EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR FINANCIAL STABILITY, FINANCIAL SERVICES AND CAPITAL MARKETS UNION AND DIRECTORATE-GENERAL FOR ENERGY

TARGETED CONSULTATION DOCUMENT

Review of the functioning of commodity derivatives markets and certain aspects relating to spot energy markets

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INTRODUCTION

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

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

Akin to, but not strictly speaking considered to be commodities, emission allowances (EUAs) have been added to the financial rulebook upon the adoption of MiFID II (Markets in Financial Instruments Directive) ([1]) as from January 2018. Since then, the majority of provisions applicable to commodity derivatives also apply to EUAs and/or derivatives thereof. For the sake of conciseness, readers of this consultation paper should consider EUAs and EUA derivatives to be included when referring to commodity derivatives. Stakeholders are however invited to outline specificities for trading of emission allowances and derivatives thereof, where relevant, in their answers throughout the questionnaire.

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

> (a) the position limit and position management controls regimes relying on data provided by competent authorities to ESMA in accordance with Article 57(5) and (10) of MiFID
>
> (b) the elements referred to in the second and third subparagraphs of Article 2(4) of MiFID and the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level pursuant to the Commission Delegated Regulation (EU) 2021/1833 ([2]), taking into account the ability to enter into transactions for effectively reducing risks directly relating to the commercial activity or treasury financing activity, the application of requirements from 26 June 2026 for investment firms specialised in commodity derivatives or EUAs or derivatives thereof as set out in Regulation (EU) 2019/2033 and requirements for financial counterparties as set out in Regulation (EU) 648/2012
>
> (c) the key elements to obtain a harmonised data set for transactions by the commodity derivative market to a single collecting entity. The relevant information on transaction data to be made public and its most appropriate format

Energy derivatives, which may be either physically or financially settled, are considered wholesale energy products under the EU Regulation on wholesale energy market integrity and transparency

([1]) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0065

([2]) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32021R1833

(REMIT) ([3]). REMIT establishes rules prohibiting abusive practices affecting wholesale energy markets which are coherent with the rules applicable in financial markets and with the proper functioning of those wholesale energy markets, whilst taking into account their specific characteristics. REMIT also provides for the monitoring of wholesale energy markets by the Agency for the Cooperation of Energy Regulators (ACER) in close collaboration with national regulatory authorities (NRAs). For such monitoring, REMIT ensures that ACER also receives structural data on capacity and use of facilities for production, storage, consumption or transmission of energy.

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

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

The above-mentioned crisis was also discussed in the recent report by Mario Draghi on *The future of European competitiveness* ([4]), published in September 2024. The report includes a significant number of recommendations linked to the functioning of energy spot and derivatives markets, as a means to ensure the European industry access to affordable energy and enhance its competitiveness (see section 6 for detail).

The outcome of this consultation serves several objectives

- Firstly, it will feed into the MiFID report exercise, with a view to making the EU commodity derivatives markets more efficient and resilient, ultimately delivering benefits to the real economy, and bearing in mind the Commission's general objective to reduce regulatory burden on EU firms
- Secondly, it will allow the Commission to collect evidence to feed into broader reflections on the wholesale energy and related financial markets that may inform future policy choices in this area
- Where appropriate, this may call for legislative amendments of the relevant legislation, including MiFID and REMIT
- The solutions under consideration may in some cases be specifically targeted at certain types of contracts or commodities. It could, for example, be possible to identify specific solutions as regards gas-related contracts (as opposed to other commodities)

This consultation is launched in conjunction with the Action Plan on Affordable Energy adopted by the Commission on 26 February 2025.

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

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

([3]) https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011R1227

([4]) https://commission.europa.eu/topics/eu-competitiveness/draghi-report_en

WHO SHOULD RESPOND TO THIS CONSULTATION

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

You are invited to reply **by 23 April 2025** at the latest to the **online questionnaire** available on the following webpage:
https://finance.ec.europa.eu/regulation-and-supervision/consultations-0/targeted-consultation-review-functioning-commodity-derivatives-markets-and-certain-aspects-relating_en

Please note that in order to ensure a fair and transparent consultation process **only responses received through the online questionnaire will be taken into account and included in the report summarising the responses**.

This consultation follows the normal rules of the European Commission for public consultations. Responses will be published in accordance with the privacy options respondents will have opted for in the online questionnaire.

Responses authorised for publication will be published on the following webpage: https://finance.ec.europa.eu/regulation-and-supervision/consultations-0/targeted-consultation-review-functioning-commodity-derivatives-markets-and-certain-aspects-relating_en

Any question on this consultation or issue encountered with the online questionnaire can be raised via email at fisma-commodities@ec.europa.eu.

TOPICS FOR CONSULTATION

1. DATA ASPECTS

1.1. Commodity derivatives reporting and transparency under the financial rulebook

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

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

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

MiFIR, in turn, provides that:

- all transactions in commodity derivatives taking place on a trading venue are to be reported by investment firms (or, if market participants are not investment firms, by the investment firm operating the venue on which the market participants executed the transaction) to NCAs pursuant to Article 26
- transactions in commodity derivatives carried out outside a trading venue are not subject to systematic transaction reporting to NCAs. However, investment firms are required to keep the relevant data relating to all orders and transactions in commodity derivatives which they have carried out at the disposal of the NCA for five years, pursuant to Article 25
- all transactions in commodity derivatives taking place on a regulated market are subject to publication of data on price, volume and time of transactions pursuant to Article 10 (post-trade transparency)
- regulated markets are required to disclose current bid and offer prices, as well as the depth of trading interests, relating to commodity derivatives traded on their venue (pre-trade transparency), pursuant to Article 8a(1)
- trading in commodity derivatives occurring on a Multilateral Trading Facility (MTF) or an Organised Trading Facility (OTF) is not subject to pre- nor post-trade transparency, pursuant to Article 8a(2). It is worth reminding that all physically-settled wholesale energy

contracts traded on an OTF are subject to the 'C6 carve-out' ([5]), which scopes those contracts out of the financial rulebook
- as regards the interaction between the upcoming consolidated tape and commodity derivatives, the consolidated tape does not include pre- nor post-trade information on commodity derivatives

1.2. Commodity derivatives reporting and transparency under REMIT

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

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

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

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

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

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

1.3. Data sharing between energy and securities markets supervisors

The current regulatory set up leads to a multiplication of reporting channels, to which only the relevant regulators have systematic access. ACER and consequently the (energy) NRAs are the recipients of data relating to wholesale energy products, while ESMA and the NCAs receive the data reported under the financial rulebook. This means that, currently, data reported under REMIT do not necessarily make their way to financial regulators and *vice versa*. For instance, NCAs and ESMA do not have systematic access to data relating to 'C6 carve-out' products and other spot market products, which is reported to ACER. This creates a data gap that may affect ESMA's and

([5]) Wholesale energy products that are (i) mandatorily physically settled and (ii) traded on an OTF are subject to a carve-out from MiFID and are not considered financial instruments. They are commonly referred to as 'C6 carve-out instruments'.

NCAs' ability to understand and therefore adequately supervise the markets that fall under financial legislation. Moreover, diverging reporting standards between products subject to REMIT reporting and those reported under MiFIR/EMIR, despite sometimes being closely related (e.g., a futures contract traded on an exchange and subject to the financial rulebook reporting vs a physically-settled forward contract traded on an OTF reported under REMIT), add to further complexifying reporting procedures and the consolidation and analysis of data.

This section therefore seeks to identify areas where reporting should be streamlined and/or better harmonised, bearing in mind the Commission's burden reduction objective. It also seeks to explore whether the creation of a single reporting mechanism for spot and derivative energy products (i.e., not concerning other commodities nor EUAs) could improve the situation on access to relevant data for supervisors on both sides. In that regard, trade repositories, which already collect data on all derivatives transactions (whether OTC or venue-traded), and Registered Reporting Mechanisms (RRMs), which play a similar role under REMIT, could play the role of single access point for all reporting related to energy-related products, spot or derivatives. A third entity, consolidating the data from trade repositories and RRMs would be an alternative option. ESMA, ACER, NRAs, NCAs and, where relevant, the European Commission, would have equal access to such data. Access to such consolidated data by trading venues in the context of their position management controls mandate could also be explored – see section 3.

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

Questions:

(1) Do you believe that REMIT reporting, on the one hand, and MiFID/MiFIR/EMIR reporting, on the other hand, should be streamlined and/or more harmonised?
If so, could you point to specific reporting items that need to be streamlined/aligned, and how?
In particular, please explain whether the provision under REMIT which aims at avoiding double reporting for transactions already reported under the financial framework effectively allows to prevent double reporting and,
if not, why.

(2) Reporting under MiFID/MiFIR/EMIR, on the one hand, and REMIT, on the other hand, can vary in terms of format and transmission protocols. In your view, which reporting standards and protocols should be used as reference (REMIT or MiFID/MiFIR/EMIR) if formats and reporting protocols were to be made uniform? Please also provide, if possible, information on one-off costs and long-term savings from such harmonisation.

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

If so, how could it be alleviated and what level of possible cost savings could result from such exercise (order of magnitude), distinguishing one-off costs and recurring compliance costs (for instance, per year)? How would you structure such a possible centralised data collection

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

(4) Do you believe that data sharing through the abovementioned centralised mechanism consolidating the data would improve supervision by NCAs, NRAs, ESMA and ACER? And if so – in which way?

(5) In the event that the centralised reporting mechanism is deemed an appropriate measure, by what entity should energy spot and derivatives markets data be consolidated? (please select the relevant items):
   a. by trade repositories?
   b. by RRMs?
   c. by a new type of entity in charge of consolidating data collected by trade repositories and RRMs?
   d. some other entity? Please specify.

   Please explain.

(6) Do you believe there is a better alternative to a central data collection mechanism for improving collection and sharing of data collected under REMIT and MiFID/MiFIR/EMIR? If so, could you please describe it?

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

(8) Do you believe that the rules on pre- and/or post-trade transparency (i.e., public dissemination of information on quotes and transactions) of commodity derivatives under MiFID/MiFIR should be amended, notably to include commodity derivatives traded on an MTF or an OTF? It is worth noting that making commodity derivatives subject to pre-trade transparency would imply that commodity derivatives would be included in the consolidated tape for OTC derivatives.
   If not, why?
   If so, under which conditions?
   Would you see any added value in introducing similar rules in REMIT aiming at pre- and/or post-trade transparency and, if yes, under which conditions?

(9) Do you believe that the consolidated tape should include pre- and/or post-trade data on exchange-traded commodity derivatives (i.e. commodity derivatives traded on regulated markets)?
   If so, under which conditions (latency, transmission protocols, precise scope of products, etc.)?

(10) The recent MiFIR review has extended reporting requirements for transactions in some OTC derivatives that are executed outside of a trading venue. This extension does not concern commodity derivatives. Do you believe that transactions in OTC commodity derivatives that are executed outside of a trading venue should be subject to systematic reporting to NCAs under MiFIR?
   If so, what would be the added value of such reporting compared to existing reporting requirements under EMIR and under REMIT? If not, why?

(11) Do you believe ESMA has sufficient access to transaction data from trading venues and from market participants reported to NCAs?
If not, please explain what are the consequences and how you believe this should be tackled.

2. ANCILLARY ACTIVITY EXEMPTION

Commodity derivatives markets are characterised by the prominent participation of 'commercial entities' (i.e., entities whose main business does not involve engaging in the provision of financial services), who rely on derivative markets to hedge their positions in the underlying physical markets or, in some cases, take advantage of market moves to generate profit. Those non-financial entities represent around two-thirds of natural gas futures markets participants ([6]), and around 60% on wheat futures markets ([7]), in terms of positions in the respective markets. Some non-financial entities also act as market makers, and are also usually active on both physical/spot and derivatives markets.

The so-called Ancillary Activity Exemption (AAE) set out in Article 2(1), point (j), of MiFID currently exempts certain non-financial market participants that engage in commodity derivatives trading from obtaining a MiFID authorisation if this trading activity is done on own account and not linked to the execution of client orders, or if it provides investment services in commodity derivatives or emission allowances or derivatives thereof to customers or suppliers of their main business. Such exemption is also only granted provided that the activity is considered "ancillary" to their main business, individually and on an aggregate basis.

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

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

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

([6]) ESMA's preliminary data report on the introduction of the market correction mechanism

([7]) Analysis of MIFID II position data on commodity derivatives: who are the market participants and what is their weight in the matif grain derivatives segment

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

Questions:

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

(12) The exception under Article 2(1), point (d), of MiFID sets out the conditions under which entities that deal on own account in financial instruments *other* than commodity derivatives are exempted from a MiFID license. In particular, this exemption does not require that this activity is ancillary to the entity's main business, unlike what is required for entities dealing on own account in commodity derivatives under point (j) of the same Article. However, the exemption under Article 2(1), point (d), is subject to different limitations. Do you believe persons dealing on own account in commodity derivatives should be treated the same way, with a view to benefit from a MiFID exemption, as persons dealing on own account in other financial instruments, in particular in not requiring that trading activities are ancillary to a main business?
If yes, what would be the associated risks and benefits, in your view, of treating traders in commodity derivatives the same way as traders in other financial instruments who benefit from the exemption under Article 2(1), point (d) of MiFID?

In providing your explanation, please also clarify whether:
- the condition under item (i) of Article 2(1), point (d), which limits the MiFID exemption for entities that are market makers, would be fit for purpose considering the role played by certain non-financial entities as market makers in commodities markets
- and the condition under item (ii) of the same provision, which limits the MiFID exemption in case a non-financial entity performs non-hedging trades while being a member of a trading venue, would be fit-for-purpose as regards the activities of non-financial entities active in commodity derivatives trading

(13) Under Article 2(1), point j of MiFID, an entity can provide investment services other than dealing on own account in commodity derivatives or emission allowances or derivatives thereof to its customers or suppliers of its main business without a MiFID authorisation, provided that the provision of such investment services is ancillary to its main activity. Do you believe that this exemption as regards the provision of investment services to customers or suppliers is fit for purpose, and why?
If not, how would you propose to amend this?

(14) Do you currently benefit from the AAE?

If so, which part of the test is the most relevant for you/do you rely on? Did the CMRP make it easier for you to benefit from the AAE?

(15) More generally, how do you assess the impact of the CMRP amendments and their application by NCAs on your activity, if any? Could you provide estimates of any cost savings and clarify their sources?

(16) What impact do you believe the alleviations brought to the AAE by the CMRP had on the liquidity and depth of EU commodities markets, if any? Could you provide any order of magnitude, for instance in terms of open interest, volumes, number and diversity of participants, bid/ask spreads, etc.?

(17) What is the most effective and efficient method to ensure that supervisors can monitor compliance with the requirements of the AAE? In particular, do you believe the abolishment of systematic (annual) notification from beneficiaries of the AAE to NCAs should be maintained or should these notifications be re-introduced? Please explain. Could you quantify costs if they were to be reintroduced?

(18) In general, do you believe that the existing AAE criteria are fit for purpose and allow to adequately identify when a trading activity in the commodity derivatives markets is ancillary to another activity (i.e., allows to bring the right type of entities into the MiFID regulatory perimeter)?
If yes, please explain.
If no, please explain what alternative ways to assess whether the trading activity/investment services provision of a firm is ancillary to its main activity you would propose. To the extent feasible, please describe a possible impact on the type and number of entities in scope of the AAE under your alternative approach.

(19) In which of the following aspects – if any – does the current scope of the AAE raise issues? (please select the relevant items, if any):

a. adequate conduct supervision of firms active in commodity derivatives markets and enforcement of the financial rulebook (e.g., for the purpose of monitoring market abuse)?
b. fair competition between market participants?
c. impact on energy prices?
d. liquidity of the commodities derivatives market?
e. safeguarding prudential and resilience aspects of firms benefitting from the AAE?
f. ability to monitor and identify future risks to financial stability (e.g., related to interconnectedness and contagion)?

Please explain.

(20) Do you believe the *de minimis* test should be broadened by counting the following towards the EUR 3 billion threshold (please select the relevant items, if any):

a. trading activity in derivatives traded on a trading venue?
b. trading activity in physically-settled derivatives?

If so, should the threshold be adapted and how?

(21) The *de minimis* test threshold is based on exposure in commodity derivatives 'traded in the Union'. Is this criterion on the location of trades fit-for-purpose?
Please explain.

(22) Currently, the *de minimis* test threshold under MiFID is calculated on a net basis (i.e., by averaging the aggregated month-end net outstanding notional values for the previous 12

months resulting from all contracts). However, other jurisdictions use a gross trading activity threshold instead. Do you believe that it would be more appropriate for the *de minimis* test threshold under MiFID to be calculated on a gross basis, so as to measure absolute trading activity?
If so, how should the threshold be adapted?

(23) Currently, MiFID contains a single *de minimis* test threshold for all types of commodities derivatives. Do you believe the *de minimis* test threshold should differ depending on the type of commodity derivative market considered (e.g., energy derivatives vs agricultural derivatives)?
If so, why, and how should the individual thresholds be adapted?

(24) Currently the *de minimis* test threshold under MiFID is calculated including trading in commodity derivatives for an entity's own account. However, other jurisdictions exclude those transactions, and focus on dealing for the benefit of a third-party. Do you believe the *de minimis* test should continue to include, or instead exclude, all trading activity carried out for an entity's own benefit (proprietary trading), so as to only rely on dealing activities for the benefit of a third party/client?
If so, why and how should the threshold be adapted?

(25) Considering the introduction of the *de minimis* test following the CMRP, and with a view to further simplifying the AAE, do you believe that the AAE could be made less complex by:
   a. abolishing the *trading test*? If not, do you believe this test continues to be adequately calibrated? If not, how should it be adjusted?
   b. abolishing the *capital employed test*? If not, do you believe this test continued to be adequately calibrated? If not, how should it be adjusted?
   c. through other types of amendments? If so, how?

(26) If your entity currently benefits from the AAE, and should your entity not be in a position to benefit from the AAE following a review of the criteria, could you please provide an assessment of the impact of being qualified as investment firm on your operations, and on your ability to maintain active participation in commodity derivatives markets? If possible, please include a quantitative assessment of the costs incurred by such a qualification and all its implications.

(27) To what extent do you believe the application of IFR/IFD prudential requirements, including those resulting from relevant Level 2 measures, as well as dedicated prudential supervision on all energy commodity derivatives traders, would have avoided or at least partially avoided the liquidity squeeze that such market participants suffered from during the 2022 energy crisis? To what extent would it have limited the need for public intervention providing some of them with the necessary liquidity to meet requirements on margin calls? Please substantiate your answer with quantitative elements, to the extent possible.

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

   1. do you believe that the current categorisation in IFR/IFD (i.e., three categories of investment firms) should apply to those entities? Should instead a *sui generis* category be created for those entities newly covered by prudential requirements?
      If so, what IFR/IFD requirements should apply to firms in that newly created category (e.g. capital, liquidity, reporting, oversight, etc) and why? If possible,

please estimate the cost of compliance with this *sui generis* category within IFR/IFD, as detailed by you above?

2. do you see merit in a decoupling, such that it triggers the application of MIFID (including its relevant provisions on supervision), without bringing those firms directly in scope of IFR/IFD (i.e. prudential regulation)?
   If so, please estimate, if possible, the cost of compliance with the sole MiFID provisions under this scenario.
3. do you consider that all or only some MiFID requirements should apply?
   If the latter, which requirements should be retained (e.g. 'fit-and-proper' assessment)? If possible, please estimate the costs of compliance with those requirements of MiFID.

(29) Assuming a review of the AAE that would tighten the access to the exemption, what would you expect to see in terms of effects on trading and liquidity? What about the opposite scenario (meaning a widening of the exemption)? Please explain, providing if possible quantitative analysis (in terms of impact on open interest, volumes, number and diversity of participants, bid/ask spreads.).

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

3. POSITION MANAGEMENT AND POSITION REPORTING

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

3.1. Position management

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

It notably allows trading venues:

- to request information from market participants on positions held in commodity derivatives that are based on the same underlying and that share the same characteristics on other trading venues and in economically equivalent OTC contracts
- to request a person to terminate or reduce positions, or to take direct action in case the person does not comply with said request
- to request a person to provide liquidity back into the market to mitigate the impact of a large or dominant position

3.2. Position reporting under MiFID

3.2.1. Reporting from market participants to trading venues

Position management controls are complemented by position reporting requirements included in Article 58(3) of MiFID which aim, among others, at providing trading venues with the necessary information to implement their position management mandate. Market participants are thereby required to submit to the trading venues they are trading on the details of their positions held in the contracts traded on that venue.

However, currently trading venues do not have access to a full set of information on the positions that their market participants build in OTC derivative instruments related to the same market/underlying. Notably, they do not get information on positions in OTC or C6 carve-out contracts that are connected to the venue-traded contract considered, despite the fact that market participants can build significant positions through OTC transactions. Currently, positions in the OTC derivatives are obtained on an ad hoc basis ([8]). However, the recent events that occurred at the London Metal Exchange (LME) suggest that positions obtained through OTC contracts can have a significant and direct impact on orderly trading on trading venues and on the functioning of markets in general.

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

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

3.2.2. Reporting from market participants and trading venues to NCAs

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

([8]) According to MiFID Article 57(8), point (c), in the context of their position management controls, venues are entitled to '*obtain information, including all relevant documentation, from persons about the size and purpose of a position or exposure entered into, information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market, including, where appropriate, positions held in commodity derivatives that are based on the same underlying and that share the same characteristics on other trading venues and in economically equivalent OTC contracts through members and participants'*. Moreover, according to MiFID Article 58(3), market participants are required to report to the trading venue, at least on a daily basis, their positions held through contracts traded on that trading venue.

3.3. Exposure reporting under REMIT

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

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

Questions:

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

(31) Currently, under MiFID, reporting from market participants to trading venues on the positions held in instruments traded on those venues is performed by market participants themselves. Do you believe that this reporting could be carried out by clearing members, as it is the case in other jurisdictions, so as to reduce the burden on individual market participants and to enhance accuracy and completeness of reporting?
If so, how should it be structured?

(32) In which of the following cases should venues trading in commodity derivatives receive the full set of information on positions of market participants trading on their venues? (please select the relevant items, if any):

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

If you replied yes to any item, please explain how the information can be collected by trading venues and reported in the most cost-efficient way. In particular, please specify your preferred option between:

a. imposing additional reporting requirements on market participants (to trading venues), or
b. achieving this through alternative means, such as by leveraging on the existing supervisory reporting channels (e.g., reporting to trade repositories or RRMs), or
c. resorting to the single data collection mechanism as referred to in 1.

Please clarify how your favourite option could be achieved and, if possible, please estimate the cost of additional data collection/reporting, to the extent relevant, for reporting entities. Please identify whether this could lead to any double reporting under the (revised) REMIT (and as will be further detailed in the revised REMIT Implementing Regulation)?

In case you deem that resorting to a single data collection mechanism would be desirable, please specify what types of safeguards should be put in place to maintain confidentiality on sensitive information from potential competitors.

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

- C6-carve-out contracts
- the underlying spot market

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

If you responded yes to either of the above, please explain how the information can be collected by competent authorities and reported in the most cost-efficient way. In particular, please specify your preferred option between:

a. imposing additional reporting requirements on market participants (to competent authorities), or
b. if instead it should be done through alternative means, such as by leveraging on the existing supervisory reporting channels, when they exist (e.g., REMIT reporting), or
c. as regards energy derivatives, by granting competent authorities access to the single data collection mechanism as referred to in section 1.

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

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

If you responded yes to the above, please explain how the information can be collected by ACER/NRAs and reported in the most cost-efficient way. In particular, please specify your preferred option between:

a. imposing additional reporting requirements on market participants (to ACER/NRAs), or
b. if instead it should be done through alternative means, such as by leveraging on the existing supervisory reporting channels (e.g., MiFID reporting), or
c. by granting NRAs/ACER access to the single data collection mechanism as referred to in section 1.

(35) The reporting of positions in economically equivalent OTC contracts under Article 58(2) of MiFID applies to investment firms only. Do you believe this requirement should be extended to all persons (like the position limit regime)?
Please explain.

(36) In your view, is the current definition of 'economically equivalent OTC derivatives' under MiFID fit for purpose?
If not, what changes would you propose?

(37) MiFID requires that position reporting specifies the end-client associated to the positions reported. However, the legal construction of the current position reporting framework entails that, for positions held by non EU-country firms, such non EU-country firms are to be considered the end-client. This prevents the disaggregation of positions held by those non EU-country firms, and therefore the identification of the end-clients related to those positions. Does the lack of visibility by NCAs and/or by trading venues of the positions held by the beneficial owner (end client) when that position is acquired via a non EU-country firm raise

issues in terms of proper enforcement of position limits and, in the case of trading venues, of their position management mandate?
If so, should the position reporting framework be amended to specify that non EU-country firms also have to report who is the end-client linked to the position they hold in venue-traded commodity derivatives and/or economically equivalent OTC derivatives?

4. POSITION LIMITS

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

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

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

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

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

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

This should be assessed against the background that, in other jurisdictions , trading venues play an overall greater role in the tailoring, application and monitoring of position limits. For instance, for those contracts not subject to federal position limits set by the Commodities and Futures Trading Commission (CFTC), trading venues are free to set the position limits they see fit. Similarly, exchanges play a greater role in granting hedging and other exemptions to market participants, applying the conditions set out in the CFTC order.

4.1. Particular case of natural gas derivatives

In the Union, TTF natural gas futures are currently the only listed non-agricultural futures contract subject to position limits. The TTF contract currently has a position limit of 25 050 960 MWh for

the spot month and 153 017 049 MWh for other months. ([9]) The position limits are expressed in MWh as the contracts available for trading, and covered by these limits, have different lot sizes. ([10]) The position limits apply irrespective of whether the contract is held to delivery or offset or settled prior to delivery. The position limit for TTF futures corresponds to 15% of the deliverable supply of natural gas to the Netherlands for the spot month, and 12.5% for other months.

In contrast, the laws governing the Henry Hub futures in the US have different position limits for physically settled and cash-settled derivatives. There is an initial 2000 contract limit for physically settled contracts, which can be combined with up to 8000 cash-settled contracts (2000 per exchange ([11]) + 2000 in the OTC market). 2000 contracts at Henry Hub amounts to 25% of the deliverable supply at the Henry Hub. The differing limits for physically settled and cash-settled contracts are justified by the need to protect the physical delivery in the delivery month by avoiding that players take too large positions into the physical market. On the other hand, market participants that hold no physically settled contracts at all are allowed to increase their positions in cash-settled contracts. This is a specific rule for natural gas contracts called the "conditional spot month limit exemption" that increases the position limit for cash-settled contracts to 10 000 contracts.

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

Questions:

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

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

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

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

(41) In your view, what was the impact of the reforms introduced by the CMRP (reduction of the scope of contracts subject to position limits, broadening of the hedging exemption to some financial entities, introduction of the liquidity provision exemption) on the liquidity and reliability of EU energy derivatives markets? Please include any quantified impact in terms of open interest, volumes, number and diversity of participants, bid/ask spreads, etc. In particular, do you believe that the extra flexibility introduced had an impact on market participants' ability to access hedging tools in smaller, less liquid markets (e.g., local electricity or gas hubs).

([9]) ESMA74-1865191303-15639 - Opinion of 1 July 2024 on position limits on ICE Endex Dutch TTF and EEX gas contracts

([10]) ESMA70-55-12400 - Opinion of 20 December 2022 on position limits on ICE Endex Dutch TTF Gas Contracts.

([11]) Cash-settled Henry Hub contracts are traded on three exchanges in the US.

(42) Do you believe that the current criterion to determine whether a contract is a 'significant or critical contract' is fit for purpose, and why?
If not, how should it be reviewed? In particular, do you believe that this definition should vary depending on the underlying commodity?

(43) In your view, under the current position limit regime, could there still be scope for traders of some commodity contracts (spot or derivative) to use their positions in commodity derivatives with a view to unfairly influence prices or secure the price at an artificial level?
If so, please indicate which types of commodity derivatives are particularly exposed to such risks, and whether any changes to the current position limits regime could address these situations. Please also indicate whether such changes could also affect the orderly price formation process for said contracts.

(44) Contracts with the same underlying and same characteristics subject to position limits are sometimes traded on several trading venues. Do you believe that the level of the position limit for those contracts should be set at European level (e.g., by ESMA), as opposed to the NCA responsible for the supervision of the main trading venue for that contract?
Do you believe ESMA should be in charge of monitoring and enforcing the position limits for those contracts?
Please explain.

(45) Some jurisdictions only apply position limits to physically-settled futures. Once captured by the position limits, cash-settled versions of those contracts however also count towards the position limits. This means that futures that are not physically-settled (e.g., futures on power) cannot be captured by the position limit regime in those jurisdictions. Do you believe that position limits in the EU should only apply to futures contracts that are physically-settled?
What would be the benefits or risks linked to the implementation of such an approach in the EU?

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

(47) Do you believe that the methodology and the level of the limits set by NCAs, for contracts subject to position limits, is adequate?
If not, please indicate which contracts are in your view not subject to adequate position limit levels.

(48) The Draghi report refers to the possibility to set stricter position limits, including by differentiating them by types of traders. Do you believe that position limits should be differentiated, depending on the type of traders/trading activity involved?
If so, how?

(49) Do you believe that the current exemptions from position limits as set out in MiFID, notably the hedging exemption, are fit-for-purpose?
If so, explain why.
If not, what changes to such exemptions would you propose? Are there certain markets where such exemption from position limits are more/less justified and is there merit to differentiate between types of commodity markets?

(50) Do you believe that the hedging exemption is sufficiently monitored by the competent supervisors?
If not, what is the most effective and efficient way for supervisors to monitor and ensure compliance with the hedging exemption?

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

(52) Some jurisdictions allow supervisors and/or trading venues to grant ad hoc exemptions outside of the legally enumerated cases for exemptions for some contracts, if they perceive that the request is legitimate. Do you believe the EU should also introduce such a flexibility for supervisors and/or trading venues?
If so, please explain which specific cases could warrant an ad hoc exemption from position limits, and whether the power to grant an ad hoc exemption should be vested with an NCA or with ESMA.
If not, why?

(53) Do you believe that trading venues (please select the relevant items, if any):
a. should be given more responsibility in setting position limits in general, for those contracts that are by law subject to position limits (i.e., commodity derivative contracts that qualify as significant and critical or are not agricultural derivative contacts), instead of competent authorities?
b. should be in charge of setting position limits for non-spot month versions of contracts subject to position limits, thereby applying regulator-set position limits only to spot month contracts, as seen in other jurisdictions?
c. should be required or rather given a possibility to set their own position limits for contracts that are not subject to position limits by law?

Please explain the potential advantages or disadvantages linked to those options.

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

(55) Do you believe that the position limits regime should also apply to 'C6 carve-out' products?
If so:
a. please explain why, including through references to any impact you would you expect on the underlying spot market, liquidity and energy prices.
b. if a framework for position limits were also to be developed under REMIT, how should it be structured in order to ensure coherence with financial legislation and avoid duplication?
c. do you believe position limits should be set at European level (e.g., ACER), or by NRAs?
d. in your view, should NRAs/ACER be empowered to grant ad hoc exemptions from such limits?

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

5. CIRCUIT BREAKERS

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

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

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

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

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

Questions:

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

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

(58) Do you believe trading venues should be permanently required to implement static circuit breakers to further restrain excessive daily volatility for commodity derivatives specifically, as a complement to circuit breakers already implemented?
What would be the associated advantages and disadvantages?
If you replied yes, how should those static circuit breakers be calibrated?
In particular, should those static circuit breakers apply only to certain types of commodity derivative instruments, or differ depending on the type of commodity derivative considered?
More specifically, should IVMs similar to those provided for by Council Regulation (EU) 2022/2576 be introduced and applied on a permanent basis?
Please explain.

(59) What should be the effect of hitting those static price bands (should this trigger for instance trading halts or order rejection mechanisms)? In your view, what are the pros and cons of each mechanism?
If you favour trading halts, what duration do you recommend for an appropriate trading halt that is long enough for market participants to assess the situation and their position in the derivatives market and for the market to 'cool off'?
Would your assessment differ according to the type of underlying commodity considered?

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

(61) Do you perceive that implementing static price bands would risk moving trading to OTC markets?
If so, what would be possible mitigants to prevent such migration?

(62) Do you believe the dynamic static breakers implemented by trading venues in general function adequately?
If not, please explain the challenges and please indicate any potential improvements to their functioning.

(63) Do you believe energy exchanges trading in spot energy products or C6 carve-out products should also implement mechanisms similar to circuit breakers?
If so, how should those be calibrated?

6. ELEMENTS COVERED BY THE DRAGHI REPORT

This section proposes to explore the measures set out in the Draghi report ([12]) which are not otherwise covered by the review items in the review clause under Article 90(5) of MiFID. This section focuses on energy commodities (thereby not concerning derivatives on other commodities, EUAs and derivatives on EUAs), so as to reflect the specific focus of the Draghi report.

6.1. Obligation to trade in the EU

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

The report however also widens its recommendation to a fall-back scenario whereby "as a minimum, all market participants (irrespective of domicile) need to report their trades (and positions) to the regulators in the EU" ([13]). The report does not clarify what instruments should be subject to such reporting. Questions relating to potential data gaps are addressed under section 1.

Questions:

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

(64) Do you believe a general obligation to trade in the EU should be introduced? If so, for which instruments should this obligation apply? Please explain.

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

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

6.2. The Market Correction Mechanism and other dynamic caps

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

Following the adoption of the MCM, both ACER and ESMA have issued reports setting out the effects of the MCM ([14]). Those reports indicated that the MCM did not to have a discernible gas

([12]) Draghi report: EU competitiveness: Looking ahead

([13]) Draghi report, p. 30

([14]) - ESMA70-446-775 - Preliminary data report on the introduction of the market correction mechanism - 23 January 2023

market impact, owing to gas prices being significantly below MCM trigger levels. Both agencies' reports however point to a number of risks, for instance in terms of a shift to less transparent and uncleared OTC trading, in terms of challenges linked to the adaptation of risk models and margin calls by Central Counterparties (CCPs), and in terms of potential hikes in margin calls, in terms of physical flow developments. Some stakeholders however claim that the MCM provided a helpful shield against extremely high prices.

As of 1 May 2023, the MCM applied to all gas virtual trading points. The MCM then expired on 31 January 2025.

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

Questions:

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

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

(68) Building on the experience of the MCM, do you think dynamic caps based on external prices (whether in the shape of the MCM or in another shape) would help avoid situations where EU energy spot or derivatives prices significantly diverge from global energy prices, and should therefore be codified in legislation?
If not, please explain why, and specify, if relevant, to what extent you believe price divergences between EU prices and international prices can be warranted.
If so, please explain to which products you believe such dynamic caps should apply (e.g., spot/derivative, OTC/venue-traded) and how such dynamic caps should be calibrated (e.g., reference price, frequence at which the boundaries are renewed, etc.). Please point to potential risks and opportunities.

(69) Do you believe that the MCM or other dynamic caps could have an impact on the attractiveness and/or stability of EU commodity derivatives markets?
If so, please explain how.

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

(71) Are you aware of any impact on margins (or other trading costs) of the mere existence of the MCM, notwithstanding the fact that the mechanism has never been triggered?
If so, please provide details on such impacts, ideally providing quantitative input.

- ESMA70-445-794 - Effects assessment of the impact of the market correction mechanism on financial markets - 1 March 2023

- ACER's preliminary data report on market correction mechanism - 23 January 2023

- ACER's effects assessment report on market correction mechanism - 1 March 2023

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

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

More concretely, the Draghi report mentions that some basic requirements of the MiFID 'trading rule book' could be extended to spot markets. This could in particular entail two types of measures: (i) rules imposed on trading venues, and (ii) rules imposed on market participants themselves.

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

6.3.1. Organisational requirements at trading venue level

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

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

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

6.3.2. Organisational requirements at market participant level

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

- The obligation for investment firms to have a management body that oversees and is accountable for the implementation of the governance arrangements that ensure an effective and prudent management of the investment firm in a manner that promotes the integrity of the market and the interest of potential clients (Article 9(3) of MiFID). This includes approving and overseeing the knowledge and expertise required by the personnel,

and the procedures and arrangements for the provision of services and activities, taking due account of the nature of the firm's activities (Article 9(3), point a). The management body is also in charge of carrying out appropriate stress testing, if appropriate (Article 9(3), point b).

- Competent authorities are required to refuse or withdraw authorisation from an investment firm whose management body is not of sufficient good repute, or does not possess sufficient knowledge, skills and experience, or if there are objective and demonstrable grounds for believing that the management body of the firm may pose a threat to its effective, sound and prudent management and to the adequate consideration of the interest of its clients and the integrity of the market (Article 9(4)).

- Investment firms should have sound administrative and accounting procedures, internal control mechanisms, effective procedures for risk assessment (Article 16(5)).

6.3.3. Other relevant rules governing market integrity and transparency

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

Questions:

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

(72) Do you believe that requirements similar to some/all organisational requirements imposed on MiFID firms as market participants should also be imposed on market participants in spot energy markets, without requalifying those entities as investment firms, and why?
If so, could you please make specific references to those organisational requirements, which are currently foreseen under MiFID and should in a similar way apply to market participants in spot energy markets? Where possible, could you please estimate expected costs to your entity, and potentially other entities that would have to comply with those new requirements, distinguishing one-off costs and recurring compliance costs (for instance, per year).

(73) Do you believe that key rules similar to those applicable to MiFID trading venues should also apply to spot energy exchanges, and why?
If so, could you please make specific reference to those? Where possible, could you please estimate a possible cost for spot energy trading venues that would have to comply with those new requirements.

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

(75) The revised REMIT clarified that benchmarks used in wholesale energy products are captured by the market abuse-related provisions in that Regulation. Do you believe that this is sufficient to ensure the integrity of such benchmarks, and avoid risks of manipulation?

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

6.4 Enhanced supervisory cooperation in the energy area

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

The Draghi Report recommends to further integrate regulatory and supervision frameworks, notably through a deepening of the cooperation between ACER and ESMA building on exchanges of information. To achieve this, the report suggests the creation of a coordination body comprised of energy and derivative markets regulators at the European level (ACER and ESMA), which should coordinate the supervision of spot and derivatives markets. The supervisory college would remove possible overlap, duplication or potential conflicts of supervision between energy and financial regulators. The report also suggests that this college could help remove layers of intermediate supervision at the national and sometimes regional levels. This supervisory college would have both the investigative and policy powers necessary to prevent, detect and prosecute anticompetitive conduct, market abuse and other practices which disrupt orderly trading in energy ([15]).

One of the main objectives of the revised REMIT is to enhance cooperation in the energy area, as recommended by the Draghi Report. As mentioned above, the revised REMIT includes numerous provisions that not only enhance cooperation and information exchanges between EU bodies and national regulators in the field of energy, financial and competition in the context of potential REMIT breaches, but also provide for the possibility of general information exchanges among the aforementioned authorities ([16]).

Questions:

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

(76) Do you agree that the current situation leads to a complex supervisory scenario between various national and sometimes regional supervisors which may slow down reactions in times of crisis?
If so, can you point to any concrete examples? Furthermore:

a. If you replied no, please explain why you believe the current supervisory structure should not be challenged.
b. If you replied yes, do you agree that a supervisory college structure would improve cooperation between supervisors of energy spot and derivative markets?
c. If you deem that a supervisory college structure would improve cooperation between energy spot and derivative markets, please describe how this structure should look and what its main roles and responsibilities should be. In particular, please explain whether

([15]) Draghi Report, p. 30

([16]) See Article 10, paragraphs (1) and (2) of revised REMIT.

you think that a supervisory college would make sense only for some contracts/products (e.g., products of Union-wide relevance) and, if so, which ones.

d. If you deem that a supervisory college structure would *not* improve cooperation between energy spot and derivative markets, please describe how the cooperation between energy and derivative markets regulators could be further enhanced. In particular, please explain whether you believe that enhanced cooperation in the energy sector could be achieved by including in the financial legislation similar provisions with those included in the revised REMIT that will allow for enhanced cooperation and information exchanges between regulators in the financial market and energy respectively in combination with the creation of a common database for financial and energy regulators?

(77) The Benchmark Regulation (Regulation (EU) 2016/1011) sets the regulatory and supervisory regime for commodity benchmarks used in financial instruments or financial products. Those benchmarks usually at least partially refer to market dynamics in the underlying physical commodity market. Do you believe that, when it comes to energy benchmarks, there is adequate cooperation between energy markets supervisors and securities markets supervisors? If not, what would be the merits of enhancing supervisory cooperation in that area?