



EUROPEAN
COMMISSION

Brussels, 24.3.2022
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COMMISSION DELEGATED REGULATION (EU) .../...

of 24.3.2022

**supplementing Directive 2014/65/EU of the European Parliament and of the Council
with regard to regulatory technical standards specifying the content of position
management controls by trading venues**

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE DELEGATED ACT

The Markets in Financial Instruments Directive (Directive 2014/65/EU, MiFID II) requires Member States to ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives apply position management controls. The aim of the introduction of position management controls on commodity derivatives is to improve the stability and integrity of European financial markets. Changes to the MiFID II commodity derivative framework have been introduced by amending Directive (EU) 2021/338 as part of the Commission's overall coronavirus recovery strategy, the Capital Markets Recovery Package ('CMRP'), with the aim of making it easier for capital markets to support European businesses to recover from the crisis. In this context, position management controls are reinforced to mitigate dissimilarities in the way positions are managed by trading venues across Europe.

2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT

In accordance with Article 10 of the Regulation (EU) 1095/2010 ESMA has carried out a public consultation on the draft regulatory technical standards. A consultation paper was published on 26 May 2021 on the ESMA website (ESMA70-156-4067) and closed the consultation on 23 July 2021. In addition, the ESMA sought the views of the Securities and Markets Stakeholder Group (MSG) established in accordance with Article 37 of the ESMA Regulation. Together with the draft technical standards, and in accordance with the third subparagraph of Article 10(1) of Regulation (EU) No 1095/2010, the ESMA has submitted its impact assessment, including the analysis of costs and benefits related to the draft technical standards. This analysis is available at https://www.esma.europa.eu/sites/default/files/library/esma70-156-4710_final_report_technical_standards_for_commodity_derivatives.pdf.

3. LEGAL ELEMENTS OF THE DELEGATED ACT

This Delegated Regulation ensures a more harmonised and convergent implementation of the position management controls is put in place by trading venues in accordance with Article 57(8) of MiFID II, by specifying the content of position management controls, thereby taking into account the characteristics of the trading venues concerned.

Article 1 introduces the general monitoring obligations for the exchanges.

Article 2 specifies what an accountability level is, that accountability levels should be set for commodity derivatives made available for trading that are physical settled or can be physically settled and specifies what exchanges have to do when a position exceeds the accountability level.

Article 3 requires the exchange to assess the adequacy and effectiveness of the accountability levels. It also specifies the reporting requirements of the trading venues to their National Competent Authority.

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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/EU¹, and in particular Article 57(8), fourth subparagraph, thereof,

Whereas:

- (1) Directive (EU) 2021/338 of the European Parliament and of the Council² sets out amendments to Article 57 of Directive 2014/65/EU as regards position management controls.
- (2) In accordance with those amendments to Article 57 of Directive 2014/65/EU, trading venues which trade commodity derivatives have to have in place and apply effective position management controls to prevent and address disorderly trading, support orderly pricing and settlement conditions and ensure the efficiency of markets.
- (3) Effective position management controls include for example legal arrangements to obtain and use data of end position holders and parent undertakings as well as technical arrangements, such as reports and metrics to construct for example a position dashboard. Therefore, effective position management controls should be closely intertwined with and rely on the ongoing monitoring by the trading venue.
- (4) In order to ensure that the price discovery process is not unduly influenced by the existence of a position and to identify the build-up of concentrations of positions that could result in price distortion, market manipulation or other abusive trading practices, trading venues should be aware of large positions held by end position holders and parent undertakings in physically settled commodity derivatives and the reasons for holding those positions. As the actual supply of the underlying physical commodity is restricted to a finite supply, physically settled commodity derivatives are more susceptible to disorderly trading practices such as market squeezes or market cornering where counterparties would make use of a dominant position to secure the price of a commodity derivative, or of the underlying commodity, at an artificial level. Therefore, large positions should be identified in commodity derivatives that are

¹ OJ L 173, 12.6.2014, p. 349.

² Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

physically settled by design as well as in commodity derivatives that can be physically settled at the option of the buyer or the seller.

- (5) The determination of what constitutes a large position should be made by trading venues taking into account the size and composition of the market in question. For that purpose, trading venues should establish qualitative or quantitative criteria that are used to identify such large exposures and should have procedures in place to identify all positions held by any person which exceed such pre-determined accountability levels. Quantitative and qualitative criteria could be, amongst others, the size of the total open interest in the commodity derivative, the share of the position of the position holder, the volatility of the markets and the characteristics of the underlying commodity market. Where such levels are exceeded, the trading venue should seek to understand the rationale for the build-up of that large position. To that end, the trading venue should assess whether it needs to request additional information from the person holding that large position, considering in particular how frequently the positions held by that person exceed the accountability levels and the extent to which the accountability levels are exceeded. Such information could include, amongst other, positions in related products, the economic reason for the open position and the activity in a related underlying commodity market. Based on the information already available or gathered through the request for information, the trading venue should take appropriate actions where necessary.
- (6) It is important that the accountability levels set remain adequate and effective to serve their intended purpose and that the competent authority is informed of the methodology used for setting and updating those accountability levels.
- (7) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority.
- (8) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council³.

HAS ADOPTED THIS REGULATION:

Article 1

General monitoring obligations

Trading venues shall have arrangements in place for the ongoing monitoring of positions held by end position holders and parent undertakings in each commodity derivative traded on their trading venues.

Article 2

Accountability levels

1. As part of their position management controls, trading venues offering trading in commodity derivatives shall set accountability levels in the spot month as defined in Article 2(3) of Commission Delegated Regulation [PO : please insert reference

³ 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 (OJ L 331, 15.12.2010, p. 84).

number to RTS 21a, with footnote containing its full title and the edition of the Official Journal in which it was published] and in the other months as defined in Article 2(4) of Delegated Regulation [PO : please insert reference number to RTS 21a] for commodity derivatives made available for trading that are physically settled or can be physically settled.

2. For the purpose of paragraph 1, an accountability level is the level of the net position held in a commodity derivative by an end position holder or parent undertaking that, when exceeded, may trigger a request for additional information by the trading venue in accordance with paragraph 3.
3. When a net position held by an end position holder or a parent undertaking in a commodity derivative referred to in paragraph 1 exceeds the accountability level set for the spot month or for the other months in accordance with paragraph 1 of this Article, the trading venue shall, where deemed appropriate obtain information as to the nature and purpose of the position held in that commodity derivative.

When assessing whether it is appropriate to obtain information, the trading venue shall take into account the frequency by which the accountability levels are exceeded by the same end position holder or parent undertaking, the magnitude of the excess and other relevant information already available.

Article 3

Review and reporting of accountability levels

1. Trading venues shall, on an annual basis, evaluate the adequacy and effectiveness of the accountability levels established pursuant to Article 2(1).
2. A trading venue shall communicate to its competent authority the methodology used for setting the accountability levels referred to in Article 2(1).
3. A trading venue shall inform its competent authority on an annual basis of the number of instances where accountability levels have been exceeded, of any requests for additional information made in accordance with Article 2(3) and of any actions taken in accordance with Article 2(4).

Article 4

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24.3.2022

For the Commission
The President
Ursula VON DER LEYEN