European Parliament
2019-2024

TEXTS ADOPTED
Provisional edition

P9_TA-PROV(2020)0317

Markets in financial instruments: amending information requirements, product governance requirements and position limits to help the recovery from the COVID-19 pandemic ***I

Amendments adopted by the European Parliament on 25 November 2020 on the 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 (COM(2020)0280 – C9-0210/2020 – 2020/0152(COD))[1]

(Ordinary legislative procedure: first reading)

Amendment 9 unless indicated otherwise

AMENDMENTS BY THE EUROPEAN PARLIAMENT*

to the Commission proposal

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)

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1 The matter was referred back for interinstitutional negotiations to the committee responsible, pursuant to Rule 59(4), fourth subparagraph (A9-0208/2020).

* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol ▌.

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,

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) The COVID-19 pandemic is severely affecting people, companies, health systems and the economies ***and financial systems*** 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'[1] 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 ***cutting red tape through*** introducing ***limited*** targeted amendments to existing pieces of financial legislation. ***The overall aim of the amendments should therefore be to remove unnecessary red tape and make temporary exceptions that are deemed effective in order to mitigate the economic turmoil. The amendments should avoid making changes that result in more burdens on the sector and leave complex legislative questions to be settled during the planned review of MIFID II.*** 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[2] 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 ***could*** be considered,

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1 COM(2020)0456 final of 27.5.2020.

2 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).

provided investor protection is sufficiently taken into consideration at the same time.

(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 always enhanced the protection of investors but at times rather hindered the smooth execution of investment decisions. ***To better enhance investor protection,*** it is ***critical that the debt level of retail investors is taken into account in the suitability assessment, in particular given the rising level of consumer debt due to the COVID-19 pandemic. Furthermore,*** certain requirements in Directive ***2014/65/EU could be amended*** to facilitate the provision of investment services and the performance of investment activities ***provided that the amendment is done in a balanced way which fully protects investors***.

(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 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.

(9a) ***The Commission should come forward with a report on the impact of the application of position limits and position management on liquidity, market abuse and orderly pricing and settlement conditions in commodity derivatives markets, as provided for in this Directive. An evidence-based assessment of the commodity derivatives regime and the consultation of a diverse range of stakeholders is essential when reviewing the substance of those provisions, which were adopted in response to the 2009 Pittsburgh and 2011 Cannes G20 summit agreements to improve the regulation, functioning and transparency of commodity derivatives markets and to address excessive price volatility.*** **[Am. 2]**

(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 to 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 ***should remain the baseline rule*** for the ***ancillary activity*** exemption. ***As an alternative, national supervisory authorities should be able to be authorised to rely*** on qualitative elements, ***subject to clearly defined conditions. ESMA should be empowered to provide guidance on the circumstances under which national authorities could apply a qualitative approach, as well as to develop draft regulatory technical standards on the qualitative criteria.*** 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 ***would be*** 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. ▌

(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.

(13a) The changes to the position limit regime are designed to support the development of new energy contracts, in particular in the electricity market, and do not seek to relax the regime for agricultural commodity contracts.

(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 ***e***uro 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[1]. 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

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

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.

(20a) 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.

(21) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[1], 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.

(21a) The aim of the amendments should be to make temporary exceptions and remove clear red tape in order to mitigate the economic crisis; the amendments should

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

therefore avoid opening up more complex issues of the legislation which could risk causing more burdens for the sector. Larger changes to the legislation should first be re-evaluated in the planned review of MiFID II,

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; **[Am. 6]**

(ba) the following paragraph is added:

"(4a) By way of derogation from paragraph 4 of this Article, Member States may choose to apply qualitative criteria in relation to the exemptions specified in point (j) of paragraph 1.

ESMA shall develop draft regulatory technical standards to provide guidance regarding the qualitative criteria that can be used to assess whether the exemptions specified in point (j) of paragraph 1 of this Article apply.

ESMA shall submit those draft regulatory technical standards to the Commission by 1 April 2021.

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

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

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

"(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, ***which prevents the prior delivery of the information on costs and charges***, the investment firm may provide the information on costs and charges 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 ***without undue delay*** after the conclusion of the transaction.

The investment firm shall offer the client the possibility of receiving such information over the phone prior to 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. ***Existing retail clients who already receive the information required by this Directive in an electronic format do not need to be informed.***

(ca) the following paragraph 9a is inserted:

"9a. Member States shall ensure that investment firms may pay for the provision of execution services and the provision of investment research jointly, provided that all of the following conditions are met:

(a) before the execution or investment research services have been provided, an agreement has been entered into between the investment firm and the research provider, identifying which part of the joint payment is attributable to investment research;

(b) the investment firm informs its client about the joint payments;

(c) the execution services for which the joint payment is made are exclusively in respect of issuers that did not exceed a market capitalisation of EUR 1 billion during the period of 36 months preceding the provision of the investment research.

For the purpose of this Article, investment research shall be understood as covering research material or services concerning one or several financial instruments or other assets, or the issuers or potential issuers of financial instruments, or as covering research material or services closely related to a specific industry or market such that it informs views on financial instruments, assets or issuers within that industry or market.

Investment research shall also comprise material or services that explicitly or implicitly recommend or suggest an investment strategy and provide a substantiated opinion as to the present or future value or price of financial instruments or assets, or otherwise contain analysis and original insights and reach conclusions based on new or existing information that could be used to inform about an investment strategy and be relevant and capable of adding

value to the investment firm's decisions on behalf of clients being charged for that research.

(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 ***of*** financial instruments. ***When providing investment advice, investments firms shall*** inform the client whether or not the benefits of such switching of financial instruments are greater than the costs involved in such switching.";

(5a) in Article 25(6), the following subparagraph is added:

"This paragraph does not apply to obligations related to loss reporting thresholds as laid down in Article 25a of this Directive."

(5b) in Article 25(8), the introductory part is amended as follows:

"8. The Commission shall be empowered to adopt delegated acts in accordance with Article 89 to ensure that investment firms comply with the principles set out in paragraphs 2 to 6 of this Article when providing investment or ancillary services to their clients, including information to obtain when assessing the suitability or appropriateness of the services and financial instruments for their clients, criteria to assess non-complex financial instruments for the purposes of point (a)(vi) of paragraph 4 of this Article, the content and the format of records and agreements for the provision of services to clients and of periodic reports to clients on the services provided, ***but excluding obligations related to loss reporting thresholds laid down in Article 25a.*** Those delegated acts shall take into account."

(5c) the following Article 25a is inserted :

"Article 25a

Loss reporting thresholds

(1) Investment firms providing the service of portfolio management shall inform the client where the overall value of the portfolio, as evaluated at the beginning of each reporting period, depreciates by 10 % and thereafter at multiples of 10 %, no later than the end of the business day in which the

threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the end of the next business day.

(2) Investment firms that hold a retail client account that includes positions in leveraged financial instruments or contingent liability transactions shall inform the client, where the initial value of any instrument depreciates by 10 % and thereafter at multiples of 10 %. Reporting under this paragraph should be on an instrument-by-instrument basis, unless otherwise agreed with the client, and shall take place no later than the end of the business day in which the threshold is exceeded or, in a case where the threshold is exceeded on a non-business day, the end of the next business day."

(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]; ***the European Commission shall comprehensively review the adequacy of the reporting requirements in this paragraph and submit a report to the European Parliament and the Council by [date of entry into force of this amending Directive + 1 year].";***

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

"The European Commission shall comprehensively review the adequacy of the reporting requirements in this paragraph and submit a report to the European Parliament and the Council by [date of entry into force of this amending Directive + 1 year];"

(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. ***The requirements laid down in point (c) of Article 24(4) shall also not apply to eligible counterparties***.

(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 1a

Changes to Directive (EU) 2019/878

Article 2(1) of Directive (EU) 2019/878 is amended as follows:

(1) the first subparagraph is replaced by the following:

"Member States shall adopt and publish, by 28 December 2020:(i) the measures necessary to comply with the provisions of this Directive insofar as they concern credit institutions;(ii) the measures necessary to comply with Article 1(1) and (9) of this Directive as regards Article 2(5) and (6) and Article 21b of Directive 2013/36/EU, insofar as they concern credit institutions and investment firms."

(2) the following subparagraph is inserted after the first subparagraph:

"They shall immediately inform the Commission thereof."

Article 1b

Changes to Directive 2013/36/EU

The third, fourth and fifth subparagraphs of Article 94(2) are replaced by the following:

"For the purpose of identifying staff whose professional activities have a material impact on the institution's risk profile as referred to in Article 92(2), except as regards staff in investment firms as defined in point (2) of Article 4(1) of Regulation (EU) No 575/2013, EBA shall develop draft regulatory technical standards setting out the criteria to define the following:

(a) managerial responsibility and control functions;

(b) material business unit and significant impact on the relevant business unit's risk profile; and

(c) other categories of staff not expressly referred to in Article 92(2) whose professional activities have an impact on the institution's risk profile comparably as material as that of those categories of staff referred to therein.

EBA shall submit those draft regulatory technical standards to the Commission by 28 December 2019.

Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010. As regards regulatory technical standards applying to investment firms as defined in point (2) of Article 4(1) of Regulation (EU) No 575/2013, the empowerment laid down in Article 94(2) of this Directive as amended by Directive (EU) 2018/843 of the European Parliament and of the Council, shall continue to apply until 26 June 2021.

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 2a

Review clause

By 31 July 2021 at the latest, after consulting ESMA, and based on the outcome of a public consultation to be conducted by the Commission with sufficient lead time, the Commission shall present a proposal for a review of Directive 2014/65/EU and Regulation (EU) No 600/2014. The review shall be broad and shall take into account issues such as those related to market structure, data, trading and post trading, research rules, rules on payment of inducements to advisors, level of professional qualifications of advisers in Europe, client categorisation and Brexit.

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	For the Council
The President	The President