook are applicable to all entities, regardless of whether they qualify as investment firms. This includes requirements relating to market abuse, position limits and reporting under EMIR.

In 2021, the Capital Markets Recovery Package (CMRP) introduced several changes to reduce some of the administrative burden 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. Directive (EU) 2021/338 simplified the test for the AAE, through the introduction of the above-mentioned exposure-based de minimis threshold. The obligation for market participants to notify every year their fulfilment of the AAE criteria was removed and replaced by a possibility for NCAs to require information on an ad hoc basis.

Other jurisdictions, such as the United States and the United Kingdom, also have rules in place to avoid entities trading commodity derivatives as an ancillary activity being captured by financial legislation. In the United States, the *Swap Dealer De Minimis Exception* exempts entities whose gross swap dealing activity does not exceed USD 8 billion over a twelve-month period from having to register with the CFTC. The US exception only covers dealing activity for the benefit of a client and excludes from the threshold calculations any proprietary trading activity. At this stage, there is no evidence that other major jurisdictions have any intention to tighten their functional equivalent of the AAE.

Lastly, the Draghi report refers to the potential benefits of bringing large, notably energy, market participants under the investment firm status to enhance market transparency and reduce the risk of misconduct.

Feedback from stakeholders and assessment

The stakeholder consultation explored in detail all the relevant aspects of the functioning of the AAE, such as the usefulness of the exemption as such, the appropriateness of the

three tests and the adequacy of the methodologies (e.g., gross-based versus net-based thresholds).

Stakeholders consistently pointed to the importance of the AAE to ensure continued participation of predominantly non-financial players in commodities markets. Stakeholders argued that the exemption was not only needed for such entities to adequately hedge their commercial exposures and plan their operations in an efficient way, but also to preserve the depth of commodity derivatives markets in the Union. Respondents also pointed to the added value of non-hedging trading activity, including by non-financial firms benefiting from the AAE, in contributing to the market depth and liquidity, reduced concentration, and to price formation by bringing expert insight to the market.

Stakeholders almost unanimously supported the need to preserve regulatory stability in this area, following the changes implemented in 2021 with the CMRP. Suggestions to simplify the test, e.g. by focussing only on proprietary trading as seen in other jurisdictions, and suggestions to strengthen the test were rejected for similar reasons, with a view to maintaining regulatory stability.

Overall, the stakeholder consultation indicated that a tightening of the AAE would have far-reaching consequences on the operation of firms that currently benefit from the AAE. This view was largely shared by industry representatives and regulators. The main cost drivers identified were:

(i) prudential obligations resulting from the application of IFR/IFD capital and liquidity requirements;
(ii) margin requirements for OTC trades resulting from a requalification as financial counterparties under EMIR; and
(iii) overall compliance costs with MiFID II requirements.

Respondents to the consultation, including three public authorities, raised concerns that a tightening of the conditions for the AAE could bring a sharp increase in operational costs, or difficulties in adequately managing risk (e.g., because of deteriorated market conditions, see below). The Commission acknowledges that such changes could lead to additional compliance costs and based on the current prudential rules, to additional capital constraints for prudential purposes. While these elements should be assessed in light of the expected benefits, and while a tightening of the AAE could theoretically reduce risk-taking trading activities by restricting non-hedging trading activities of its current beneficiaries, respondents noted that this situation could nevertheless pose a risk that some firms, that are currently not subject to financial conduct and prudential regulations, may exit these markets. A significant exit by existing firms, unless substituted by new market participants, could lead to a reduction of the depth, liquidity and efficiency of commodity markets, resulting in more concentrated markets, higher costs and lower reliability of hedging. Several stakeholders noted that these increased costs, whether direct or due to imperfect hedging, could ultimately be passed on as higher commodity prices to end-customers.

The consultation also sought to assess whether stakeholders perceived that prudential requirements could have mitigated the liquidity stress that some market participants had experienced during the 2022 energy crisis and the related period of a surge in margin calls. All but one stakeholder who responded considered that such requirements would not have eased the situation and could have even worsened it by further restricting access to liquidity.

Some stakeholders pointed out that several key provisions related to commodity derivatives trading, such as market abuse rules, position reporting, and position limits, as well as EMIR reporting, apply irrespective of the regulatory status of commodity traders. These stakeholders questioned the necessity and added value of requiring commodity traders to attain full-fledged investment firm status. Only three respondents out of 73 providing feedback on this point were open to the idea of reviewing the AAE regime, of which only one was explicitly calling for a reform. Two public authorities (from the same Member State) noted that if the AAE is reviewed, a tailored prudential regime for commodity traders should be established to address their specific risk profiles and business models. The Commission notes that, in terms of conduct supervision and market oversight, no elements have been put forward by respondents that would suggest that tightening the AAE would enhance the integrity of markets.

The Commission notes that many participants were of the view that the tightening of the AAE regime would place the EU commodity market participants at a competitive disadvantage compared to their global peers, especially as other jurisdictions adopt more flexible regulatory frameworks.

Regarding the structure and functioning of the three tests, the consultation showed that all three tests are valuable and used by respondents. This is despite the Commission's understanding that no entity currently benefiting from the AAE would fail the de minimis test. Stakeholders considered that changing or removing any of those tests would incur adaptation costs for market participants, who have already implemented systems and procedures to comply with their chosen test.

Similarly, stakeholders held that any changes to the methodologies for calculating the relevant thresholds would require unnecessary adaptations. Specifically, shifting to a gross trading activity-based threshold, as that employed the US, based on overall trading activity, was viewed by respondents as incompatible with the risk-based approach under MiFID II, which is best reflected in a net trading activity-based threshold.

Finally, regarding the removal of yearly notifications on compliance with the AAE thresholds by commodity derivatives traders, more than half of the respondents were of the view that the CMRP amendment has reduced administrative burdens and red tape. Multiple respondents emphasised that information could still be requested by NCAs on an ad hoc basis, beyond what is already provided based on the MiFID II and EMIR reporting. However, some responders suggested considering a one-time initial notification to a single NCA or ESMA to maintain an EU-wide record of entities active in commodity derivatives markets. While not excessively burdensome for firms, such a notification could provide supervisors with a comprehensive view of market participants (notably if coupled with a notification from firms ceasing their activity in commodity derivatives markets).

Conclusions of the Commission's assessment

Based on stakeholders' feedback, no material element has been reported that would suggest that the AAE is not functioning adequately. Still on the basis of this feedback, it appears that altering the scope and operation of the AAE may have significant and far-reaching consequences, potentially impacting the competitiveness of EU firms in commodity derivatives markets. At this stage, the responses provided by stakeholders do not suggest that changes to the AAE are urgently required. In this respect, the Commission notes that key conduct provisions, notably relating to market abuse and position limits, already apply regardless of the status of trading entities as investment firms.

Should a review of the AAE be contemplated at a later point, which could result in more entities being subject to authorisation and supervision as investment firms, a tailored prudential regime commensurate with the risk profile of firms operating in commodity derivatives markets would seem to be more appropriate. Notwithstanding the above, the Commission could consider, as suggested by some stakeholders, that a one-off notification to NCAs, when starting and ceasing operations, should be provided by all entities active on commodity derivatives markets, in order to increase visibility of supervisors over the identity of market participants. This also applies for firms active in EUA or EUA derivatives trading.

4. POSITION LIMITS, POSITION MANAGEMENT CONTROLS AND POSITION REPORTING

Role and functioning of position limits and position management controls

Position limits are a fundamental feature of the rules governing commodity derivatives trading in the EU. They constrain the size of a net position which a person can hold at all times in certain commodity derivatives contracts, with a double objective of (i) ensuring orderly trading and settlement, and (ii) preventing market manipulation.

Position limits are set by NCAs, following principles set out in Delegated Regulation (EU) 2022/1302 and following an opinion by ESMA. Position limits apply to exchange-traded derivatives and economically equivalent over-the-counter (EEOTC) contracts. They do not apply to emission allowances and derivatives of emission allowances. They do not apply to 'C6-carve out contracts', as such instruments fall outside the financial legislation.

The initial position limits regime established under MiFID II had proved to be overly restrictive. Therefore, in 2021 the CMRP significantly alleviated the regime to support the development and deepening of commodity derivatives markets. In particular, the CMRP:

- reduced the scope of contracts subject to position limits only to agricultural commodity derivatives and to significant or critical non-agricultural 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;

- extended the hedging exemption to positions taken by financial entities that are part of a predominantly commercial (i.e., non-financial) group; and

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

To date, three non-agricultural commodity derivative contracts are subject to a position limit: the TTF derivative contract traded on ICE Endex and on the European Energy Exchange (EEX), the THE derivative contract traded on EEX and on ICE Endex, and the German Power Base contract traded on EEX.

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

The appropriateness of the functioning of the position limits regime 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, in the US, for 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 as they see fit. Similarly, trading venues play a greater role in granting hedging and other exemptions to market participants, applying the conditions set out in the CFTC order.

Position limits are complemented by position management controls (PMCs), which require trading venues to have arrangements in place to monitor open positions of market participants and ensure orderly trading on their venue. The requirement to establish PMCs has a broader scope and applies to all positions in commodity derivatives, irrespective of whether the contract is subject to a position limit. It covers all types of positions, including those entered into for hedging purposes. The objective of PMCs is to enable trading venues to identify the build-up of large, concentrated positions that could result in price distortion, market manipulation or other abusive trading practices. According to Article 57(8) of MiFID II, controls should include at least the powers to:

- monitor open interest;
- obtain comprehensive information in relation to the positions entered into, including, but not limited to, the size and the purpose of building the position;
- terminate or reduce the position;
- require the position holder to inject liquidity back into the market in certain situations.

Furthermore, for contracts that can be physically settled, Commission Delegated Regulation 2022/1299 supplementing MiFID II ([18]) introduced the obligation to set accountability levels, whose purpose is to trigger dialogue with the position holder if certain qualitative or quantitative thresholds are crossed. Trading venues should communicate all the details of their PMCs to their NCAs, including the number of instances where accountability levels have been reached.

Lastly, position reporting includes, under Article 58(3) of MiFID II, the obligation for market participants to transmit information on positions to trading venues. One of the aims of this requirement is to provide trading venues with the necessary information to implement their position management mandate. Market participants are thereby required to submit to the trading venues on which they are trading the details of their positions held in the contracts traded on that venue. The information submitted to trading venues, however, does not include positions in identical contracts traded on other venues, nor positions in OTC contracts that relate to the same underlying. It should be noted that the UK Financial Conduct Authority (FCA) recently explored the possibility of extending the scope of contracts to be reported to trading venues by market participants, but concluded that such a measure would be excessively cumbersome for market participants. Alternatively, the FCA decided that trading venues would be granted the power, as part of their position management control mandate, to ask information on positions in a wider set

([18]) Delegated regulation - 2022/1299 - EN - EUR-Lex

of OTC contracts , where such positions pose a risk to the fair and orderly trading of their markets ([19]).

Feedback from stakeholders and assessment

The targeted consultation conducted by the Commission sought feedback from stakeholders on an extensive set of questions on position limits, position management controls and reporting.

- *Position limits*

A strong majority of respondents, including regulators and public authorities, considered that the current position limits regime functions adequately and has achieved its objectives of contributing to the prevention of market abuse and ensuring orderly trading. Stakeholders highlighted the fact that the CMRP reforms have allowed to mitigate the previously observed adverse effects on market depth and liquidity, and made the measure more targeted, proportionate and efficient. Overall, under the current setting, stakeholders were of the view that the current position limits regime has had no adverse impact on market liquidity, nor on the ability of market participants to hedge themselves, thanks to a well-functioning hedging exemption. In particular, several respondents pointed out that the better tailored post-CMRP hedging exemption proved particularly useful during the energy crisis, enabling efficient hedging.

Fact-finding conducted by the Commission based on NCA daily position data in TTF derivatives shows that, despite positions of some market participants at times moving close to the limits, such positions have systematically declined before they could exceed those limits. In the Commission's view, this demonstrates that position limits are functioning adequately and are set at appropriate levels.

The Commission also observes that position limits can help avoid excessive market concentration. In that regard, the Commission notes that the concentration of positions in the TTF derivatives market has steadily decreased from the top 10 participants representing around 50% of all long positions in July 2022 to around 35% at the end of 2024. ([20])

Most respondents, including most public authorities, considered that there is no need to change the scope of contracts captured by position limits, nor the type of positions captured. Respondents also almost unanimously rejected the suggestion of the Draghi report to differentiate position limits based on types of traders. The Commission considers that there is no discernible need to further differentiate the position limit regime per type of market participant, given the existing hedging exemption in MiFID II, which already allows for certain flexibility for non-financial firms, and the non-negligible risk of making the framework unnecessarily complex.

Some industry stakeholders noted that the procedures for applying for and granting hedging or liquidity provision exemptions were burdensome. 57% of respondents suggested that these tasks could be transferred to trading venues. Five trading venues and two exchanges associations, however, disagreed with this suggestion. In addition, two

([19]) This consultation was notably prompted among others by the events that had occurred on the London Metals Exchange in March 2022, which were linked to the building of large positions in the OTC market that were not visible to trading venue operators, thereby hindering their ability to fulfil their position management mandate.

([20]) Source: EEX and ICE data for Summer 2022 and 2024.

regulators mentioned that the role of trading venues should not be extended to the setting of position limits themselves, notably because of conflicting commercial interests between venues where the same contract is traded. The Commission also sees challenges in the latter case and would therefore consider that any delegation of tasks related to the setting of position limits should not be envisaged. Nonetheless, it appears that the process of granting hedging or liquidity provision exemptions could potentially be made more agile by delegating certain tasks, such as the processing of applications and validation of requests for exemptions, to trading venues, notably where no or little discretion is required.

Lastly, two respondents raised questions as regards the application of the EU position limits regime to positions entered into on third-country venues, and as regards the potential risk of circumvention that this implies. The current MiFID position limits regime may be subject to legal uncertainty as regards positions taken by EU investment firms and their clients on third-country venues offering trading in economically equivalent commodity derivative contracts and the extent to which such positions should be reported and count towards position limits – where such contracts are subject to position limits in the EU. This could contribute to an unlevel playing field between EU and third country venues, and create potential incentives to trade in economically equivalent derivatives on third country venues rather than on EU venues.

- *Position reporting and position management controls*

As regards position reporting, all but one respondent expressed concerns over possible obligations for market participants to systematically report OTC positions to trading venues to support their position management control mandate. Respondents point to a potential significant burden and to risks that this could lead to inappropriate sharing of commercially sensitive information. Stakeholders rather recommend a more efficient use of the existing reported data. Around 10% of respondents (notably three public authorities) suggested that the reporting of EEOTC positions should be extended to all market participants, and therefore apply to non-investment firms, notably for the purpose of ensuring adequate enforcement of position limits.

However, several of those stakeholders opposing systematic reporting of OTC positions to trading venues considered that trading venues should have the ability to request additional position information on a wider scope of OTC contracts, when positions in such contracts can influence the price of contracts traded on the same venue, and only in specific circumstances, such as during periods of market stress or heightened risk (as opposed to a systematic reporting). The Commission is of the view that this could enhance the capacity of trading venues to perform their position management controls and help monitor orderly trading and, eventually, preserve markets against financial stability risks, while limiting implementation costs compared to systematic reporting of OTC positions to trading venues.

Around 85% of respondents considered that financial and energy supervisors should have a comprehensive access to their respective data sets (e.g., NRAs should have access to MiFID/R data, while NCAs should have access to C6 carve-out and spot markets data). The Commission considers that this could be achieved through facilitated cooperation and data sharing (see data section).

Lastly, stakeholders' views on the potential extension of reporting of end-beneficiaries of positions held by non-EU market participants were split. While (notably EU-based) respondents overall agreed on the added value of such information, three respondents

pointed out the additional burden incurred and potential challenges in terms of ensuring compliance by non-EU market participants. Regulators strongly advocated for this reporting gap to be closed, including as regards transaction data. Two financial regulators and one energy regulator emphasised that the current system hinders proper oversight and leads to potential systemic vulnerabilities. It should be noted that the current rulebooks of key trading venues for commodity derivatives (notably energy derivatives) already mandate for such information to be provided, notably to comply with the reporting requirements under REMIT.

Conclusions of the Commission's assessment

Overall, the Commission considers that the current position limits regime functions adequately. No strong evidence points towards a need to neither tighten the regime, nor to loosen it. The Commission also estimates that the amendments brought by the CMRP have contributed to further deepening of commodity derivatives markets, notably in the energy derivatives segment.

The Commission sees potential for further exploring the conditions under which trading venues could be tasked with greater, yet well-framed, responsibilities in granting hedging and liquidity provision exemptions, as well as possibly ad hoc exemptions, with a view to making the measure more agile and more responsive to market trends, while avoiding a significant transfer of powers away from regulators. Specific safeguards, such as systematic (yet targeted) reporting to and regular reviews by national competent authorities, would need to be put in place to avoid any conflicts of interest and to allow supervisors to have a consolidated view of the existing exemptions. However, the Commission does not consider it appropriate to transfer the power to set position limits to trading venues.

As regards the application of position limits to positions entered into on non-EU venues, the Commission has, as part of the Market Integration and Supervision Package, proposed to clarify that positions held by EU investment firms and their clients in economically equivalent contracts traded outside an EU trading venue should contribute to the assessment of compliance with the position limit regime under MiFID. This would ensure the same treatment for positions in contracts traded on EU venues, on non-EU venues and OTC. This clarification is aligned with the policy objectives of strategic autonomy and EU competitiveness highlighted in the Draghi report, creating a level playing field across all trading venues, removing incentives for trading outside the EU, and avoiding possible circumvention of EU rules. It also ensures legal certainty for market participants, reducing costs associated with legal uncertainty.

To support trading venues in fulfilling their position management mandate and to ensure fair and orderly markets, the Commission could further explore the conditions under which trading venues could be entrusted with extended position management control powers to request, on an ad-hoc basis and in certain circumstances, information on the positions held by their market participants in a broader set of OTC contracts related to the commodity derivatives they offer for trading, and related assets and liabilities in the underlying commodity. This power should extend to all OTC contracts which have the ability of influencing the pricing or settlement conditions of the relevant on-venue contract in the EU. This proposal would also allow to better align the EU rules with the conclusions drawn by IOSCO in a recent report on the regulation and supervision of commodity derivatives

markets ([21]) where it recommended that further work should be done to improve the ability of exchanges to obtain information about market participants' positions in related OTC commodity derivatives and in the underlying physical commodity markets. The Commission, however, considers that any requirement for market participants to systematically report their positions in the underlying market and in a broad set of OTC contracts to trading venues would not be proportionate because of the burden such a measure could represent. For the same reason, reporting to supervisors of all positions in the underlying markets or in OTC contracts beyond reporting of EEOTC positions by investment firms, does not seem to be appropriate. Nevertheless, to level the playing field between different types of market participants, the Commission may consider whether the reporting of EEOTC positions could be extended to all market participants ([22]), to ensure the appropriate enforcement of position limits.

Finally, the Commission may consider to which extent a possible additional requirement on third-country market participants to submit information on end beneficiaries could be appropriate to close the gap in the current position reporting.

5. CONCLUSIONS

Responses from stakeholders, as well as the subsequent Commission assessment based on the analysis of market trends did not point to an urgent need to make substantive changes to the reviewed elements of the commodity derivatives framework, even though certain targeted amendments could be considered in the future.

([21]) https://www.iosco.org/library/pubdocs/pdf/IOSCOPD781.pdf.

([22]) That is to say, beyond investment firms and non-investment firms transacting through an investment firm.