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Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2014/65/EU as regards information requirements, product governance and position limits to help the recovery from the COVID-19 pandemic

(Text with EEA relevance)

{SWD(2020) 120 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

1.1. Reasons for and objectives of the proposal

EU Member States have been severely affected by the economic crisis resulting from the COVID-19 pandemic. This calls for a quick reaction to support capital markets participants. In the Communication of the Commission of 13 March 2020, entitled 'Coordinated economic response to the COVID-19 outbreak', the Commission highlighted the importance of ensuring the liquidity of the EU financial sector and countering a threatening recession through actions at all levels. Furthermore, on 27 May 2020, in its Communication entitled 'Europe's moment: Repair and Prepare for the Next Generation' , the Commission presented key instruments supporting the recovery plan for Europe, including measures that aim at kick-starting the economy and helping private investment. This Communication also stressed that liquidity and access to finance will be a continued challenge for companies.

The objective of this targeted amendment is to provide for the best possible conditions for European economies to emerge from the current COVID-19 pandemic. The rules on investments services can play a key role in promoting the recapitalisation of European companies as they emerge from the crisis. The modified commodities regime will allow companies in the real economy to react to market volatility while also enabling nascent commodity contracts, which is also important to promote the international role of the Euro. The present review is driven by two key objectives:

- Facilitating investments in the real economy and
- Allowing for a rapid recapitalisation of European companies.

To ensure that financial institutions and intermediaries can fulfil their essential function in financing the real economy, targeted adjustments of certain requirements of Directive 2014/65/EU ('MiFID II') are appropriate. Already in 2019, stakeholders had warned the Commission that several aspects of the MiFID II distribution rules were either unnecessary or perceived as overly burdensome. The current COVID-19 pandemic makes it even more important to remove formal burdens where they are not strictly necessary. A more finely calibrated view of investor requirements would also leave more resources for dealing with the consequences of the COVID-19 pandemic. The Commission therefore strives to recalibrate those areas to strike the right balance between a sufficient level of transparency towards the client, the highest standards of protection and acceptable compliance costs for firms.

In that context, this amendment to MiFID II applying to investments in financial instrument has the aim of removing administrative burdens that result from documentation and disclosure rules that are not counterbalanced by corresponding increases in investor protection. It also recalibrates the position limit and corresponding hedging exemption regime to foster nascent euro denominated markets.

1.2. Consistency with existing policy provisions in the policy area

While laying down extraordinary measures to soften the impact of the COVID-19 pandemic and help the economic recovery, this proposal remains in line with the overarching objectives of MiFID II to foster market transparency and integrity and to promote investor protection.

1.3. Consistency with other Union policies

This legislative proposal amending MiFID II is part of a set of measures to facilitate the economic recovery postCOVID-19 pandemic, which includes also legislative proposals amending the Prospectus Regulation[1] the Securitisation Regulation[2] and the Capital Requirements Regulation[3].

This legislative proposal also aims to complement the objectives of the Capital Markets Union to diversify market-based sources of financing for European companies and facilitate cross-border investments.

Furthermore, this initiative must be consistent with any additional proposals that the Commission aims to develop in different policy areas to soften the impact of the COVID-19 pandemic on capital markets, including the key instruments supporting the recovery presented in the Commission Communication entitled ‘Europe’s moment: Repair and Prepare for the Next Generation’ of 27 May 2020.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

2.1. Legal basis

The proposed amendment is built on the same legal basis as the legislative act that is being amended, i.e. Article 53(1) TFEU which allows the adoption of measures for the approximation of national provisions concerning the access to the activity of investment firms, regulated markets and data service providers.

2.2. Subsidiarity (for non-exclusive competence)

Under Article 4 TFEU, EU action for completing the internal market must be appraised in the light of the subsidiarity principle set out in Article 5(3) of the Treaty on European Union (TEU). The objectives pursued by the proposed measures aim at supplementing already existing EU legislation and can therefore best be achieved at EU level rather than by different national initiatives. Financial markets are inherently cross-border in nature and are becoming more so. The conditions according to which firms and operators can compete in this context, including on investor protection, need to be common across borders and are all at the core of MiFID II today. Because of this integration, isolated national intervention would be far less efficient and would lead to the fragmentation of markets, resulting in regulatory arbitrage and distortion of competition. For instance, different levels of investor protection across Member States would fragment markets, compromise efficiency, and lead to harmful regulatory arbitrage.

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1 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12).

2 Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 (OJ L 347, 28.12.2017, p. 35).

3 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p.1).

2.3. Proportionality

The proposal takes full account of the principle of proportionality, namely that EU action should be adequate to reach the objectives and does not go beyond what is necessary. The proposed measures to lighten the burden on investment firms respect the principle of proportionality. In particular, the need to balance investor protection, efficiency of the markets and costs for the industry has been central in laying out these requirements. Not only have all the proposed options been individually assessed against the proportionality objective, but also the lack of proportionality of the existing rules has been presented as a separate problem. The amendments are therefore compatible with the principle of proportionality, taking into account the right balance of the public interest at stake and the cost-efficiency of the measure.

2.4. Choice of the instrument

The measures are proposed to be implemented by amending MiFID II through a Directive. The proposed measures indeed refer to or develop further already existing provisions inbuilt in those legal instruments. Article 53(1) of TFEU allows for the adoption of acts in the form of a Directive. Amendments to Directive 2014/65/EU can therefore only be achieved, by virtue of a Directive of the European Parliament and of the Council amending Directive 2014/65/EU.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

3.1. Impact assessment

This proposal is not accompanied by a separate impact assessment. Given the urgency of measures to be taken to help the recovery, the impact assessment was replaced by a cost-benefit analysis included in the Staff Working Document supporting the Capital Markets Recovery Package. The proposal primarily aims at providing, for exceptional reasons in the context of the current COVID-19 pandemic, for a streamlined application of the regulatory requirements, keeping high safeguards for retail clients while allowing for more flexibility for wholesale clients and ensure that fully functioning commodity markets can play their important role in the recovery of EU economies. An analysis of the proposed measures is included in the Staff Working Document supporting the Capital Markets Recovery Package.

3.2. Fundamental rights

The proposal respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular the freedom to conduct a business (Article 16) and consumer protection (Article 38). As this initiative aims at alleviating the administrative burden placed on investment firms while maintaining existing high standards for retail clients, this initiative would contribute to improving the right to conduct a business.

4. BUDGETARY IMPLICATIONS

The initiative is not expected to have any impact on the EU budget.

5. OTHER ELEMENTS

5.1. Implementation plans and monitoring, evaluation and reporting arrangements

As the amendment aims at mitigating the effects of the COVID-19 pandemic an early application of the amendment would be most beneficial. It is therefore expected that the proposed amendment should start applying at the earliest opportunity.

In parallel, the European Markets and Securities Authority (ESMA) will continue to collect the necessary data for monitoring the effects of the COVID-19 pandemic on investment firms and investment activities in Europe and how the pandemic affects markets and supervisory practices. This will allow for the future evaluation of the new policy tools. Additionally, the Commission services will continue to carefully monitor the latest developments and to engage in the relevant fora, such as the European Securities Committee (ESC).

Compliance and enforcement will be ensured on an ongoing basis where needed through the Commission launching infringement proceedings for lack of transposition or for incorrect transposition or application of the legislative measures. Reporting of breaches of EU law can be channelled through the European System of Financial Supervision (ESFS), including the national competent authorities and ESMA.

5.2. Detailed explanation of the specific provisions of the proposal

5.2.1. Amendments to information requirements

The proposed amendments carefully recalibrate specific requirements in order to strike a more appropriate balance between protecting investors on the one hand and facilitating the provision of high-quality investment services on the other hand. To ensure that retail clients receive a high level of investor protection, the amendments will carefully calibrate between retail clients, professional clients and eligible counterparties. While limited alleviations would cut across investor categories (e.g. the phase-out of paper based information), the majority of the amendments to the current rule-book will focus on providing alleviations for professional clients and eligible counterparties.

The following table provides an **overview** of the proposed changes and identifies the investor categories affected by these changes:

Amendments to information requirements	
Phase-out of the paper-based default method for communication.	The new paragraphs in Article 24 will ensure that documents are provided in electronic format. Retail clients, however, can opt-in to paper based information.
Costs and charges disclosure: Introduction of an exemption for eligible counterparties and for professional clients for other services than investment advice and portfolio management.	Pursuant to Articles 29a and 30, eligible counterparties and professional clients are exempted from the costs and charges requirements where other services than investment advice and portfolio management are concerned. In addition, in case of distance communication all clients using all services should be able, under certain conditions, to receive costs and charges information just after the transaction (Article 24(4)).

Alleviate ex-post reporting requirements: in particular, the end-of day loss reporting requirement promotes a short-term view among inexperienced investors and fosters “herd behaviour” which is not conducive to taking informed views of the market. Professional clients are allowed to opt-in.	Article 25(6) is added to the measures that eligible counterparties and professional clients are exempted from, and to which professional clients can opt in.
Suspend best execution reports: In their current form best execution reports are not read by investors, while buy-side investment firms receive all the relevant information via other means (e.g. via brokerage meetings). To reduce the burden of producing those reports, this obligation will be suspended, pending a thorough analysis with regard to a possible streamlining of the reports.	A new subparagraph is added to Article 27(3) that temporarily dis-applies the reporting obligation.
Alleviate cost benefit analysis: As part of the suitability assessment, firms are required to obtain information about the client in order to perform a cost-benefit analysis in case they ‘switch’ between products in the course of an ongoing relationship. For professional clients this is overly burdensome.	A new paragraph to Article 25(2) is inserted, setting the requirements for the cost-benefit analysis as they are currently laid down in Article 54(11) of Delegated Regulation (EU) 2017/565, adding an exemption combined with a possibility to opt-in for professional clients
Product governance: to facilitate the financing of the economy bonds with make-whole clauses will be exempted from the product governance regime.	Article 16(3), subparagraphs 2 until 6 and Article 24(2) will not apply to corporate bonds with make-whole clauses.

Detailed description of the measures:

(a) Phase-out of the paper-based default method for communication

Currently, MiFID II requires that all investor reports and information is provided in a “durable medium”, which includes electronic formats (e.g. E-mail), but paper remains the default method for communication (where durable medium is required). Given that clients are widely able to view their investment portfolios online (or contact their investment firm where necessary), providing them with a plethora of paper-based statements has become superfluous. Compliance with this requirement introduced under MiFID II imposes a considerable cost burden on banks and slows down the investment process.

Not only have some firms experienced difficulties in relation to the provision of paper-based disclosures to clients during the COVID-19 pandemic, but this default option for communication is also not aligned with the objectives of the Commission’s Green Deal and its Digital Finance Agenda. As the economic downturn caused by the COVID-19 pandemic has made it even more urgent to facilitate the investment process to increase the funding alternatives for European companies and to enable investment firms to use resources more efficiently, the default option of all client communication should consist in an electronic format (either E-Mail, a dedicated webpage or an electronic mailbox). The chosen default option should then be used for the provision of all information documents to ensure that the client has all his or her information easily available in one place. Paper-based communication should therefore be phased out as soon as possible. Retail investors will still have the possibility to opt-in and receive their information by paper if they so wish.

(b) Introducing an exemption for eligible counterparties and professional clients from the cost and charges information

Costs and charges information is supposed to provide investors with basic levels of transparency regarding pricing and to enable them to compare different offers. Currently, the information requirements on cost and charges apply for all client categories alike. However, professional clients, eligible counterparts and ESMA[4] have unanimously and repeatedly told the Commission that these requirements have no benefit where other services than portfolio management and investment advice are concerned. These clients have a different relationship with their investment firms than retail clients do; in many cases these market participants are familiar with the market conditions and prices of the various providers but also define the conditions of the transaction in question themselves. Professional clients and eligible counterparties furthermore generally place a large number of high-value orders compared to those placed by retail investors and attach great importance to swift order execution. Wholesale clients thus put, on their own volition, investment advisers and brokerage firms in competition when requesting pricing for their trades. This provides these investor groups with more influence and control of the prices than the average retail client. By alleviating the requirement for information that is claimed not to be used neither by eligible counterparties nor by professional counterparties, the information will be individualised and provide wholesale clients with the data they need.

Cutting red tape has become even more urgent during the COVID-19 pandemic, which placed the EU's economy and financial system under strain. Streamlining the investment process for wholesale clients is likely to channel alternative financing option to those enterprises that are in need of new equity. With the addition of a new Article 29a and the amendment to Article 30(1) of MiFID II, eligible counterparties and professional clients will be fully exempted from receiving the costs and charges disclosures on other services than investment advice and portfolio management. For retail clients the requirement remains unchanged.

(c) Allow for a delayed transmission of cost information when using distant communication channels

Article 24 of MiFID II provides for detailed information requirements. Many transactions with all categories of clients tend to be concluded over the phone or by online means. All client categories have come to expect immediate execution of such "distance orders" as a standard feature of investment services. The supply of ex-ante cost information translates into time lags and the risk of adverse price movements between receipt and execution of an order. Often, the requirement of systematic ex-ante cost disclosures would be disadvantageous to clients. These circumstances would neither allow nor warrant ex-ante cost information, especially as the client would bear the market risk of adverse price movements in the time between preparation and provision of the ex-ante cost information.

The COVID-19 pandemic has accelerated the usage of electronic investment services and therefore the need for an efficient and fast trade execution online and on the phone. As the current application of the ex-ante costs disclosure requirements leads to delays in the

4 https://www.esma.europa.eu/press-news/esma-news/esma-advises-european-commission-inducements-and-costs-and-charges-disclosures

execution of transactions for participants for whom time is of essence and these effects may therefore have a negative impact on best execution clients should be enabled to provide their consent to a delayed transmission of the cost information documents.

(d) Alleviations for service reports

MiFID II requires investment firms to send ex-post statements to clients concerning the services they have received. Eligible counterparties and professional clients should be exempted from receiving the ex-post statements all together. Professional clients, however, should be enabled to opt into receiving these statements. Giving these clients the ability to opt in will ensure that those who want to receive these statements may continue to do so and, conversely, those who do not derive any benefit from receipt of such standardised disclosures do not receive them.

For example, Article 25(6) of MiFID II obliges firms to provide post-transaction service reports to clients. These reports include the loss-reporting reports that are triggered by 10% portfolio losses. These reports have deemed not useful or even confusing for certain clients, especially when markets are extremely volatile, as was the case during the COVID-19 pandemic. Instead of forwarding reports that are triggered by volatility or by a mere administrative deadline, the COVID-19 pandemic has shown that individualised and timely information is of much higher relevance to wholesale clients. To allow both firms and clients to focus on providing and receiving (i.e. actively progressing) the information that is relevant to them, in particular during challenging market environments, these reports will therefore no longer apply with regard to eligible counterparties, while professional clients have the choice to receive them or not.

(e) Opt in for professional investors to cost benefit analysis in case of switching

Article 25(2) of MiFID II requires firms to perform a suitability assessment when they provide investment advice or portfolio management. This provision applies to retail clients and to professional clients. Eligible counterparties are excluded in Article 30(1). With regard to clients that are professional clients on request[5], firms need to obtain such information as it is necessary to have a reasonable basis for determining that the specific transaction to be recommended, or entered into, meets the investment objectives of the client, including the client's risk tolerance, and that the client is financially able to bear any related investment risks consistent with his investment objectives. With regard to professional clients as listed in Annex II, paragraph I of MiFID II, firms may assume that the client is able to financially bear the investment risks.

In case of ongoing relationships, firms are currently required to undertake a costs-benefit analysis of certain portfolio activities, which involve a "switching" between products. In this context, before executing a product switch, investment firms are required to obtain the necessary information from the client and be able to demonstrate that the costs outweigh the benefits. Suitability testing in case of a product switch is viewed as applying to all portfolio activity rather than those switches for which is was designed, such as the sale and purchase of an "equivalent" product (for example the sale of a European Equity investment fund and the purchase of a European Equity ETF with broadly the same features).

To facilitate the rapid capitalisation of the real economy, the process for wholesale clients to change their investment strategies should be as swift as possible. If switching becomes easier,

[5] Based on Annex II, chapter II, paragraph II MiFID.

this will also incentivise wholesale clients to invest in other and new business models and therefore help a broader range of firms at an early stage in the recovery process. Professional clients should therefore be allowed to choose whether this measure applies to them. To this end, the substantive requirements as they are currently laid down in Article 54(11) of Delegated Regulation (EU) 2017/565 will be added to Article 25(2) of MiFID II, and a reference to this provision will be included in the list of provisions professional clients are exempted from but can opt-in to.

(f) Product governance

The product governance requirements currently apply to all financial instruments and regardless of the client, even though there seems little benefit in assessing the particularities of a plain vanilla bond when transactions take place between eligible counterparties. In its guidelines on product governance[6], ESMA has already partially addressed this lack of proportionality by explicitly recommending further flexibility for "non-complex products".

Stakeholders to the MiFID II consultation have submitted evidence that product governance rules for certain instruments, which are often referred to as "plain vanilla" issuances, have prevented an optimal allocation of capital by means of vibrant secondary markets. In the light of the current crisis caused by the COVID-19 pandemic, it is indispensable to facilitate the issuing of capital. Issuers and investors must be equipped with the right tools to easily issue new capital and to easily get access to an increased investor base. The earlier these tools are operational, the better for companies and investors alike.

This proposal is therefore lifting the product governance requirements for simple corporate bonds with make-whole clauses (which are investor-protective features). The aim of this exemption, which would need to be complemented by a clear rule that a make-whole clause does not of itself make these instruments a packaged retail and insurance-based investment product (PRIIP), is to make more plain vanilla corporate bonds available to retail investors. This targeted exemption will allow issuers to tap a broader base of investors, allow sophisticated retail investors' to access a larger choice of instruments and it will retain protection for all categories of investors, however categorised, when accessing complex products. It is an essential part of a recovery package that retail clients can obtain exposure to fixed income products, as such products are essential for diversification and risk-reduction reasons.

(g) Best-execution reports

Article 27(3) of MiFID II requires that each trading venue and systematic internaliser for financial instruments subject to the trading obligation in Articles 23 and 28 of Regulation (EU) No 600/2014 ('MiFIR') and each execution venue for other financial instruments, makes available to the public data relating to the quality of execution of transactions on that venue periodically. These periodic reports need to include details about price, costs, speed and likelihood of execution for individual instruments, which are further described in Delegated Regulation (EU) 2017/575 ('RTS 27'). Stakeholders indicate that the reports are rarely read by investors, evidenced by very low numbers of downloads from their website. It is therefore assumed that investors cannot or do not make any meaningful comparisons between firms on the basis of this data. Buy-side firms informed us furthermore that they receive all the relevant information on best execution through other means (e.g., via brokerage meetings). The current

6 https://www.esma.europa.eu/sites/default/files/library/esma35-43 620_guidelines_on_mifid_ii_product_governance_requirements_0.pdf

crisis has increased the urgency to address problems with regard to the costly production of the best execution reports. This is evidenced by ESMA's statement that firms may need to deprioritise efforts for the publication of these reports due to the exceptional circumstances created by the COVID-19 pandemic.[7]

Therefore, the requirement to publish the best execution report should be suspended. This would free up resources currently used for production of the report, without requiring firms and venues to invest in costly implementation. This option does not lead to a decrease of investor protection since investors currently do not read the reports at all and buy-side firms receive the relevant information through other means. In the context of the full review of MiFID II in 2021, the Commission will assess whether the requirement to publish the report should be deleted permanently, or if the reports need to be reintroduced in a revised manner.

5.2.2. Measures affecting energy derivatives markets

The proposed amendments carefully recalibrate the position limit regime and the scope of the hedging exemption in order to ensure that nascent euro denominated markets are able to foster and allow producers and manufacturers are able to hedge their risks whilst safeguarding the integrity of commodity markets, except for agricultural commodities, in particular those with food for human consumption as an underlying.

The following table provides an overview of the proposed changes:

Amendments in the field of commodities markets (except agriculture)	
Amend position limits: in its current form, the position limit regime has negatively affected the liquidity in new commodity markets. To ensure that new commodity markets can develop, position limits are limited to **agricultural commodity derivatives or commodity derivatives designated as significant or critical**. ESMA will be mandated to develop draft regulatory standards to define those agricultural derivatives subject to position limits and to define critical or significant derivatives subject to position limits. For the critical or significant derivatives, ESMA will take into account a gross size of open interest of 300 000 lots on average over one year, the number of market participants and the underlying commodity. For agricultural derivatives, particular focus will be on those derivatives that have food for human consumption as underlying.	Change Article 57 whereby the scope of position limits would be amended to only apply to agricultural contracts and significant or critical contracts.
Delete concept of "Same contract": for	Amend Article 57(6) on position limits for

[7] https://www.esma.europa.eu/press-news/esma-news/esma-provides-clarifications-best-execution-reports-under-mifid-ii.

competing venues trading commodity derivatives based on the same underlying and sharing the same characteristics, the current definition of "same contract" is detrimental to the less liquid market. To ensure a level playing field, the concept of "same contract" is deleted and replaced with a more cooperative approach between competent authorities (CAs). **Reinforce position management controls**: significant dissimilarities exist in the way positions are managed by trading venues. Therefore, position management controls will be reinforced where necessary. ESMA will be mandated to further clarify the content of position management controls taking into account the characteristics of the relevant trading venues.	the "same contracts" and Article 58(2) on position reporting to the central competent authority for same contracts. Amend Article 57(8) to extend access to information in letter (b) to positions held in related contracts on other trading venues and OTC through members and participants, where appropriate.
Introduce a narrowly defined hedging exemption: – This hedging exemption would be available where, within a **predominantly commercial group**, a person has been registered as an investment firm and trades on behalf of the group. – A **position limit exemption** is also introduced for financial and non-financial counterparties for positions resulting from transactions undertaken to **fulfil mandatory liquidity provisions**. ESMA will be mandated for the narrowly defined hedging exemption and the liquidity provision exemption to determine a procedure setting how persons may apply the respective exemption. **Exclude securitised derivatives** from the position limit regime as the current position limit regime fails to recognise the unique characteristics of those instruments.	In Article 57(1) a hedging exemption is introduced for - financial counterparties acting as the market facing entity of a commercial group for the positions held to reduce the risks of the commercial entities of the group; - financial and non-financial counterparties for positions which are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue, in accordance with letter (c) of the fourth subparagraph of Article 2(4). In Article 57(1) an exemption is introduced for financial instruments defined in point (44)(c) of Article 4(1) which relates to a commodity or an underlying referred to in section C(10) of Annex I.
Simplify the ancillary activity test as the quantitative tests of the ancillary activity test are particularly complex and have not altered the status quo in terms of persons that are	Article 2(1)(j) will be changed in order to delete all quantitative elements.

eligible for the exemption.	

The measures set out for positon limits and the hedging exemption for energy derivatives are interlinked. To the extent that position limits play a useful role, they should not prevent the commercial companies from entering into risk reducing transactions. Therefore, reducing the scope of the position limit regime to only the most developed commodity derivatives leaves less need for hedging exemptions. That is why the Commission considers targeted measures regarding the hedging exemption in combination with the position limits for critical benchmark derivatives.

(a) Position limit regime for critical benchmark contracts

The COVID-19 pandemic and its economic consequences have exacerbated the issues in the MiFID II position limit regime and its inflexibility. Various position limits in commodity derivatives markets are proven to be out of date, whilst adjusting them to accommodate for rapidly changing market conditions requires the completion of lengthy change processes. Position limits would be limited to derivatives with agricultural derivatives, in particular food for human consumption, as underlying and commodity derivatives traded on trading venues and in economically equivalent OTC (EEOTC) derivatives designated as significant or critical.

The Commission will mandate ESMA to draft regulatory technical standards (RTS) to determine the derivative characteristics in order to qualify as a significant or critical derivative and to define those agricultural derivatives subject to position limits, in particular those with food for human consumption as underlying. For the significant and critical derivatives, the criteria include an open interest of 300 000 lots over one year, the number of active market participants, and the underlying commodity. An open interest threshold for derivatives of a sufficiently high number of lots over a one-year period will ensure that only derivatives the price of which serves as a benchmark for the underlying commodity are captured. The relevant threshold for critical derivatives will be set at 300 000 lots, this ensures that only the appropriate significant or critical commodity derivatives traded in the EU remain subject to position limits. The other criteria will be determined in Level 2.

(b) Targeted hedging exemption

Under the current market circumstances, market participants can develop an urgent need to obtain hedging exemptions. However, in crisis conditions they may struggle to prepare and submit an application for a hedging exemption before a position limit unduly restricts their trading activity. MiFID II does not allow hedging exemptions for any financial entities. Prior to MiFID II, some commercial groups decided to register as an investment firm the entity that trades on their behalf for the risk reducing transactions of the commercial entities of the group. Because they are now financial entities, these entities within a predominantly commercial group are not eligible for the hedging exemption. The hedging exemption should be available where, within a predominantly commercial group, a person has been registered as an investment firm and trades on behalf of that commercial group. The exemption applies to the positions held by that financial counterparty that are objectively measurable as reducing risks directly related to the commercial activities of the non-financial entities of the group. This hedging exemption should not be considered as an additional exemption to the position limit regime but rather as a “transfer” to the financial counterparty of the group of the hedging exemption otherwise available to the commercial entities of the group.

In certain circumstances, as the COVID-19 pandemic has shown, the provision of liquidity is challenging even for the most liquid derivatives. Therefore, the Commission also introduces a position limit exemption for financial and non-financial counterparties that are under mandatory liquidity provision obligations. This exemption mirrors the exclusion of transactions entered to fulfil obligations to provide liquidity on a trading venue from the ancillary activity test.

(c) Qualitative Ancillary Activity Test

Market participants that trade in commodity derivatives on a professional basis can make use of an exemption from authorisation as an investment firm when their trading activity is ancillary to their main business. Market participants have to notify annually the relevant competent authority that they make use of this exemption and provide the necessary elements to satisfy the quantitative tests. These quantitative tests are particularly complex and during the crisis present a significant burden for market participants working in business continuity mode. The ancillary activity test will be considerably simplified. The proposed simplification of the current and highly technical quantitative ancillary test is to return to a solely qualitative test. In addition, the ancillary activity exemption with regard to trading of emission allowances on EU and third-country trading venues will be reviewed to ensure that it supports the well-functioning and objectives of the EU emission trading system (EU ETS).

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(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The COVID-19 pandemic is severely affecting people, companies, health systems and the economies of Member States. The Commission, in its Communication to the European Parliament, the European Council, the Council, the European economic and social committee and the Committee of the regions of 27 May 2020 entitled ‘Europe's moment: Repair and Prepare for the Next Generation’[8] stressed that liquidity and access to finance will be a continued challenge in the months to come. It is therefore crucial to support the recovery from the severe economic shock caused by the COVID-19 pandemic by introducing targeted amendments to existing pieces of financial legislation. This package of measures is adopted under the label “Capital Markets Recovery Package”.

(2) Directive 2014/65/EU of the European Parliament and the Council[9] on markets in financial instruments was adopted in 2014 in response to the financial crisis that unfolded in 2007-2008. That Directive has substantially strengthened the financial system in the Union and guaranteed a high level of protection of investors across the Union. Further efforts to reduce regulatory complexity and investment firms’ compliance costs and to eliminate distortions of competition should be considered.

(3) As regards the requirements that were intended to protect investors, Directive 2014/65/EU has not fully achieved its objective to adapt measures that take the particularities of each category of investors (retail clients, professional clients and eligible counterparties) sufficiently into account. Some of those requirements have not

8 COM/2020/456 final of 27.5.2020.

9 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 (OJ L 173, 12.6.2014, p. 349).

always enhanced the protection of investors but at times rather, hindered the smooth execution of investment decisions. It is therefore necessary to amend certain requirements in that Directive to better balance the requirement to protect investors on the one hand and to facilitate the provision of investment services and the performance of investment activities on the other.

(4) Product governance requirements can restrict the sale of corporate bonds. Corporate bonds with a “make whole clause” are generally considered safe and simple products that are eligible for retail clients. Such a “make whole clause” protects investors against losses in case an issuer opts for early repayment by ensuring that those investors are provided with a payment equal to the net present value of the coupons they would have received if the bond would not have been called. The product governance requirements should therefore no longer apply to corporate bonds with such “make-whole clauses”.

(5) The call for evidence, launched by the European Securities and Markets Authority (ESMA), on the impact of inducements and cost and charges disclosure requirements under Directive 2014/65/EU and the public consultation of the Commission both confirmed that professional clients and eligible counterparties do not need standardised and mandatory cost information as they already receive the necessary information when they negotiate with their service provider. That information is tailored to their needs and often more detailed. Eligible counterparties and professional clients should therefore be exempted from those cost and charges disclosure requirements, except with regard to the services of investment advice and portfolio management because professional clients entering into portfolio management or investment advice relationships are do not necessarily have sufficient expertise or knowledge to be exempted from the costs and charges disclosures.

(6) Investment firms are currently required to undertake a costs-benefit analysis of certain portfolio activities in case of ongoing relationships with their clients in which financial instruments are switched. Investment firms are thereby required to obtain the necessary information from the client and to be able to demonstrate that the benefits of such switching outweigh the costs. As this procedure is overly burdensome for professional clients, who tend to switch on a frequent basis, they should be exempted from this requirement, while maintaining the possibility to opt-in. As retail clients need a high level of protection, that option should be limited to professional clients.

(7) Clients with an ongoing relationship with an investment firm receive mandatory service reports, either periodically or based on triggers. Neither investment firms nor their professional clients find such service reports useful. Those reports have proved in particular unhelpful for professional clients in extreme volatile markets, as those reports are provided in a high frequency and number. Professional clients often react to those service reports either by not reading those reports, or by making fast investment decisions rather than continuing with a long-term investment strategy. Eligible counterparties should therefore no longer receive such service reports, Professional clients, however, should have the possibility to opt-in to those service reports.

(8) Directive 2014/65/EU introduced reporting requirements on how orders were executed on terms most favourable to the client. Those technical reports contain large amounts of detailed quantitative information about the execution venue, the financial instrument, the price, the costs and the likelihood of execution. They are rarely read by investors, as is evidenced by the very low numbers of downloads from the websites of

the investment firms. As they do not enable investors to make any meaningful comparisons on the basis of those data, the publication of those reports should be temporarily suspended.

(9) In order to facilitate the communication between investment firms and their clients and thus the investment process itself, investment information should no longer be provided on paper but should, as a default option, be provided electronically. Retail clients should however be able to request the continued provision of information on paper.

(10) Directive 2014/65/EU allows persons that trade in commodity derivatives, emission allowances and derivatives on emission allowances on a professional basis to make use of an exemption from authorisation as an investment firm when their trading activity is ancillary to their main business. Those persons applying for the ancillary activity test are required to notify the relevant competent authority annually that they make use of that possibility and provide the necessary elements to satisfy the two quantitative tests that determine whether its trading activity is ancillary to its main business. The first test compares the size of an entity's speculative trading activity to the total trading activity in the Union on an asset class basis. The second test compares the size of the speculative trading activity, with all asset classes included, to the total trading activity in financial instruments by the entity at group level. There is an alternative form of the second test, which consists of comparing the estimated capital used for the speculative trading activity to the actual amount of capital used at group level for the main business. Those quantitative tests are particularly complex and have not altered the status quo in terms of persons that are eligible for the exemption. Therefore, the exemption should rely solely on qualitative elements. Persons that are eligible for the exemption, including market makers, are dealing on own account or providing investment services other than dealing on own account, to customers or suppliers of their main business. The exemption is available for both cases individually and on an aggregate basis where this is an ancillary activity, when considered on a group basis. That exemption should not be available for persons who apply a high-frequency algorithmic trading technique or are part of a group the main business of which is the provision of investment services, or banking activities, or acting as a market maker in relation to commodity derivatives. All provisions regarding the quantitative elements should be deleted.

(11) Competent authorities currently have to establish and apply position limits on the size of a net position which a person can hold at all times in commodity derivatives traded on trading venues and in economically equivalent Over-The-Counter (EEOTC) contracts designated by the Commission. As the position limit regime has proved to be unfavourable for the development of new commodity markets, nascent commodity markets should be excluded from the position limit regime. Instead, the position limits should only apply to those commodity derivatives that are deemed significant or critical commodity derivatives and their EEOTC contracts. Significant or critical derivatives are energy commodity derivatives with an open interest of at least 300 000 lots over a one-year period. Due to its critical importance for citizens, agricultural commodities that have an underlying that is for human consumption, and their EEOTC contracts, will remain under the current position limit regime. ESMA should be mandated to develop draft regulatory standards to define agricultural commodities with an underlying for human consumption subject to position limits and critical or significant derivatives subject to position limits. For significant and critical

derivatives, ESMA should take into account the 300 000 lots open interest over a one-year period, the number of market participants and the underlying commodity.

(12) Directive 2014/65/EU does not allow hedging exemptions for any financial entities. Several predominantly commercial groups who set up a financial entity for their trading purposes found themselves in a situation where their financial entity could not carry out all the trading for the group, as the financial entity was not eligible for the hedging exemption. Therefore, a narrowly defined hedging exemption for financial counterparties should be introduced. That hedging exemption should be available where, within a predominantly commercial group, a person has been registered as an investment firm and trades on behalf of that commercial group. To limit this hedging exemption to only those financial entities that trade for the non-financial entities in the predominantly commercial group, that hedging exemption should apply to those positions held by that financial entity that are objectively measurable as reducing risks directly related to the commercial activities of the non-financial entities of the group.

(13) Even in liquid contracts, only a limited number of market participants typically act as market makers in commodity markets. When those market participants have to apply position limits they are not in a positon to be as effective as market markers. Therefore, an exemption from the position limit regime should be introduced for financial and non-financial counterparties for positions resulting from transactions undertaken to fulfil mandatory liquidity provisions.

(14) The current position limit regime does not recognise the unique characteristics of securitised derivatives. Securitised derivatives should therefore be excluded from the position limit regime.

(15) Since the entry into force of Directive 2014/65/EU, no same commodity derivative contracts have been identified. Due to the concept of "same contract" in that Directive, the methodology for determining the other months' limit is detrimental to the venue with the less liquid market when trading venues are competing on commodity derivatives based on the same underlying and sharing the same characteristics. Therefore, the reference to "same contract" in Directive 2014/65/EU should be deleted. Competent authorities should be able to agree that the commodity derivatives traded on their respective trading venues are based on the same underlying and share the same characteristics, in which case the baseline for the other months' limit on the most liquid market for that commodity derivative can be used as the baseline limit for setting the other months' position limit for the competing contracts traded on the less liquid venues.

(16) Significant dissimilarities exist in the way positions are managed by trading venues in the Union. Therefore, position management controls should be reinforced where necessary.

(17) In order to ensure the further development of Euro denominated EU commodity markets, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of which agricultural commodity derivatives should be subject to position limits and which critical or significant derivatives should be subject to position limits, in respect of a procedure for which persons may apply for a hedging exemption for positions resulting from transactions undertaken to fulfil mandatory liquidity provisions, in respect of a procedure for which financial entities that are part of a predominantly commercial group may apply for a hedging exemption for positions held by that financial entity that are objectively measurable as reducing risks directly related to the

commercial activities of the non-financial entities of the group, in respect of the clarification of the content of position management controls. It is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level, and that those consultations are conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[10]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(18) The EU Emissions Trading System (ETS) is the Union's flagship policy for achieving the decarbonisation of the economy in line with the European Green Deal. Trading in emission allowances and derivatives thereof is subject to Directive 2014/65/EU and to Regulation (EU) No 600/2014 and represents an important element of the Union's carbon market. The ancillary activity exemption under Directive 2014/65/EU enables certain market participants to be active in emission allowance markets without having to be authorised as investment firms, provided certain conditions are met. In view of the importance of orderly, well-regulated and supervised financial markets, the significant role of the ETS in achieving the Union's sustainability objectives, and the role that a well-functioning secondary market in emission allowances has in supporting the functioning of the ETS, it is essential that the ancillary activity exemption is appropriately designed to contribute to those objectives. This is particularly relevant where trading in emission allowances takes place on third country trading venues. In order to ensure the protection of the Union's financial stability, market integrity, investor protection and the level playing field, and to ensure that the ETS continues to function in a transparent and robust manner to ensure cost-effective emission reductions, the Commission should monitor the further development of trading in emission allowances and derivatives thereof in the Union and in third countries, assess the impact of the ancillary activity exemption on the ETS, and where necessary, propose any appropriate amendment as regards the scope and application of the ancillary activity exemption.

(19) Directive 2014/65/EU should therefore be amended accordingly.

(20) The objectives pursued by this amendment aim at supplementing already existing Union legislation and can therefore best be achieved at Union level rather than by different national initiatives. Financial markets are inherently cross-border in nature and are becoming more so. Because of that integration, isolated national intervention would be far less efficient and would lead to the fragmentation of markets, resulting in regulatory arbitrage and distortion of competition. Since the objectives of this Directive, namely to refine already existing Union legislation ensuring uniform and appropriate requirements that apply to investment firms throughout the Union, cannot be sufficiently achieved by the Member States but can rather, by reason of their scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

[10] OJ L 123, 12.5.2016, p. 1.

(21) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[11], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2014/65/EU

Directive 2014/65/EU is amended as follows:

(1) Article 2 is amended as follows:

(a) in paragraph 1, point (j) is replaced by the following:

“(j) persons:

(i) dealing on own account, including market makers, in commodity derivatives or emission allowances or derivatives thereof, excluding persons who deal on own account when executing client orders; or

(ii) providing investment services, other than dealing on own account, in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business;

provided that

– for each of those cases individually and on an aggregate basis, the activity is ancillary to their main business, when considered on a group basis;

– those persons are not part of a group the main business of which is the provision of investment services within the meaning of this Directive, the performance of any activity listed in Annex I to Directive 2013/36/EU, or acting as a market-maker for commodity derivatives;

– those persons do not apply a high-frequency algorithmic trading technique;

– those persons report upon request to the competent authority the basis on which they have assessed that their activity under points (i) and (ii) is ancillary to their main business.”`;

(b) paragraph 4 is deleted;

(2) Article 4(1) is amended as follows:

(a) the following point (8a) is inserted:

[11] OJ C 369, 17.12.2011, p. 14.

"(8a) 'switching of financial instruments' means selling a financial instrument and buying another financial instrument or exercising a right to make a change in regard to an existing financial instrument;";

(b) the following point (50a) is inserted:

"(50a) 'corporate bonds with make-whole clauses' means corporate bonds with a clause that obliges the issuer in case of early repayment to return to the investor the principal amount of the bond and the net present value of the coupons the investor would have received in case the bond had not been called;";

(c) the following point (62a) is inserted:

"(62a) 'electronic format' means any durable medium other than paper;"

(3) in Article 16(3) the following subparagraph is added:

"The requirements laid down in the second to fifth subparagraphs of this paragraph shall not apply to corporate bonds with make-whole clauses.";

(4) Article 24 is amended as follows:

(a) In paragraph 2, the following subparagraph is added:

"This paragraph shall not apply to corporate bonds with make-whole clauses.";

(b) In paragraph 4, the following subparagraph is added:

"Where the agreement to buy or sell a financial instrument is concluded using means of distance communication, the investment firm may provide the information on costs and charges in an electronic format without undue delay after the conclusion of the transaction, provided that all of the following conditions are met:

(i) the investment firm has given the client the option of delaying the conclusion of the transaction until the client has received the information;

(ii) the client has agreed to receive the information shortly after the conclusion of the transaction.";

(c) the following paragraph 5a is inserted:

"5a. Investment firms shall provide all information required by this Directive to clients or potential clients in electronic format, except where the client or potential client is a retail client or potential retail client who has requested receiving the information on paper, in which case that information shall be provided on paper and free of charge.

Investment firms shall inform retails clients or potential retail clients that they have the option to receive the information on paper.

Investment firms shall inform existing retail clients that used to receive the information required by this Directive on paper about the fact that they will receive that information in electronic form at least eight weeks before sending that information in electronic form. Investment firms shall inform the existing retail clients that they have the choice to either continue receiving information on paper or to switch to information in electronic format. Investment firms shall also inform existing retail clients that an automatic switch to the electronic format will follow where they do not request the continuation of the provision of the information on paper within that eight weeks period.";

(5) in Article 25(2), the following subparagraph is added:

"When providing investment advice or portfolio management services that involve switching of financial instruments, investment firms shall analyse the costs and benefits of the switching financial instruments, and inform the client whether or not the benefits of such switching of financial instruments are greater than the costs involved in such switching.";

(6) in Article 27(3), the following subparagraph is added:

"The reporting requirement laid down in this paragraph shall however not apply until [date of entry into force of this amending Directive + 2 years].";

(7) the following Article 29a is inserted:

"Article 29a

Services provided to professional clients

(1) The requirements laid down in point (c) of Article 24(4), shall not apply to services provided to professional clients except for investment advice and portfolio management.

(2) The requirements laid down in the third subparagraph of Article 25(2) and in Article 25(6) shall not apply to services provided to professional clients, unless those clients inform the investment firm in writing that they wish to benefit from the rights provided for in those provisions.

(3) Member States shall ensure that investment firms keep a record of the written requests referred to in paragraph 2.";

(8) in Article 30, paragraph 1 is replaced by the following:

"1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients, to deal on own account, or to receive and transmit orders, have the possibility to bring about or enter into transactions with eligible counterparties without being obliged to comply with Article 24, with the exception of paragraph 5a, Article 25, Article 27 and Article 28(1), in respect of those transactions or in respect of any ancillary service directly relating to those transactions.";

(9) Article 57 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. Member States shall ensure that competent authorities, in line with the methodology for calculation determined by ESMA in regulatory technical standards adopted in accordance with paragraph 3, set and apply position limits on the size of a net position which a person can hold at all times in agricultural commodity derivatives and critical or significant commodity derivatives that are traded on trading venues, and in economically equivalent OTC contracts. The limits shall be set based on all positions held by a person and those held on his or her behalf at an aggregate group level in order to:

(a) prevent market abuse;

(b) support orderly pricing and settlement conditions, including preventing market distorting positions, and ensuring, in particular, convergence between prices of derivatives in the delivery month and spot prices for the underlying commodity, without prejudice to price discovery on the market for the underlying commodity.;

The position limits shall not apply to:

(a) positions held by, or on behalf of, a non-financial entity, and which are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity.;

(b) positions held by, or on behalf of, a financial entity that is part of a non-financial group and is acting on behalf of this non-financial group and which are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial group;

(c) positions held by financial and non-financial counterparties for positions that are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4);

(d) securities as referred to in point (44)(c) of Article 4(1)which relate to a commodity or an underlying as referred to in section C(10) of Annex I.";

ESMA shall develop draft regulatory technical standards to determine a procedure for financial entities that are part of a predominantly commercial group and who may apply for a hedging exemption for positions held by that financial entity that are objectively measurable as reducing risks directly related to the commercial activities of the non-financial entities of the group. ESMA shall develop draft regulatory technical standards to determine a procedure setting out how persons may apply for a hedging exemption for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue.

ESMA shall submit those draft regulatory technical standards to the Commission by [9 months after entry into force of this Directive].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010;.";

(b) paragraphs 3 and 4 are replaced by the following:

"3. ESMA shall develop draft regulatory technical standards to specify the agricultural commodity derivatives and critical or significant commodity derivatives referred to in paragraph 1, and to determine the calculation methodology that competent authorities are to apply when establishing the spot month position limits and other months' position limits for physically settled and cash settled commodity derivatives based on the characteristics of the relevant derivative concerned.

When specifying critical or significant commodity derivatives, ESMA shall take into account the following factors:

(a) the size of open interest of 300 000 lots on average over one year

(b) the number of market participants;

(c) the commodity underlying the derivative concerned.

When determining the calculation methodology referred to in the first subparagraph, ESMA shall take into account the following factors:

(a) the deliverable supply in the underlying commodity;

(b) the overall open interest in that derivative and the overall open interest in other financial instruments with the same underlying commodity;

(c) the number and size of the market participants;

(d) the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market;

(e) the development of new derivatives;

(f) the experience of investment firms or market operators operating a trading venue and of other jurisdictions regarding the position limits.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by [9 months after entry into force of this Directive].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

4. A competent authority shall set position limits for critical or significant contracts in commodity derivatives traded on trading venues and for agricultural commodity derivatives based on the methodology for calculation determined in regulatory technical standards adopted by the Commission pursuant to paragraph 3. That position limit shall include economically equivalent OTC contracts.

A competent authority shall review position limits where there is a significant change on the market, including significant change in deliverable supply or open interest, based on its determination of deliverable supply and open interest, and reset the position limit in accordance with the methodology for calculation laid down in the regulatory technical standards adopted by the Commission pursuant to paragraph 3;.";

(c) paragraphs 6, 7 and 8 are replaced by the following:

“6. Where agricultural commodity derivatives and critical or significant commodity derivatives based on the same underlying and sharing the same characteristics are traded in significant volumes on trading venues in more than one jurisdiction, the competent authority of the trading venue where the largest volume of trading takes place (‘central competent authority’) shall set the single position limit to be applied on all trading in that derivative. The central competent authority shall consult the competent authorities of other trading venues on which that derivative is traded in significant volumes on the single position limit to be applied and any revisions to that single position limit. Competent authorities that do not agree with the setting of the single position limit by the central competent authority shall state in writing the full and detailed reasons why they consider that the requirements laid down in paragraph 1 have not been met. ESMA shall settle any dispute arising from a disagreement between competent authorities.

The competent authorities of the trading venues where agricultural commodity derivatives and critical or significant commodity derivatives that are based on the same underlying and that share the same characteristics are traded, and the competent authorities of position holders in those derivatives, shall put in place cooperation arrangements, which shall include the exchange of relevant data, in order to enable the monitoring and enforcement of the single position limit.

7. ESMA shall monitor at least once a year the way competent authorities have implemented the position limits set in accordance with the methodology for calculation established by ESMA under paragraph 3. In doing so, ESMA shall ensure that a single position limit effectively applies to the agricultural commodity derivatives and critical or significant contracts based on the same underlying and sharing the same characteristics irrespective of where it is traded in line with paragraph 6.

8. Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives apply position management controls, including powers for the trading venue to:

(a) monitor the open interest positions of persons;

(b) obtain information, including all relevant documentation, from persons about the size and purpose of a position or exposure entered into, information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market, including, where appropriate, positions held in related contracts on other trading venues and OTC through members and participants;

(c) require a person to terminate or reduce a position, on a temporary or permanent basis, and to unilaterally take action to ensure the termination or reduction of the position where the person does not comply with such request; and

(d) require a person to provide, on a temporary basis, liquidity back into the market at an agreed price and volume with the express intent of mitigating the effects of a large or dominant position.

ESMA shall develop draft regulatory technical standards to specify the content of position management controls, thereby taking into account the characteristics of the trading venues concerned.

ESMA shall submit those draft regulatory technical standards to the Commission by [9 months after entry into force of this Directive].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010. ;";

(10) in Article 58, paragraph 2 is replaced by the following:

“2. Member States shall ensure that investment firms trading in commodity derivatives or emission allowances or derivatives thereof outside a trading venue provide the central competent authority referred to in Article 57(6), on at least a daily basis, with a complete breakdown of their positions taken in commodity derivatives or emission allowances or derivatives thereof traded on a trading venue and economically equivalent OTC contracts, as well as of those of their clients and the clients of those clients until the end client is reached, in accordance with Article 26 of Regulation (EU) No 600/2014 and, where applicable, of Article 8 of Regulation (EU) No 1227/2011.".

(11) in Article 90, the following paragraph 1a is inserted:

"1a. Before 31 December 2021, the Commission shall review the impact of the exemption laid down in Article 2(1), point (j), with regard to emission allowances or derivatives thereof, and shall accompany that review, where appropriate, with a legislative proposal to amend that exemption. In this context, the Commission shall assess the trading in EU emission allowances and derivatives thereof in the EU and in third countries, the impact of the exemption under Article 2(1), point (j), on investor protection, the integrity and transparency of the markets in emission allowances and derivatives thereof and whether measures should be adopted in relation to trading that takes place on third country trading venues.".

Article 2

Transposition

(1) Member States shall adopt and publish by [9 months from the entry into force of this Directive] the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those measures.

Member States shall apply those measures from [12 months from the entry into force of this Directive].

(2) Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

Entry into force

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

Article 4

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament *The President*	*For the Council* *The President*