



European Securities and
Markets Authority

Response Form to the Consultation Paper

Technical standards for commodity derivatives



Responding to this paper

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions summarised in Annex I. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **23 July 2021**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Please do not remove tags of the type <ESMA_QUESTION_CD_1>. Your response to each question has to be framed by the two tags corresponding to the question.
3. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
4. When you have drafted your response, name your response form according to the following convention: ESMA_PFG_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_PFG_ABCD_RESPONSEFORM.
5. Upload the form containing your responses, in Word format, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open consultations" → "Consultation on Position limits and position management in commodities derivatives").



Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

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Who should read this paper

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



General information about respondent

Name of the company / organisation	Deutsche Börse Group
Activity	Regulated markets/Exchanges/Trading Systems
Are you representing an association?	<input type="checkbox"/>
Country/Region	Germany

Introduction

Please make your introductory comments below, if any

<ESMA_COMMENT_CD_00>

Deutsche Börse Group (DBG), notably its two derivative exchanges the European Energy Exchange Group (EEX Group) and Eurex Frankfurt AG (Eurex), welcomes the opportunity to provide feedback to the draft Regulatory Technical Standards (RTS) ESMA is required to develop pursuant the EU Directive (EU) 2021/338 or the so-called “MiFID II Quick-Fix”

It is our pleasure to share our general market surveillance experiences, including the experience we have gained with the implementation of the MiFID II position limits regime and position management provisions.

Draft RTS 21a

Overall, we are supportive of the suggested changes and believe they will improve the position limits regime.

Particularly for new and less liquid agricultural commodity derivatives, we believe that the proposals will substantially improve the status quo. Setting both the spot month and other months position limits at 10,000 lots for contracts below 20,000 lots open interest is a very much welcomed proposal that will allow for the further development of new and illiquid agricultural commodity derivative contracts in Europe (see Question 12 for further details).

There are two proposals, however, we believe might have a negative impact on more liquid but still growing agricultural commodity derivative markets. Both are related to contracts for which the deliverable supply is substantially or significantly higher than the open interest:



1) In Art. 12 on deliverable supply, ESMA proposes to set the baseline for the spot month position limit based on 25% of open interest instead of on 25% of deliverable supply (see Question 9 for further details).

2) In Art. 19 on the overall open interest, ESMA proposes to adjust the spot month position limit downwards (see Question 13 for further details).

Both proposals seem to suggest that position limits should be tightened if the deliverable supply is substantially higher than the open interest. However, such a situation is inherent to markets for which exchange-trading remains underdeveloped and most trading takes place bilaterally, i.e. most commodity derivative markets in Europe. A substantially higher deliverable supply does not mean that markets are more vulnerable to market cornering. Rather the opposite is true. It would be close to impossible to “squeeze” a contract of which the open interest reflects only a small share of the overall physical market supply. Moreover, the proposals would risk hampering the move from bilateral trading to regulated on-exchange trading (please see our responses to Questions 9 and 13 for a detailed explanation).

Amendment to ITS 4

We support all ESMA's proposals.

Draft RTS on position management controls

We believe that, if deemed necessary by ESMA, it is essential that these position management controls

1) Continue to be an integral part of wider and more sophisticated market surveillance arrangements which are already in place, and

2) Continue to be cautiously calibrated and tailored to the individual circumstances of each trading venue.

If considered in isolation or when individual circumstances are not taken into account, the position management controls as proposed by ESMA risk putting a disproportionate compliance burden on both the exchanges' Market Surveillance Departments and trading participants' compliance departments with little contribution to market integrity.

We explain in more detail on the basis of ESMA's proposal.

2. A) General monitoring obligations.

Generally, we are supportive of the proposal for exchanges to have arrangements in place for the ongoing monitoring of positions of the final beneficiaries and parent undertakings. (For further details and one important caveat please see our response to Question 16.)

2. B) Accountability levels

It is noteworthy that information about positions alone does not give sufficient indication about possible market manipulation. The detection and prevention of market abuse is primarily based on the constant monitoring of trading behaviour, i.e. orders, trades and prices thereof. The monitoring takes place via numerous automated processes and alerts. For certain types of market manipulation, such as market cornering, however, also positions can be a valuable source of information. This information is leveraged from Eurex and EEX' clearing houses, the position reports stemming from MiFID II Art. 58 and additional information requests.

In our understanding, the proposal from ESMA to require exchanges to set position accountability levels would generally imply a further degree of automation of the current monitoring of positions.

If such accountability levels are deemed necessary from an evidence-based point of view, it is of utmost importance that ESMA:

- 1) Introduces the necessary discretion for exchanges to set accountability levels as they deem appropriate, and**
- 2) Maintains the necessary discretion for exchanges to send an additional information request as they deem appropriate.**

2. B. 1) Discretion to set accountability levels

Accountability levels need to be cautiously calibrated and tailored to the individual circumstances of each trading venue such as the nature of its membership as well as the characteristics and underlying markets of the contracts it offers for trading.

While it is evident that financially settled contracts would not be in focus of such accountability levels, there are more parameters important for assessing whether an accountability level for a commodity derivative contract would be appropriate and meaningful for market surveillance purposes. Other parameters to be considered are for example the ratio OTC trading versus on-exchange trading, the liquidity established in the respective contract and whether it is easy to control the delivery of the underlying commodity.

We believe it should be at the discretion of the trading venue to determine which physically-settled commodity derivatives would benefit from a position accountability level as one harmonised methodology is unlikely to provide for sufficient granularity for the broad variety of products trading venues offer for trading.

As proposed in Art. 3 of the draft RTS, the methodology should be communicated towards the national competent authority who should have the right to question the methodology.

2. B. 2) Discretion to send additional information request

Apart from automated surveillance processes and alerts when thresholds are being exceeded, market surveillance activities are largely based on a trading venue's in-depth understanding of

the market as well as detailed knowledge about its members and their trading strategies. Clear provisions in the regulations and the market rules already entitle the EEX and Eurex Market Surveillance Departments to request detailed information to market participants whenever there is a suspicion of market abuse. **Imposing mandatory additional information requests due to a breach of accountability levels on positions alone will not increase the effectiveness of the market surveillance.** We are concerned that, instead, such requirements as proposed in Art 2. Para 2 and 3 would require significant resources from both exchanges and trading participants, while the additional information requests are highly unlikely to result in any additional findings. This is because, as already mentioned, **the EEX and Eurex Market Surveillance Departments base their appreciation of potential market abuse on a combination of several aspects of trading behaviours, not only the open position.** It uses its in-depth understanding of the market and trading participants to differentiate between ordinary market practices and suspicious activities.

For example, it may be appropriate for a firm to exceed accountability levels on a relatively frequent basis when the firm in question has a naturally large position in a given market due to its physical exposure in that market. Mandatory information requests and investigations each time a breach occurs could considerably burden both the firm and the exchange's Market Surveillance Department when both are already familiar with the reason for the firm's activities. This could also simply be the case when the accountability level is being repeatedly exceeded for the reasons already explained to the Market Surveillance Department. The experience with market participants as well as the expertise of the trading venue in operating the market, justifies leaving more discretion to the trading venue.

In addition, from a market surveillance perspective it might not be useful to immediately act when an accountability level is exceeded. As market cornering only becomes possible a few days before the delivery of a contract, the Market Surveillance Department should be able to wait to investigate until closer to delivery. They might also want to act before a threshold is exceeded.

In sum, imposing mandatory information requests aims at standardising an already existing practice that is too complex to standardise. Every case or irregularity is an individual case and needs to be assessed carefully if an information request would be appropriate and if so, which content or questions should be included. Standardisation risks making this process lose its value.

3. In line with MiFID II and the CFTC

We believe that the above proposed discretion for exchanges is in line with MiFID II Art. 57 para. 8 which refers to "powers" rather than a requirement for the trading venues. In addition, it is particularly well aligned with the stipulation that ESMA should specify the position management controls taking into account the characteristics of the trading venues concerned.

The proposed discretion would also be well aligned to the overall position limits and position management controls framework under which trading venues operate in the U.S. The CFTC Final Rulemaking from 2021, for all physical contracts that do not have Federal Position Limits (Federal Position Limits are set for 25 core referenced futures contracts), provides exchanges flexibility in setting spot and non-spot month position limits or accountability levels. The

CFTC does not obligate exchanges, but rather authorizes them to set accountability levels or exchange position limits on the majority of commodity derivative contracts and stresses the flexibility exchanges receive whilst doing so. Depending on the product, this shall be done during the spot month and/or non-spot months. These levels are subject to the exchange's assessment whether they are deemed "necessary and appropriate" to reduce the potential threat of market manipulation or price distortion of the contract's underlying price or index.

Exchanges have discretion to establish accountability levels or exchange position limits based on example formulas and acceptable practices provided by the CFTC. These practices constitute additional, yet non-binding guidelines and exchanges have the flexibility to develop other approaches. For example, exchanges are generally required to set spot month exchange position limits no greater than 25% of deliverable supply but they can use other approaches if they deem them "necessary and appropriate", subject to the CFTC's review. For non-spot months, exchanges have flexibility to set either exchange position limits or accountability levels, whichever they deem appropriate, provided that the position limits or accountability levels set are deemed "necessary and appropriate" to reduce the potential threat of market manipulation or price distortion of the contract's underlying price or index.

Whilst the monitoring of these exchange accountability levels is an integral part of the U.S. based exchanges' oversight activities, additional information requests by the exchanges typically do not automatically follow when a market participant would exceed them. Given exchanges' deep knowledge of its markets, its knowledge of its market participants' trading practices, and its regular close interactions with market participants, formal information requests typically only occur when the surveillance department sees no rationale behind trading activity taking into account, for example, the respective market participant's physical exposure or hedging strategies.

4. The proposal

Concretely, to introduce the necessary discretion for exchanges, we recommend that in Paragraphs 1, 2 and 3 and the second part of Paragraph 4 of Article 2 of the draft RTS the word "shall" should be replaced by "may".

The amended Article 2 would then read as follows:

*1. As part of their position management controls, trading venues **offering trading in trading commodity derivatives may shall** set accountability levels in the spot month as defined in Article 2(3) of Commission Delegated Regulation [RTS 21a] and in the other months as defined in Article 2(4) of Commission Delegated Regulation [RTS 21a]. ~~at least~~ for the physically settled commodity derivatives made available for trading.*

*2. For the purpose of paragraph 1, an accountability level is the level of the net position held in a commodity derivative by persons with close links that, when exceeded, ~~shall~~ **may** trigger an additional information request by the trading venue. as to the nature and purpose of the position*

3. When a net position held by persons with close links in a commodity derivative referred to in paragraph 1 exceeds the accountability level set for the spot month or for

*the other months in accordance with paragraph 1, the trading venue shall **may** exercise the power set out in point (b) of the first subparagraph of Article 57(8) of Directive 2014/65/EU to obtain any additional information as to the nature and purpose of the position held in that commodity derivative.*

*4. The trading venue shall assess the information provided and, where appropriate, **may** exercise the powers set out in points (c) and (d) of the first subparagraphs Article 57(8) of Directive 2014/65/EU.*

Alternatively, the drafting could also be more closely aligned with the wording of the CFTC Final Rulemaking by each time using the words “shall [...] as they deem necessary and appropriate” which encapsulates the more flexible approach the US is taking.

The amended Article 2 would then read as follows:

*As part of their position management controls, trading venues **offering trading in trading** commodity derivatives shall set accountability levels in the spot month as defined in Article 2(3) of Commission Delegated Regulation [RTS 21a] and in the other months as defined in Article 2(4) of Commission Delegated Regulation [RTS 21a] **as they deem them necessary and appropriate** ~~at least~~ for the physically settled commodity derivatives made available for trading.*

*2. For the purpose of paragraph 1, an accountability level is the level of the net position held in a commodity derivative by persons with close links that, when exceeded, shall trigger an additional information request by the trading venue **as deemed necessary and appropriate** as to the nature and purpose of the position,*

*3. When a net position held by persons with close links in a commodity derivative referred to in paragraph 1 exceeds the accountability level set for the spot month or for the other months in accordance with paragraph 1, the trading venue shall **as deemed necessary an appropriate** exercise the power set out in point (b) of the first subparagraph of Article 57(8) of Directive 2014/65/EU to obtain any additional information as to the nature and purpose of the position held in that commodity derivative.*

4. The trading venue shall assess the information provided and, where appropriate, exercise the powers set out in points (c) and (d) of the first subparagraphs Article 57(8) of Directive 2014/65/EU.

With regard to potential further ESMA guidance on the methodology, we believe that for this particular topic it might be more suitable for ESMA to act as a platform for NCAs to share best practices with a view to ensure convergence rather than to seek harmonisation. This is because one harmonised methodology is unlikely to provide for sufficient granularity to be suitable for the broad variety of products trading venues offer for trading.

Moreover, we are firmly of the view that trading venues do not compete by lowering standards for market surveillance practices or could obtain any competitive advantage by not implementing an adequate methodology for setting accountability levels. The opposite is true.



Strong market surveillance practices that ensure the integrity of the market bring confidence to market participants and make trading venues more attractive.

Finally, please note that throughout our response we only focus on the position limits and position management controls' objective to prevent market cornering. We do not believe these tools play a role in supporting orderly pricing and settlements. This is because not open positions, but trading activities affect orderly pricing and settlement. In particular, the settlement price is based on order prices, trade prices or fair values and is entirely independent of the positions of market participants. Hence, orderly pricing and settlement are primarily ensured through the established surveillance of orders, trades and the prices thereof.

<ESMA_COMMENT_CD_00>



Questions

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

<ESMA_QUESTION_CD_01>

Yes, we agree and support ESMA's proposal. Replicating the arrangements for qualifying positions for the hedging exemption currently in place for Non-Financial Entities (NFEs) ensures consistency between the various exemptions and allows them to be used by financial entities (FEs) in a non-discriminatory manner.

<ESMA_QUESTION_CD_01>

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

<ESMA_QUESTION_CD_02>

Yes, we agree and support ESMA's proposal. We believe it is helpful to have an identical approach for classifying transactions as risk reducing for all positions held by FEs and NFEs that qualify for a hedging exemption under the MiFID II position limit regime.

<ESMA_QUESTION_CD_02>

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

<ESMA_QUESTION_CD_03>

Yes, we agree and support the proposal. Mirroring the application procedure for NFEs to the extent possible provides for the equal treatment of the various market participants when applying for a hedging exemption and there are no apparent reasons for any differentiation.

<ESMA_QUESTION_CD_03>

Q4 : Do you agree with ESMA's proposal on the application procedure for mandatory liquidity provision exemption? If not, please elaborate and provide an alternative proposal.

<ESMA_QUESTION_CD_04>

Yes, we agree and support the proposal.

<ESMA_QUESTION_CD_04>

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



<ESMA_QUESTION_CD_05>

Yes, we agree and support the proposal.

<ESMA_QUESTION_CD_05>

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

<ESMA_QUESTION_CD_06>

Yes, we agree and support the proposal.

<ESMA_QUESTION_CD_06>

Q7 : Do you agree with ESMA's proposal regarding the aggregation and netting of positions in a commodity derivative? If not, please elaborate and provide an alternative proposal where available.

<ESMA_QUESTION_CD_07>

1. We support ESMA's proposal to delete the reference to "the same commodity derivative".
2. We do not believe "spread contracts" require a special treatment under the position limit regime. To our knowledge, the "spread contracts" referred to are not outright contracts. In fact, they are merely a trading strategy whereby two combined orders in at least two different contracts (for example two different maturities) are executed simultaneously. Both of those legs count towards the position limits of the respective outright futures contracts. From this perspective, and this has been recognised by the answer to Question 10 of the ESMA Q&A on MiFID II / MiFIR commodity derivatives topics, we believe it is unnecessary to specify in Art. 3 par. 2 that the positions of disaggregated components of a "spread contract" need to be aggregated for the purpose of determining the position of a person in a commodity derivative.
3. Although EEX currently does not offer "minis" or "balmos", we agree with the proposal to aggregate the positions of commodity derivatives that are based on the same underlying and share almost the same specifications as the principal or main commodity derivative traded on the same trading venue.

<ESMA_QUESTION_CD_07>

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

<ESMA_QUESTION_CD_08>

Yes, we agree and support the proposal.

<ESMA_QUESTION_CD_08>

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

<ESMA_QUESTION_CD_09>

We are seriously concerned about the negative effects of such a proposal and question the reasoning behind it.

Only deliverable supply is a proper reflection of a persons' ability to squeeze or corner a market. Where deliverable supply is high in comparison to the respective position a person holds, this person has little power to "squeeze" or corner a market. This is because other position holders can easily close out their positions via the mechanism of physical delivery.

As many exchange-traded commodity derivatives markets in Europe are still relatively illiquid compared to the total available commodity, it is a direct consequence that in these markets the deliverable supply will be substantially higher than the open interest. Setting the baseline for the spot month limit at 25% of open interest in these cases would have no economic foundation (See also our answer to Question 18) and would be unjustified for two reasons:

- 1) A substantially higher deliverable supply does not mean that markets are more vulnerable to market cornering. Rather the opposite is true. It would be close to impossible to "squeeze" a market of which the open interest reflects only a small share of the overall physical market supply. More logical would be the opposite reasoning, i.e. in case that the deliverable supply is substantially higher than the open interest, an upwards review of the position limit of the other month contract would be needed. (See also our response to Question 13 for further details.) The proposal is particularly questionable from the point of view that EEX commodity derivative contracts are cash-settled and hence, as explained in Question 17, highly unlikely to ever be cornered.
- 2) It would penalise the spot month contract for the lack of development of the exchange-traded commodity market or, in case trading is already taking place at a competing regulated market, hamper the development of a newly introduced on-exchange contract. As a situation in which the deliverable supply is substantially higher than the open interest reflects a market with substantial growth potential, a limit based on open interest is destined to restrict further growth in the respective contract and discourages the move from bilateral off-exchange trading to regulated on-exchange trading.

At DBG, we envisage this to become a significant problem when our EEX dairy futures will, over the coming years, exceed the 20,000 lots liquidity threshold. As our market participants will often hold contracts until cash settlement takes place, the open interest often remains high towards the point of expiry and can be substantially higher in the spot month than is usually observed in contracts based upon physical delivery. If the open interest would be used as a baseline for the spot month position limit, we believe it could put a severe obstacle to further growth of these contracts.

As explained in our answer to Question 12, these agricultural derivative contracts will become an even more important risk management tool, as the EU Common Agricultural Policy becomes more market oriented and European agriculture becomes increasingly integrated in global markets. Tightening the position limits without evidence-based concerns about market manipulation not addressed by current market surveillance arrangements, is set to make it

more difficult for agricultural players to use these futures markets to mitigate exposure to price volatility.

As the consultation paper reads that in this case “the spot month is deprived of any effect”, we would like to warn that the mere objective of a position limit cannot be the curbing of speculative trading. Academics widely agree increased participation of speculators leads to better price discovery and less unwarranted price volatility. It is important to realise that although commodity futures markets are viewed as “hedging” markets, there is a vital role for speculators because there will not always be an even balance of short hedgers and long hedgers at any one time. Speculators are needed to balance the market. By taking on risk that other market participants wish to mitigate, they provide liquidity to the market and hence contribute to price discovery and market efficiency.

If spot month position limits of certain contracts are not breached, the immediate conclusion should not be that the spot month position limit is too high, but rather that there is sufficient deliverable supply to close out a position and hence no risk of market cornering.

In conclusion, we strongly recommend omitting the proposal to add “*Where the deliverable supply is substantially higher than the total open interest, competent authorities shall determine the baseline figure for the spot month limit by calculating 25% of the open interest in that commodity derivative.*” to Art. 11 para. 1 and para. 4 and suggest maintaining the current regime.

<ESMA_QUESTION_CD_09>

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

<ESMA_QUESTION_CD_10>

While we understand this approach would be a feasible way forward for some commodity asset classes, we would like to caution that the same approach might not be appropriate for other asset classes. For example, like many other commodity markets, agriculture markets follow seasonal patterns. As there are years of high- and years of low-yields, a two-year reference period would for example be advisable.

We therefore strongly recommend to take the same approach as is being proposed for determining the open interest figure in Art. 14 of the draft RTS 21a, i.e. the NCA calculates deliverable supply “over a representative period of time” which would depend on the characteristics of the commodity derivative.

<ESMA_QUESTION_CD_10>

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

<ESMA_QUESTION_CD_11>

We support ESMA’s proposal to calculate open interest on a net basis, based on position reporting data.

On a related note, although not explicitly consulted upon, we believe that in Art. 14 para. 1 it should indeed be clear that in the case of two critical contracts that are based on the same underlying and that share the same characteristics “*Competent authorities shall calculate the net open interest in a commodity derivative by aggregating the number of lots of that commodity derivative that are outstanding on trading venues ...*”. In the case of two critical contracts that are based on the same underlying and that share the same characteristics, the single other month position limit that the competent authority will be responsible for according to MiFID II Art. 57 para. 6 should indeed refer to the open interest of both venues.

We strongly support the proposal to calculate open interest “over a representative period of time” which would depend on the characteristics of the respective commodity derivative. This flexibility will help set the appropriate basis for determining a position limit. However, when it comes to Art. 14 para. 2, we believe the same flexibility is needed in special circumstances, such as trading moving from one venue to another due to a merger or from one contract to another due to an index transfer. As a matter of fact, it is notably in these special circumstances that sufficient flexibility should be granted for NCAs to determine a suitable and forward-looking “representative period of time”.

To demonstrate: In September 2021 the two German market areas Gaspool (GPL) and NetConnect Germany (NCG) will merge into a new gas hub called “Trading Hub Europe” (THE). For EEX this means the following: As of 1 October 2021, NCG Futures will be renamed to THE Futures and will comprise the new combined market area and will be continued to be offered for trading. In contrast, GPL Futures will not continue to be offered for trading. Open interest existing in GPL Futures, if any, will be fulfilled in the new THE market area.

In this special case, setting new other months position limits based on the past six months’ open interest figures would not make sense. This is because those figures do not reflect a normal market situation. There are two reasons for this: 1) Because market participants anticipate the merger, they do no longer take positions on GPL for long maturities and hence the open interest in GPL has decreased in the last couple of months. In contrast, the expected increase in liquidity in the NCG/THE market area did not yet materialise. 2) Due to the seasonality of the gas market and subsequent fluctuation in open interest throughout the year, we are at a moment of relatively low open interest figures.

In this case a representative period of time would be the 3rd quarter of 2020, both because of the need to look at more historical data as well as to take into account the seasonality of the gas market. Market participants typically build up their position ahead of the winter and ahead of next years.

The example demonstrates one more concern regarding ESMA’s proposal: The current description to capture special circumstances might be too narrow. For example, the upcoming German gas market merger is an event beyond the control of the trading venues, which leads to trading being transferred from two commodity derivatives to one commodity derivative newly admitted to trading on the same trading venue.

We therefore recommend that Art. 14 para. 2 is amended as follows:

*“By way of derogation to paragraph 1, when trading in a commodity derivative is transferred from one **or more** EU or third country trading venues to an EU trading venue following **for example** a merger, **business transfer** or other corporate event or from one or more existing commodity derivatives **to one or more commodity derivatives** newly admitted to trading on the same trading venue **or in any other circumstances comparable to the before described events**, the competent authority shall calculate the open interest in that commodity derivative by taking into account the open interest on the former venues or in the former commodity derivatives ~~for a six-month period~~. The competent authority shall then calculate the open interest in accordance with paragraph 1.”*

<ESMA_QUESTION_CD_11>

Q12 : Do you see merit in the new approach considered by ESMA for new and less liquid agricultural commodity derivatives? If not, please elaborate and provide an alternative proposal.

<ESMA_QUESTION_CD_12>

Yes, we see merit in the new approach and strongly support the ESMA's proposal. The suggested approach constitutes indeed a very suitable way forward for new and less liquid agricultural commodity derivatives. These derivatives are key to help agricultural players manage their risks, especially as the EU Common Agricultural Policy becomes more market oriented and European agriculture becomes increasingly integrated in global markets. These developments make agricultural players become increasingly exposed to market risks such as price volatility and hence in high need of risk management tools.

The Agricultural Markets Task Force set up by the European Commission in 2018 acknowledges the importance of futures markets as an important risk management tool. It also acknowledges that it takes time to develop such markets and that one of the key challenges in developing liquid futures markets is attracting a sufficient number of users.

For further information on the challenges involved in setting up and developing futures markets can be found in chapter 6 of the Task Force' [full report](#).

<ESMA_QUESTION_CD_12>

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

<ESMA_QUESTION_CD_13>

We welcome that Art. 19 para. 3 clarifies that where the open interest is significantly lower than the deliverable supply, NCAs shall adjust the other months' position limit upwards to avoid the risk of unduly constraining trading. However, as stated in our response to Q9, we consider it inappropriate to adjust the spot month position limit downwards in this case.

As many-exchange traded commodity derivative markets in Europe are still relatively illiquid compared to the total available commodity, it is a direct consequence that in these cases the

deliverable supply is substantially higher than the open interest. Adjusting the spot month position limit downwards is unjustified for two main reasons:

1. A substantially higher deliverable supply does not mean that markets are more vulnerable to market cornering. Rather the opposite is true. It would be close to impossible to “squeeze” a contract of which the open interest reflects only a small share of the overall physical market supply. More logical would be the opposite reasoning, i.e. in case that deliverable supply is substantially higher than open interest, an upwards review of the position limit of the other month contract would be needed. (See also our response to Question 13 for further details.) The proposal is particularly questionable from the point of view that EEX commodity derivative contracts are cash-settled and hence, as explained in Question 17, highly unlikely to ever be cornered.

2. It would penalise the spot month contract for the lack of development of the exchange-traded commodity market or, in case trading is already taking place at a competing regulated market, hamper the development of a newly introduced on-exchange contract. As a situation in which the deliverable supply is substantially higher than the open interest reflects a market with a substantial growth potential, a limit based on open interest is destined to restrict further growth in the respective contract and discourages the move from bilateral trading to regulated on-exchange trading.

As the consultation paper reads that in this case “the spot month is deprived of any effect”, we would like to warn that the mere objective of a position limit cannot be the curbing of speculative trading. Academics widely agree increased participation of speculators leads to better price discovery and less unwarranted price volatility. It is important to realise that although commodity futures markets are viewed as “hedging” markets, there is a vital role for speculators because there will not always be an even balance of short hedgers and long hedgers at any one time. Speculators are needed to balance the market. By taking on risk that other market participants wish to mitigate, they provide liquidity to the market and hence contribute to price discovery and market efficiency.

If spot month position limits of certain contracts are not breached, the immediate conclusion should not be that the spot month position limit is too high. But rather that there is sufficient deliverable supply to close out a position and hence no risk of market cornering.

As stated in our response to Question 9 we believe that adjusting the spot month position limit downwards in this case is unjustified and risks forming an obstacle to further growth.

We therefore recommend amending Art. 19 para. 3 as follows: “*Where the open interest is significantly lower than the deliverable supply, competent authorities shall adjust the other months’ position limit upwards and the spot month position limit downwards.*”

<ESMA_QUESTION_CD_13>

Q14 : Do you agree with ESMA’ proposal regarding the upward adjustment factor to be used in case of a small number of market participants or less than three investment firms acting as market makers? If not, please elaborate and provide an alternative proposal.



<ESMA_QUESTION_CD_14>

Yes, we agree and support the proposal.

<ESMA_QUESTION_CD_14>

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

<ESMA_QUESTION_CD_15>

Yes, we share the analysis regarding the hedging exemption and liquidity provision exemption. Only the legal reference to "RTS21" of the hedging field should be amended to "RTS21a".

<ESMA_QUESTION_CD_15>

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

<ESMA_QUESTION_CD_16>

Please also refer to the introductory statement of the present response.

We generally support the proposal for exchanges to have arrangements in place for the ongoing monitoring of positions held by the end position holder. However, there is one important caveat. "Persons with close links" is a foreign concept for EU commodity derivative trading venues, which have no access to such information. It would require a highly sophisticated and expensive system and legal arrangements to collect these "close links" and keep them updated. It furthermore creates an inconsistency between the various components of the requirements applicable to commodity derivatives markets, including the position limit regime, the position reporting requirements and the position management controls.

It is therefore highly recommended that the concepts already present in the commodity derivatives section of MiFID II are used: As part of their obligation under Art. 58 par. 3 market participants need to provide the trading venue with information about the position holder as well as its ultimate parent undertaking. The latter will allow the Market Surveillance Department to also monitor positions related to the same parent undertaking and assumedly meet the intention behind the introduction of the concept of "persons with close links".

<ESMA_QUESTION_CD_16>

Q17 : Do you agree with ESMA's suggestion to introduce accountability levels as part of position management controls? Do you agree with ESMA's assessment that accountability levels would be of particular relevance for physically settled commodity derivatives? If not, please elaborate and provide alternative proposals.

<ESMA_QUESTION_CD_17>

Please also refer to the introductory statement of the present response.

Do you agree with ESMA's suggestion to introduce accountability levels as part of position management controls?

First of all, if ESMA were to maintain its proposal to require trading venues to set accountability levels, it is of utmost importance that these position management controls:

- 1) Continue to be an integral part of wider and more sophisticated market surveillance arrangements which are already in place, and
- 2) Continue to be cautiously calibrated and tailored to the individual circumstances of each trading venue.

Concretely, this means that ESMA should:

- 1) Introduce the necessary discretion for exchanges to set accountability levels as they deem appropriate, and
- 2) Maintain the necessary discretion for exchanges to send an additional information request as they deem appropriate.

If considered in isolation or when individual circumstances are not taken into account, the position management controls as proposed by ESMA risk putting a disproportionate compliance burden on both the exchanges' Market Surveillance Departments and trading participants' compliance departments with little contribution to market integrity.

For further details, please refer to our introductory statement.

Do you agree with ESMA's assessment that accountability levels would be of particular relevance for physically settled commodity derivatives? If not, please elaborate and provide alternative proposals.

It is evident that financially settled contracts would not be in focus of such accountability levels. This is because in a financially settled contract the settlement price at expiration is set equal to the value of some reference price or index value derived from the spot market during the delivery period. E. g. The EEX Phelix DE power future uses the Physical Electricity Index (Phelix) which refers to the base load and peak load price index published daily on the power spot market for the German/Austrian market areas.

We therefore recommend omitting "at least" from Art. 2. Para. 1. The amended paragraph would then read as follows:

*1. As part of their position management controls, trading venues **offering trading in trading** commodity derivatives **may** set accountability levels in the spot month as defined in Article 2(3) of Commission Delegated Regulation [RTS 21a] and in the other months as defined in Article 2(4) of Commission Delegated Regulation [RTS 21a] ~~at least~~ for the physically settled commodity derivatives made available for trading.*

However, there are more parameters important for assessing whether an accountability level for a commodity derivative contract would be appropriate and meaningful for market surveillance purposes. Other parameters to be considered are for example the ratio OTC



trading versus on-exchange trading, the liquidity established in the respective contract and whether it is easy to control the delivery of the underlying commodity.

We believe it should be at the discretion of the trading venue to determine which physically-settled commodity derivatives would benefit from a position accountability level as one harmonised methodology is unlikely to provide for sufficient granularity for the broad variety of products trading venues offer for trading. ESMA could potentially provide for a platform for NCAs to share best practices with a view to ensure convergence rather than to seek harmonisation

As proposed in Art. 3 of the draft RTS, the methodology should be communicated towards the national competent authority who should have the right to question the methodology.

Moreover, we consider that such discretion would also be better aligned with the CFTC position management regime and the position management controls stipulated in Art. 57 para. 8 of MiFID II which entrusts exchanges with powers rather than imposing prescriptive requirements on them.

<ESMA_QUESTION_CD_17>

Q18 : In your view, how should accountability levels be set for the spot month and the other months? Based on which methodology or criteria? Should all types of positions count towards the accountability levels?

<ESMA_QUESTION_CD_18>

Please also refer to the introductory statement of the present response.

In your view, how should accountability levels be set for the spot month and the other months?

First of all, if ESMA was to maintain its proposal to require trading venues to set accountability levels in addition, we believe that ESMA should at least introduce the necessary discretion for exchanges to 1) set accountability levels as they deem appropriate, and 2) send an additional information request as they deem appropriate.

That being said, we can imagine accountability levels to apply throughout the whole curve. However, as market cornering only becomes possible a few days before delivery, we would not expect it to be useful for an information request to be sent if a breach occurs more than a certain amount of days before delivery of a contract. The Market Surveillance Department should be able to assess when would be the right timing for sending an additional information request. On the other hand, it should also be possible for them to reach out before a threshold is exceeded.

Again, it will depend on different factors such as the characteristics of the contract as well as on the respective trading participant's background which would be the most suitable way forward. The introduction of a harmonised methodology for setting accountability levels is unlikely to provide for sufficient granularity to be suitable for the broad variety of products trading venues offer for trading.

Based on which methodology or criteria?

As explained in our responses to Question 9 and Question 13, only deliverable supply is a proper reflection of a persons' ability to squeeze or corner a market. Where deliverable supply is high in comparison to the respective position a person holds, this person has little power to "squeeze" or corner a market. This is because other position holders can easily close out their positions via the mechanism of physical delivery.

This approach is being confirmed by the CFTC who advises exchanges to use deliverable supply as a baseline for setting the general accountability level. (For further details, please refer to our introductory statement.)

Open interest on the other hand cannot be used as a proxy for a person's ability to squeeze or corner the market as it is very rarely reflects the deliverable supply. (Please also refer to our response to Question 9 and Question 13.) As many exchange-traded commodity derivatives markets in Europe are still relatively illiquid compared to the total available commodity, it is a direct consequence that in these cases the open interest will be substantially lower than the deliverable supply. Please note that for other financial instruments this might be different and open interest might be a useful baseline.

If open interest is used as a baseline in the context of commodity derivatives, it merely represents the objective to curb (speculative) trading. A more detailed explanation can be found in [this](#) MIT masters research on "price distortions in the commodity futures market" from 2012, by Devin Helfrich.

We would strongly advise against such an objective. (Please note also the [policy brief](#) of the Food and Agriculture Organization of the United Nations (FAO) from 2012 on this topic.) Academics widely agree increased participation of speculators leads to better price discovery and less unwarranted price volatility. It is important to realise that although commodity futures markets are viewed as "hedging" markets, there is a vital role for speculators because there will not always be an even balance of short hedgers and long hedgers at any one time. Speculators are needed to balance the market. By taking on risk that other market participants wish to mitigate, they provide liquidity to the market and hence contribute to price discovery and market efficiency.

Should all types of positions count towards the accountability levels?

We believe they generally should, but again warn that the Market Surveillance Department should have the discretion to determine whether an additional information request, in case of a breach of an accountability level, is appropriate or not. For its decision, the Market Surveillance Department will consider the information about the character of the position, such as whether the position has a risk-reducing or liquidity provision purpose or not. This information is available to the exchanges through the position reports laid down in MiFID II Art. 58.

<ESMA_QUESTION_CD_18>

Q19 : Do you agree with ESMA's suggestion to introduce requirements for the review of accountability levels? Do you also agree with ESMA's proposal regarding reporting requirements to the NCA on accountability levels? If not, please elaborate.

<ESMA_QUESTION_CD_19>

Yes, we agree with the suggestion and proposal. In order to monitor whether the exchanges properly use their discretion to set accountability levels as they deem appropriate, NCAs should have the opportunity to review the respective methodology.

<ESMA_QUESTION_CD_19>

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

<ESMA_QUESTION_CD_20>

Please see our introductory statement. The MiFID II requirements on position reporting and position management have been a welcome and useful addition to the overall market oversight framework. Ideally, the new RTS on position management controls would focus on optimising the quality of these reports and leveraging their use for other market surveillance purposes.

<ESMA_QUESTION_CD_20>

Cost Benefit Analysis

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

<ESMA_QUESTION_CD_21>

TYPE YOUR TEXT HERE

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

<ESMA_QUESTION_CD_21>

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

<ESMA_QUESTION_CD_22>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CD_22>

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

<ESMA_QUESTION_CD_23>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CD_23>

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

<ESMA_QUESTION_CD_24>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CD_24>

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

<ESMA_QUESTION_CD_25>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CD_25>

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

<ESMA_QUESTION_CD_26>

Yes, we believe that the absence of sufficient discretion for the exchange to implement the accountability levels as proposed by ESMA in an appropriate manner and the extension of the position management controls to cover 'persons with close links' are likely to result in a significant cost to the exchange and market participants.

As outlined in our introductory remarks in detail, following ESMA's current proposal, any breach of an accountability level would require the exchange to investigate and obtain a substantial amount of information from market participants. These mandatory information requests would come on top of the information requests that are an integral part of market surveillance

processes already. DBG exchanges will have to hire additional market surveillance staff to handle all investigations prompted by alerts and market participants will have to hire additional compliance staff to respond to all information requests. All of this is very unlikely to contribute to market integrity.

The extension of the scope of the position management controls to cover 'persons with close links' would require new daily reporting arrangements between the exchange and their clients to be developed, as the information about affiliates covered under the 'persons with close links' requirement is not covered in existing MiFID II position reporting arrangements. This would imply a considerable investment for exchanges, while the existing concepts within MiFID II are considered to meet the same objective.

<ESMA_QUESTION_CD_26>

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

<ESMA_QUESTION_CD_27>

We would assess the estimated compliance costs with the draft RTS on position management controls as unreasonably high and disproportionate.

<ESMA_QUESTION_CD_27>