23 May 2024
ESMA74-2134169708-7270

Reply form

to the Consultation Paper on the amendments to certain technical standards for commodity derivatives

Responding to this paper

ESMA invites comments on all matters in this consultation paper and in particular on the specific questions. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **23 August 2023.**

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

1. Insert your responses to the questions in the Consultation Paper in the present response form.
2. Use this form and send your responses in Word format (**pdf documents will not be considered except for annexes**);
3. Please do not remove tags of the type <ESMA_QUESTION _PMPR_1>. Your response to each question has to be framed by the two tags corresponding to the question.
4. If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
5. When you have drafted your response, name your response form according to the following convention: ESMA_PMPR_nameofrespondent_RESPONSEFORM. For example, for a respondent named 'ABCD', the response form would be entitled ESMA_PMPR_ABCD_RESPONSEFORM.
6. Upload the form containing your responses, **in Word format**, to ESMA's website (www.esma.europa.eu under the heading "Your input – Open Consultations" -> "Consultation Paper on the amendments to certain technical standards for commodity derivatives").

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading Legal Notice.

Who should read this paper

This consultation paper is primarily of interest to trading venues, investment firms and non-financial counterparties trading in commodity derivatives, but responses are also sought from any other market participant including trade associations, industry bodies and investors.

General information about respondent

Name of the company / organisation	European Venues and Intermediaries Association and LEBA
Activity	Regulated markets/Exchanges/Trading Systems
Are you representing an association?	☒
Country/Region	Europe

Questions

Q1 Do you agree with ESMA's proposal to extend the requirements to set, review and report accountability levels to trading venues trading derivatives on emission allowances? Do you have any other comments on ESMA's proposed amendments? Please elaborate.

<ESMA_QUESTION_PMPR_1>

No, we disagree due to the language precluding any possibility of trading forwards on EUAs. This would especially be the case for uncleared forwards traded on MTFs and OTFs where the trades settle bilaterally and the consequent positions under Credit Annexes ("CSA's") and Master Netting Agreements would be fungible such that no "Open Interest" is formed, and no single trading venue could claim rights or knowledge of the positions across market participants and their onwards clients.

As with all of the MiFID II position limits, controls and reporting level two rules, ESMA remains insufficiently concise on the applicability of the rules across trading venue models, where rather the regulatory technical standards should be constrained to CCP cleared contracts traded on designated Regulated Markets. That is, the so-called, "vertical silo exchange model," which evidently accounts for almost all EUA trading. Whilst not at all common, but where any MTF or OTF trades derivatives on EUAs which would or could be in uncleared forwards, or where cleared at a third-party CCP; evidently it would not know the position of the client if the instrument were fungible and able to be traded elsewhere either bilaterally or at other trading venues.

Therefore, in the architecture of the RTS, it should be made clear that concepts such as, accountability levels and position controls under points (a - d) in Article 57(8) of MiFID II could only apply to trading venues whose trades form cleared "Open Interest" at the level of a clearing member on an integrated CCP. They could not be applied by a trading venue with participants rather than members, to bilateral forwards on spot EUAs for self-evident reasons. As drafted, we cannot identify this limitation only to those positions held as cleared "Open Interest".

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<ESMA_QUESTION_PMPR_1>

Q2 Do you foresee any challenges with the use of JSON format comparing to XML? Please provide estimates of the costs and benefits (short- and long term) related to potential transition to JSON?

<ESMA_QUESTION_PMPR_2>

Regarding data transmission formats, we do not suggest that ESMA defines at this level of detail or restricts FIRDs accordingly. The MiFID text is not specific as to whether it is referring just to the application layer, the presentation layer or a combination of these with or without the session layer.

Rather industry should develop a preferred global approach and adoption of data encoding layers and transport formats mindful that neither JSON, nor XML are commonly understood to 'formats' as such, although across the scope of the MiFIR review this term remains undefined notwithstanding any level 1 mandate which doesn't define whether this applies to the business content ("the application layer"), the on-the-wire representation of that business content ("the presentation layer") or both. For the avoidance of doubt, our understanding has developed with the FIX Organisation that JSON is an encoding ("presentation layer").

Moreover, we do not agree with JSON as being the most suitable layer for the reference data transmission requirements. The primary concern is standardisation and universal adoption, but regarding effectiveness and speed, JSON is a relatively more verbose presentation layer than SBE which is preferable for a number of reasons. Encodings such as FAST and SBE are compatible with several industry applications including FIX and all of these protocols so can be used to encode ISO 20022 messages, for example.

FAST and SBE offer different encodings and therefore form the alternatives to JSON rather than XML application per se. FAST and SBE are not proprietary standards; they are FIX technical standards and as such have a legal guarantee of being free to use and 'open' (in the sense that anybody can contribute design suggestions, and they are available under open licenses). SBE has recently been submitted to ISO/IEC JTC1 for consideration as a Publicly Available Standard (PAS). Part of the SBE technical standard is the meta-data for defining SBE message schema which can capture any application layer message content. The SBE message schema allows the sender and receiver to understand how to interpret the content of the binary encoded message once it is decoded. SBE is "protocol compatible" as it does not define any business application content or protocol as part of the standard itself.

The relevance of all of this to this question lies in the table of 'categories defining quality of transmission protocols' as these apply to these different levels. Performance and Compatibility can be a factor of all three of application, presentation and session layers, Security relates to presentation and session layers, and Reliability relates to the session layer.

The OSI defines messaging protocols as a layered stack with each layer representing a difference and clearly delineated component from business data all the way down to physical hardware. The OSI model has seven layers, but it is the top three that are the most relevant here – the 'application' layer (containing the business content), the 'presentation' layer (describing how the business content is represented on the wire, otherwise known as 'encoding') and the 'session' layer (which describes aspects such as authentication, message recoverability and similar).

By way of example, ISO 20022 has one application layer (its business domain model) and, at the time of writing, two encodings (XML and ASN.1) and no defined session layer.

The commonly deployed "*FIX messaging suite*" similarly splits into the FIX Protocol (application layer), various encodings (including FIX's own ISO 3531-1 FIX Tag_Value encoding, Simple Binary Encoding and FIXML, but can equally be used with other encodings such as ASN.1, JSON and Google Protocol Buffers) as well as various sessions (including ISO 33531-2 FIX Session Layer, FIXP).

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<ESMA_QUESTION_PMPR_2>

Q3 Do you agree with the other proposals to change ITS 4? Please use the reference number in the table above to provide comments on a specific proposal. In relation to the proposed change 5, are there other units of underlying to be added to the existing list including for reporting the information on emission allowances? In relation to the proposed change 7, are there other position types that should be added to provide more granular reporting, beyond the existing (futures, options and other)? In relation to the proposed change 8, do you foresee any scenarios in which the possibility to use the National ID should be retained?

<ESMA_QUESTION_PMPR_3>
No, we disagree with those proposals in ITS4 which predicate a CCP-cleared exchange traded model, but are drafted such that they would apply to all MTF and OTF traded commodity derivatives despite being labelled for "Futures" under the [COMB] and [FUTR] flags. The context of ITS4, which seeks to address post-trade quantum for derivatives, should be moved from MiFID to EMIR, or at least be constituted such that it is predicated on EMIR scope and definitions.

Specifically, where the trading does not form CCP-cleared Open Interest in a vertically integrated model, the scope of the provisions in ITS4 should be clarified in order to enable any Competent Authority to take a proportionate approach to authorisation and supervision. This would especially be the case for uncleared forwards traded on MTFs and OTFs where the trades settle bilaterally and the consequent positions under Credit Annexes ("CSA's") and Master Netting Agreements would be fungible such that no "Open Interest" is formed, and no single trading venue could claim rights or knowledge of the positions across market participants and their onwards clients.

For change ID fields [1,2,3,] the term “option” should be clarified as to mean a CCP-cleared option traded on a vertically integrated exchange. Where any option, especially if not a straightforward put or call, is traded on an MTF or OTF for bilateral settlement, or where traded on venue for clearing on a third-party CCP, so the venue could not know the position of the underlying beneficial owner other than the immediate market participant.

In respect of change ID field [5,] concerning positions in derivatives on electricity and natural gas these should be explicitly limited to those positions which form CCP-cleared Open Interest bearing in mind that a number of regional power markets are traded on a financially settled basis (Italy, Spain, CE4) but entirely bilateral. These markets do not fall under the MiFID C6 WEP exemption, but could not comply with ITS4. Similarly certain cleared power markets, notably HUDEX use of ECC, are deemed to be traded on OTFs and similarly could not comply with ITS4.

For change ID fields [6, 7, 8,] the fields “Position quantity,” “Notation of the position quantity,” “Position type”, “Position maturity,” “Delta equivalent position quantity,” “Position holder ID”, “Reporting entity ID” and “Ultimate parent ID” could not be known by the trading venue where it is not a vertically integrated exchange and therefore should similarly be limited to “exchange traded derivatives” as defined by EMIR, or otherwise disapplied to MTFs and OTFs under MiFID.

Given that MiFID II has hitherto scoped together forwards and futures in its implementation of Perimeter Guidance, both the ITS and associated RTS should make explicit reference to the limitation of ITS4 to exchange traded futures, and offer competent authorities clarity as to where and how to disapply these provisions.

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<ESMA_QUESTION_PMPR_3>

Q4 Do you support the draft Technical Advice related to Article 83 of CDR 2017/5654?

<ESMA_QUESTION_PMPR_4>
No, we disagree with those proposals in ITS4 which predicate a CCP-cleared exchange traded model, but are drafted such that they would apply to all MTF and OTF traded commodity derivatives.

It follows from our answers above that unless the trading venue cited in Article 83 (1) of CDR 2017/5654 is a vertically integrated exchange with full visibility over a non-fungible pool of cleared open interest, it could not know any of the metrics in points (a) and (b). Indeed point (b) is entirely couched in exchange traded terms of “open interest” and “lots” (despite the ESMA advice for power and gas positions notation even when traded on RM-exchange).

Rather, in Article 83 of CDR 2017/5654 should be limited to “exchange traded derivatives” as defined by EMIR, or otherwise term “trading venue” in point (1) be changed to regulated market in order to disapply to MTFs and OTFs under MiFID. Similarly, and mindful that MiFID II combined “futures” and “forwards”, under points (a) and (b) the terms “futures and options” should each be clarified by the preposition “exchange traded … ”

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<ESMA_QUESTION_PMPR_4>