



EUROPEAN PARLIAMENT

2009 - 2014

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*Committee on Development*

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**2011/0296(COD)**

22.5.2012

# **DRAFT OPINION**

of the Committee on Development

for the Committee on Economic and Monetary Affairs

on the proposal for a regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories (COM(2011)0652 – C7-0359/2011 – 2011/0296(COD))

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## SHORT JUSTIFICATION

Commodity markets are fundamentally different from pure financial markets. It is possible to live a life without being exposed directly to the price of shares and bonds but it is not possible to live a life without being exposed to the price of food or energy. Commodity derivatives, in the form of contracts fixing a price for future delivery, pre-date financial markets. Commodity markets arose out of the legitimate needs of producers and consumers of raw materials, agricultural products and energy to protect themselves from the influence on prices of factors beyond their control. However, the growth of financial markets has meant that, over the last decade or so commodities have joined bonds and shares as "investment assets".

Developments in commodity related markets are critical and need to be thoroughly monitored and regulated if the purpose is to prevent dramatic situations such as the hunger riots in 2008 where unprecedented levels of food commodity price volatility created a tangible and immediate threat to fundamental human rights of a significant part of the world population. The exacerbated commodity market volatility and price levels that seem unrelated to fundamental extraction costs and the balance between supply and demand over the last ten years has indeed generated devastating and long lasting negative externalities which are potentially much bigger than the total amount of official development aid over the same period.

It has been often argued that the recent trends related to commodity markets and in particular commodity price dynamics reflect economic fundamentals driven by supply and demand and more specifically a rising demand from fast growing emerging economies, the rapid development of agrofuels as well as exogenous shocks such as droughts, floods or political tensions. According to such a view, speculation and more generally financial markets, play little or no negative role on commodity markets price formation, and on the contrary, provide the necessary liquidity required to ensure a more efficient price discovery process. In sharp contrast with such a view, it has been often claimed that speculation has become the 'key driver' of recent trends observed in commodity prices. Even though the matter of the 'driver' remains controversial in the academic and institutional literature, there is a growing body of evidence corroborated by several of the most recent empirical studies which highlight the major potential distortive and disruptive role played by the financialization of commodity trading irrespective of whether commodity based derivative contracts are assumed to drive 'spot prices' or to be driven by them.

Two patterns provide indeed compelling evidence of the substantial role played by financialisation in commodity markets. As the United Nations Conference for Development and Trade (UNCTAD) has recently pointed out, "*investments in commodities became a common part of a larger investor portfolio allocation which coincides with a significant increase of assets under management of commodity indexes. (...) Consequently, the volumes of exchange-traded derivatives on commodity markets are now 20 to 30 times greater than physical production*". In addition, over the last ten years price correlations between commodities and equity markets have soared significantly, *providing additional support to the idea that there are financial-based factors behind this structural change*.

Crucially, in spite of the controversy referred to above there is a large consensus on the lack of comprehensive and granular information required in order to build an overall assessment on the effective impact of the rapid financialisation of commodity trading over the last decade. As the G20 has repeatedly acknowledged there is indeed a lack of transparency and oversight on both physical and financial commodity related markets which results in an incomplete view on crucial data required for a better monitoring and regulation of commodity related markets such as inventories levels and the size of financial positions taken by commercial and non commercial players.

Given the critical importance of commodities it is beyond doubt that a comprehensive EU sustainable development cooperation strategy should go hand in hand with more transparent and better regulated commodity related markets in the EU and worldwide. Such a need is particularly relevant in the EU where commodity related financial markets are more lightly regulated than in the US.

The Commission recast proposals on the Markets in Financial Instruments Directive and Regulation (MIFID and MIFIR) include provisions with the explicit purpose of addressing the need to reinforce supervision and regulation in commodity related financial markets. These proposals foresee in particular position limits or alternative arrangements (Article 59) on commodity related derivative financial instruments which is a welcome move if the overall objective is to facilitate price discovery and efficient hedging of the price risks to which producers and consumers are exposed, and therefore, to prevent and correct asset bubbles and other distortions. As a necessary complement to position limits the proposals introduce position reporting requirements by categories of traders to the market and to the regulators (Article 60). It is also worth noting the deletion of the current full exemption from MIFID for commodity traders. These provisions represent steps in the right direction but more needs to and can be done. For that purpose your rapporteur for this draft opinion believes that three general issues need to be addressed by the European Parliament in the framework of the MIFID/MIFIR revision.

- 1. Strict limitation on exemptions from MIFID to include all commodities actors within the scope of the regulation.**
- 2. Strengthening the provisions for position limits (MIFID – Article 59).**
- 3. Strengthening the powers for regulators to intervene in specific products or activities (MIFIR articles 31, 32 and 35).**

The amendments proposed by your rapporteur for this draft opinion intend to address these three issues, with the aim of enhancing the functioning and transparency of the European markets related to commodities, and at the same time provide a valuable contribution to the fulfilment of the overarching objectives of the Union's development cooperation strategy.

## **AMENDMENTS**

The Committee on Development calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

## Amendment 1

### Proposal for a regulation

#### Article 2 – paragraph 1 – point 29 a (new)

*Text proposed by the Commission*

*Amendment*

***(29a) 'bona fide hedging transactions' means transactions as defined under Directive [New MIFID]***

Or. en

## Amendment 2

### Proposal for a regulation

#### Article 2 – paragraph 1 – point 29 b (new)

*Text proposed by the Commission*

*Amendment*

***(29b) 'excessive speculation' means a trading activity as defined under Directive [New MIFID]***

Or. en

## Amendment 3

### Proposal for a regulation

#### Article 23 – paragraph 3

*Text proposed by the Commission*

*Amendment*

3. The reports shall, in particular, include details of the names and numbers of the instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, and means of identifying the

3. The reports shall, in particular, include details of the ***type, the class of assets, the*** names and numbers of the instruments bought or sold, the quantity, the dates and times of execution, the transaction prices, a designation to identify the clients on whose behalf the investment firm has executed that transaction, a designation to identify the persons and the computer algorithms within the investment firm responsible for the investment decision and the execution of the transaction, and means of identifying

investment firms concerned. For transactions not carried out on a regulated market, MTF or OTF, the reports shall also include a designation identifying the types of transactions in accordance with the measures to be adopted pursuant to Article 19(3)(a) and Article 20(3)(a).

the investment firms concerned.  
***Additionally, for transactions related to commodity derivatives, the report shall indicate whether such transactions qualify as bona-fide hedging transactions.***  
For transactions not carried out on a regulated market, MTF or OTF, the reports shall also include a designation identifying the types of transactions in accordance with the measures to be adopted pursuant to Article 19(3)(a) and Article 20(3)(a).

Or. en

#### **Amendment 4**

##### **Proposal for a regulation Article 23 – paragraph 8 – point (c a) (new)**

*Text proposed by the Commission*

*Amendment*

***(ca) the criteria defining bona-fide hedging transactions related to the commodity, and the related evidence required from investment firms to support their claim that a transaction meets the criteria defined.***

Or. en

#### **Amendment 5**

##### **Proposal for a regulation Article 31 - title**

*Text proposed by the Commission*

*Amendment*

ESMA powers ***to temporarily intervene***

ESMA ***intervention*** powers

Or. en

## Amendment 6

### Proposal for a regulation

#### Article 31 - paragraph 2 – point (a)

*Text proposed by the Commission*

(a) the proposed action addresses a threat to investor protection or to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system in the Union;

*Amendment*

(a) the proposed action addresses a threat to investor protection or to the orderly functioning, ***economic utility*** and integrity of financial markets or to the stability of the whole or part of the financial system in the Union;

Or. en

## Amendment 7

### Proposal for a regulation

#### Article 34 - paragraph 2

*Text proposed by the Commission*

2. After receiving notification of any measure under Article 83(5) of Directive [new MiFID] ESMA shall record the measure and the reasons thereof. In relation to measures pursuant to Article 72(1) subparagraph (f) and (g) of Directive [new MiFID], it shall maintain and publish on its website a database with summaries of the measures in force including details on the person or class of persons concerned, the applicable financial instruments, any quantitative measures or thresholds such as the maximum number of contracts persons can enter into before a limit is reached, any exemptions thereto, and the reasons thereof.

*Amendment*

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Or. en

## Amendment 8

### Proposal for a regulation

#### Article 35 - paragraph 1 – introductory part

*Text proposed by the Commission*

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA shall, where **all** conditions in paragraph 2 are satisfied, take one or more of the following measures:

*Amendment*

1. In accordance with Article 9(5) of Regulation (EU) No 1095/2010, ESMA shall, where **any of the** conditions in paragraph 2 are satisfied, take one or more of the following measures:

Or. en

## Amendment 9

### Proposal for a regulation

#### Article 35 - paragraph 1 – point (b)

*Text proposed by the Commission*

(b) after analysing the information obtained, require any such person to take steps to reduce the size of the position or exposure;

*Amendment*

(b) after analysing the information obtained, require any such person **or class of investors** to take steps to reduce the size of the position or exposure;

Or. en

## Amendment 10

### Proposal for a regulation

#### Article 35 - paragraph 1 – point (c)

*Text proposed by the Commission*

(c) limit the ability of a person from entering into a commodity derivative.

*Amendment*

(c) limit the ability of a person from entering into a commodity derivative **or prohibit new classes of contracts**.

Or. en

## Amendment 11

### Proposal for a regulation

#### Article 35 - paragraph 2 – introductory part

*Text proposed by the Commission*

ESMA shall only take a decision under paragraph 1 if **all** of the following conditions are fulfilled:

*Amendment*

***Without prejudice to the measures foreseen in Article 59 of Directive [new MiFID],*** ESMA shall only take a decision under paragraph 1 if ***one or more*** of the following conditions are fulfilled:

Or. en

## Amendment 12

### Proposal for a regulation

#### Article 35 - paragraph 2 – point (a)

*Text proposed by the Commission*

(a) the measures listed in points (a) to (c) of paragraph 1 address a threat to the orderly functioning and integrity of financial markets including in relation to delivery arrangements for physical commodities, or the stability of the whole or part of the financial system in the Union;

*Amendment*

(a) the measures listed in points (a) to (c) of paragraph 1 address a threat to the ***efficient and*** orderly functioning and integrity of financial markets including in relation to delivery arrangements for physical commodities, ***consisting in excessive speculation and market manipulation, increased volatility or distortion of price discovery, or a threat to*** the stability of the whole or part of the financial system in the Union ***or a distortion of risk management functions of commodity markets;***

Or. en

## Amendment 13

### Proposal for a regulation

#### Article 35 - paragraph 3 – point (a)

*Text proposed by the Commission*

(a) **does significantly address** the threat to the orderly functioning and integrity of financial markets or of delivery arrangements for physical commodities, or the stability of the whole or part of the financial system in the Union or **significantly** improve the ability of competent authorities to monitor the threat;

*Amendment*

(a) **addresses** the threat to the **efficient and** orderly functioning and integrity of financial markets or of delivery arrangements for physical commodities, or the stability of the whole or part of the financial system in the Union or improve the ability of competent authorities to monitor the threat;

Or. en

## Amendment 14

### Proposal for a regulation

#### Article 35 - paragraph 3 – point (c)

*Text proposed by the Commission*

(c) does not have a detrimental effect on the efficiency of financial markets, including reducing liquidity in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure.

*Amendment*

(c) does not have a detrimental effect on the efficiency of financial markets, including reducing liquidity **required by bona fide hedging transactions** in those markets or creating uncertainty for market participants, that is disproportionate to the benefits of the measure.

Or. en

## Amendment 15

### Proposal for a regulation

#### Article 35 - paragraph 4

*Text proposed by the Commission*

4. Before deciding to undertake or renew any measure referred to in paragraph 1, ESMA shall notify relevant competent

*Amendment*

4. Before deciding to undertake or renew any measure referred to in paragraph 1, ESMA shall notify relevant competent

authorities of the measure it proposes. In case of a request under subparagraph (a) or (b) of paragraph 1 the notification shall include the identity of the person or persons to whom it was addressed and the details and reasons thereof. In case of a measure under subparagraph (c) of paragraph 1 the notification shall include details on the person or class of persons concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum number of contracts the person or class of persons in question can enter into, and the reasons thereof.

authorities of the measure it proposes. In case of a request under subparagraph (a) or (b) of paragraph 1 the notification shall include the identity of the person or persons to whom it was addressed and the details and reasons thereof. In case of a measure under subparagraph (c) of paragraph 1 the notification shall include details on the person or class of persons concerned, the applicable financial instruments, the relevant quantitative **and qualitative** measures such as the maximum number of contracts **and the value of the gross or open position the** person or class of persons in question can enter into, and the reasons thereof.

Or. en

## Amendment 16

### Proposal for a regulation Article 35 - paragraph 6

#### *Text proposed by the Commission*

6. ESMA shall publish on its website notice of any decision to impose or renew any measure referred to in subparagraph (c) of paragraph 1. The notice shall include details on the person or class of persons concerned, the applicable financial instruments, the relevant quantitative measures such as the maximum number of contracts the person or class of persons in question can enter into, and the reasons thereof.

#### *Amendment*

6. ESMA shall publish on its website notice of any decision to impose or renew any measure referred to in subparagraph (c) of paragraph 1. The notice shall include details on the person or class of persons concerned, the applicable financial instruments, the relevant quantitative **and qualitative** measures such as the maximum number of contracts **and the value of the gross or open position the** person or class of persons in question can enter into, and the reasons thereof.

Or. en

## Amendment 17

### Proposal for a regulation Article 35 - paragraph 10

*Text proposed by the Commission*

10. ***The Commission shall adopt by means of delegated acts in accordance with Article 41 measures specifying criteria and factors to be taken into account by ESMA in determining when a threat to the orderly functioning and integrity of financial markets including in relation to delivery arrangements for physical commodities, or the stability of the whole or part of the financial system in the Union referred to in paragraph 2(a) arise.***

*Amendment*

10. ***ESMA shall develop drafts for regulatory technical standards specifying the measures, criteria and factors that it shall take into account in determining whether the circumstances referred to in paragraph 2(a) arise.***

Or. en

## Amendment 18

### Proposal for a regulation Article 35 - paragraph 10 a (new)

*Text proposed by the Commission*

*Amendment*

***10a. ESMA shall submit those draft regulatory technical standards to the Commission by [31 December 2012].***

***The Commission shall be empowered to adopt delegated acts concerning regulatory technical standards referred to in subparagraph 1 in accordance with Articles 10 to 14 of Regulation (EU) N° 1095/2010.***

Or. en

## Amendment 19

### Proposal for a regulation Article 35 - paragraph 10 b (new)

*Text proposed by the Commission*

*Amendment*

***10b. For the purpose of effectively carrying out its duties in relation to commodities markets and coordinating supervisory activities between the designated national competent authorities with responsibility for those markets, ESMA shall establish a specific commodities division.***

Or. en

## Amendment 20

### Proposal for a regulation Article 35 - paragraph 10 c (new)

*Text proposed by the Commission*

*Amendment*

***10c. ESMA shall develop, in close coordination with the ESRB and other relevant sectoral supervisors from the Union and third countries, draft regulatory technical standards specifying a set of relevant indicators and thresholds required for the monitoring of the characteristics of underlying commodity markets as well as the details of the granular and aggregate information to be provided by market participants, regulated markets, MTF, OTFs, OTC dealers and trade repositories authorized under Regulation [EMIR] to the relevant competent authorities, ESMA and the ESRB.***

Or. en