FESE response to the Commission consultation on the functioning of commodity derivatives markets and certain aspects relating to spot energy markets

Brussels, 21 April 2025

[For all open answers: 5000-character(s) maximum including spaces and line breaks, i.e. stricter than the MS Word characters counting method.]

1. Data aspects

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?

☒Yes

☐No

☐Don't know / no opinion / not applicable

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

Inefficiencies in the arrangements for reporting of orders, transactions and positions in European energy markets arise from the overlapping and duplicative European regulatory frameworks for financial regulation and energy policy. Gas and power derivatives fall under both regulations for financial instruments (such as EMIR, MiFID/R, MAD/R) and regulations for physical (spot) energy markets (REMIT), creating duplicative and potentially conflicting frameworks for reporting, insider trading and market abuse.

Under the current reporting framework consisting of EMIR, MiFID II/R, MAR and REMIT, trading venues and clearing houses are required to report certain data multiple times. These duplications create inefficiencies within the system and result in incomplete data collection. Ideally, FESE therefore agrees in principle with the idea of streamlining supervisory reporting requirements so that in the end, any transaction, order or position would be reported once.

However, before the Commission considers broader changes, and bearing in mind the ongoing implementation efforts on both MiFID/MiFIR/EMIR and REMIT sides, which include significant costs, it is essential to take a stepwise approach which commences with improved data sharing between supervisory authorities. Following this, we would welcome a platform for dialogue including relevant supervisory authorities and stakeholders, to map available data, assess gaps, policy nuances behind different reporting schemes, and find the most efficient way forward. A comprehensive strategy should consider, for example, the lengthy reporting requirements within MiFID as well as existing gaps in data collection.

Any changes to existing regulatory reporting should be carefully planned and calibrated to keep costs and efforts for the industry at a minimum. A proper cost-benefit analysis is a must. Changes to a technical infrastructure need a clear and sensible concept, which needs to be well understood by the industry for them to deliver on the goal. Rushing the change will only produce extra costs and carry the risk of failures from the start. Often, legal entities are affected by multiple technical changes at the same time due to multiple changing regulations affecting them. Regulators need to keep this in mind.

In consequence, it should be differentiated as regards the need-to-know data and which data may be shared amongst supervisory authorities. The focus of this should clearly and solely be the enabling of supervisors to access relevant data on a need-to-know basis, data should only be shared between supervisors who already have legal access to the data and solely for supervisory purposes only. The aim of a more streamlined and/ or harmonised reporting should exclusively be to decrease data burdens for market participants while increasing supervisory efficiencies. This should not lead to an expansion of access rights.

If no, Why do you believe they should not be streamlined and/or more harmonised?

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.

While we see a theoretical benefit in aligning standards and protocols, transitioning each reporting requirement into an aligned standard and protocol requires a specific and burdensome technical implementation, with possibly only minor savings. Without providing views at this time on specific protocols to be used as a reference, we would underline that reflection in relation to reporting formats must be holistic and consider NCA and ESMA reporting requirements so that future evolutions can effectively produce benefits and not, in reality, lead to additional complexity and unnecessary cost. Full endorsement from all NCAs and commitment that all adjust their practices and requirements in favour of any evolutions is a necessary prerequisite.

Therefore, as noted in our response to Q1, a more pragmatic approach would be to focus on using established industry standards and enhancing data-sharing between authorities as a primary action. Since all relevant data is already reported today, the most logical step is to set up a comprehensive assessment to explore how this existing data can be collected and used most efficiently.

Lastly, if any change or uniformisation is indeed one day considered, it is important that sufficient implementation time be provided for any transition (18 months at a minimum) and in a context where no new reporting format would be introduced or required in the coming 5 to 8 years.

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

☒Yes

☐No

☐Don’t know / no opinion / not applicable

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

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

FESE calls for caution and thinks that any reform of the data collection system, including implementing a data collection mechanism, should follow the existing statutory principles of confidentiality and strictly adhere to the need-to-know principle. FESE is cautiously supportive if double reporting practices can be alleviated without any supplementary operational changes or technical modifications that can add complexity and unnecessary costs. In this context, we want to refer to our answer in Q1.

Given that reporting data sets entail sensitive data which are compiled and reported for clearly determined and legally mandated supervisory purposes only, a potentially undefined re-use of data by other parties, even regards NCAs if out of their jurisdiction, would be questionable. Any data sharing that would facilitate the re-use of data for purposes other than those originally mandated shall be weighed against the principles of data protection and confidentiality. In this regard, we would like to point out that any EU data space for regulatory data creates risks of data loss and leakage – hence, access must be restricted to need-to-know only.

Such risks can be witnessed in other jurisdictions. The US SEC recently reported a significant data leak involving the Consolidated Audit Trail (CAT), which exposed sensitive market data, raising concerns about the security of the system. An audit revealed an "elevated" risk of data leakage from the CAT, which is used for comprehensive market data surveillance. The SEC has acknowledged the need for additional oversight and monitoring to safeguard CAT data. In response, they have implemented measures to mitigate potential security risks, including exempting certain personally identifiable information (PII) from being reported to the CAT. Such risks may be elevated through overly and unnecessarily broad access rights, going beyond the need-to-know principle. To avoid the above scenarios, besides a strict need-to-know governance of access to the data, cybersecurity measures should be considered.

If no, Please explain your answer to question 3:

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

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

Since all existing data is already available, rather than restructuring the entire framework, priority should be given to data-sharing among supervisory authorities. EMIR and REMIT have included provisions establishing communication channels between financial and energy market regulators at the EU and national levels.

In addition to Q3, FESE would like to note that data availability does not seem to be the root issue for supervisors. On the contrary, all the abovementioned supervisory authorities already have extensive access rights to data under their jurisdiction, in the form of regular reporting and ad hoc enquiries.

Since each legislative act (REMIT, MIFID II, MIFIR and EMIR) has its distinct purpose, sharing consolidated data to all supervisors alike could cause additional problems, such as liability issues for the supervisors in the event of an overly comprehensive data sharing of information. Therefore, we see merit in a strict application of the need-to-know principle for the sake of data protection and supervisory efficiencies.

If no, Please explain your answer to question 4:

5. In the event that the centralised reporting mechanism is deemed an appropriate measure, by what entity should energy spot and derivatives markets data be consolidated? Please select as many answers as you like:

☐by trade repositories

☒by RRM

☐by a new type of entity in charge of consolidating data collected by trade repositories and RRMs

☒some other entity

If "some other entity", please specify to what other entity(ies) you refer in your answer to question 5:

Ideally, the collecting body should have the facility to process both EMIR and MiFID/MiFIR data.

Please explain your answer to question 5:

Practically, if a centralised data collection mechanism is pursued, it would be most efficient to use existing infrastructure and leverage technical interfaces and the know-how and expertise of existing entities. This should go hand in hand with minimising disruption to reporting processes, and in any case, avoid duplicating reporting obligations.

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?

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, Please describe this better alternative:

If no, Please explain your answer to question 6:

FESE wishes to note that any changes to the current reporting infrastructure, if any, should be balanced and over a sufficiently long time horizon. The industry is burdened by increasing and regularly changing regulations, which impact productivity. This is affecting the EU economy negatively. Any changes to existing regulatory reporting should be carefully planned and calibrated to keep costs for the industry at a minimum.

A proper cost-benefit analysis is a must. Changes to a technical infrastructure need a clear and sensible concept, which needs to be well understood by the industry to deliver on the objectives. Rushing changes will only produce extra costs and carry the risk of failures from the start. Often, legal entities are affected by multiple technical changes at the same time due to multiple changing regulations affecting them.

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

   ☒Yes

   ☐No

   ☐Don't know / no opinion / not applicable

If yes/no, please explain your answer to question 7:

Allowing regulators to have a more holistic view of financial and physical energy markets when required should be a first step. As addressed in our answers under Q1 and Q4, this is ideally facilitated in a structured manner in order to increase efficiency and avoid fragmentation. FESE believes in the report-once-only principle. As such, a fundamental operational requirement is for public authorities to have mutual access to their databases on a strict need-to-know basis.

Further, concerns arise about the protection of sensitive data. Existing rules around data confidentiality and data protection should be respected (see answer to Q3). Finally, the principle that reporting requirements have been designed in a way to ensure that only the relevant supervisory authorities have access to specific data for specific supervisory purposes should be respected. **Reporting parties should always be in a position to understand who has access to their data.**

8. Do you believe that the rules on pre- and/or post-trade transparency (i.e., public dissemination of information on quotes and transactions) of commodity derivatives under MiFID/MiFIR should be amended, notably to include commodity derivatives traded on an MTF or an OTF. It is worth noting that making commodity derivatives subject to pre-trade transparency would imply that commodity derivatives would be included in the consolidated tape for OTC derivatives.

   ☐Yes

   ☒No

   ☐Don't know / no opinion / not applicable

If yes, please explain under which conditions should these rules be amended:

If no, please explain why you think these rules should not be amended:

Amending the rules on pre- and/or post-trade transparency of commodity derivatives to include commodity derivatives traded on an MTF or an OTF may pose operational and technical challenges, while the added value remains unclear. Furthermore, FESE would like to remark that the scope of the consolidated tape for derivatives only covers OTC contracts. Therefore, we understand that the applicability of transparency requirements on commodity derivatives contracts traded on MTFs and OTFs will have no impact on the eligibility of those trades to be reported in the consolidated tape, which will remain out of scope.

8.1) Would you see any added value in introducing similar rules in REMIT aiming at pre- and/or post-trade transparency?

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, Please explain under which conditions should similar rules be introduced in REMIT:

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, please explain under which conditions (latency, transmission protocols, precise scope of products, etc.) should the consolidated tape include pre- and /or post-trade data on exchange-traded commodity derivatives:

If no, please explain your answer to question 9:

ETDs should remain excluded from the scope of the consolidated tape. ETDs are not a fragmented market and are completely transparent pre- and post-trade, unlike OTC derivatives. Contracts are trading venue-specific, meaning that the same contract cannot be traded on multiple trading venues. There may be similar contracts trading on multiple venues (e.g. similar to the Dutch TTF gas contract), but they are not equivalent. Therefore, pre- and post-trade data related to a specific contract are already consolidated in the trading venue that originated the contract.

10. The recent MiFIR review has extended reporting requirements for transactions in some OTC derivatives that are executed outside of a trading venue. This extension does not concern commodity derivatives. Do you believe that transactions in OTC commodity derivatives that are executed outside of a trading venue should be subject to systematic reporting to NCAs under MiFIR?

☐Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please explain what would be the added value of such reporting compared to existing reporting requirements under EMIR and under REMIT:

If no, please explain why you think these transactions should not be subject to systematic reporting to NCAs under MiFIR:

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, please explain your answer to question 11:

If no, please explain what are the consequences of this situation and how you believe this should be tackled

ESMA might not have full access to transaction data from trading venues and market participants reported to NCAs. This issue was evident in ESMA's TRV article on gas derivatives, which concluded that there was a high concentration of positions in European gas derivatives, while a more complete dataset later showed that the level of concentration was within normal ranges. As ESMA indicated, the analysis of risks in natural gas derivatives markets was hampered by data fragmentation and the availability of data to ESMA and NCAs, particularly related to information being reported only to energy regulators or only to NCAs. Referencing our response to Question 1, we recommend tackling this within a stepwise approach, which commences with improved data sharing between authorities, followed by a comprehensive data strategy, based on a cost-benefit analysis and an assessment of potential efficiency gains.

2. Ancillary Activity Exemption (AAE)

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

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

☐Yes

☒No

☐Don’t know / no opinion / not applicable

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
- 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

If no, please explain your answer to question 12:

The exemptions under Article 2(1) of MiFID II are crucial for commodity market participants and industrial actors. These exemptions allow EMPs to engage in non-hedging activities such as risk transformation, price discovery, and business diversification without needing authorisation as investment firms. This ensures liquidity and market efficiency, which are essential for the proper functioning of commodity and energy markets. The exemptions also support EMPs in managing financial risks and contribute to the energy transition by allowing them to act as key counterparties in energy projects. Removing or narrowing these exemptions would hinder market liquidity, commodity market participants’ ability to manage risks, and Europe's competitive position globally.

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?

☒Yes

☐No

☐Don’t know / no opinion / not applicable

If yes, please explain why you believe that this exemption is fit for purpose:

The exemption under Article 2(1)(j) is considered appropriate and well-targeted. It applies strictly to investment services related to commodity derivatives and emission allowances when offered by commodity market participants to their existing commercial counterparties, typically large industrial firms. These counterparties face significant energy and commodity price risks and require long-term certainty for planning and competitiveness.

The exemption supports these needs by allowing EMPs to provide tailored hedging solutions, leveraging their market expertise. This benefits not only EMPs but also their customers, suppliers, and society by enabling efficient risk management, fostering competition, potentially reducing energy costs, and enhancing economic outcomes for end consumers.

If no, please explain how you would propose to amend this:

14. Do you currently benefit from the AAE?

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, which part of the test is the most relevant for you/do you rely on?

If no, please explain your answer to question 14

FESE, as an AISBL, does not benefit from the AAE. However, FESE would like to make some remarks on the usefulness of the AAE for market participants.

It is essential to recognise the diversity of firms operating in the commodity markets, from large utilities to smaller commercial entities. Most of these firms are not authorised as investment firms and benefit from the AAE under MiFID II, which is a proportionate approach, given the unique nature and scale of activity of commodities firms. A one-size-fits-all approach to regulation would be inappropriate, and any regulatory regime for this sector must consider the specific risk profiles and business models of different types of firms. Regulations which does not apply proportionally risk impacting some market participants unduly and disincentivising their participation in European commodity derivatives markets. Any resulting reduction in liquidity in commodity derivatives markets is likely to have a material adverse impact on the sector and the real economy which it serves.

It must also be noted that many utilities and commercial/industrial companies need to access the commodity derivatives markets to hedge and optimise their physical assets. The ability to do so efficiently is critical to their ability to obtain financing for - and make investments in - new assets (particularly concerning investment in the energy transition). Unduly burdensome regulation would have a dampening effect on the development of new assets for energy transition. Besides, increasing the cost of accessing the hedging markets would necessarily disincentive some from participating in those markets, so that they would operate entirely or partly unhedged. That would increase the credit risk they present to their financiers, thereby increasing the risk they present to the financial system.

Having said this, it should be highlighted that the AAE was only recently reviewed and amended by the EU co-legislators in the 2021 MiFID II "Quick-fix". The review consisted of carefully calibrated tests to define ancillary activities, which entered into force in November 2021. FESE does not see the need to review again the AAE regime.

If yes:

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

☐Yes

☐No

☐Don't know / no opinion / not applicable

If yes/no, please explain your answer to question 14.1

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?

The implementation of the CMRP amendments has had a positive impact on EMPs, mainly by reducing unnecessary administrative burdens without significantly altering regulatory oversight by NCAs. The review consisted of carefully calibrated tests to define ancillary activities, which entered into force in November 2021. These changes have simplified internal processes for EMPs and lowered barriers to market entry, thereby enhancing market efficiency and participation. FESE does not see the need to review again the AAE regime.

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.?

The CMRP alleviations have increased the open interest in particular and the number of commercial participants of all sizes (specifically smaller actors). This increases the quality of price discovery on the markets in question, which is intrinsically linked to the participation of many, heterogeneous, and diverse actors. This allows enhanced market quality compared to a market where actors would be limited to a range of major players only.

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?

It is important that actors are aware that there will be checks and sanctions. It makes sense for the initiative to check and monitor compliance to come from the supervisors.

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)?

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please explain your answer to question 18:

The current AAE criteria are both effective and essential for allowing commodity market participants to support efficient, competitive energy markets without falling under full MiFID II regulation. The AAE framework uses objective tests that reflect the unique role of commodity market participants. These criteria ensure only firms primarily engaged in investment services are regulated under MiFID II. Altering the AAE could harm EU energy market competitiveness, hinder the energy transition, and conflict with key policy goals such as the Green Deal, REPowerEU, and the Affordable Energy Action Plan.

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 as many answers as you like

☐adequate conduct supervision of firms active in commodity derivatives markets and enforcement of the financial rulebook (e.g., for the purpose of monitoring market abuse)

☐fair competition between market participants

☐impact on energy prices

☐liquidity of the commodities derivatives market

☐safeguarding prudential and resilience aspects of firms benefitting from the AAE

☐ability to monitor and identify future risks to financial stability (e.g., related to interconnectedness and contagion)

Please explain your answer to question 19:

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

Trading activity in derivatives traded on a trading venue?

☐Yes

☒No

☐Don't know / no opinion / not applicable

Trading activity in physically settled derivatives?

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, should the threshold be adapted?

☐Yes

☐No

☐Don’t know

If yes/no, please explain how the threshold should be adapted:

If no, please explain your answer to question 20:

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?

☒Yes

☐No

☐Don’t know / no opinion / not applicable

If yes/no/don’t know, please explain your answer to question 21:

Limiting the AAE and De Minimis tests to commodity derivatives traded within the EU is appropriate. Including non-EU trades would risk the extraterritorial application of MiFID II, leading to conflicting regulatory obligations across jurisdictions. Non-EU trading activities are already regulated by local authorities in countries like the US, UK, and Switzerland, making their inclusion in the EU framework both unnecessary and problematic.

22. Currently, the de minimis test threshold under MiFID is calculated on a net basis (i.e., by averaging the aggregated month-end net outstanding notional values for the previous 12 months resulting from all contracts). However, other jurisdictions use a gross trading activity threshold instead. Do you believe that it would be more appropriate for the de minimis test threshold under MiFID to be calculated on a gross basis, so as to measure absolute trading activity?

☐Yes

☒No

☐Don’t know / no opinion / not applicable

If yes, please explain how the threshold should be adapted:

If no, please explain your answer to question 22:

The de minimis threshold under MiFID should not be calculated on a gross basis. Doing so would undermine the test’s goal of regulatory simplicity, as emphasised by the CMRP and the Clean Industrial Deal. Furthermore, comparisons to third-country rules like the U.S.

Swap Dealer Test are misleading, as those frameworks are based on different principles and focus on overall dealing activity, not directly comparable to the EU context.

23. Currently, MiFID contains a single de minimis test threshold for all types of commodities derivatives. Do you believe the de minimis test threshold should differ depending on the type of commodity derivative market considered (e.g., energy derivatives vs agricultural derivatives)?

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, please explain why it should differ, and how should the individual thresholds be adapted:

If no, please explain your answer to question 23:

Adopting a more granular approach to the de minimis test would significantly increase complexity by requiring firms to monitor multiple thresholds across different commodity asset classes. It also introduces legal uncertainty about the regulatory status of firms that breach thresholds in some asset classes but not others. This approach contradicts the CMRP's and the Clean Industrial Deal's goals of reducing red tape and promoting regulatory simplicity.

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?

☐Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please explain why and how the threshold should be adapted:

If no, please explain your answer to question 24:

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:

Abolishing the trading test:

☐Yes

☒No

☐Don’t know / no opinion / not applicable

Abolishing the capital employed test:

☐Yes

☒No

☐Don’t know / no opinion / not applicable

Through other types of amendments:

☐Yes

☐No

☐Don’t know / no opinion / not applicable

Please explain your answer to question 25:

If no, If you think abolishing the trading test would not make the AAE less complex, do you believe this test continues to be adequately calibrated?

☒Yes

☐No

☐Don’t know / no opinion / not applicable

If yes, please explain why you think the trading test continues to be adequately calibrated?

The Trading Test is a vital component of the AAE, ensuring fair regulatory treatment for commodity market participants that don’t own large physical assets but still play critical roles in energy markets, such as retailers, aggregators, and flexibility service providers. It ensures regulation is based on the nature and purpose of trading activity, not simply on asset ownership. Removing the Trading Test would risk misclassifying real-economy firms as financial entities, imposing disproportionate burdens, increasing costs, and discouraging participation, ultimately harming market liquidity and efficiency.

If no, if you think the trading test if not adequately calibrated anymore, please explain how it should be adjusted:

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

The Capital Employed Test is a key element of the AAE, ensuring that regulation targets firms primarily engaged in investment services, not those operating substantial real-economy businesses. It recognises that many commodity market participants invest heavily in physical infrastructure like wind farms and power plants. As a relative measure,

the test compares the risk from trading to the overall capital employed, ensuring proportionality based on firm size. Commodity market participants use trading to manage unavoidable commodity price risks tied to their core operations, not as financial entities. Misclassifying such firms under MiFID II would impose unnecessary costs, reduce risk management efficiency, and harm the EU's industrial competitiveness. In short, the Capital Employed Test preserves regulatory balance, aligns with economic realities, and supports the energy transition. Removing or narrowing it would risk overregulation of real-economy firms.

If no, If you think abolishing the capital employed test would not make the AAE less complex, do you believe this test continued to be adequately calibrated?

☒Yes

☐No

☐Don't know / no opinion / not applicable

Please explain how the AAE could be made less complex through other types of amendments:

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.

It is our understanding that this would imply significant extra compliance and technical costs that could prove too burdensome for some players and result in a diminished diversity of actors interacting on these markets.

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.

FESE believes that the application of prudential requirements as proposed in Q27 would have had no positive effects on market dynamics from the August 2022 events. On the contrary, further prudential requirements could have led to less liquidity in the market, exacerbating the situation.

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

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

☐Yes

☐No

☐Don't know / no opinion / not applicable

Please explain 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.

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

☐Yes

☐No

☐Don't know / no opinion / not applicable

If yes, if possible, please estimate the cost of compliance with the sole MiFID provisions under this scenario

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

☐Yes

☐No

☐Don't know / no opinion / not applicable

If no, please explain which requirements should be retained (e.g. 'fit-and-proper' assessment)? If possible, please estimate the costs of compliance with those requirements of MiFID.

Please explain your answer to question 28:

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.):

The potential application of MiFID II/R and other pieces of regulation would act as a strong disincentive to those market participants who are today active in the market and benefit from the AAE. Restricting the AAE under MiFID II would have severe consequences for EMPs, including significant financial and regulatory burdens.

In a likely scenario, some market participants would eventually decide to exit the market and rely on OTC transactions instead. This would exacerbate liquidity issues in transparent markets, as those participants often act as liquidity providers. Furthermore, an essential part of the trading activity would further move in the dark, defeating the objectives of MiFID II/R to increase overall transparency.

Conversely, retaining or expanding the AAE would preserve liquidity, enhance market resilience, and support competitive price formation. It would also facilitate private sector investment in renewable energy, promoting energy security and the transition to a sustainable energy system.

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

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

☐Yes

☐No

☐Don’t know / no opinion / not applicable

If yes, please explain how this reporting should be structured?

If yes/no, please explain your answer to question 31:

32. In which of the following cases should venues trading in commodity derivatives receive the full set of information on positions of market participants trading on their venues? Please select as many answers as you like

☐positions held in critical or significant contracts based on the same underlying and sharing the same characteristics, traded on other trading venues

☐OTC contracts that relate to the same underlying

☐related C6-carve-out contracts

☐positions in the underlying spot market

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

Please specify what your preferred option would be:

☐imposing additional reporting requirements on market participants (to trading venues)

☐achieving this through alternative means, such as by leveraging on the existing supervisory reporting channels (e.g., reporting to trade repositories or RRMs)

☐resorting to the single data collection mechanism as referred to in section 1

☐don't know / no opinion / not applicable

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

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:

C6-carve-out contracts:

☐Yes

☒No

☐Don't know / no opinion / not applicable

The underlying spot market:

☐Yes

☒No

☐Don't know / no opinion / not applicable

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

We refer to our response to Q1 in which we advocate for a stepwise approach, in which data sharing amongst authorities should be pursued as the primary objective to obtain a more comprehensive view of the market. Any new reporting requirements should, however, be avoided.

If yes, please specify what your preferred option would be:

☐imposing additional reporting requirements on market participants (to competent authorities)

☐through alternative means, such as by leveraging on the existing supervisory reporting channels, when they exist (e.g., REMIT reporting)

☐as regards energy derivatives, by granting competent authorities access to the single data collection mechanism as referred to in section 1

☐don't know / no opinion / not applicable

If yes, please explain how the information can be collected by competent authorities and reported in the most cost-efficient way:

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?

☒Yes

☐No

☐Don't know / no opinion / not applicable

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

We refer to our response to Q1 in which we advocate for a stepwise approach, in which data sharing amongst authorities should be pursued as the primary objective to obtain a more comprehensive view of the market. Any new reporting requirements should, however, be avoided.

If yes, please specify what your preferred option would be:

☐imposing additional reporting requirements on market participants (to trading venues)

☐achieving this through alternative means, such as by leveraging on the existing supervisory reporting channels (e.g., reporting to trade repositories or RRMs)

☒by resorting to the single data collection mechanism as referred to in Section 1

☐don't know / no opinion / not applicable

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

Please explain your answer to question 34:

In this context, FESE would like to stress the report-once-only principle and avoid that, for example, ACER constructs a reporting channel mirroring what is already in place today with ESMA and NCAs. This would only exacerbate the regulatory burden on reporting entities. As explained in other questions, supervisors should have in place mechanisms to share information stemming from reporting requirements if it serves their supervisory purposes.

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

☐Yes

☐No

☐Don't know / no opinion / not applicable

If yes/no/not applicable, please explain your answer to question 35:

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please explain your answer to question 36:

If no, please explain what changes you would 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 third-country firms, such third-country firms are to be considered the end-client. This prevents the disaggregation of positions held by those third-country firms, and therefore the identification of the end-clients related to those positions. Does the lack of visibility by NCAs and/or by trading venues of the positions held by the beneficial owner (end client) when that position is acquired via a third-country firm raise issues in terms of proper enforcement of position limits and, in the case of trading venues, of their position management mandate?

☒Yes

☐No

☐Don't know / no opinion / not applicable

Please explain your answer to question 37:

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?

No, the position reporting framework should not be amended in a direction where non-EU country firms report who the end-client is linked to the held position for the following reasons:

- A non-EU country firm can be (i) a trading member of a trading venue, or (ii) a client of an EU firm which is a member of the trading venue. In both cases, the reporting of the data belongs to the end-client of that non-EU country firm. For the trading venue, this would be a difficult and cumbersome process as the trading venue does not have direct access to this data and would be dependent on the trading member in the middle.
- We assume that the transmitted data would be primarily personal, i.e., name, surname, date of birth, etc., and it might not be appropriate, if not legally forbidden, to share personal data with another party. This is a very delicate topic. Also, private information shall not be stored by an entity except the investment firms for security concerns. Trading venues should not be the recipients of such sensitive data, as the data is not related to trading.
- The trading venue must also ensure that the information provided by the trading participant is accurate, complete and submitted in time to allow the trading venue to fulfil its own reporting obligation towards its regulator. In those circumstances, the major problem for the trading venue is incomplete, incorrect and missing data by the relevant trading participants, as the trading venue is both responsible for the reporting and unable to ensure the quality, accuracy and the provision of the necessary information.

Hence, changing the position reporting framework would not be proportionate for trading venues as the necessary data is not easily available to the trading venue, and the trading venue would be dependent on its trading members. Also, past reporting experiences, i.e. transaction reporting under MiFIR (Art. 26), showed that the concerns listed above occurred in the past.

4. Position limits

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

Fundamental gaps exist in the completeness of the data used by European supervisors for analysis of globally traded financial markets in the EU, resulting in important aspects of such analysis being incorrect. This is particularly relevant for energy derivatives markets, as an ESMA report referenced in the Draghi report wrongly concludes that EU gas derivatives markets are highly concentrated. The Draghi report subsequently justifies various policy measures, including the revisions to the position limits regime, by pointing to the supposed issue of concentration.

MiFID II's main aim is to safeguard market integrity. The ability of position limits to support this aim has been subject to extensive discussions among regulators, policymakers, and industry practitioners in recent years.

Generally, and depending on the calibration of a position limits regulatory regime, position limits have the potential to put significant strain on the development of commodity derivative contracts, hampering the emergence and growth of markets that allow for hedging price risks stemming from, e.g. long-term energy investments.

The EU MiFID II position limit regime, as it was in place before the CMRP, was globally unprecedented as it applied to all commodity derivatives traded on a trading venue and the related EEOTC contracts, irrespective of the size of open interest and whatever the underlying instrument. Whilst the regime mostly did not hamper the liquidity of mature benchmark contracts, it did introduce severe adverse effects on the development of new and nascent markets. Market participants have been discouraged from trading on regulated markets, limiting the execution of trades, which could have a negative impact on the orderly functioning and general transparency of the market.

In the process leading up to the changes implemented by the CMRP, between 2019 and 2021, European policymakers gathered significant evidence and feedback on the implications of the MiFID position limits regime on the development of liquidity in European commodity derivative markets. Following this, ESMA proposed in its final report of 19 November 2021 changes to the RTS 21 on position limits, and the Commission adopted the respective CDR (EU) 2022/1302, which entered into force in August 2022. Hence, stakeholders and ESMA only recently and consistently argued that the application of position limits to all commodity derivatives would have adverse impacts on the functioning and development of new products and further growth of the existing illiquid commodity derivative markets. Overall, they acted as a barrier. Further, it should not be forgotten that non-critical or significant commodity derivatives remain subject to position reporting and management controls, and other MiFID obligations such as transparency and transaction reporting. Therefore, any concerns about high market concentration can be detected by ESMA and NCAs, irrespective of MiFID-prescribed position limits.

FESE believes that the recent comprehensive analysis from the industry and EU policymakers on the position limits regime still holds, and past regulatory barriers were addressed by the MiFID "Quick-Fix". Therefore, we do not recommend amending the current position limit regime again, as it is working as intended.

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

Position limits may ultimately restrict the flexibility of market participants to hedge their risks effectively. This brings the risk that market participants shift volumes away to less-transparent bilateral OTC markets or opt for a less optimal hedging strategy compared to when no limits would be in place. Therefore, a hedging exemption is an essential aspect of any position limits regime.

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

Please explain your answer to question 40:

Whereas MiFID main aim is to safeguard market integrity, the ability of position limits to support this objective has been subject to extensive discussions among regulators, policymakers, and industry practitioners in recent years. ESMA and the European Commission only recently extensively reviewed the position limits regime in the context of the MiFID "Quick-fix amendments". Before the final Level 1 amendments, ESMA issued a call for evidence, publicly consulted stakeholders, and issued the ESMA final report on position limits and position management in April 2020. The report explains the need for a nuanced application of the position limit regime, i.e. by applying limits to well-developed "critical and significant" contracts, but not to nascent or illiquid contracts. FESE concurred with ESMA's assessment and found that the previous position limits regime did not marginally contribute to orderly pricing and settlement, nor to prevent market abuse. For example, ESMA in their final report from April 2020 mentioned above, noted in section 3.2 that rather than being the main objective, preventing market abuse is only an indirect potential consequence of the position limits regime. In the same section, ESMA stated that "the extent to which position limits contribute to preventing market abuse appears less apparent".

Furthermore, it should not be forgotten that non-critical or significant commodity derivatives remained subject to position reporting and management controls, and other MiFID obligations such as transparency and transaction reporting. Therefore, any concerns about high market concentration can be detected by ESMA and NCAs, irrespective of MiFID-prescribed position limits. For this purpose, the position management controls regime provides a more appropriate and useful tool in the total toolset of exchanges' market surveillance departments.

FESE believes that the recent comprehensive analysis from the industry and EU policymakers on the position limits regime still holds, and past regulatory barriers were addressed by the MiFID "Quick-Fix". Therefore, we do not recommend amending the current position limit regime again, as it is working as intended. The proposals outlined in the Draghi Report would only bring back well-known regulatory issues that are already resolved.

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):

We agree with the assessment of the Commission on page 18 of this Targeted Consultation on Commodity Markets on page 18, which reads "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."

Indeed, the CMRP resolved well-known issues related to the old position limits regime, which was hampering the development of new contracts.

Since the CMRP, the refocused position limits regime has removed a key obstacle for the growth of nascent and less liquid contracts and effectively addressed the unintended consequences the regime had on these contracts. Critically, this has allowed market participants to hedge their exposure in the most efficient way possible during the subsequent energy crisis.

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

Please explain your answer to question 42:

We concur with the ESMA final report on position limits and position management of April 2020 which argues for a targeted application of the position limit regime, i.e., by applying limits to well-developed "critical and significant" contracts where price formation takes

place and that have a role in the pricing of the underlying commodity. We do not believe that since the implementation of the CMRP, the definition of such has changed. In this context, it should be noted that attractive commodity markets would also support the EU's competitiveness objectives. Rather than artificially seeking a scope increase, policymakers should ensure that the EU regime is proportionate and effective.

Please explain how the current criterion should 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?

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, 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:

If no, please explain your answer to question 43:

To support orderly pricing and settlement, it is sufficient to consider mature contracts which serve as a benchmark in their respective markets and are relevant for the price information for the underlying commodity. This is the scope that has been implemented through the CMRP. Furthermore, ensuring orderly pricing and settlement is one of the key responsibilities of an exchange and has already been achieved through a broad range of measures designed to prevent factors that might impact the price formation process.

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

Please explain your answers to question 44:

FESE is not aware of problems in the existing supervisory structure for commodity derivatives markets that would be resolved by transferring the responsibility to set and monitor position limits from national competent authorities to ESMA. The current regime balances an equal level playing field between trading venues and still enables less liquid markets to develop. As a principle, the level of position limits should be set by the authority that is closer to the market. There is a risk that if ESMA were to set the limit, for example, it would be less flexible or take longer to adapt to changes in the underlying market, which could exacerbate volatility or a stressed market. FESE supports the currently applicable regime.

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes/no/ don't know, please explain what would be the benefits or risks linked to the implementation of such an approach in the EU?

As elaborated in Q38, FESE believes the regime, as currently calibrated, is fit for purpose. The current scope ensures that position limits can play a valuable role, i.e. for contracts where price formation takes place and that have a role in the pricing of the underlying commodity and other related commodity derivatives, regardless of whether it is financially or physically settled. Therefore, FESE does not identify any rationale for additional reforms of the position limit regime, also to provide a stable and predictable regulatory environment. Generally, however, we agree with the rationale that position limits are best fit on those highly mature benchmark contracts, which have as an additional characteristic that they are physically settled.

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

Please explain your answer to question 46:

For the sake of regulatory clarity and predictability, FESE supports retaining the current position limits regime regarding physical and cash-settled contracts.

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please explain your answer to question 47:

We generally support the methodology, including the factors for NCAs to take into account.

If no, 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?

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, please explain how position limits should be differentiated:

If no, please explain your answer to question 48:

The Draghi report incorrectly assumes that European gas markets are highly concentrated, and policy intervention is therefore justified. The Draghi report subsequently justifies various policy measures, including the revisions to the position limits regime, by pointing to the supposed issue of concentration. Analysis by FESE members shows that the ESMA data referenced in the Draghi report does not include a significant proportion of non-EU liquidity. When that non-EU liquidity is added, it is clear that the markets concerned are competitive, diverse and not at all concentrated. The policy objective of position limits, or the commodity derivatives regulatory framework in general, is to preserve orderly markets, which are independent of the type of traders active in those markets. Introducing different levels of limits depending on the types of traders would introduce another layer of complexity that we believe is not supported by

any additional benefits. We question which specific risk the Draghi report would seek to eliminate by introducing stricter limits. A position acquired by a market participant in a commodity derivatives contract does not impact market dynamics any differently depending on the type of trader. Additionally, differentiating position limits based on trader classification would be unduly highly complex to implement and monitor. By maintaining a single framework for position limits, regulators uphold both fairness and the broader goal of financial stability. Finally, any need for differentiation is already efficiently achieved through the exemptions regime.

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please explain why you believe the current exemptions from position limits are fit for purpose:

FESE believes the position limits exemptions, both the hedging and liquidity provision exemption, are fit-for-purpose, not hampering the functioning, liquidity and competitiveness of critical/significant energy derivatives contracts. In particular, the hedging exemption allows market participants to use regulated venues to effectively manage their trading risk. Moreover, the liquidity provision exemption allows exchanges to incentivise trading on new/illiquid contracts. Finally, they ensure a level playing field among all market participants.

If no, 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?

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please explain your answer to question 50:

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?

☒Yes

☐No

☐Don't know / no opinion / not applicable

Please explain your answer to question 51:

It would make sense for trading venues to play a greater role in granting hedging or liquidity provisions exemptions to their market participants. As the first line of oversight, trading venues are well-positioned to assess exemption requests in the context of prevailing market conditions, liquidity needs, and the potential for market abuse. Their proximity to real-time market activity allows for more informed and responsive decision-making. However, it is also important to take stock of current market practices and the capabilities of exchanges in the EU. Such a proposal would substantially increase exchanges' responsibility in this respect, which is impossible without providing them with the appropriate tools. Ultimately, exemptions from position limits should be granted by the authority that sets the limit. i.e. if the power to set position limits is shifted to trading venues, then trading venues should also be the ones granting exemptions.

52. Some jurisdictions allow supervisors and/or trading venues to grant ad hoc exemptions outside of the legally enumerated cases for exemptions for some contracts, if they perceive that the request is legitimate. Do you believe the EU should also introduce such a flexibility for supervisors and/or trading venues?

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes, 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 no, please explain why you think the EU should not introduce such a flexibility?

53. Do you believe that trading venues:

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?

☐Yes

☐No

☒Don't know / no opinion / not applicable

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?

☐Yes

☐No

☒Don't know / no opinion / not applicable

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?

☐Yes

☒No

☐Don't know / no opinion / not applicable

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

If the position limits regime were to be reviewed, then we would support giving more responsibility to trading venues in the setting of position limits for those contracts in scope. Trading venues are inherently closest to the markets and would be able to set limits based on their extensive experience of the underlying market dynamics and market participants. In addition, exchanges would likely be able to adjust limits more rapidly in response to changing market dynamics. As stated under the questions above, however, we believe the current regime and notably its scope are fit for purpose. Hard position limits should apply only to significant or critical contracts, whereas exchanges' existing position management controls ('soft' limits) and further surveillance powers prove sufficient to ensure fair market functioning in any other contract.

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

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

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

Importantly, it should be noted that trading venues already have the rulebooks in place to monitor and potentially act upon the implications of positions to fulfil their obligation to ensure orderly trading and settlement. Under the Position Management Controls, the default situation for all futures contracts is that there is no pre-set limit on the size of the position that may be held. Accountability levels instead trigger an information request from the trading venue, which can take further necessary steps at its discretion. Exceptions to this general approach exist at the exchange's discretion, and limits may be assigned to individual contracts.

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

Please explain your answer to question 54:

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes (to Q55):

55.1) Please explain why, including through references to any impact you would you expect on the underlying spot market, liquidity and energy prices:

55.2) 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?

55.3) Do you believe position limits should be set at European level (e.g., ACER), or by NRAs?

☐At European level

☐By NRAs

☐Don't know / no opinion / not applicable

Please explain your answer to question 55.3:

55.4) In your view, should NRAs/ACER be empowered to grant ad hoc exemptions from such limits?

☐Yes

☐No

☐Don't know / no opinion / not applicable

Please explain your answer to question 55.4:

If no (to Q55):

Please explain your answer to question 55:

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

☐Yes

☒No

☐Don’t know / no opinion / not applicable

Please explain your answer to question 56:

In light of regulatory certainty, we support the current set-up of responsibilities where the setting, monitoring, and enforcement of position limits lies with the NCA. Should the NCA, however, see the need for a more holistic view of the relevant energy markets, then the sharing of data and dialogue should be facilitated between the NCA and the relevant energy regulatory authority, in line with our response to Q1.

5. Circuit breakers

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?

FESE Members have tried and tested a suite of dynamic and configurable systems and controls which enable them to manage periods of increased price volatility and to ensure that new information and rapidly changing events can be expressed in the demand and supply conditions in their market in an orderly manner. These tools are effectively mitigating excessive volatility, with enhancements made to their calibration based on market consultation and the implementation of Council Regulation (EU) 2022/2576.

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

☐Yes

☒No

☐Don’t know / no opinion / not applicable

If yes/no, what would be the associated advantages and disadvantages?

FESE strongly warns against interventions that risk distorting the price formation process and argues that flexibility and adaptability to the local market environment are key. Mandating specific types of circuit breakers would not address issues and would only make the system more rigid.

FESE agreed with the proposed RTS 7 draft prepared by ESMA and with the principles for establishing circuit breakers. FESE also largely agrees with the ESMA October 2023 supervisory briefing on the calibration of circuit breakers.

Trading venues can deploy circuit breakers in the form of trading halts or price collars by choosing the mechanism that they consider best suits their market conditions. If trading halts and price collars are appropriately calibrated, they can be used interchangeably.

In the past, FESE concurred with ESMA’s conclusion that there might be instances where the use of only static or only dynamic circuit breakers can have merits due to the specificities of the market. FESE suggested that there needs to be flexibility provided

here, and any process established for trading venues to provide information to their NCAs on this should not be overly burdensome. As an example, the requirement for both static and dynamic circuit breakers should be relaxed when the fair price of an instrument may change significantly due to the nature of the product, such as in the case of option contracts. Another instance is when there are additional trading constraints, such as the case of securitised derivatives using the RFE (Request For Execution) model, where trades can only be executed within Liquidity Provider quotes. FESE also argues that trading venues can adopt different mechanisms than static and/or dynamic reference prices to manage excess volatility episodes for certain types of instruments and/or trading models where circuit breakers are not the right mechanism to ensure price continuity. This would be common practice, for example, on European derivative exchanges for products where the price discovery is normally driven by external factors, such as for options products as referenced above.

If 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? Please select as many answers as you like

☐apply only to certain types of commodity derivative instruments

☐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?

☐Yes

☐No

☐Don't know / no opinion / not applicable

Please explain your answer to question 58:

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?

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

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

☐Yes

☐No

☐Don't know / no opinion / not applicable

Please explain your answer to question 59.2:

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

Please explain your answer to question 60:

Please see our response in Q57 and Q58.

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

What would be possible mitigants to prevent such migration?

FESE strongly suggests leaving the necessary flexibility to trading venues. The circuit breakers' design was extensively reviewed by ESMA when consulting on RTS 7.

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please explain the challenges and please indicate any potential improvements to their functioning:

If no, please explain your answer to question 62:

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, please explain how those should be calibrated:

If no, Please explain your answer to question 63:

6. Other elements covered by the Draghi Report

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, please explain for which instruments this obligation should apply?

If no, please explain your answer to question 64:

ETD markets, and derivative contracts in general, are inherently global markets. The EU cannot operate these markets, or remain competitive, if such a rule was implemented. Introducing a general obligation to trade in the EU would create significant barriers for market participants who rely on the global nature of these markets to hedge risks and manage their portfolios effectively. Such a rule would likely lead to a fragmentation of liquidity, as market participants might seek alternative venues outside the EU to avoid the constraints imposed by this obligation. This could result in reduced market efficiency, higher transaction costs, and diminished competitiveness of EU financial markets on the global stage.

Moreover, the imposition of a general obligation to trade in the EU could have unintended consequences on the ability of EU market participants to engage with non-EU counterparties. This restriction could limit their access to diverse trading opportunities and counterparties, thereby reducing their ability to hedge risks effectively. It could also lead to a decrease in the depth and liquidity of the markets concerned, as market participants might be forced to trade in less optimal conditions.

In summary, the negative impacts on market efficiency, liquidity, and competitiveness far outweigh the potential benefits of this proposal. Therefore, FESE strongly advise not to implement such a rule.

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:

See Q64.

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:

See Q64.

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

Please explain your answer to question 67:

Reports by ESMA and ACER testify to the overall efficiency and proper functioning of the energy markets throughout the crisis period in 2022. Also, ESMA and ACER found no measurable impact of the MCM on the post-crisis recovery of European energy wholesale markets since its introduction.

Exchanges have configurable controls that enable them to manage periods of increased price volatility. There is no need for a new type of price intervention which would ultimately undermine the risk management function of European energy markets. When triggered, the price cap would artificially constrain the value of energy derivatives, decoupling them from the price of the underlying physical market where supply/demand dynamics may have shifted.

This posed serious risks to financial stability and security of supply and did not fit with the EU's ambition to improve its competitiveness and strengthen its strategic autonomy.

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, If you think it is a useful tool, 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:

If no, if you think it is not a useful tool, please explain why, and specify, if relevant, to what extent you believe price divergences between EU prices and international prices can be warranted:

Fundamentally, any mechanism aimed to curb volatility or price movements (such as circuit breakers or the IVM or the MCM) would not prevent episodes of volatility in European energy prices or would not prevent the price of the underlying from changing. A cap undermines the risk management function of European energy markets. When triggered, the price cap would artificially constrain the value of energy derivatives, decoupling them from the price of the underlying physical market where supply/demand dynamics may have shifted.

Instead, it would likely harm trust in European markets and market participants to shift towards other, unrestrained and therefore more representative reference prices, which are primarily located outside of the EU. Specifically in the case of natural gas, if the price is artificially capped below market value, Europe no longer offers a competitive price to attract LNG shipments, which would jeopardise security of supply.

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?

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please explain how the MCM or other dynamic caps could have an impact:

If market participants ever become concerned about the prospect of the MCM activation, the EU's energy commodity derivatives market may move outside of the EU. This euro-denominated market would thereby no longer be subject to the EU's regulatory framework and supervision. Moreover, the liquidity in the main hedging tool in Europe, which is designed to smoothen consumer impact to spot prices, would be reduced. This would result in consumers being more exposed to price volatility, increasing the cost of capital of the European energy industry and reducing their competitiveness.

If no, please explain your answer to question 69:

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

A price cap presents significant threats to Europe's financial stability. The ECB has expressed concerns that the design of the previously implemented MCM jeopardised financial stability in the euro area. The design of this price cap mechanism could increase volatility and trigger higher margin calls, placing undue strain on central counterparties' ability to manage financial risks. This may also incentivise market participants to migrate from regulated trading venues to non-centrally cleared OTC markets. ESMA, in its assessment report of the MCM (March 2023), also foresees that when prices would approach the artificial limit, a swift and significant shift of trading would move outside the EU.

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

☒Yes

☐No

☐Don't know / no opinion / not applicable

If yes, please provide details on such impacts, ideally providing quantitative input:

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

Should exchanges' prices differ from the actual market price (due to the MCM), CCP valuation of positions is likely to occur within the OTC bilateral market. Once a price cap is enforced, liquidity will start migrating away from the exchange to the OTC bilateral market. Consequently, the accurate valuation of the TTF front month will be conducted in the OTC bilateral market, influencing the valuation process in margining. This inefficiency in the clearing mechanism would result in a significant increase in margins.

If no, please explain your answer to question 71:

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

If yes, Please explain why, making if possible 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):

If no, please explain your answer to question 72:

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

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

☐Yes

☐No

☒Don't know / no opinion / not applicable

If yes, Please explain why, making if possible 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.

Please explain your answer to question 73:

Price-insensitive buying in day-ahead spot markets, whereby the buyer did not hedge its position on the futures market, resulted in extraordinary price peaks in European natural gas during the summer of 2022. This trading activity in day-ahead markets aimed to fulfil gas storage obligations under the EU gas storage regulation. To fundamentally address one of the root causes of the energy crisis in Europe, and the price increasing trading behaviour that has exacerbated it, one possibility is that the tighter governance arrangements and controls that apply to MiFID trading venues could in future, subject to proper consideration and impact assessment, apply also to day-ahead gas market operators. However, in line with our answer to Q72, whilst spot markets can take inspiration from the robust arrangements of MiFID on a case-by-case basis and to the extent this fits the respective markets, a broad-brush application of financial services legislation would not be appropriate. A lack of a tailored approach could lead to unnecessary, duplicative, and potentially harmful requirements.

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

☐Yes

☒No

☐Don’t know / no opinion / not applicable

Please substantiate your answer to question 72:

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?

☒Yes

☐No

☐Don’t know / no opinion / not applicable

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

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

☐Yes

☒No

☐Don't know / no opinion / not applicable

If no, please explain your answer to question 76:

Speedy reaction time in case of crisis is key. FESE believes that it would not serve the interest of the EU to have a situation, for example, where multiple authorities would need to be consulted before taking any appropriate measures.

If yes, please provide concrete examples in relation to your answer to question 76:

If yes, question 76.1. Do you agree that a supervisory college structure would improve cooperation between supervisors of energy spot and derivative markets?

☐Yes

☐No

☐Don't know / no opinion / not applicable

If yes, 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 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:

If no, if you deemed 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?

☒Yes

☐No

☐Don’t know / no opinion / not applicable

If yes, please explain your answer to question 77:

If no, please explain what would be the merits of enhancing supervisory cooperation in that area:
