



8 January 2020

Final FIA and ISDA response to the ESMA Consultation on Position Limits under MiFID II

Executive Summary

- ISDA and FIA welcome the opportunity to respond to the consultation on the review of the position limits regime in view of the future technical advice that ESMA will have to submit to the European Commission in the context of the MiFID 2/ MiFIR Review.
- The MiFID II commodity derivatives position limits regime is a new and unprecedented regime in the EU and has no equivalent in other jurisdictions.
- Position limits have been applicable for approximately two years and ISDA and FIA consider that to date the regime has generally not caused significant negative consequences, with the exception of the constraints for new and illiquid contracts.
- We are of the view that the regime could still be improved, particularly in three areas where we welcome ESMA's proposals:
 - to re-focus the scope of the position limits regime to most important ('benchmark') contracts, and particularly to food commodity contracts. This would notably help solve the problems with the **application of limits to new and illiquid contracts**, where exchanges, dealers and end-users have raised concerns that the existing limits, even with the flexibility granted under ESMA RTS 21, are a hurdle to the development of markets for new contracts.
 - to limit the **scope of contracts covered by position limits**. The definition of financial instruments – and of commodity derivatives – has led to extensive discussions as to whether some securities or some derivatives with no underlying physical commodity should be subject to position limits just because the cross references between MiFID and MiFIR suggest that they are 'commodity derivatives'. FIA and ISDA members support the objectives of the legislation and particularly the prevention of excessive

speculation on underlying commodities such as food commodities. However, we would welcome the idea raised by ESMA of limiting the regime to a '*set of important, critical derivatives contracts*'. In addition, we support ESMA's suggestion to dis-apply position limits to securitised commodity contracts.

- *to expand the **scope of the hedging exemption***. Whilst the position limits regime includes exemptions for market participants pursuing hedging activity, the MiFID II definition of *hedging* as set out in RTS 21 is clear that only non-financial entities can engage in such activity. As a result, the exemption is unavailable to investment banks or commodity trading houses that are MiFID II authorised, which both play a vital role in providing smaller commercial players with access to commodity derivatives markets.
- FIA and ISDA generally support most of ESMA's suggestions BUT members strongly recommend to retain the C(6) carve-out for physically settled power and gas contracts as they are sufficiently regulated under the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) and supervised by ACER. The interlinkage of wholesale gas and power markets in the European Union remains unique in commodity markets. REMIT was designed in 2011 by DG Energy, based on the advice from the Committee of European Securities Regulators (CESR) before the creation of ESMA, and of the European regulators Group for Electricity and Gas, to combat insider trading and market manipulation in this sector. Even though the Market Abuse Directive was reformed after REMIT's adoption and the Market Abuse Regulation now addresses insider trading and market manipulation for commodity derivatives and spot commodity contracts generally, the basis for a specific regulation addressing European gas and power markets remains. It would not be appropriate to duplicate regulation and to apply MiFID to these markets.



Q 1: Which option (Option 1 or Option 2) do you support for dealing with competing contracts? Please explain why. If you support Option 1, do you have any suggestions for amending the definition of “same contract” in Article 5(1) of RTS 21? If you support another alternative, please explain which one and why.

FIA and ISDA members understand the concern raised by ESMA that article 57(6) of MIFID 2 does not appropriately allow the application of a single limit to contracts with the same underlying commodity that would be traded on different trading venues across the EU because article 5(1) of RTS 21 designs the concept of ‘same’ contracts too restrictively.

However, no ISDA or FIA members have raised that this has led to fragmentation of markets or to disruption or to increased risks of market abuse or excessive speculation.

FIA and ISDA members are supportive of preserving the existing definition of EEOTC contracts. Although the concept of EEOTC is not related to ‘same contracts’ traded on different venues but aims to target OTC contracts economically equivalent to trading venue traded contracts subject to limits (article 57(1), we note that ESMA makes an indirect link between the two definitions.

ESMA indeed states (paragraphs 85 and 86 of the consultation paper) that: *The first option (Option 1) would be to amend, and broaden, the definition of the “same contract” in Article 5(1) of RTS 21, for example by deleting the requirement that the same commodity derivatives form a single fungible pool of open interest. [...]. At the same time, should the “identical” characteristics criteria made somewhat more flexible to accommodate a broader set of “same contracts”, this would have a direct impact on the definition of EEOTC contracts that may then have a narrower definition than “same contracts”.*

With regard to this statement, FIA and ISDA members are concerned by the potential broadening of the definition of ‘same contracts’ under article 5(1) of RTS 21.

Some members agree with the proposal to remove the current part of the definition that same commodity contracts ‘*form a single fungible pool of open interest*’, as it is too restrictive. They note that the second part of the definition is sufficiently restrictive because of the condition that different venues should have identical terms and conditions. These members may then prefer option 1 because option 2 may lead to a divergence of opinion on different contracts and therefore would bring uncertainty.

However, most FIA and ISDA members would not support option 1 **IF** it leads to a revision of the definition of EEOTC contracts.

Generally, they question why the definition of the “same” commodity derivative should be amended and are not convinced that the current regime genuinely hinders fair competition between trading venues.

First, it should be emphasized that in practice commodity derivatives traded on different trading venues can never be considered as the “same contract”, even if they have the same physical underlying. This is because a contract is designed by the trading venue, whereby the rules and conditions, including those related to pricing and settlement, differ across venues. Thus, commodity derivatives traded on different trading venues cannot and should not be netted against each other for position limits or other purposes. Also, for that reason, the removal of the condition for contracts to



“form the same pool of open interest” would not necessarily remedy the level playing field problem which ESMA is trying to solve. In addition, even if in theory option 2 might lead to NCAs interpreting differently what amounts to a “same contract”, option 2 looks more pragmatic, given the current set-up of NCAs towards position limits reporting and monitoring systems only facilitates the reporting of positions in the contracts listed in its jurisdiction. Moreover, trading venues only have access to information on the positions in contracts listed at their venue.

Should ESMA wish to go ahead with proposals to change the existing definition of “same contracts” under article 5(1) of RTS 21, a majority of ISDA and FIA members would support the pragmatic approach (option 2).

Q 2: Do you agree that the C(6) carve-out creates an unlevel playing field across trading venues and should be reconsidered? If not, please explain why.

FIA and ISDA members do not share ESMA’s view that the C(6) carve-out created an unlevel playing field across trading venues and we therefore recommend that it is retained. Our members feel that ESMA should consider the substantial differences between the energy sector and the financial sector.

The reasons why DG Energy established the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) (published in 2011) go beyond the fact that at that time the existing Market Abuse Directive was not properly addressing commodity derivatives markets.

There is unique interlinkage of wholesale gas and power markets in the European Union that makes these markets different in nature from other commodity markets. REMIT was supported by the Committee of European Securities Regulators (CESR) (before ESMA was created to replace it) and by the European regulators Group for Electricity and Gas (before the creation of ACER) to combat insider trading and market manipulation in this sector. After a few years of full application, market participants consider that REMIT is effective.

Even though the Market Abuse Directive was reformed since the adoption of REMIT and the Market Abuse Regulation now addresses insider trading and market manipulation for commodity derivatives and spot commodity contracts generally, the basis for a specific regulation addressing European gas and power markets remains valid. ISDA and FIA members strongly believe that it would not be appropriate to duplicate regulation and to apply MiFID to these markets. It would be hugely disruptive to the proper functioning of the largest commodity market and subject gas/power trades to 3 sets of reporting regimes.

As there is no factual basis that the gas/power markets are not transparently priced, nor that REMIT and ACER are not properly regulating the market, ISDA and FIA support that the MiFID Annex 1 Section C.6 carve-out should remain.

Energy markets function differently than financial markets and have different products, which are traded to address the specific (physical) needs of the energy industry and the real economy. Wholesale energy trading aims at managing supply and demand.

FIA and ISDA members note ESMA’s suggestion that there needs to be a level playing field between trading platforms. ESMA states on page 23 that: *“ESMA shares the concerns expressed by some respondents with regard to the shift of trading in physically-settled wholesale energy contracts (REMIT*



contracts) from regulated markets and MTFs to OTFs post-MiFID II as a result of the C(6) carve-out and the unlevel playing field this exemption has created.”

However, the objective of MiFID is not to create equal opportunities between trading venues. The aim of MiFID II is to create a framework for market integrity and transparency of the financial market. Recital 4 of MiFID II emphasizes “the need to strengthen the framework for the regulation of markets in financial instruments, ..., in order to increase transparency, better protect investors, reinforce confidence, address unregulated areas, and ensure that supervisors are granted adequate powers to fulfil their tasks.”

With regards to C(6) products, transparency is achieved through REMIT and its reporting requirements, market participants have confidence in the REMIT regulation, which has been functioning well for a number of years, and ACER has supervisory power to oversee the physical energy market.

In summary, REMIT provides a legal framework for:

- transparency through the reporting of order and transaction data, which is available to financial regulators in the event that they need to observe market activity;
- measures to prevent market abuse, which include insider dealing, market manipulation and the abuse of market dominant positions at trading venues (e.g. cornering);
- obligations to publish inside information, which ensure an orderly price formation process and market-specific rules relating to insider dealing;
- market monitoring, supervision and enforcement by ACER and national energy regulators;
- registration of market participants;
- OTFs are Organised Market Places (OMPs) under REMIT, meaning that they are obliged to report orders and transactions and implement market surveillance systems;
- sharing of information between regulators (including ESMA); and
- Co-operation at EU and national levels.

Thus there is no need to hand power to financial regulators to supervise the functioning of the physical energy markets where the EU has already established a specific, tailor-made framework for it and created a supervisory body in ACER as well as national energy regulators. Furthermore, the objectives of MiFID II are currently fulfilled by REMIT.

Furthermore, we note that C(6) physical products traded on non-MTF platforms have been out of scope of financial regulation since MiFID I. FIA and ISDA members thus believe that it is not correct that trading in physically-settled wholesale energy contracts shifted from MiFID regulated platforms to OTFs. By introducing OTFs, MiFID II just provided formalization of the previous (MiFID I) non-MTF term and introduced the criterion “must be physically settled”. Additionally, OTFs created transparency in the physical market, which set the right price signals to hedge.

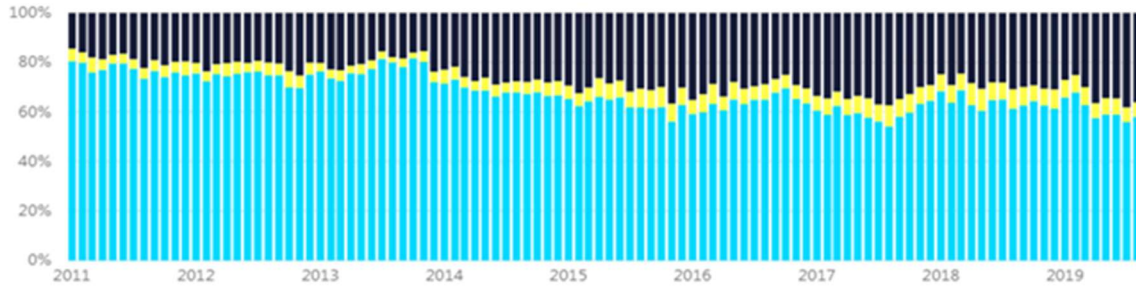
Finally, quantitative data does not seem to support ESMA’s statement that trading has shifted to OTFs from regulated markets and MTFs. On the contrary, the data which is publicly available (<https://www.trayport.com/category/market-dynamics-report/>?) shows that the opposite has happened and that the market share of exchange executed transactions in gas and power has grown since the implementation of MiFID II.

The chart below shows the Trayport monthly data since 2011 for gas and power:

All gas:

Trayport volume by Period and Execution type

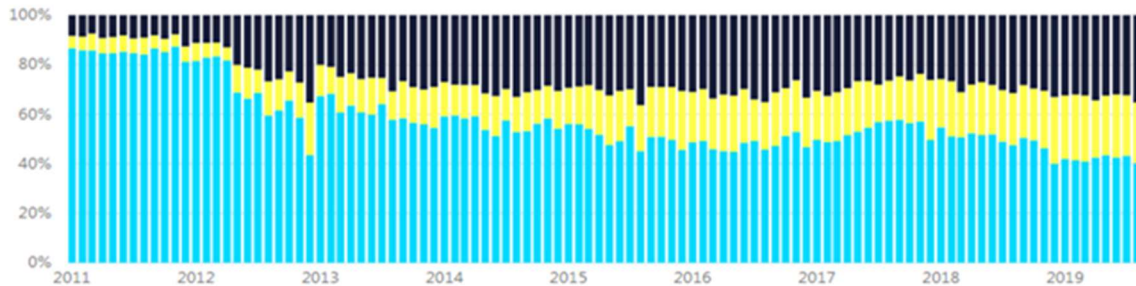
Execution type ● Broker Bilateral ● Broker Cleared ● Exchange Executed



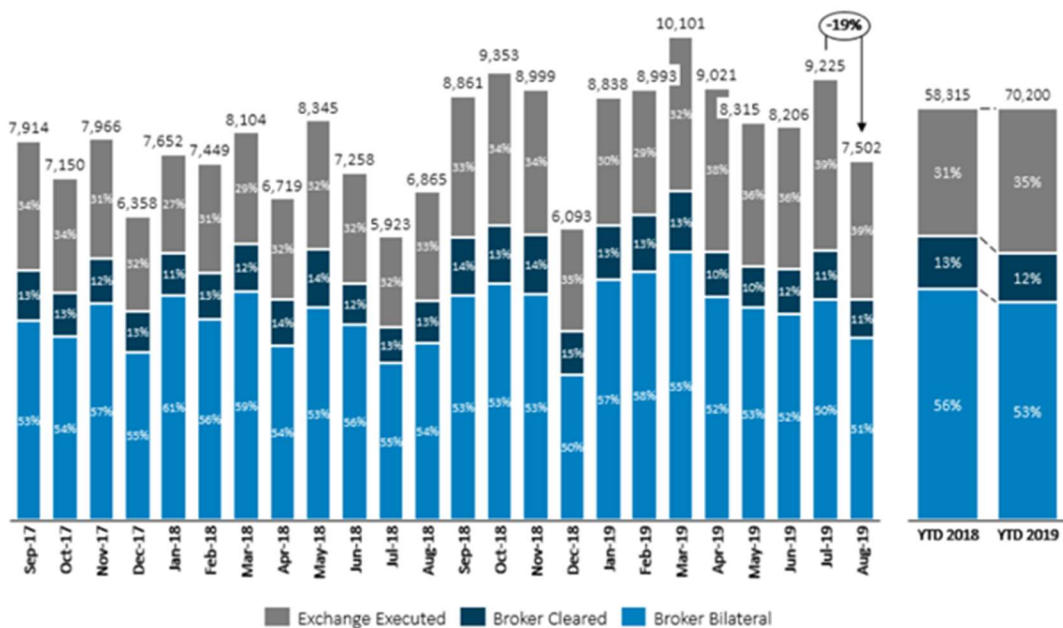
All Power:

Trayport volume by Period and Execution type

Execution type ● Broker Bilateral ● Broker Cleared ● Exchange Executed



The following data shows that compared with 2018 in 2019 (YTD August) the market share of exchange traded gas and power products has grown by 4%:





Possible consequences of a removal of the C.6 carve-out:

FIA and ISDA members do not expect physical trading to move to other types of venues but rather to pure bilateral trading.

If C(6) products fell under the definition of commodity derivatives in MiFID II, they would be regarded as financial instruments, with the consequence that financial regulators (i.e. National Competent Authorities and ESMA) would need to supervise the physical energy market, whereas REMIT had established a specific framework for this market including a specific regulatory authority (ACER). We believe that energy regulators are best placed to supervise physical energy markets.

The removal of the C(6) carve-out would complicate compliance with existing regulation by potentially extending the scope of financial instruments widely into the area of bilateral OTC contracts for the physically delivery of power and gas. Removing the carve-out in MiFID II, Annex 1, C(6), will create the risk that bilateral physically settled supply contracts will be deemed to be equivalent to contracts traded on an OTF or other venue and (see Annex 1, C(7) of MiFID II), hence, will be artificially classified as a financial instrument although they clearly do not possess the characteristics of financial instruments, as they serve to cover the physical power and gas demand of the real economy. In addition, it makes compliance more difficult with regards to C(7), as firms would have to check on a case-by-case basis whether equivalent contracts are traded at a trading venue somewhere in the EU.

Further, C(6) contracts would need to be reported under EMIR instead of REMIT, which will require substantial changes to the reporting systems and processes, especially where market participants specialize in physical power and gas markets. In addition, questions arise how reporting requirements would deal with open contracts, novations, and other life cycle events.

Conclusion:

The above-mentioned reasons outline that there is no unlevel playing field across trading venues and that the C(6) REMIT carve-out serves the well-intended purpose to provide non-financial instruments, which help to ensure competitive gas and power prices for consumers across the EU. Any change would affect the fine-tuned wholesale energy markets in gas and power.

In summary, FIA and ISDA members believe the C(6) carve-out should be retained and does not create an unlevel playing field for the following reasons:

- The C6 REMIT carve out captures only **physical** transactions of gas and power. The definition of **must be physically settled** is inherent to the nature of the REMIT carve-out.
- Wholesale energy trading in gas and power is subject to a specific, functioning, tailored regulation (REMIT); the removal of the C6 REMIT carve-out would be in conflict with the previous political decision to install a comprehensive, tailor made transparency and market integrity regime, the REMIT regulation for physical energy markets. Under REMIT, the C6 REMIT carve-out contracts are supervised under a tailored regime by ACER and national energy regulators, which ensures the well-functioning of the gas and power energy markets. A deletion or narrowing of the REMIT carve-out would not improve the functioning and

supervision of energy markets and we see no further requirement for these markets to be similarly regulated by financial regulators.

- There is no evidence that physical gas and power contracts pose a threat to the well-functioning and stability of the financial markets.
- C6 REMIT Carve-out contracts are used to hedge merchant risk to manage supply and demand. Market participants need to be able to deliver or take delivery of the contract.
- Each transaction is subject to REMIT reporting which guarantees transparency in the physical market. REMIT foresees access to the transaction data to financial regulators should there be a concern that the activity on the physical market has an impact on the financial market.

Q 3: Do you agree that the position limit framework should not apply to securitised derivatives? If not, please explain why.

ISDA and FIA members agree that the position limit framework should not apply to securitised derivatives and fully support ESMA's proposals.

We consider that the inclusion of securitised commodity derivatives in the definition of 'commodity derivatives' contradicts the principle that transferable securities (Section C.1) are not derivatives (Sections C.4 - C.10) and therefore are not subject to the same legal regime as derivatives. Transferable securities are subject to the Prospectus Directive whereas derivatives are not and derivatives are subject to EMIR whereas transferable securities are not. Exchange traded warrants, for instance, are not subject to EMIR obligations).

The application of financial regulation to securitised derivatives has raised a number of legal questions in the past. For instance, it was debated whether warrants should be subject to the Prospectus Directive as transferable securities or to rules applicable to derivatives. In the end, warrants were considered transferable securities: they are subject to the Prospectus Directive but not to EMIR. Since 2016, ISDA have raised a similar question about the application of position limits to securitised commodity derivatives.¹

Securitised commodity derivatives are transferable securities: the bank acts as an issuer, submits a prospectus under the Prospectus Directive and targets a large panel of investors including retail and wholesale investors. Unlike derivatives, securitised commodity derivatives are subject to custody and to notary functions administered by Central Securities Depositories. Securitised commodity derivatives are not subject to EMIR.

This is supported by Section C.1, Annex I, MiFID II and the definition of transferable securities in article 4.1 (44) (c) of MiFID II:

“‘transferable securities’ means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:

(a) shares in companies and other securities equivalent to shares in companies, partnerships or other

entities, and depositary receipts in respect of shares;

(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;

¹ <https://fia.org/articles/fia-files-letters-esma-position-limit-proposals-under-mifid-ii>



(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;”.

It is not possible that an instrument is both a security and a derivative. If they were both, how could the resulting clash between the application of EU Directives applicable to securities (notably, the Prospectus Directive) and rules applicable to derivatives (such as EMIR) be resolved? This creates confusion between transferable securities and derivatives in MiFID II which is the cornerstone of the EU financial markets legislation and would have unexpected consequences that are difficult to assess.

For example, one consequence will be that an issuer of a securitised commodity derivative will hold 100% of the open interest for that contract. We note indeed that: a) this issuer will always be an investment firm or a credit institution which do not benefit from the hedging exemption and b) there is no market in EOTC unlisted securities. Therefore, this issuer is unable to reduce its position, holding 100% of the open interest in the relevant contract. We cannot see how the position limits regime could apply as it would lead de facto to the prohibition of issuances of securitised commodity derivatives.

For the purpose of the position limits regime set in article 57 of MiFID II, we strongly believe that the scope should not include securitised commodity derivatives. We note that the design of the position limits regime and particularly the features of the calculation methodology set in ESMA RTS 21 cannot apply to securitised commodity derivatives for obvious reasons. First, the concepts of deliverable supply or open interest are meaningless; second, the concepts of lots, delivery date, economically equivalent contracts (there cannot be any economically equivalent contract to a securitised derivative, which by nature is a fungible security) are equally not applicable.

As noted above, position limits were intended to prevent market abuse and to support orderly pricing and settlement conditions. However, we note that in relation to securitised commodity derivatives, these instruments are already subject to the market abuse regime under Regulation (EU) No 596/2014 (MAR) and can only be admitted to trading on a regulated market in the EU if it is possible to have an orderly market in trading in these instruments (Art. 51.1 MiFID II). In addition, since there is no possibility of physical delivery or physical settlement in relation to these instruments, they are not capable of having the same impact on physical commodity markets as derivatives falling within sections C.5, C.6, C.7 and C.10, Annex I of MiFID II.

As a result, we consider that it should not be necessary to apply commodity derivative position limits to these instruments as appropriate controls are already in place. Moreover, we note that if additional controls were required, both ESMA and competent authorities have the power to implement such controls (e.g. ESMA's temporary intervention powers under article 40 MiFIR).

Q 4: Which option do you support to address the negative impact of position limits on new and illiquid commodity derivatives: Option 1 or Option 2? Please explain why. If you support another alternative, please explain which one and why.

As stated in the introductory remarks, the position limits regime was unprecedented in that it extends to every single commodity derivative traded in the EU, and after only two years of application, it remains difficult to assess its full impact. However, ISDA and FIA members have noted that the specific



treatment of new and illiquid contracts and particularly the de-minimis threshold is a major barrier to development of markets.

ESMA offers two proposals to fix this issue, i.e. either re-focusing the regime to a limited set of important or critical contracts (option 1) or modifying the regime application to new and contracts (option 2).

ISDA and FIA members support option 1 in principle but note the following two points:

- we continue to support the objectives of the legislation and are keen to assist with designing a regime that effectively prevents excessive speculation on underlying commodities, particularly food commodities, whilst allowing market growth and for the EU to remain competitive in a global commodities market. We need more time to assess which criteria should be used for the classification of the 'important' or 'critical' contracts and particularly the nature of the underlying commodity, the size of the markets, the importance for the supply of the underlying commodity across the EU, and the existence of non-EU markets for the same commodity.
- option 2, though less optimal, also has merits and should be considered, especially if option 1 is proving politically difficult.

Under RTS 21, ESMA has established a specific regime for new and illiquid contracts for the purpose of calculations of position limits. Article 15 of RTS 21, states that new contracts traded on a trading venue with a total combined interest in spot and other months not exceeding 10,000 lots over a consecutive three-month period shall be set a limit of 2,500 lots.

FIA and ISDA note that some NCAs have interpreted this requirement to mean that on day 1 of a new commodity derivative, a limit of 2,500 lots would apply. Market participants have raised that this limit is too restrictive to allow a new contract to develop into a liquid instrument.

And whilst in theory, in line with ESMA Q&As on 'commodity derivative topics', NCAs can use different derogations for illiquid markets which have an open interest between 5.000 and 10.000 lots, these remain difficult to apply in practice in a meaningful manner and are often not sufficient to mitigate the negative impact of disproportionately low position limits.

Other problems with new, illiquid as well as less liquid contracts are related to the time it takes to move from the de-minimis regime to a bespoke position limit, to review a bespoke limit and the general inflexibility to deal with exceptional circumstances, such as following an update of indices (resulting in new contracts), as took place in the dry bulk freight market.

To effectively overcome the negative impact of the current regime on new and illiquid commodity derivatives a more fundamental review is needed, i.e. option 1. This would imply a more proportionate and efficient position limit regime by focusing its application on important, "critical" commodity derivative contracts and allow new and nascent products to develop, it would also better fulfil the overall objective of MiFID II to "improve the functioning and transparency of commodity markets and address excessive commodity price volatility".

New, illiquid and less liquid products are unlikely to influence price movements in the underlying physical commodity markets that could negatively affect consumers. Thus, the suspension of position limits for such contracts would not pose any risk to the transparency and functioning thereof. Rather, attracting more volume to regulated venues would contribute to a more transparent trading environment.



At the same time, we concur with ESMA that a policy process involving a fundamental Level 1 change, which option 1 would require, would take years to become effective. Therefore, we welcome ESMA's statement that some amendments to the Level 2 measures on position limits may be appropriate in the meantime. In order to prevent any negative consequences for new and illiquid markets during the course of the more thorough Level 1 policy process, FIA and ISDA recommend that Option 2, i.e. suspending the limits for new contracts for a certain period is implemented in the shortest possible term. However, a 12-month period suggested by ESMA is too short to develop a contract and we therefore recommend, instead that this period should be extended to 24 months. With regards to option 2, we note that that a maximum position limit of up to 50% of the reference amount for contracts below 20,000 lots open interest might not be sufficient, especially for contracts with a very low open interest and typically a one-digit figure of market participants. For example, should a contract only have 4,000 lots open interest and the position limits is subsequently set at 2,000 lots, the proposal would result in more restrict limits than the current regime. If, after 12 months, the combined open interest has still not exceeded 20,000 lots, ideally a 10,000 lots de-minimis limit should apply. Only such an approach can facilitate rapid growth as well as provide sufficient time for NCAs to set a bespoke position limit.

Q 5: If you support Option 1 and would suggest different or additional criteria to determine whether a contract qualifies as a critical contract, please explain which ones.

As there is a high correlation between the parameters exchanges use to assess liquidity in a market, FIA and ISDA suggest to continue to use open interest as a parameter. Additionally, given the regime is focused on convergence between the derivative pricing and the underlying commodity, we think it would also be sensible to remove limits from any contracts where there is no associated deliverable supply. Such an approach would also be consistent with the proposal to remove securitised derivatives, which also have no deliverable supply, from the regime.

As stated above under question 4, ISDA and FIA members need more time to assess which criteria should be used for the classification of the 'important' or 'critical' contracts. Particularly, we believe that specific attention should be paid to: the nature of the underlying commodity; the size of the markets; the importance for the supply of the underlying commodity across the EU; and the existence of non-EU markets for the same commodity.

Whereas the criteria proposed by ESMA may be relevant, we note that the existence of non-EU markets for the same commodity should be seriously considered.

Q 6: Which open interest and participant threshold would you suggest for qualifying a commodity derivative as a critical one?

To ensure that only contracts are captured of which the price serves as a benchmark for the underlying commodity, FIA and ISDA believe it would be appropriate to look at contracts that exceed 300,000 lots open interest, which is based on calculations by several trading venues. The number of market participants that correlate to this figure is significantly different across different asset classes. Though in general, the number of active market participants should not be lower than 20 for a contract to be considered critical.



Q 7: Would you support a position limit exemption for financial counterparties under mandatory liquidity provision obligations? If not, please explain why.

ISDA and FIA members support the introduction of a position limit exemption for positions entered in the framework of mandatory liquidity provision arrangements. However, we believe that such an exemption should be available to both financial and non-financial counterparties. We do not see any valid reason why the scope of the exemption should be limited to investment firms. For example, in power and gas markets, liquidity providers are typically non-financial counterparties.

Q 8: Would you support introducing a hedging exemption for financial counterparties along the lines described above? If not, please explain why.

ISDA and FIA members support ESMA's proposal for the introduction of a position limit hedging exemption for financial counterparties belonging to a predominantly commercial group.

Further, whilst the position limits regime includes exemptions for market participants pursuing hedging activity, the MiFID II definition of *hedging* as set out in RTS 21 is clear that only non-financial entities can engage in such activity. As a result, the exemption is unavailable to investment banks (including financial entities belonging to an industrial group and acting on behalf of non-financial entities of that group) or MiFID II authorised commodity-trading houses, which both play a vital role in providing smaller commercial players with access to commodity derivatives markets.

Even though financial institutions clearly perform hedging activities in commodity derivatives markets, they are not be able to make use of the exemption envisaged under article 8 of MiFIR or article 57 of MiFID II.

ISDA and FIA members support that financial institutions benefit from a hedging exemption based on genuine hedging intention. Currently, some hedging transactions are attributed to banks' net commodity position limits, despite such transactions actually providing vital commodity derivative market access for smaller commercial participants and contributing to the orderly pricing and settlement conditions of commodity derivative markets in general.

Q 9: Do you agree with ESMA's proposals to amend Article 57(8)(b) of MiFID II and to introduce Level 2 measures on position management controls? If not, please explain why.

ISDA and FIA members believe that the current position management regimes exercised by exchanges are generally adequate. We continue to believe that trading venues are best placed to determine how to implement position management controls and when it is necessary to trigger them. We view trading venues as the primary gatekeepers of the position limit regime. In our view, trading venues should actively monitor positions and effectively communicate with position holders to ensure the robustness of the regime.

While a one-size-fits-all approach may be difficult to calibrate and may result in unintended consequences, we see merits in establishing a set of measures that would provide a minimum standard with which all trading venues must comply. We agree with ESMA that new Level 2 measures may be the most appropriate instrument to achieve this objective. Given the wide variety of market



structures and specificities across different commodity derivative markets, such measures should not be overly prescriptive and should not constrain the ability of a trading venue to implement enhanced controls if deemed necessary.