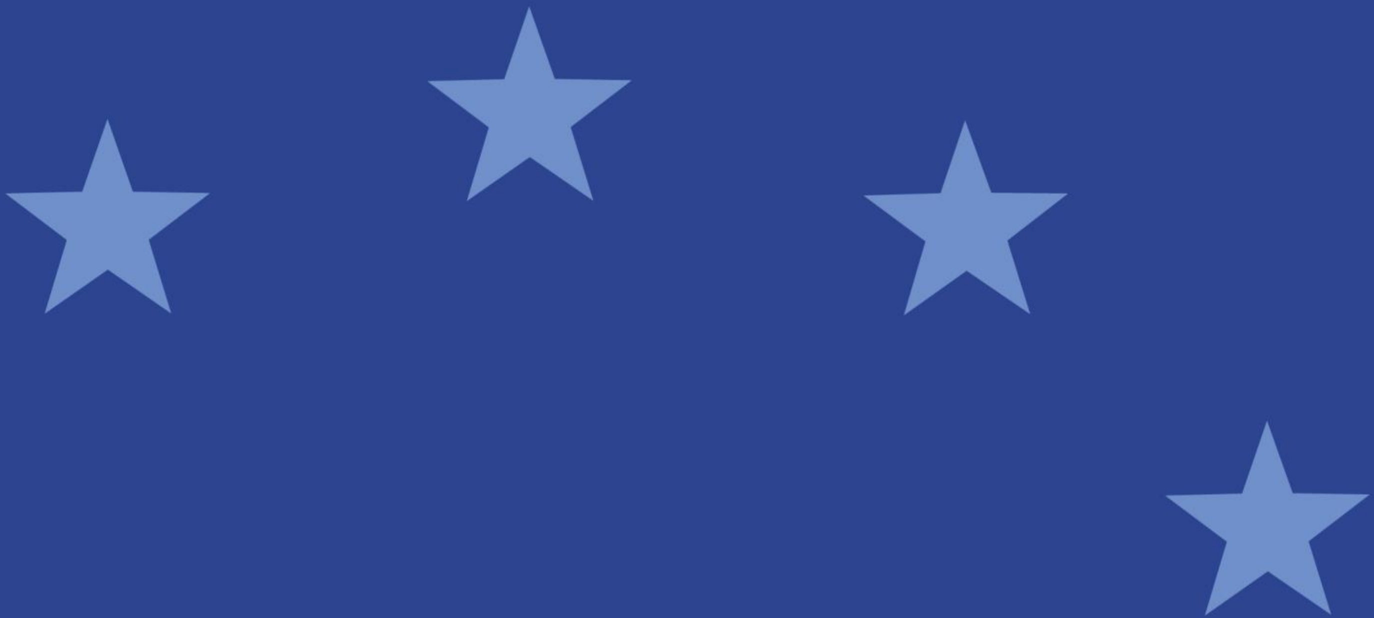
Questions and Answers

On MiFID II and MiFIR commodity derivatives topics



27 March 2019 | ESMA70-872942901-36

Date: 27 March 2019
ESMA70-872942901-36

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Acronyms and definitions used

CCP	Central Counterparty
EEOTC	Economically Equivalent OTC contracts
EMIR	European Market Infrastructure Regulation – Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories
ESMA	The European Securities and Markets Authority
ETC	Exchange Traded Commodities
ETF	Exchange Traded Fund
ITS 4	Commission Implementing Regulation (EU) 2017/1093 of 20 June 2017 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators
ITS 5	Commission Implementing Regulation (EU) 2017/953 of 6 June 2017 laying down implementing technical standards with regard to the format and the timing of position reports by investment firms and market operators
LNG	Liquefied Natural Gas
MiFID I	Markets in Financial Instruments Directive – Directive 2004/39/EC of the European Parliament and of the Council
MiFID II	Markets in Financial Instruments Directive (recast) – Directive 2014/65/EU of the European Parliament and of the Council
MiFIR	Markets in Financial Instruments Regulation – Regulation 600/2014 of the European Parliament and of the Council
MTF	Multilateral Trading Facility
NCA	National Competent Authority
NFE	Non-Financial Entity
OTF	Organised Trading Facility

REMIT	Regulation on Wholesale Energy Market Integrity and Transparency – Regulation (EU) No 1227/2011 of the European Parliament and of the Council
RTS 2	Commission Delegated Regulation (EU) 2017/583 of 14 July 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to regulatory technical standards on transparency requirements for trading venues and investment firms in respect of bonds, structured finance products, emission allowances and derivatives
RTS 20	Commission Delegated Regulation (EU) 2017/592 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business
RTS 21	Commission Delegated Regulation (EU) 2017/591 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives

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	12	What is the meaning of the 'single fungible pool of open interest' in Art 5.1(b) of RTS 21? Does it refer only to those commodity derivatives cleared in the same central counterparty?	Art 5(1)(b) of RTS 21	29/03/2017
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	21	In cases where an OTC contract is economically equivalent to more than one ETD contract traded on an EU trading venue and where those ETD contracts are not the same derivative contract, to which NCA should the reporting of the EEOTC contracts be addressed?	Article 58 of MiFID II	27/03/2018
	22	Which types of firm fall within each of the ITS 4 categories for the purposes of the weekly Commitment of Trader (CoT) reports?	Article 58 of MIFID II	02/10/2018
Position management controls	1	Are position management controls required to play a role in the application of position limits applied by NCAs according to Article 57(1) MiFID II?	Art. 57 of MIFID II	04/10/2017
Third country issues	1	Should economically equivalent contracts traded on a third-country venue be considered EEOTC for position limit and	Art. 58(2) of MIFID II	31/05/2017

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1 Introduction

Background

The final legislative texts of Directive 2014/65/EU[1] (MiFID II) and Regulation (EU) No 600/2014[2] (MiFIR) were approved by the European Parliament on 15 April 2014 and by the European Council on 13 May 2014. The two texts were published in the Official Journal on 12 June 2014 and entered into force on the twentieth day following this publication – i.e. 2 July 2014.

Many of the obligations under MiFID II and MiFIR were further specified in the Commission Delegated Directive[3] and two Commission Delegated Regulations[4][5], as well as regulatory and implementing technical standards developed by the European Securities and Markets Authority (ESMA).

MiFID II and MiFIR, together with the Commission delegated acts as well as regulatory and implementing technical standards will be applicable from 3 January 2018.

Purpose

The purpose of this document is to promote common supervisory approaches and practices in the application of MiFID II/ MiFIR in relation to the position limits, position reporting and ancillary activity provisions and other aspects of the commodity derivatives regime in MiFID II. It provides responses to questions posed by the general public, market participants and competent authorities in relation to the practical application of MiFID II/MiFIR.

The content of this document is aimed at competent authorities and firms by providing clarity on the application of the MiFID II and MiFIR requirements.

The content of this document is not exhaustive and it does not constitute new policy.

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[1] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

[2] Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) N0 648/2012.

[3] Commission Delegated Directive (EU) 2017/593 of of 7 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits.

[4] Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive..

[5] Commission Delegated Regulation(EU) 2017/567of 18 May 2016 supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions..

Status

The Q&A mechanism is a practical convergence tool used to promote common supervisory approaches and practices under Article 29(2) of the ESMA Regulation.[6]

Due to the nature of Q&As, formal consultation on the draft answers is considered unnecessary. However, even if they are not formally consulted on, ESMA may discuss them with representatives of ESMA's Securities and Markets Stakeholder Group, the relevant Standing Committees' Consultative Working Group or, where specific expertise is needed, with other external parties.

ESMA will periodically review these questions and answers to identify if, in a certain area, there is a need to convert some of the material into ESMA Guidelines and recommendations. In such cases, the procedures foreseen under Article 16 of the ESMA Regulation would be followed.

The Q&As in this document cover only activities of EU investment firms in the EU, unless specifically mentioned otherwise. Third country related issues, and in particular the treatment of non-EU branches of EU investment firms, will be addressed in a dedicated third country section.

Questions and answers

This document is intended to be continually edited and updated as and when new questions are received. The date on which each section was last amended is included for ease of reference.

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[6] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC Regulation, 15.12.2010, L331/84.

2 Position limits [Last update: 02/10/2018]

Question 1 [Last update: 19/12/2016]

Are position limits applicable only at the end of each trading day or also throughout the trading day?

Answer 1

Position limits are applicable at all times. This is particularly relevant when a commodity derivative is traded OTC outside the normal trading hours of a trading venue.

Question 2 [Last update: 13/11/2017]

What is the definition of a lot for the application of Article 15(1)(a) and (b) (New and illiquid contracts) of RTS 21 to those commodity derivatives for which a lot, as defined in the contract specification by the trading venue, does not represent a standard quantity of the underlying across all maturities/delivery periods for that commodity derivative?

Answer 2

In some derivative markets (mainly related to power or gas), trading venues offer trading in derivative contracts that refer to an identical underlying but have a variety of delivery periods, e.g. annual (calendar), quarterly, monthly, weekly (whole week, working day week and weekend) or daily.

For these contracts a lot or unit of trading, as defined in the contract specification by the trading venue, does not necessarily represent a standard quantity of underlying across all maturities/delivery periods, i.e. the lot size for a daily contract is different from that for a monthly contract as the lot size usually depends on the number of relevant days and/or hours in the delivery period. For baseload power derivatives, this is illustrated by the following table:

Delivery period	Unit of trading (1 Lot = 1MW)	Quantity of underlying commodity (baseload)	Lot size
1 day	1 MW	24 MWh	24 h
1 week – 7 days	1 MW	168 MWh	168 h
1 month – 30 days	1 MW	720 MWh	720 h

Since there is not an unambiguous equivalence between a lot and an absolute quantity of underlying commodity, it is necessary to define a reference period and use the associated lot size to determine the liquidity of a contract under Article 15(1)(a) and (b) of RTS 21 and to set position limits under Article 15(1)(a) of RTS 21.

As the trading activity in European power and gas derivative markets is generally concentrated in monthly contracts, the period of the monthly contract should be used as the reference period. The associated lot size should be calculated by using the relevant days and/or hours as specified by the trading venue for that particular contract type.

Example:

Lot size calculation for a monthly base load and a monthly peak load power derivative contract to determine liquidity and set position limits for illiquid contracts:

Base load lot size = 30 days * 24 hours/day = 720 h, 10,000 lots are equivalent to 7.2 TWh,

Peak load lot size: 22 days * 12 hours/day = 264 h, 10,000 lots are equivalent to 2.64 TWh.

Question 3 [Last update: 19/12/2016]

What is a lot in the case of Economically Equivalent OTC contracts (EEOTC)?

Answer 3

A significant number of OTC contracts are specified by reference to a quantity of the underlying commodity and not the standardised lot sizes of an exchange-traded derivative. Where an OTC contract is not defined in standardised lots the size of the contract should be calculated as a multiple of the standard unit of trading used by the trading venue for the commodity derivative to which the OTC contract is equivalent.

Question 4 [Last update: 19/12/2016]

Should positions with different maturities for other months' limits be netted?

Answer 4

Yes. Persons must determine their net position for each commodity derivative for the other months' limit, as indicated in Article 3(4) of RTS 21.

They should sum (or net, as appropriate) all individual positions across the curve excluding those positions in the spot month for that commodity derivative.

Question 5 [Last update: 19/12/2016]

How should non-EU entities with positions above the limits be treated? Do they have access to exemptions, and if so, when and how do they apply to the relevant NCA?

Answer 5

A non-financial entity from outside the EU (European Union) may apply for an exemption in the same manner as an EU firm would. The rules and procedures are laid down in RTS 21.

Question 6 [Last update: 19/12/2016]

How do limits apply to long and short positions?

Answer 6

Position limits apply to net positions regardless of whether the net position is long or short. When calculating their positions, a person needs to aggregate their long and short holdings in spot contracts towards the spot month limit. They separately need to aggregate all their long and short positions for all other months towards the other months' limit.

Question 7 [Last update: 19/12/2016]

Are securitised derivatives considered to be commodity derivatives under MiFID II? How does ESMA differentiate between ETCs and securitised derivatives?

Answer 7

"Securitised derivatives" are transferable securities whose value is based upon underlying assets. However, neither MiFID I (incl. level 2 thereof), nor MiFID II/MiFIR contain a specific definition of these instruments.

Where the underlying asset of securitised derivatives is one or more commodities, these instruments are caught by the definition of "transferable securities" in Article 4(1)(44)(c) of MIFID II and are commodity derivatives under Article 2(1)(30) of MiFIR.

Exchange traded commodities (ETCs) are debt instruments which are within the scope of Article 4(1)(44)(b) of MiFID II and are classified as such in RTS 2. Therefore, they are outside the definition of commodity derivatives in Article 2(1)(30) of MiFIR and the position limits regime does not apply to them.

ESMA is aware that market practices in differentiating between ETCs and securitised derivatives are neither clear nor uniform and presents the following guidance to allow for a correct classification of instruments in practice.

In RTS 2 ETCs are described as debt instruments issued against a direct investment by the issuer in commodities or commodity derivative contracts. The price of an ETC is directly or indirectly linked to the performance of the underlying. An ETC passively tracks the performance of the commodity or the commodity indices to which it refers.

In addition, ESMA considers that ETCs typically have the following features:

- a primary market exists which is accessible only to authorised market participants permitting the creation and redemption of securities on a daily basis at the price set by the issuer;
- they are not UCITS and therefore unlike an ETF can have an exposure profile not in compliance with the UCITS diversification requirements;
- they are traded on- and off-venue in significant volumes;
- the price is aligned, or multiplied by a fixed leverage of the price of the underlying commodity;
- a management fee is charged by the issuer;
- they may be issued by non-banking institutions;
- they do not have an expiry date;
- they may have a strict regime of capital segregation, usually through the use of special purpose vehicles;
- they are often aimed at professional investors.

In comparison, the term 'securitised derivatives' describes a much wider set of financial instruments that can have a large variety of features among them the following typical features:

- they can have commodities as underlying but also many financial instruments or they can be linked to strategies, indices or baskets of instruments;
- they can passively track the performance of the underlying but they can typically also apply leverage, can have an option structure or also have a lower risk profile than the underlying by, for example, offering capital protection;
- they are traded on venue or OTC by the issuer directly or via intermediaries;
- the issuers' costs and compensation are factored into their price;
- they have an expiration date;
- they provide an issuer credit risk exposure;
- they are often aimed at retail clients.

Question 8 **[Last update: 19/12/2016]**

Are the net positions held by clearing members usable for the purposes of determining the positions of their clients for the application of position limits under Article 57?

Answer 8

No. Central counterparties determine net positions at the level of their clearing members, which usually encompass the long and short position of many different clients unless held in individually segregated accounts. A CCP may also see positions only for those contracts for which it provides a central counterparty service and not the EEOTC positions or any held at a CCP subject to interoperability. Position limits apply at the level of the individual person, and net positions held at clearing level must therefore be disaggregated.

Question 9 **[Last update: 13/11/2017]**

Will there be a different position limit for options and futures? If so, how should options be converted into futures for the application of position limits?

Answer 9

No, there will be no separate limits for futures and options on the same commodity derivative. Futures and options are fungible in terms of their economic effect at expiry if an option expires in the money with the respective future expiring at the same time. During the life of an option contract, the probability of the option expiring in the money is reflected in its delta value.

Option positions should therefore be converted into positions in their respective future contracts on the basis of the current delta to arrive at a delta equivalent futures position. Long delta equivalent positions on calls and short delta equivalent positions on puts should be added to positions on futures. Short delta equivalent positions on calls and long delta equivalent positions on puts should be subtracted from positions on futures.

If available, position holders should use the delta value published by the trading venue or the CCP to report their positions in options. In the absence of a published delta value, position holders may use their own calculation. Position holders should be able to demonstrate, on demand, to the NCA responsible for the application of the position limit that their calculations correctly reflect the value of the option.

To determine which contracts are liquid under Article15 of RTS 21 and also to establish position limits based on the quantity of open interest, the open interest of futures plus the delta-adjusted open interest of options should be used, where there is a future and/or option traded on the commodity derivative and the relevant data are available. This is consistent with the reporting of positions made under Article 58 of RTS 21.

Question 10 **[Last update: 27/03/2018]**

How is the position limits regime applied to the various underlyings listed in Annex I, Section C(10) of MIFID II?

Answer 10

Section C(10) of Annex I of MIFID II covers a number of different types of commodity derivatives. For these instruments the following approaches should be taken:

Position limits should be applied to **freight rate derivatives** (wet and dry freight) based on the open interest both in the spot month and in the other months.

Position limits should be applied to derivative contracts relating to **indices** if the underlying index is materially based on commodity underlyings as defined in Article 2 No. 6 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016. ESMA considers that the underlying index is materially based on commodities if such commodities have a weighting of more than 50% in the composition of the underlying index. The spot and the other months' limits should be based on open interest only, in accordance with Article 13(1) of RTS 21, as no single measurable deliverable supply can be determined for the commodities contained within the index.

A commodity derivative contract in the legal form of a **"spread" or "diff" contract** is a contract that is cash-settled and whose value is determined by the difference between two reference commodities which may vary in type, grade, location, time of delivery, or other features. The application of the regime regarding these contracts is dealt with specifically in question 17.

For other derivatives listed in Section C10 of Annex I of MiFID II and in Article 8 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016, ESMA is not expecting the setting of any position limits as the underlyings of such derivatives are not considered to be commodities as defined in Article 2 No. 6 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.

Question 11 **[Last update: 29/03/2017]**

Can a hedge exemption be netted against positions in derivatives which are not objectively measurable as reducing risks directly related to that person's commercial activity?

Answer 11

No. Once an exemption has been granted and positions are approved as risk-reducing in accordance with Article 8 of RTS 21, those positions fall outside the position limit regime. Otherwise, the benefit of a risk-reducing position would be double-counted, by first being excluded from the limit and then being used to offset a speculative exposure.

Question 12 **[Last update: 29/03/2017]**

What is the meaning of the 'single fungible pool of open interest' in Art 5.1(b) of RTS 21? Does it refer only to those commodity derivatives cleared in the same central counterparty?

Answer 12

Commodity derivatives with a single fungible pool of open interest would include those cleared by the same central counterparty (CCP) and those in interoperable CCPs which may be closed out against each other. It would also include other commodity derivatives with delivery obligations which are fungible and can be closed out against each other (for example, through the operational netting provided by a transmission system operator).

Question 13 **[Last update: 29/03/2017]**

How should contracts that have a high variability of open interest during the year be treated (i.e. minimum open interest is below 10,000 lots but maximum above it)?

Answer 13

Article 15 of RTS 21 states that new and illiquid contracts for which the total combined open interest in spot and other months' contracts does not exceed 10,000 lots for a consecutive three-month period are assigned a position limit of 2,500 lots. Therefore, any contract with a high variability would have to exceed the threshold of 10,000 lots of open interest on a daily basis based on end-of-day figures for three consecutive months before an individualised position limit has to be set for that contract.

Question 14 **[Last update: 07/07/2017]**

Is it necessary for a Non-Financial Entity (NFE) to apply to the relevant NCA of a trading venue for a position limit exemption in all contracts in which that NFE holds positions?

Answer 14

No. It is necessary only for an NFE to apply for an exemption when it expects that one is necessary to permit it to hold a position that is risk-reducing for its commercial activities which would be in excess of the position limit for that commodity derivative which has been set by the NCA.

There is no requirement under MIFID II to apply for a position limit exemption if an NFE does not expect to need one for its normal level of activities.

Question 15 [Last update: 15/12/2017]

How should the spot month be defined for contracts where there are daily, weekly, quarterly and calendar as well as monthly variants of the same contract?

Answer 15

The determination of the spot month for the application of the spot month position limit should be made by the NCA on the basis of the contract specification and the characteristics of the market for that particular commodity derivative.

Where there are daily or weekly as well as monthly contracts, the positions to be included in the spot month period and subject to the position limit, include positions in contracts referencing days or weeks which fall entirely inside that spot month.

For many contracts, the spot month will be the current calendar month in which delivery is taking place (until the final day of that month). For example, between 1 and 30 January, January is the spot month.

In other contracts, where e.g. the January contract expires at the end of December, the spot month will change to the next calendar month which is available to trade. For these contracts, for most of January, the spot month will be February (and positions in any days or weeks falling wholly within February will count towards the spot month limit).

Question 16 [Last update: 27/03/2018]

How can limits be set for contracts with an open interest between 5,000 and 10,000 lots which have a low number of market participants or market makers as described in Article 19(2) of RTS 21?

Answer 16

Article 15(1)(a) and (c) of RTS 21 establishes a fixed limit of respectively 2,500 lots for lower liquidity commodity derivative contracts and 2.5 million securities for lower liquidity securitised derivatives whereas Article 19(2) of RTS 21 allows limits of up to 50% if the contract has less than ten market participants or less than three investment firms acting as market makers.

RTS 21 does not establish a hierarchy between these two Articles. Accordingly, to achieve the aims set out in Article 57(1) of MiFID II, where commodity derivatives traded on a trading venue have a total combined open interest in spot and other months' contracts exceeding 5,000 lots, authorities may set the limits of positions held in those commodity derivatives using either the default 2,500 lot limit under Article 15(1)(a) of RTS 21 or a limit within the range established by Article 19(2) of RTS 21. The limit under Article 19(2) of RTS 21 would be used where the automatic limit under Article 15(1)(a) would unduly constrain the operation of the market and prevent the contract from supporting the functioning of commercial activities in the underlying

market, as clarified in Recital (1) of RTS 21. The limit would be established in accordance with the baseline and the relevant adjustment factors set out in Article 14 of RTS 21.

For securitised derivatives with an issuance size between five and ten million securities, a similar approach applies. Where necessary to allow for the proper operation of the market, competent authorities may set a position limit within the range established in Article 19(2) of RTS 21 when the conditions thereof are met. The position limit would apply to the number of securities in issuance and would be the same for the spot month and the other months.

Question 17 [Last update: 27/03/2018]

How are position limits applied to intercommodity 'spread' or 'diff' contracts?

Answer 17

A commodity derivative contract in the legal form of a "spread" or "diff" contract is a cash-settled contract whose value is determined by the difference between two reference commodities that may vary in, inter alia, type, grade, location, or delivery characteristics. Whilst having multiple underlying constituents, the spread derivative is available on a trading venue as a single tradable financial instrument.

A spread contract differs from a 'spread trading strategy' (two or more commodity contracts traded together to achieve a particular economic effect), as such a strategy may be executed by a single action in a venue's trading systems, but it remains composed of separate, and legally distinct commodity derivatives which are executed as trades simultaneously.

As a spread contract has no single underlying commodity at a specific place or time, it is not possible to link it to a single physical deliverable supply against a contractual obligation to physically settle the trade. It is for this reason all spread contracts are cash-settled and not physically settled.

Article 57(4) of MiFID II states 'A competent authority shall set limits for each contract in commodity derivatives traded on trading venues based on the methodology […]'. Whilst specifically referencing each contract, this should refer to outright instruments (i.e. the disaggregated components of spreads) and the limits be applied at that level. The prevailing limits will apply to the net eligible positions, inclusive of spread limits, post-disaggregation.

In cases where a constituent leg is not independently admitted for trading, then the spread itself will receive a limit (de minimis or bespoke). In these cases, the same methodology as for C10 commodity derivatives that have no physical underlying will apply, as such the open interest figure for the spread shall be used as the baseline for both the Spot Month and Other Months' limits.

Question 18 [Last update: 02/10/2018]

Do position limits also apply to positions in contracts that have been entered into prior to 3 January 2018 and are traded on a trading venue, including an OTF, or are economically equivalent OTC contracts (EEOTC) to those traded on a trading venue?

Answer 18

Yes. The position limits regime does apply to all positions in commodity derivatives offered by EU trading venues and EEOTC contracts, irrespective of the time when the contracts have been entered into. This is even the case if the relevant financial instrument was not a financial instrument at the time of the contract formation, e.g. prior to the application of MiFID II on 3 January 2018.

This is because all positions in a MiFID II commodity derivative held by a position holder are assessed constantly and from the point of application (see also Q&A 1). Articles 57 and 58 of MiFID II do not refer to the formation of the contract in any of their provisions. As soon as a financial instrument becomes subject to the position limits regime, the position limits apply to the positions of position holders and are to be reported and monitored against position limits.

3 Ancillary activity [Last update: 27/03/2019]

Question 1 [Last update: 19/12/2016]

Do all legal entities that deal in commodity derivatives within a financial group need to be individually authorised as investment firms?

Answer 1

Yes. Under Article 2(1)(j), the exemption for trading in commodity derivatives only applies when the main business of the group is considered on an overall basis not to be the provision of investment services within the meaning of this Directive or banking activities under Directive 2013/36/EU.

Therefore, all entities within a group which cannot be considered as a non-financial group are required to obtain authorisation as an investment firm under MiFID II if they wish to trade commodity derivatives.

Question 2 [Last update: 19/12/2016]

Does trading activity in C6 contracts which takes place on OTFs after 3 January 2018 need to be counted towards the ancillary thresholds prior to that date?

Answer 2

We differentiate between wholesale energy products categorised as C6 within the REMIT scope (derivatives with electricity and natural gas as underlying traded on an OTF that must be physically settled), C6 energy derivatives contracts (those with coal or oil as underlying traded on an OTF that must be physically settled) and the rest of C6 instruments.

Financial instruments under MiFID I which will also be financial instruments within C6 under MiFID II should count towards the trading activity and assessed against the ancillary thresholds.

C6 with coal or oil as underlying and the rest of C6 instruments count throughout the calculation period to determine market size, as OTC instruments until January 3, 2018 and as OTF on-venue instruments after that. For C6 instruments with coal or oil as underlying traded on OTFs this assessment is based on them only being exempted from certain EMIR obligations for a transitional period while they are being classified as financial instruments throughout the period. The same applies to the computation of positions by non-financial corporates.

Question 3 [Last update: 02/10/2018]

Can the parent undertaking notify its NCA for the whole group or do the subsidiary undertakings also have to notify their local NCA?

Answer 3

The ancillary exemption applies to persons. Notification to the relevant NCA for that person is a condition for using the exemption. Therefore, any person that is party to a commodity derivative will need to notify its relevant NCA. This also applies to persons who are part of a group. It is not possible for a group to apply for an exemption on behalf of all the entities that the group contains.

Question 4 [Last update: 31/05/2017]

Who has to notify annually the relevant competent authority that they make use of the ancillary activity exemption?

Answer 4

In general, any (natural or legal) person that deals on own account or provides investment services in commodity derivatives as a regular occupation or business on a professional basis pursuant to Article 5 of MiFID II has to be authorised as an investment firm under MiFID II. However, if the person meets the criteria for activities considered to be ancillary to the main business pursuant to Article 2(1)(j) and the provisions in RTS 20 and makes use of the ancillary

activity exemption, then it has to notify annually the relevant competent authority that they make use of this exemption.

Question 5 [Last update: 31/05/2017]

To which competent authority should a person provide notification that it makes use of the ancillary activity exemption?

Answer 5

The relevant competent authority will be the national competent authority to which the person would need to apply for authorisation if it were unable to make use of the ancillary activity exemption.

Question 6 [Last update: 27/03/2019]

By when does a firm that wants to make use of the ancillary activity exemption need to notify its competent authority?

Answer 6

Article 2(1)(j) of MiFID II exempts persons who deal in commodity derivatives on an ancillary basis under a number of conditions. One of these conditions is that they notify annually the relevant competent authority that they make use of this exemption. The notification needs to have been made for a firm to be able to rely on it.

~~The first of such notifications must be made by January 3rd of 2018. For 2019 and subsequent years, the notification needs~~Ancillary activity notifications ~~-~~need to be made annually by April 1st of the year for which the exemption applies ~~each year~~. Any firm that has not applied for authorisation has to notify.

Question 7 [Last update: 31/05/2017]

When does a firm that can no longer make use of the ancillary activity exemption need to apply for a license?

Answer 7

When a person's trading activity increases to such an extent that it can no longer be considered to be ancillary to its main business under Article 2(1)(j), the firm must apply to the competent authority for a license.

Firms may not be certain whether they will be able to benefit from the exemption until the data on market size becomes available. Those who have reasonable grounds for considering they will be able to benefit from the ancillary activity exemption should notify. Where subsequently the market data indicates that this is not the case, the firm would be expected to apply for authorisation as soon as reasonably practicable.

Question 8 [Last update: 31/05/2017]

What are the criteria that liquidity provision contracts need to meet in order to qualify for the privileged transactions exemption under Article 2(4) of MiFID II?

Answer 8

Article 2(4) fifth paragraph, letter (c) of MiFID II permits a number of transaction types to be classified as "privileged transactions" and thus to be set aside for the purposes of the ancillary activity calculations. Those transaction types include "transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue, where such obligations are required by regulatory authorities in accordance with Union law or with national laws, regulations and administrative provisions, or by trading venues". Therefore, Article 2(4)(c) of MiFID II establishes two alternatives of liquidity provision programmes that can be exempt from the ancillary activity calculations, one being based on requirements by regulatory authorities and the other based on requirements imposed by trading venues. Under both alternatives it is only the transactions carried out under the liquidity programme that are exempt but not the liquidity provider as a person.

When elaborating the Level 2 rules, ESMA offered one example of the circumstances in which transactions undertaken in order to fulfil liquidity obligations would be privileged, i.e. the market making requirements established by the UK energy regulator, OFGEM, which oblige large electricity suppliers to post the prices at which they buy and sell wholesale electricity on power trading platforms up to two years in advance and to trade at those prices. This is an example of an obligation required by a regulatory authority in line with applicable national rules which satisfies the conditions imposed by the first alternative described in Article 2(4)(c) of MiFID II.

Article 2(4)(c) of MiFID II uses the term "obligations to provide liquidity" as opposed to the related term market maker which is used in Article 2(1)(j)(i) of MiFID II to determine the scope of the ancillary activity exemption and which is defined in Article 4(1)(7) of MiFID II.

As a consequence, a liquidity provider under Article 2(4)(c) of MiFID II in addition to providing liquidity on a continuous basis and being willing to deal on own account against its proprietary capital has to be under genuine obligations to carry out transactions. Such obligations have to be specified in advance by the trading venue and have to be the subject of an enforceable agreement between the trading venue and the liquidity provider. The obligations a trading venue requires liquidity providers to fulfil have to be transparent to other market participants and be applied in a non-discriminatory manner.

The obligations of any liquidity provider have to go clearly beyond the activities of any ordinary market participant providing liquidity in a more general sense by simply trading on the market. The obligations should contain elements such as or comparable to quoting requirements with a maximum spread, a minimum volume, a minimum quote duration and, depending on the trading model, a maximum response time to provide quotes and a minimum participation rate. Only transactions executed under these obligations should be considered as privileged transactions.

Question 9 [Last update: 31/05/2017]

Should the capital employed test be calculated only on the same positions as included in the market size test or for all commodity derivatives traded in the group?

Answer 9

Article 3(1) b) RTS 20[7] refers to the estimated capital employed for those activities referred to in Article 1 of RTS 20. According to Article 3(3) RTS 20 the size of the activities referred to in Article 1 shall be calculated by aggregating the size of the activities with respect to all of the asset classes referred to in Article 2(1). Accordingly, the numerator of the capital test is calculated on the basis of the same positions as included in the market size test as only those asset classes referred to in Article 2(1) shall be included.

Question 10 [Last update: 02/10/2018]

Should the denominator in the capital test under Article 3(9) of RTS 20 be calculated using consolidated accounts? Should firms use capital on a worldwide basis or just capital employed within the EU?

Answer 10

The RTS 20 capital test should be calculated using consolidated accounts. According to Article 3(9) of RTS 20, the capital employed for carrying out the main business of a group shall be the sum of the total assets of the group minus its short-term debt as recorded in the consolidated financial statements of the group at the end of the relevant annual calculation period.

Firms shall use capital employed on a worldwide basis when calculating the capital test.

[7] Commission delegated regulation (EU) 2017/592 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the criteria to establish when an activity is considered to be ancillary to the main business

Question 11 [Last update: 04/10/2017]

How should various underlyings falling under the C(10) category be treated for the purpose of ancillary activity calculations?

Answer 11

The various commodity derivative underlyings within the scope of the C(10) category shall be treated consistently across all provisions concerning commodity derivatives in the MiFID II/MiFIR framework. Therefore, all those commodity derivative contracts with underlyings that are subject to the position limit regime as specified in Position Limits Question 10 should also be counting towards the ancillary activity test calculations. Other contracts within the C(10) scope should not be counted.

Question 12 [Last update: 13/11/2017]

How shall transactions concluded on venues outside the EU be treated for the market size test computations under Article 2 of RTS 20?

Answer 12

Transactions concluded on non-EU venues should not be included in either numerator or denominator of the market size test, since those transactions do not constitute part of trading activity in the Union.

Question 13 [Last update: 13/11/2017]

RTS 20 refers only to Article 360 of the CRR, while the 'simplified approach for calculating regulatory capital requirements' is contained in CRR Articles 357, 358 and 360. Is the text in RTS 20 self-contained or should firms refer to the whole of CRR?

Answer 13

Article 3(5)(6)(7) of RTS 20 replicates the content of Articles 360(1) and 357(3) of Regulation (EU) No 575/2013 of 26 June 2013 (CRR). RTS 20 contains the stand-alone test that needs to be performed without firms having to refer to the rest of the articles that relate to commodity derivatives in the CRR. However, firms may find it useful to refer to the EBA Q&A on clarification of the treatment of positions in commodities for the purposes of calculating net and gross positions according to Article 360(1) of CRR.

Question 14 [Last update: 27/03/2019]

Is a third-country firm (or a third-country subsidiary of an EU firm) dealing on an EU trading venue in commodity derivatives or emission allowances or derivatives thereof in scope of the Ancillary Activity test as per RTS 20?

Answer 14

No. A third-country firm (or a third-country subsidiary of an EU firm) dealing on an EU trading venue in commodity derivatives or emission allowances or derivatives thereof is not in scope of the ancillary activity test as per RTS 20. Consequently such third-country firm (or third-country subsidiary of an EU firm) does not have to notify any EU competent authority or ESMA that it makes use of the ancillary activity exemption.

4 Position reporting [Last update: 02/10/2018]

Question 1 [Last update: 07/07/2017]

Do positions held by an investment firm on behalf of their clients add to the investment firm's own positions?

Answer 1

Article 57(1) explicitly introduces the possibility that positions are held on behalf of another entity for legal or operational reasons. In order to avoid double counting, such positions are only to be reported as the positions of the person on whose behalf they are held. They are not to be added to or netted against other positions held by the investment firm.

Question 2 [Last update: 07/07/2017]

How should investment firms report the positions in commodity derivatives of persons who receive investment or ancillary services from a non-investment firm that is an "end client" of the investment firm?

Answer 2

As position limits apply to "persons", all positions in commodity derivatives must be included in position reporting. Where an investment firm is reporting the positions of an end client that is not an investment firm and does not therefore have reporting obligations of its own under MIFID II, its report should cover both the end-client's own account positions and any positions that the end-client holds on behalf of third parties.

Investment firms reporting such positions will reduce the risk of their reports erroneously identifying a breach of the position limit by the end-client by reporting the position of the end client separately from positions held by that end-client on behalf of third parties.

Further, by reporting the positions held by the end-client on behalf of third party entities on an entity-by-entity basis the investment firm will further reduce the risks of its reports erroneously identifying positions which appear to give rise to breaches because they aggregate across unaffiliated entities.

Entity-by-entity reporting is therefore encouraged, though ESMA recognises that the investment firm may not be able to disaggregate end-client's positions, and there is no obligation on non-investment firms to provide disaggregated positions.

Every person holding a position in commodity derivative is subject to the position limits even if their positions are aggregated in the reporting process.

Question 3 [Last update: 07/07/2017]

Who should submit position reports under Article 58(2) of MiFID II?

Answer 3

Only investment firms trading in commodity derivatives or emission allowances or derivatives thereof outside a trading venue (economically equivalent OTC contracts) should submit position reports under Article 58(2) of MiFID II.

Question 4 [Last update: 07/07/2017]

Should investment firms include positions traded on a trading venue and economically equivalent OTC contracts in position reports under Article 58(2) of MiFID II?

Answer 4

Investment firms should only include economically equivalent OTC contracts in position reports under Article 58(2) MiFID II, as positions traded on trading venues are already reported under Article 58(1)(b) MiFID II.

Question 5 [Last update: 07/07/2017]

Does the requirement for trading venues to make public weekly aggregate position reports and to communicate that report to the competent authority and to ESMA apply to securitised derivatives?

Answer 5

The weekly aggregate position reports to be published by trading venues under Article 58(1)(a) of MiFID II aim at providing transparency to investors about the view of the market that certain categories of traders may be taking. As an example, if non-commercial traders are predominantly long in grain futures, this would be indicative of a view among professional investors that grain prices are going to go up.

Providing this type of transparency to investors appears useful and meaningful with regards to contracts for instance with large open interest that serve as a reference or benchmark for market participants.

In contrast, trading in European securitised derivatives is fragmented with well over 10,000 instruments in issue and liquidity per contract is often low. The potential publication of a multitude of weekly reports in securitised commodity derivatives on a per security level when position holder thresholds are exceeded would send out a confusing picture to investors rather than serve the envisaged purpose of market-wide transparency.

ESMA also notes that under Article 83 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016, the obligation for a trading venue to make public weekly aggregate position reports applies “when both of the following two thresholds are met:

- 20 open position holders exist in a given contract on a given trading venue; and
- the absolute amount of the gross long or short volume of total open interest, ex-pressed in the number of lots of the relevant commodity derivative, exceeds a level of four times the deliverable supply in the same commodity derivative, expressed in number of lots.

Where the commodity derivative does not have a physically deliverable underlying asset and for emission allowances and derivatives thereof, point (b) shall not apply.”

While the condition of 20 position holders could be applied to securitised derivatives, the terminology of condition (b) referring to long or short volumes of open interest expressed in lots appears to be geared solely towards the contracts described in MiFID II, Annex I, Section C (5), (6), (7) and (10).

Based on the above, ESMA is of the view that Article 58(1)(a) of MiFID II and the Commission Delegated Regulation (EU) 2017/565 dealing with weekly position reports does not apply to securitised derivatives.

Question 6 [Last update: 07/07/2017]

At what level should Asset Managers aggregate positions? Is this to be done at group level or a lower level (e.g. fund/legal entity identifier etc.)?

Answer 6

Under Article 4 (2) of RTS 21, as an exception to the general rule on calculating positions for legal entities within a group, the parent undertaking of a collective investment undertaking (CIU), or of the management company of a collective investment scheme, should not aggregate the positions in commodity derivatives in any collective investment undertaking where it does not in any way influence the investment decisions in respect of opening, holding or closing those positions. In that case, positions are to be reported at CIU/LEI level. Alternatively, if the parent undertaking influences investment decisions by the collective investment undertaking or by the management company of a collective investment undertaking, it should aggregate the positions held in the relevant collective investment scheme(s).

The parent undertaking has to conduct a self-assessment exercise to determine whether it exercises any influence on investment decisions by the collective investment undertaking or by the management company of a collective investment undertaking, taking into account any relevant circumstances governing the relationship between the parent undertaking and the CIU or its management company.

Upon request, the parent undertaking should be in a position to explain to the relevant competent authority why it deems it does not exercise any influence on the decisions of the CIU or its management company.

Question 7 [Last update: 07/07/2017]

Which MIC should be used by trading venues for position reporting?

Answer 7

Venues should use the relevant 'segment MIC' under which a commodity derivative is traded. If a venue does not have a segment MIC, it should use its 'operating MIC'.

Question 8 [Last update: 07/07/2017]

By when do positions have to be reported under Articles 58(1)(b) and 58(2) of MIFID II?

Answer 8

Trading venues and investment firms should report their positions to the respective NCA by 22:00 CET on T+1.

Question 9 [Last update: 07/07/2017]

Does the requirement under Article 58(1)(b) and (2) of MiFID II to submit daily position reports to the NCA apply to securitised derivatives with a total number of securities in issue not exceeding 2.5 million?

Answer 9

No. The NCAs do not need to require the submission of daily position reports of securitised derivatives with a total number of securities in issue not exceeding 2.5 million. The purpose of daily reporting is to monitor for potential breaches of position limits. To that end, Article 58(3) of MiFID II stipulates that daily position reporting shall enable monitoring of compliance with Article 57(1) of MiFID II. Accordingly, the reporting requirement has been set for situations in which reporting is necessary to enable monitoring. As a consequence, NCAs do not need to require daily reporting if the possibility of a breach of position limits can be ruled out from the outset.

These instruments would be illiquid contracts and benefit from the derogation pursuant to Article 15(1)(c) of RTS 21 with regard to regulatory technical standards for the application of position limits to commodity derivatives. For issues not exceeding 2.5 million securities it is per se not possible to breach position limits.

Trading venues that would otherwise be required to submit position reports of these securitised derivatives must confirm to the NCA that the total number of securities in issue does not exceed the 2.5 million threshold. The NCA assesses whether this condition is fulfilled. The reporting entity can rely on information provided by the CSD, the issuer, or another reliable source that ensures up-to-date knowledge on the current number of securities in issue. As soon as the threshold is exceeded, position reporting must be performed.

Question 10 [Last update: 07/07/2017]

How does ESMA propose to address the breaches of applicable non-EU laws and regulations regarding data protection and bank secrecy which may potentially arise from the reporting of client and end client positions?

Answer 10

Article 58(2) of MiFID II requires investment firms trading in commodity derivatives to provide to the relevant competent authority a complete breakdown of their positions as well as those of their clients and the clients of those clients until the end-client is reached. ITS 4 provides a template for such reporting. Position holders are to be identified in the same way as for transaction reporting purposes. Legal persons are identified by their LEI. For non-EU position holders that are natural persons, the identifier with the highest priority is the passport number, the second priority being a unique CONCAT code combining nationality, first name and surname of the position holder.

The requirement to identify clients and clients of clients until the end client in position reports cannot be waived. Therefore, where an investment firm would be dealing with or on behalf of clients or clients of clients that cannot be identified in position reporting because of legal, regulatory or contractual impediments, that investment firm would not be deemed compliant with its obligations under Article 58(2) of MiFID II.

Question 11 [Last update: 13/11/2017]

Where an NFE trades only, or partly, for hedging purposes, can every transaction be reported as being for speculative purposes?

Answer 11

No. NFEs should ensure that their position reports accurately describe their position. This is necessary to ensure the reliability and accuracy of the position reports submitted to NCAs and the published weekly position reports. Accordingly, NFEs are expected to correctly flag positions as hedging (or speculative) based on the conditions established in Article 7 of RTS 21. In particular, the reports should accurately describe whether the position is risk reducing in relation to the NFE's commercial activities. This is the case even if the NFE does not apply for a hedging exemption under Article 8 of RTS 21 (in accordance with Q&A 14 on position limits) because it does not expect its aggregated positions resulting from hedging and non-hedging activities to exceed the limit set by the relevant NCA for that commodity derivative contract.

Question 12 [Last update: 13/11/2017]

Should an investment firm acting as broker and using a matched principal model be subject to position reporting?

Answer 12

Yes. Any investment firm trading in commodity derivatives contracts traded on a trading venue or in EEOTC contracts is subject to position reporting and should provide a complete breakdown of positions held on own account and on behalf of clients as the investment firm can end up holding a position even if trading on a matched principal basis. It is the investment firm's responsibility to assess whether the transaction executed results in a change in the positions held on own account and/or on behalf of clients.

Question 13 [Last update: 13/11/2017]

Do end-of-day zero positions need to be reported?

Answer 13

Article 58(2) of MiFID II provides for the reporting, at least on a daily basis, of a complete breakdown of the positions. End of day zero positions do not need to be reported to the NCA unless the firm showed a positive or negative position in the previous report. In that case, the first time the open position is reduced to zero, a zero position should be reported to the NCA.

Question 14 **[Last update: 13/11/2017]**

Can position reporting pursuant to Article 58(2) be outsourced to another entity?

Answer 14

Yes. Investment firms can delegate the reporting to third parties but shall remain responsible for the reports. The investment firm has to comply with the relevant outsourcing requirements specified in MiFID II.

Question 15 **[Last update: 13/11/2017]**

Do positions in C(10) instruments with an underlying which is not a commodity as defined in Article 2(6) of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 need to be reported?

Answer 15

The various commodity derivative underlyings within the scope of the C(10) category shall be treated consistently across all provisions concerning commodity derivatives in the MiFID II/MiFIR framework.

The purpose of daily reporting is to monitor for potential breaches of position limits as Article 58(3) of MiFID II stipulates that daily position reporting shall enable monitoring of compliance with Article 57(1) of MiFID II. Therefore, all those commodity derivatives contracts with underlyings that are subject to the position limit regime as specified in Position Limits Question 10 and Ancillary Activity Question 11 are also subject to position reporting.

Question 16 **[Last update: 13/11/2017]**

In respect of which contracts does ESMA expect to receive weekly reporting data from trading venues under Article 58(7) of MiFID II in conjunction with ITS 4 and 5?

Answer 16

Submission of weekly reports to ESMA should be strictly limited to those contracts that fulfil the conditions specified in Article 83 of Commission Delegated Regulation (EU) 2017/565 of

25 April 2016. This is to ensure that ESMA only publishes those reports it is authorized to publish and that the ESMA publications give a consistent picture to stakeholders. Trading venues can publish on their own webpages information in respect of additional contracts.

Question 17 [Last update: 15/12/2017]

Where there is a chain of investment firms that have to comply with commodity position reporting obligations, who has to report to the trading venue or NCA?

Answer 17

Where there is a chain of investment firms that are executing trades on behalf of their clients, each one of them has an obligation to report a complete breakdown of the positions held by all persons down the chain, down to the end client, as defined under Article 58(3) of MIFID II.

At the same time, duplicative reporting should be avoided. Unless firms make arrangements to avoid it, this may arise, for example, where two or more of the investment firms in the chain are members of a trading venue, and therefore have an obligation (under Article 58(3)) to report to the trading venue.

To this aim, there is a possibility to outsource reporting, for example, an arrangement in which the first investment firm in a chain will agree with the second that it will report to the trading venue. The firm which outsources the reporting should make sure that all the necessary and factual information is provided to the reporting agent, as the responsibility for reporting cannot be outsourced.

Question 18 [Last update: 15/12/2017]

How should clients of investment firms inform their intermediaries of the nature of each of their positions (hedge or speculation)? Should that information be provided for each position or could clients indicate to their intermediaries that, except if they explain otherwise, all their positions should be deemed for hedging or non-hedging purposes?

Answer 18

The obligation to report positions under Article 58 of MIFID rests with members or participants of regulated markets, MTFs and clients of OTFs or with investment firms when executing EEOTC transactions on behalf of their clients.

It is the client's responsibility to ensure that their position is accurately described in their position report, in particular regarding whether their positions are for hedging or speculative purposes. It is a matter for the individual client as to how they satisfy this obligation and they may provide an initial instruction that unless informed otherwise, the investment firm should report certain defined positions to be for hedging (or speculative) purposes providing that this

is an accurate description at the time. There may, however, be circumstances where a client is able more accurately to assign new transactions to hedging or speculative positions only after the initial trade. In this case the client should ensure that their position report is adjusted accordingly to the hedging or non-hedging nature of their position. Some clients may find it useful to adopt the ITS 4 template for reporting to investment firms.

Question 19 [Last update: 15/12/2017]

How is the position quantity field reported for contracts that relate to delivery of the same underlying over different periods of time?

Answer 19

The Position Quantity held in a contract must be reported in the same unit as used by the Competent Authority to set the position limit for that contract. The position limits for those contracts that refer to the same underlying commodity but have a variety of delivery periods, e.g. annual (calendar), quarterly, monthly, weekly (whole week, working day week and weekend) or daily are set in units of underlying since a lot does not represent a standard quantity of underlying across all maturities/delivery periods. Thus, for these contracts, the figures reported in the field position quantity must be expressed in units of underlying.

Question 20 [Last update: 15/12/2017]

How should the position in the spot month and other months be reported for contracts where there are daily or weekly as well as monthly contracts?

Answer 20

Positions in daily or weekly contracts whose delivery period is completely included in the spot month should be reported as spot month positions ('SPOT').

Positions in weekly contracts whose delivery period is not completely included in the spot month, i.e. weekly contracts that straddle the spot month and other months, should be reported as other months' positions ('OTHR').

Positions in quarterly or annual contracts whose delivery period straddles the spot month and other months should also be reported as other months' positions ('OTHR').

Question 21 **[Last update: 27/03/2018]**

In cases where an OTC contract is economically equivalent to more than one ETD contract traded on an EU trading venue and where those ETD contracts are not the same derivative contract, to which NCA should the reporting of the EEOTC contracts be addressed?

Answer 21

In cases where an OTC contract is economically equivalent to more than one ETD contract traded on a trading venue in the EU and where those ETD contracts do not qualify as the same derivative contract in accordance with Article 5(1) of RTS 21, positions in the EEOTC contract can be reported to any of the NCAs of the trading venues where the ETD contract is traded.

Position reporting of such EEOTC contract should not be split among different NCAs and should not be reported to more than one NCA. Investment firms should ensure that non-reporting or double reporting is avoided and that EEOTC contracts are consistently reported to the same NCA, with a consistent reference to the contract.

For aggregation purposes, in order to calculate “net positions” according to Article 57(1) of MIFID II and Article 3 of RTS 21, the EEOTC contract should be considered only once and be aggregated only once with the ETD contract that the investment firm has considered it is equivalent to.

Question 22 **[Last update: 02/10/2018]**

Which types of firm fall within each of the ITS 4 categories for the purposes of the weekly Commitment of Trader (CoT) reports?

Answer 22

ITS 4 implementing MiFID II provides the format of the weekly CoT report to be published by trading venues and provided to ESMA. In providing information to the trading venues to enable them to produce the CoT report, members and participants of those venues must use their knowledge and judgment to categorise their activities and the activities of their clients accurately.

In order to achieve accuracy and consistency in the reporting of positions across different categories, the following guidance may be of assistance:

- Investment firms or credit institutions – includes banks and other firms regulated under MiFID II.
- Investment funds – entities holding investments directly in the commodity derivatives market as a form of collective investment scheme, including hedge, pension and exchange-traded funds.

- Other financial institutions – those financial firms not falling within any of the other categories.

- Commercial undertakings – non-financial entities using commodity derivatives, for example firms using those markets to hedge the risk they directly incur from dealing in physical commodities such as producers, end users, processors, manufacturers, shippers and merchants.

- Operators with compliance obligations under the Emissions Allowance Trading Directive – such as commercial airlines, entities in power and heat generation, energy-intensive industry sectors including oil refineries, steel works, production of iron, aluminium, metals, cement, lime, glass, ceramics, pulp, paper, cardboard, acids and bulk organic chemicals.

It should be noted that it is possible for a firm to be categorised as an operator with compliance obligations under the Emissions Allowance Trading Directive for a Weekly CoT report for an emissions allowance contract or derivatives thereof while, on the other hand, it must be categorised as a commercial undertaking for a Weekly CoT referring to another asset class of commodity derivatives contract (i.e. metals, oil, coal, gas, power, etc.).

5 Position management controls [Last update: 04/10/2017]

Question 1 [Last update: 04/10/2017]

Are position management controls required to play a role in the application of position limits applied by NCAs according to Article 57(1) MiFID II?

Answer 1

No. NCAs are responsible for the application of position limits established under Article 57(1). Recital (128) MiFID further specifies that the powers to require the reduction or termination of a position or to provide back liquidity should “mitigate the effects of a large or dominant position”.

However, the controls listed in Article 57(8) are not exhaustive and shall not prevent trading venues from developing their own position limits as a mean to control positions held on commodity derivatives traded on their trading venues.

6 Third country issues [Last update: 31/05/2017]

Question 1 [Last update: 31/05/2017]

Should economically equivalent contracts traded on a third-country venue be considered EEOTC for position limit and position reporting purposes under MiFID II?

Answer 1

Whether or not positions held in commodity derivatives contracts traded on third-country venues that are economically equivalent (EE) to contracts traded on an EU trading venue, are to be considered as EETOC for position limit and position reporting purposes under Article 58(2) of MiFID II depends on the characteristics of that third-country trading venue, as set out in ESMA Opinion 70-154-466 of 15 December 2017[8].

Market participants holding positions on third country venue contracts, that may be considered EEOTC under Article 58(2) of MiFID II and Article 6 of Commission Delegated Regulation (EU) 2017/591 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives (RTS 21), or considering trading such contracts, should contact their CA and make them aware of those contracts. The CA will then get in touch with the third-country venue with a request for further information. Based on the information provided, ESMA will determine whether the third-country trading venue meets the criteria set out in the ESMA Opinion. If so, the respective third-country venue will be listed in an Annex to the Opinion.

Where a third-country trading venue appears in the annex to the Opinion, EE contracts traded on that venue will not be considered EEOTC for position limit and position reporting purposes. EE contracts traded on any other third-country trading venue that does not appear in the Annex to the Opinion will be considered EEOTC.

ESMA is aware that it is important for market participants to have legal certainty as soon as possible on the treatment of their transactions in EE contracts on third-country trading venues for position limit and reporting purposes. Whilst ESMA cannot commit to any set timeline for the assessment of the information received through NCAs, all notifications will be processed as expediently as possible.

7 Other issues [Last update: 04/01/2019]

Question 1 [Last update: 04/01/2019]

How should the field "Price Multiplier" (field 25 of Table 3 of the Annex of RTS 23) be populated for electricity derivative contracts?

Answer 1

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[8] https://www.esma.europa.eu/sites/default/files/library/esma70-156-112_cdtf_opinion_eeotc_third_countries.pdf

When reporting an electricity derivative contract, i.e. where Base product (field 35 of Table 3 of the Annex of RTS 23) is equal to “NRGY” and Sub product (Field 36 of Table 3 of the Annex of RTS 23) is equal to “ELEC”, a trading venue should report a value in MWh which is equal to the number of relevant hours of delivery during the delivery period, multiplied by the lot size in MW.