



Response of the Ministry of Finance and the Ministry of Climate Policy and Green Growth
to the *targeted consultation on the review of the functioning of commodity derivatives markets and
certain aspects relating to spot energy markets*

The Ministry of Finance and Ministry of Climate Policy and Green Growth of the Netherlands have taken note of the consultation on commodity derivatives markets and spot energy markets and appreciate the opportunity to give feedback, by means of this note, on the various topics covered by the consultation.

In general, we believe the EU regulatory and supervisory framework for commodity derivatives markets and spot energy markets is designed and calibrated appropriately.

Recent changes to this framework, introduced by the CMRP, MiFIR review and REMIT review, have contributed to this outcome. We do not see an urgent need to overhaul the overall regulatory and supervisory framework for these markets. Instead, a few targeted adjustments may be justified. To improve the functioning of the commodity derivatives and spot energy markets, we advocate to:

- Further enhance and consolidate trading data reporting for better supervision;
- Extend the scope of position reporting by traders to trading venues and supervisors;
- Maintain the design, scope and set-up of the position limit and circuit breaker calibration;
- Abstain from introducing artificial price caps that hamper market functioning and impose risks.

Please find below our elaborated position on the various topics, in order of the consultation document.

Data aspects

Market participants, supervisors, regulators and law makers would benefit from a broader and more consolidated view of trading activity on commodity derivatives markets.

The fact that off-venue transactions are not systemically reported and trading venues and NCAs do not have a consolidated view of the total trading (including OTC and OTF/ C6 carve-out instruments) – as well as positions – because of multiplication of reporting channels, merit two adjustments:

- Firstly, a better view of total trading activity across markets (financial/ derivatives and spot/ physical), trading venues and off-venue. This can be achieved by better, more elaborate, and more streamlined reporting by market participants to trading venues and supervisors.
- Secondly, more data sharing between supervisors – NCAs, NRAs, ESMA and ACER. A common database for efficient single collection and storage could be of value, if it serves the needs of both supervisors at national and EU-level and market participants. This could potentially be designed as further enhancements of ESAP or the Consolidated Tape.

Better transparency and data sharing can help to overcome current reporting data gaps. Together these improvements can aid surveillance of markets and detection of abusive market behaviors. Moreover, a more consolidated view of markets can improve analyses that feed into policy debates and prevent misinterpretation of market behavior or trends.

While better access to an enriched EU-dataset improves supervision, more data sharing should not result in duplication or conflict of supervisory powers between national and European financial and spot market supervisors. Intensified cooperation between supervisors requires well-established agreements on mandates and responsibilities and well-defined governance structures.

A more harmonized approach across the various legislative acts covering financial and spot markets where commodities and energy products are traded would reduce the reporting burden for market participants. Currently, there are both overlaps and differences between the various reporting requirements resulting from MiFIR, EMIR and REMIT. While these differing approaches might be justified given the various objectives of each piece of legislation and market specificities, a rethink could enhance the overall framework. However, we strongly advocate a thorough process rather than a rushed approach aimed at only removing or streamlining some reporting requirements without properly assessing the overall needs and demands of the various market participants and supervisors using these data. This is more suited as a potential medium to long-term measure, rather than an urgent short-term need.

Ancillary activity exemption

The current ancillary activity exemption (AAE) set-up seems to be functioning rather well. In our view, recent changes have resulted in a reduced administrative burden without significant negative consequences for the commodity derivatives markets. Any future review should be done with care, taking into account the importance of transparent, accessible, liquid and stable markets as well as diverging characteristics of market participants (i.e., different business models of commodity firms and energy firms, and differences compared to financial institutions operating under a MiFID-license). For example, in case of insolvency energy firms possess tangible assets with intrinsic value which allows for continued operations, while (insolvent) financial institutions typically only have intangible assets. This implies that a well-designed, proportionate prudential regime will probably look different for non-financial entities compared to financial entities, given the different risks inherent to various business models.

A targeted review of the AAE aimed at narrowing the scope and reducing the thresholds could be worthwhile to further explore regarding trading activities other than hedging. The AFM concluded in 2022 that the AAE tests have limited discriminatory power due to high threshold levels. A more narrowed AAE could be accompanied by a tailored prudential regime for business activities of non-financial energy firms in scope of this AAE and carrying out trading activities other than hedging. Liquidity requirements could improve absorption capabilities in case of market stress and reduce the likelihood of bankruptcy. Such a tailored prudential regime should be carefully assessed to ensure it is proportional and has a low regulatory and cost burden. Any

review of the AAE tests should be done in a holistic manner focused on the appropriateness of granting an exemption to MiFID.

Position management and reporting

Position reporting is a valuable tool for market oversight and aids supervisors in their task to safeguard market integrity. Position reporting enhances the range of data at the disposal of NCAs' market supervision, according to the AFM. It thereby supports detection of market abuse and allows for a better understanding of trading activity. This contributes to policy development and enhancing supervisory processes. Position management controls are important for trading venues to enforce position limits of market participants.

Extending the scope of position reporting to OTC positions, other than economically equivalent OTC (EEOTC) positions, will enhance trading venue operators' and supervisors' ability to enforce position limits. The restrictive nature of EEOTC and lack of other OTC reporting implies that a significant part of economic activity is not clearly visible for operators and supervisors. Relaxing the EEOTC definition and extending (EE)OTC position reporting requirements beyond investment firms will prevent circumvention of position limits. This also applies to requiring all market participants, including non-EU market participants, to report their positions. As stated above in the data aspects section, a coordinated or centralized reporting approach will improve efficiency and contribute to a proportionate administrative burden.

Position limits

The current scope and method of setting and enforcing position limits should be maintained. NCAs supervising the trading venue where a commodity derivative contract is being traded are best placed to set the level and monitor compliance of a position limit for this contract. MiFID already prescribes that the Central Competent Authority sets the limit in the case a commodity derivative is traded at multiple trading venues, as is the case for the TTF gas derivative. In our view, the operator of the relevant trading venue should be involved in this process as it is best placed to assess its own market and associated risks, and aid calibration of the position limit by the NCA accordingly.

We do not see merit in transferring the calibration and supervision of position limits to ESMA, as long as trading venues are being supervised by NCAs. Single supervision would not be enhanced by a divided supervisory arrangement, with single entities being supervised at multiple levels. The market for agricultural and significant or critical commodity derivatives is not fragmented in the EU, as it is concentrated on only a few trading venues, with only a limited number of NCAs responsible for its supervision. For the objectives of the Savings- and Investment Union, it is essential that the supervisory framework does not divide or duplicate tasks between national and EU supervisors.

The alleviations to the position limits regime introduced by the CMRP in 2021 have proven to be effective in supporting the development of new commodity markets while preventing undesired speculative behavior in agricultural and significant or critical commodity

derivative contracts. Overall, the regime has performed well for the TTF gas derivatives market in particular. Position limits should in our view not be misinterpreted as a tool for controlling overall speculation in a market, as they are designed to apply to individual entities and individual derivative contracts.

Circuit breakers

The MiFID II framework provides for adequate tools – in the form of circuit breakers – to ensure fair and transparent market behavior in episodes of high volatility. As trading venues are required to ensure orderly trading, they must have circuit breakers in place. These can prevent undesired market behavior in the case of temporary high volatility, for example, during a flash crash, by providing a pause for market participants. The MiFIR review has in our view built on the experience of the intraday volatility management mechanism (IVM) and ESMA's RTS will enhance unified application of circuit breakers in the EU by trading venues.

Trading venues should remain responsible for adequate calibration of the circuit breakers. They are best placed to assess the specific market characteristics and subsequently choose and design the best suitable type of circuit breaker. Supervisors should not be mandated to calibrate circuit breakers instead of market operators. It is important that these market operators strike the right balance between orderly trading and free market functioning, in the interest of the market and its participants. Legislation should be sufficiently flexible to allow for this assessment and calibration. Therefore, we see no merit in prescribing the implementation of static circuit breakers, as a certain market may be better served by a dynamic circuit breaker, especially to manage intraday price volatility.

Circuit breakers are not intended to be triggered frequently, nor should be. If circuit breakers are too rigid and triggered continuously, adequate price formation is hampered. This may result in risks for market participants and financial stability, as they might not be able to hedge their risks appropriately. Market participants may be forced to trade elsewhere, for example on OTC-markets or outside the EU, as liquidity will naturally flow where price discovery is most efficient. Moreover, if trading of a derivative is halted, price formation of the underlying value continues on another market resulting in misalignment. Therefore, circuit breakers are not designed, nor should they be, to curb prices.

Price caps

We strongly advocate against introducing new (permanent) artificial price caps on commodity (energy) markets, as robust evidence-based justifications are absent. There are significant downsides and risks involved while it is unlikely to provide significant benefits. As noted by the ECB, ESMA, ACER and academics, there is no evidence that the market correction mechanism (MCM) contributed to lower prices or lower volatility since 2022, while posing risks to the stability and functioning of EU markets.¹ The Netherlands has consistently expressed

¹ ECB, Opinion of the European Central Bank of 2 December 2022 on a proposal for a Council regulation establishing a market correction mechanism to protect citizens and the economy against excessively high prices; ESMA (2023), Effects Assessment of the impact of the market correction mechanism of financial

skepticism regarding market intervention measures such as the MCM. As an artificial price limit on the gas derivatives market, the MCM did not address the root cause of high prices; which is the imbalance between supply and demand in the global physical natural gas markets. Interventions as the MCM can exacerbate the problem, as restricting free price formation could lead to disorderly markets and subsequent clearing of trades. This hampers traders' ability to effectively hedge the price risks of underlying physical markets under all market conditions, posing significant threats to the stability of financial and energy markets.

Price caps may jeopardize the EU's strategic autonomy and gas security of supply, as it could make its market less appealing to global LNG suppliers, as global gas prices are not restricted by such artificial price caps. This could also undermine efforts to diversify energy sources and increase dependence on unreliable regimes. Moreover, they could make European financial and spot markets less attractive, negatively affecting market liquidity and weakening the TTF's role as a global benchmark, contradicting the objectives of the Savings- and Investment Union. Affordable energy prices may be achieved by addressing the root causes of high energy prices. Efforts should continue to focus on ensuring sufficient import of LNG and reducing gas consumption.

Other Draghi report recommendations

The introduction of a general obligation to trade in the EU poses risks and, if further explored, requires a thorough analysis and cautious approach. Previous experience has shown diverging effects of trading obligations, resulting in markets moving towards the EU or vice versa. As commodity markets are global by nature because of the physical location of resources, limiting access of non-EU market participants to the EU market, or of EU-market participants to non-EU markets, may result in insufficient supply of commodities, including (LNG) gas or electricity to the EU. This undermines the objectives of the Clean Industrial Deal. Such an obligation could result in reduced trading and hedging opportunities for EU non-financial (energy) firms. It could also reduce access for liquidity providers, resulting in less attractive EU markets.

The current supervisory structure seems to function rather well, and continued efforts should be focused on improving cooperation and coordination between NCAs, NRAs, ESMA and ACER. We believe significant progress has been made in this regard over the past few years. We do not see significant added value of a coordination body at EU-level, as ESMA and ACER already have cooperation agreements in place. At national level, NCAs and NRAs have similar cooperation agreements to act swiftly in times of crisis that impact both the financial and spot market. Following a more thorough review of the various legislative frameworks covering the financial and spot energy markets (as described in the data aspects section above), a thorough assessment of the accompanying supervisory framework might be a measure for the long term.

markets; ACER (2023), Market Correction mechanism Effects Assessment Report; Ebbe Rogge (2024), The European energy crisis, the Dutch TTF, and the market correction mechanism: a financial markets perspective. Journal of World Energy Law & Business.