

COMMISSION DELEGATED REGULATION (EU) 2022/1302**of 20 April 2022****supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives and procedures for applying for exemption from position limits****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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 ⁽¹⁾, and in particular Article 57(1), sixth subparagraph, Article 57(3), fifth subparagraph, and Article 57(12), third subparagraph, thereof,

Whereas:

- (1) Directive (EU) 2021/338 of the European Parliament and of the Council ⁽²⁾ provides for amendments to Article 57 of Directive 2014/65/EU as regards, among other things, position limits, which also include new related empowerments.
- (2) In order to improve the stability and integrity of financial markets in the Union, a methodology should be specified for calculating position limits to commodity derivatives in a harmonised manner. The methodology should prevent regulatory arbitrage and promote consistency whilst providing competent authorities with sufficient flexibility to take into account the variations among different commodity derivatives markets and the markets in the underlying commodities. The methodology for calculating the limits should allow competent authorities to balance the objectives of setting limits at a level sufficiently low to prevent persons holding positions in those commodity derivatives from abusing or distorting the market against the objectives of supporting orderly pricing and settlement arrangements, developing new commodity derivatives and enabling commodity derivatives to continue to support the functioning of commercial activities in the underlying commodity market.
- (3) A number of concepts stemming from Directive 2014/65/EU and technical terms used in this Regulation should be defined to ensure a uniform understanding.
- (4) Long and short positions of market participants in a given commodity derivative should be netted off against each other to determine the effective size of a position a market participant controls at any point in time. The size of a position held through an option contract or a commodity derivative traded on the same trading venue that is a subset of the principal contract should be calculated on a delta equivalent basis. To allow for a comprehensive, centralised and representative overview of a person's activity, and to prevent circumventing the objective of the position limit set for the principal contract, the aggregate position held by a person in a commodity derivative traded on a trading venue should also include the position resulting from the disaggregation of the components of a spread contract admitted to trading as a single tradable instrument on the same trading venue and the positions in commodity derivatives traded on the same trading venue that are a sub-set of the principal contract with regards to their size (so-called minis), or pricing period maturity, such as balance-of-the-month (so-called balmos) contracts.
- (5) Directive 2014/65/EU requires that any positions held by third parties on behalf of a person is to be included in the calculation of that person's position limit and for position limits to be applied at both an entity level and at a group level. It is therefore necessary to aggregate positions at a group level. It is appropriate to only provide for aggregation at the group level if a parent undertaking can control the use of positions. Accordingly, parent undertakings should aggregate positions held by their subsidiaries with any positions that the parent undertaking holds directly, in addition to the subsidiaries aggregating their own positions. Such aggregation can lead to positions calculated at the

⁽¹⁾ OJ L 173, 12.6.2014, p. 349.

⁽²⁾ Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 14).

level of the parent undertaking which are larger or, due to a netting of long and short positions held by different subsidiaries, lower than at individual subsidiary level. Positions should not be aggregated at the level of the parent undertaking if the positions are held by collective investment undertakings which hold those positions on behalf of their investors rather than on behalf of their parent undertakings in cases where the parent undertaking cannot control the use of those positions for its own benefit.

- (6) The amendments set out in Directive (EU) 2021/338 require that position limits apply to critical or significant commodity derivatives that are traded on trading venues, and to their economically equivalent OTC ('EEOCT') contracts. Critical or significant derivatives are commodity derivatives with an open interest of at least 300 000 lots on average over a one-year period. Due to the critical importance of agricultural commodities for citizens, agricultural commodity derivatives and their EEOCT contracts remain under the position limit regime below 300 000 lots. The liquidity threshold from which position limits start to apply to agricultural commodity derivatives is to be specified in this Regulation and should only be considered as trading in significant volume on a trading venue if they exceed the liquidity threshold for a sufficient period of time.
- (7) Where an over-the-counter ('OTC') contract is valued on the same underlying commodity that is deliverable at the same location and with the same contractual conditions and if it is having a highly correlated economic outcome to a contract traded on a trading venue, it should be deemed economically equivalent regardless of small differences in the contractual specifications concerning the lot sizes and the date of delivery. Differences in post-trade risk management arrangements, such as clearing arrangements, should not be barriers to declaring such contracts as economically equivalent. In order to prevent inappropriate netting of potentially dominant positions traded on a trading venue by the use of bilateral arrangements in OTC contracts and to ensure an efficient operation of the position limits regime in practice, it is necessary for commodity derivatives traded OTC to be considered economically equivalent to trading venue contracts only in limited circumstances. To deter avoidance of position limits and to enhance the integrity of the position limit regime it is necessary that a definition of an economically equivalent OTC contract is narrowly framed so that it does not permit a person to net an OTC position against multiple other positions. Furthermore, discretion in the consistent choice of positions against which an OTC position is netted should be limited to the specific circumstances where such an OTC contract is economically equivalent to more than one commodity derivative traded on a trading venue in the Union.
- (8) In order to establish which positions in commodity derivatives are objectively measurable as reducing risks directly relating to commercial activity, certain criteria should be provided, including the use of the accounting definition of a hedging contract based on International Financial Reporting Standards (IFRS) rules. That accounting definition should be also available to non-financial entities even though they do not apply IFRS rules at an entity level.
- (9) Additionally, non-financial entities should be able to use risk management techniques to mitigate the overall risks arising from their commercial activity or that of their group including risks arising from several geographic markets, products, time horizons or entities (that is, macro or portfolio hedging). Likewise, financial entities within predominantly commercial groups should be able to use risk management techniques to mitigate the overall risks arising from the commercial activity of the non-financial entities of the group. When a non-financial entity or a financial entity uses macro or portfolio hedging, it may not be able to establish a one-to-one link between a specific position in a commodity derivative and a specific risk arising from the commercial activity that the commodity derivative is intended to hedge. A non-financial entity or a financial entity may also use a non-equivalent commodity derivative to hedge a specific risk arising from commercial activity of the non-financial entity where an identical commodity derivative is not available or where a more closely correlated commodity derivative does not have sufficient liquidity (that is, proxy hedging). In such cases, risk management policies and systems should be able to prevent non-hedging transactions from being categorised as hedging and should be able to provide for a sufficiently disaggregate view of the hedging portfolio so that speculative components are identified and counted towards the position limits. Positions should not qualify as reducing risks related to commercial activity solely on the grounds that they have been included as part of a risk-reducing portfolio on an overall basis.

- (10) A risk may evolve over time and, in order to adapt to the evolution of the risk, commodity derivatives initially executed for reducing risk related to commercial activity may have to be offset through the use of additional commodity derivative contracts that close out those commodity derivative contracts that have become unrelated to the commercial risk. Additionally, the evolution of a risk that has been addressed by the entering into of a position in a commodity derivative for the purpose of reducing risk should not subsequently give rise to the re-evaluation of that position as not being a privileged transaction from the beginning.
- (11) Financial and non-financial entities should be able to apply for the exemption in relation to hedging of commercial activities before entering into a position. The application should give the competent authority a clear and concise overview of the commercial activities of the non-financial entities in respect of an underlying commodity that are intended to be hedged, the associated risks and how commodity derivatives are utilised to mitigate those risks. Position limits apply at all times to agricultural commodity derivatives and to critical or significant commodity derivatives, and should the exemption ultimately not be granted by the competent authority, the financial or the non-financial entity, as the case may be, should reduce any position in excess of a limit accordingly and could face supervisory measures in respect of a breach of a limit. Financial and non-financial entities should re-assess their activities periodically to ensure that the continued application of the exemption is justified.
- (12) Financial and non-financial entities should be able to apply for the exemption in relation to positions resulting from the mandatory provision of liquidity on trading venues before those transactions are undertaken. The application should give the competent authority a clear and concise overview of the mandatory liquidity provision framework under which those persons operate, the person's activities in the trading of commodity derivatives in accordance with the written agreement entered into with the trading venue and of the resulting open positions. Position limits apply at all times to agricultural commodity derivatives and to critical or significant commodity derivatives, and should the exemption ultimately not be granted by the competent authority, the non-financial or financial entity should reduce any position in excess of a limit accordingly and could face supervisory measures in respect of a breach of a limit. Non-financial and financial entities should re-assess their activities periodically to ensure that the continued application of the exemption is justified.
- (13) The spot month period, which is the time period immediately before delivery at expiry, is specific to each commodity derivative and may not correspond to exactly one month. Spot month contracts should therefore refer to the contract that is the next contract in that commodity derivative to mature. Restricting the positions a person may hold in the period during which delivery of the physical commodity is to be made limits the quantity of the underlying deliverable supply each person may make or take delivery of, thereby preventing the accumulation of dominant positions by individuals which may enable them to squeeze the market through restricting access to the commodity. The standard baseline for the spot month position limit for both physically and cash settled commodity derivatives should therefore be computed as a percentage of the deliverable supply estimate. Competent authorities should be able to implement a schedule of decreasing position limits ranging from the point in time when a contract becomes a spot month contract until maturity in order to more precisely ensure that position limits are adequately set throughout the spot month period and to ensure orderly settlement.
- (14) Where there is relatively little derivative trading compared with the deliverable supply of a commodity, open interest will be smaller in comparison with deliverable supply. In such circumstances, even using the lowest percentage of the deliverable supply in the methodology may not allow the competent authorities to set a spot month limit that is consistent with the objective of ensuring orderly pricing and settlement conditions and preventing market abuse. To ensure that those objectives are met in all circumstances, when the deliverable supply for a commodity derivative is substantially higher than the total open interest to such extent that the spot month limit based on deliverable supply would deprive the requirement for competent authorities to apply position limits of any effect, competent authorities should, as a fall back methodology, determine the baseline figure for the spot month limit in that commodity derivative as a percentage of the total open interest in that commodity derivative and then proceed with the relevant adjustment factors.

- (15) Crops in agricultural products can be subject to high volatility due to weather conditions. It is therefore appropriate that the reference period for the determination of deliverable supply in agricultural commodity derivatives extends beyond the reference period used for the determination of deliverable supply in other commodity derivatives.
- (16) The other months' position limit is applied across all maturities other than the spot month. The standard baseline for the other months' position limits for both physically and cash settled commodity derivatives should be computed as a percentage of the total open interest. The distribution of positions across the other months' of a commodity contract is often concentrated in the months closest to maturity. Therefore, total open interest provides a more appropriate baseline for setting position limits than using a figure averaged across all maturities. As open interest may change significantly over a short period of time, the open interest should be calculated by the competent authorities over a period of time that adequately reflects the commodity derivative trading characteristics. That reference period should notably account for seasonality of trading of a contract.
- (17) To ensure that the position limits established by competent authorities are based on a comprehensive representation of the overall open positions held in a commodity derivative, the open interest calculated by the competent authority should include both the outstanding positions on the trading venue where the commodity derivative is traded and the outstanding positions in economically equivalent OTC contracts reported to the competent authority.
- (18) The standard baseline of 25 % of deliverable supply and of open interest has been set with reference to the experience of other markets and other jurisdictions. The baseline should be adjusted by competent authorities to enable it to be reduced to 5 % of deliverable supply and open interest, or 2,5 % in the case of some agricultural commodity derivatives, and to be increased up to 35 % of deliverable supply and open interest should the characteristics of the market require it in order to support the orderly settlement and functioning of the contract and its underlying market. Since any adjustment to the baseline figure applies only where, and for so long as, objective characteristics of the market require it, temporary adjustments to the baseline should be therefore possible. Competent authorities should ensure that an adjustment downwards of the baseline is effected whenever it is necessary to prevent dominant positions and to support orderly pricing in the commodity derivative and in the underlying commodity. For derivatives without a tangible underlying the deliverable supply cannot be used to establish a position limit. Therefore, competent authorities should be able to enhance or adjust the methodologies to determine position limits for these commodity derivatives based on different parameters like the use of open interest also for the spot month.
- (19) There may be circumstances where a commodity derivative newly admitted to trading on a trading venue was formerly traded on one or more trading venues in the Union or in third countries. In order to allow for the smooth transfer of the commodity derivative the open interest in the commodity derivative formerly traded on the other trading venue(s) should be taken into account by the competent authority when establishing the initial position limits for the newly admitted to trading commodity derivative. Other circumstances may arise, for example, where two commodity derivatives are traded on the same trading venue and due to a slight difference in their characteristics, such as a change in the underlying index or bidding zone, the open interest in the older contracts is expected to quickly move to the more recent contract. When establishing the position limits for the more recent contract, the competent authority should take into account the open interest in the older contract to allow for the smooth development of the more recent contract.
- (20) Certain commodity derivatives, in particular based on power and gas, provide that the underlying be delivered constantly over a specified period of time such as day, month, or year. Moreover, certain contracts with longer delivery periods such as year or quarter may be automatically substituted by related contracts of shorter delivery periods such as quarter or month (so-called cascading contracts). In those cases, a spot month position limit for the contract to be substituted prior to delivery would be inappropriate, as such limit would not cover the expiry and physical delivery or cash settlement of the contract. To the extent that delivery periods of contracts for the same underlying overlap, a single position limit should apply to all the related contracts in order to properly take into account the positions across those contracts which may potentially be delivered. To facilitate that, related contracts should be measured in units of the underlying and aggregated and netted accordingly.

- (21) For certain agricultural commodity derivatives, which have a material impact on consumer food prices, the methodology should enable a competent authority to set a baseline and position limit beneath the minimum of the general range, where it finds evidence of speculative activity impacting significantly on prices.
- (22) The competent authority should assess whether the factors listed under Article 57(3) of Directive 2014/65/EU necessitate adjustment of the baseline in order to set the final level of the position limit. The assessment should take into account those factors as relevant for the particular commodity derivative in question. The methodologies should provide a direction of how to set the limit without taking away the ultimate decision on an appropriate position limit for a commodity derivative from the competent authority in order to prevent market abuse. The factors should give important indications to the competent authorities and to the European Securities and Markets Authority, to facilitate forming their opinions and ensuring an adequate alignment of position limits across the Union.
- (23) Position limits should not create barriers to the development of new agricultural commodity derivatives and should not prevent less liquid sections of the agricultural commodity derivative markets from working adequately. The methodology should take into account the time required to develop and attract liquidity to both new and existing commodity derivatives and, in particular, for agricultural commodity derivatives that may support risk management in bespoke or immature markets or seek to develop new hedging arrangements in new commodities. Equally, there are agricultural commodity derivative contracts which may never attract sufficient participants or liquidity to enable the effective application of position limits without the risk of participants regularly and inadvertently breaching the limit and consequently disrupting the pricing and settlement of those commodity derivatives. In order to address those risks to the efficient functioning of markets, the position limit for the spot month and for other months should be set at a fixed level of 10 000 lots until the open interest in the agricultural commodity derivative exceeds a threshold of 20 000 lots.
- (24) The number, composition and role of market participants in a commodity derivative can influence the nature and the size of positions that certain market participants hold in the market. For some commodity derivatives, certain market participants might hold a large position which reflects their role in the buying and selling of, and the delivery of, the commodity when they are on the opposite side of the market to the majority of other market participants providing liquidity or risk management services for the underlying commodity market.
- (25) The supply, use, access to, and availability of the underlying commodity are characteristics of the underlying commodity market. Through the assessment of more granular components of those characteristics, such as perishability of the commodity and method of transportation, the competent authority should be able to determine the flexibility of the market and adjust position limits appropriately.
- (26) There may be a large discrepancy between open interest and deliverable supply for some commodity derivatives. That may occur where there is relatively little derivative trading compared with the deliverable supply, in which case open interest will be smaller in comparison with deliverable supply, or, for example, where a particular commodity derivative is widely used to hedge many different risk exposures and deliverable supply is therefore smaller in comparison with open interest. Such significant discrepancies between open interest and deliverable supply justify adjustments from the baseline applicable to the other months' limit upwards or downwards, in order to avoid a disorderly market when the spot month approaches. More specifically, when open interest is significantly higher than deliverable supply, the other months' limit should be adjusted downwards to avoid a cliff-edge effect with the spot month limit that is based on deliverable supply. It would not be appropriate to adjust the spot month limit upward in such circumstances considering the risk of market cornering. When deliverable supply is significantly higher than open interest, the other months' limit should be adjusted upwards to avoid the risk of unduly constraining trading. As deliverable supply is significantly higher than open interest, the spot month limit based on deliverable supply that results from the baseline is expected to exceed the open positions held by market participants in the spot month. To ensure that the spot month limit does prevent market participant to build a dominant position and that the objectives of preventing market abuse and ensuring orderly pricing, as required by Article 57(1) of Directive 2014/65/EU, are effectively achieved, the spot month limit should, on the contrary, be adjusted downwards when based on deliverable supply.

- (27) With the same objective of limiting disorderly markets as the spot month approaches because of large discrepancies between calculations of deliverable supply and open interest, deliverable supply should be defined to include any substitute grades or types of a commodity that can be delivered in settlement of a commodity derivative contract under the terms of that contract.
- (28) Article 57(1), (3) and (12) of Directive 2014/65/EU empowers the Commission to adopt the methodology for the calculation and application of position limits in order to establish a harmonised position limits regime across commodity derivatives traded on trading venues and EOTC contracts. Article 57(1) requires a methodology for calculation that competent authorities are to apply in establishing position limits for commodity derivatives. Article 57(1) also requires the determination of a procedure for applying for the liquidity provision exemption and for the risk reducing exemption for financial entities, that are part of a predominantly commercial group. Article 57(3) requires the specification of how competent authorities should take into account factors when establishing the spot month position limits and other months' position limits for physically settled and cash settled commodity derivatives. Article 57(12) requires the determination of how the position limits methodology should be applied, for example, in the aggregation of positions within a group, when a position may be qualified as reducing risk or when a firm may use a hedging exemption. The content of the rules is substantively linked, since they are closely related to the methodology for establishing position limits. In the interests of simplicity and transparency, as well as to facilitate the application of the rules and avoid duplication, they should be laid down in a single act rather than in a number of cross-referenced separate acts.
- (29) This Regulation is based on the draft regulatory technical standards submitted to the Commission by the European Securities and Markets Authority.
- (30) The European Securities and Markets Authority has conducted open public consultations on the draft regulatory technical standards on which this Regulation is based, analysed the potential related costs and benefits and requested the advice of the Securities and Markets Stakeholder Group established in accordance with Article 37 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council ^(?).
- (31) Commission Delegated Regulation (EU) 2017/591 ⁽⁴⁾ supplements Directive 2014/65/EU with regard to regulatory technical standards for the application of position limits to commodity derivatives. This Regulation replaces that Delegated Regulation, taking into account the amendments of Directive 2014/65/EU brought by Directive (EU) 2021/338, which set out new provisions regarding hedging exemptions for liquidity provisioning and for financial entities that are part of a predominantly non-financial group, empowering the Commission to adopt a delegated act specifying the criteria for liquidity provision exemption and for the risk-reducing exemption for financial entities. Furthermore, the notion of 'same commodity contract' was deleted and securities derivatives no longer in scope. Finally, the calculation of open interest was clarified and the methodology for new and less liquid agricultural commodity derivative contracts was simplified. Therefore, Delegated Regulation (EU) 2017/591 should be repealed and replaced by this Regulation,

^(?) Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

⁽⁴⁾ Commission Delegated Regulation (EU) 2017/591 of 1 December 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the application of position limits to commodity derivatives (OJ L 87, 31.3.2017, p. 479).

HAS ADOPTED THIS REGULATION:

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter

This Regulation lays down rules for the calculation of the net position held by a person in a commodity derivative, the methodology for calculating the position limits on the size of that position and the procedures for applying for exemptions to position limits.

Article 2

Definitions

For the purposes of this Regulation, the following definitions shall apply:

(1) 'financial entity' means any of the following:

- (a) an investment firm authorised in accordance with Directive 2014/65/EU;
- (b) a credit institution authorised in accordance with Directive 2013/36/EU of the European Parliament and of the Council ⁽⁵⁾;
- (c) an insurance undertaking as defined in Article 13, point (1), of Directive 2009/138/EC of the European Parliament and of the Council ⁽⁶⁾;
- (d) a reinsurance undertaking as defined in Article 13, point (4), of Directive 2009/138/EC;
- (e) an undertaking for collective investment in transferable securities (UCITS) and, where relevant, its management company, authorised in accordance with Directive 2009/65/EC of the European Parliament and of the Council ⁽⁷⁾;
- (f) an institution for occupational retirement provision within the meaning of Article 6, point (1), of Directive (EU) 2016/2341 of the European Parliament and of the Council ⁽⁸⁾;
- (g) an alternative investment fund managed by managers of alternative investment funds (AIFMs) authorised or registered in accordance with Directive 2011/61/EU of the European Parliament and of the Council ⁽⁹⁾;
- (h) a central counterparty (CCP) authorised in accordance with Regulation (EU) No 648/2012 of the European Parliament and of the Council ⁽¹⁰⁾;
- (i) a central securities depository authorised in accordance with Regulation (EU) No 909/2014 of the European Parliament and of the Council ⁽¹¹⁾;

⁽⁵⁾ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

⁽⁶⁾ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ L 335, 17.12.2009, p. 1).

⁽⁷⁾ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

⁽⁸⁾ Directive 2016/2341 of the European Parliament and of the Council of 14 December 2016 on the activities and supervision of institutions for occupational retirement provision (IORPs) (OJ L 354, 23.12.2016, p. 37).

⁽⁹⁾ Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).

⁽¹⁰⁾ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

⁽¹¹⁾ Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).

- (2) 'non-financial entity' means a legal or natural person other than a financial entity;
- (3) 'spot month contract' means the commodity derivative contract in relation to a particular underlying commodity whose maturity is the next to expire in accordance with the rules set by the trading venue;
- (4) 'other months' contract' means any commodity derivative contract that is not a spot month contract;
- (5) 'lot' means the unit of trading used by the trading venue on which the commodity derivative trades representing a standardised quantity of the underlying commodity.

A third-country entity shall be considered a financial entity where its authorisation would be required under any of the legal acts of the Union referred to in point (1) of the first paragraph if that entity was based in the Union and subject to Union law.

A third-country entity shall be considered a non-financial entity where its authorisation would not be required under any of the legal acts of the Union referred to in point (1) of the first subparagraph if that entity was based in the Union and subject to Union law.

CHAPTER II

METHOD FOR CALCULATING THE SIZE OF THE NET POSITION OF A PERSON

Article 3

Aggregation and netting of positions in a commodity derivative

1. The net position of a person in a commodity derivative shall be the aggregation of the following:
 - (a) its positions held in that commodity derivative traded on a trading venue and in economically equivalent OTC contracts pursuant to Article 6;
 - (b) where the commodity derivative is an agricultural commodity derivative traded in significant volume in accordance with Article 5, its position held in agricultural commodity derivatives based on the same underlying and sharing the same characteristics, traded in significant volumes on other trading venues and subject to the position limits set by the central competent authority;
 - (c) where the commodity derivative is a critical or significant contract, its positions held in critical or significant contracts based on the same underlying and sharing the same characteristics, traded on other trading venues and subject to the position limits set by the central competent authority.
2. The positions held in a commodity derivative traded on a trading venue referred to in paragraph 1, point (a), shall include the positions held in the disaggregated components of a spread contract and in other closely related commodity derivatives traded on the same trading venue that are a fraction of the value of a corresponding standard futures contract or whose pricing period is defined as the selected start date to the end of the contract month of the standard commodity derivative.
3. Where a person holds both long and short positions in any of the commodity derivatives referred to in paragraphs 1 and 2, the person shall net those positions to determine its net position for that commodity derivative.
4. Positions held by a non-financial entity in commodity derivatives that are objectively measurable as reducing risks in accordance with Article 7(1) and (3), as approved by the competent authority pursuant to Article 8(5) on the basis of Article 8(1) and (2), shall not be aggregated for the purposes of comparing the net position of that non-financial entity with the limits for that commodity derivative.

5. Positions held by a financial entity in commodity derivatives that are objectively measurable as reducing risks in accordance with Article 7(2) and (4), as approved by the competent authority pursuant to Article 8(5) on the basis of Article 8(3) and (4), shall not be aggregated for the purposes of comparing the net position of that financial entity with the limits for that commodity derivative.

6. Positions held by a person in commodity derivatives that result from transactions undertaken on trading venues to fulfil liquidity provision obligations in accordance with Article 10, as approved by the competent authority pursuant to Article 9, shall not be aggregated for the purposes of comparing the net position of that person with the limits for that commodity derivative.

7. A person shall determine separately the net position it holds in a commodity derivative for both the spot month contracts and the other months' contracts.

Article 4

Method of calculating positions for legal entities within a group

1. A parent undertaking shall determine its net position by aggregating the following positions in accordance with Article 3:

- (a) its own net position;
- (b) the net positions of each of its subsidiary undertakings.

2. By way of derogation from paragraph 1, the parent undertaking of a collective investment undertaking or, where the collective investment undertaking has appointed a management company, the parent undertaking of that management company, shall not aggregate the positions in commodity derivatives in any collective investment undertaking where it does not in any way influence the investment decisions in respect of opening, holding or closing those positions.

Article 5

Significant volumes

1. An agricultural commodity derivative shall be considered to be traded in a significant volume on a trading venue when the trading in the agricultural commodity derivative on that trading venue over a consecutive three month period exceeds an average daily open interest of 20 000 lots in the spot month and other months combined.

2. The trading venue where the largest volume of trading in commodity derivatives based on the same underlying and sharing the same characteristics takes place shall be the trading venue that over 1 year has the largest average daily open interest.

Article 6

OTC contracts economically equivalent to commodity derivatives traded on trading venues

An OTC derivative shall be considered economically equivalent to a commodity derivative traded on a trading venue where it has identical contractual specifications, terms and conditions, excluding different lot size specifications, delivery dates diverging by less than 1 calendar day and different post trade risk management arrangements.

Article 7

Positions qualifying as reducing risks directly related to commercial activities

1. A position held by a non-financial entity in a commodity derivative traded on trading venues or in economically equivalent OTC contracts pursuant to Article 6 qualifies as reducing risks directly relating to the commercial activities of that non-financial entity in accordance with Article 57(1), second subparagraph, point (a), of Directive 2014/65/EU where by itself, or in combination with other derivatives in accordance with paragraph 3 of this Article ('position in a portfolio of commodity derivatives'), the position meets one of the following criteria:

- (a) it reduces the risks arising from the potential change in the value of assets, services, inputs, products, commodities or liabilities that the non-financial entity or its group owns, produces, manufactures, processes, provides, purchases, merchandises, leases, sells, or incurs or reasonably anticipates owning, producing, manufacturing, processing, providing, purchasing, merchandising, leasing, selling or incurring in the normal course of its business;
- (b) it qualifies as a hedging contract pursuant to International Financial Reporting Standards (IFRS) adopted in accordance with Article 3 of Regulation (EC) No 1606/2002 of the European Parliament and Council ⁽¹²⁾.

2. A position held by a financial entity in an agricultural commodity derivative, in a critical or significant commodity derivative traded on trading venues or in economically equivalent OTC contracts pursuant to Article 6 qualifies as reducing risks directly related to the commercial activities of the non-financial entities of a predominantly commercial group in accordance with Article 57(1), second subparagraph, point (b), of Directive 2014/65/EU where by itself, or in combination with other derivatives in accordance with paragraph 3 of this Article (position in a portfolio of commodity derivatives), the position meets one of the criteria mentioned in paragraph 1, points (a) or (b), of this Article.

3. For the purposes of paragraph 1, a position qualifying as risk-reducing taken on its own or in combination with other derivatives is one for which the non-financial entity or the person holding the position on behalf of that entity:

- (a) contains the following in its internal policies:
 - (i) the types of commodity derivatives included in the portfolios used to reduce risks directly relating to commercial activity and their eligibility criteria;
 - (ii) the link between the portfolio and the risks that the portfolio is mitigating;
 - (iii) the measures adopted to ensure that the positions concerning those commodity derivatives serve no other purpose than covering risks directly related to the commercial activities of the non-financial entity, and that any position serving a different purpose can be clearly identified;
- (b) is able to provide a sufficiently disaggregated view of the portfolios in terms of class of commodity derivative, underlying commodity, time horizon and any other relevant factors.

4. For the purposes of paragraph 2, a position qualifying as risk-reducing taken on its own or in combination with other derivatives is one for which the financial entity complies with the conditions set out in paragraph 3, points (a) and (b).

Article 8

Application for the exemption from position limits for positions qualifying as reducing risks directly related to commercial activities

1. A non-financial entity holding a qualifying position in an agricultural commodity derivative or in a critical or significant commodity derivative shall apply for the exemption referred to in Article 57(1), second subparagraph, point (a), of Directive 2014/65/EU to the competent authority which sets the position limit for that commodity derivative.

2. The person referred to in paragraph 1 shall submit to the competent authority the following information which demonstrates how the position reduces risks directly relating to the non-financial entity's commercial activity:

- (a) a description of the nature and value of the non-financial entity's commercial activities in the commodity to which the commodity derivative for which an exemption is sought is relevant;

⁽¹²⁾ Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243, 11.9.2002, p. 1).

- (b) a description of the nature and value of the non-financial entity's activities in the trading of and positions held in the relevant commodity derivatives traded on trading venues and in their economically equivalent OTC contracts;
- (c) a description of the nature and size of the exposures and risks in the commodity which the non-financial entity has or expects to have as a result of its commercial activities and which are or would be mitigated by the use of commodity derivatives;
- (d) an explanation of how the non-financial entity's use of commodity derivatives directly reduces its exposure and risks in its commercial activities.

3. A financial entity holding a qualifying position in an agricultural commodity derivative or in a critical or significant commodity derivative shall apply for the exemption referred to in Article 57(1), second subparagraph, point (b), of Directive 2014/65/EU to the competent authority which sets the position limit for that commodity derivative.

4. The person referred to in paragraph 3 shall submit to the competent authority:

- (a) appropriate information which demonstrates that the parent undertaking has entrusted to the financial entity the trading of commodity derivatives traded on a trading venue and their economically equivalent OTC contracts to reduce the exposure and risks in the commercial activities of the non-financial entities of the predominantly commercial group;
- (b) the following information which demonstrates how the position reduces risks directly relating to the commercial activity of the non-financial entities of the same predominantly commercial group:
 - (i) a description of the nature and value of the non-financial entities' commercial activities in the commodity to which the commodity derivative for which an exemption is sought is relevant;
 - (ii) a description of the nature and size of the exposures and risks in the commodity which the non-financial entities have or expect to have as a result of the non-financial entities' commercial activities which are or would be mitigated by the use of commodity derivatives;
 - (iii) a description of the nature and value of the financial entity's activities in the trading of and positions held in the relevant commodity derivatives traded on trading venues and in their economically equivalent OTC contracts;
 - (iv) an explanation of how the financial entity's use of commodity derivatives directly reduces the exposure and risks in the non-financial entities' commercial activities.

5. The competent authority shall approve or reject the application within 21 calendar days after it has received the application and shall notify the applicant of its approval or rejection of the exemption.

6. The non-financial entity shall notify the competent authority if there is a significant change to the nature or value of the non-financial entity's commercial activities or its trading activities in commodity derivatives and the change is relevant to the information set out in paragraph 2, point (b), and shall submit a new application for the exemption if it wishes to continue to use it.

7. The financial entity shall notify the competent authority if there is a change to the information set out in paragraph 4, point (a), or a significant change to the nature or value of the non-financial entity's commercial activities or the financial entity's trading activities in commodity derivatives and the change is relevant to the information set out in paragraph 4, point (b)(iii), and shall submit a new application for the exemption if it wishes to continue to use it.

*Article 9***Application for the exemption from position limits for mandatory liquidity provision**

1. A person holding a qualifying position in an agricultural commodity derivative or a critical or significant commodity derivative shall apply for the exemption referred to in Article 57(1), second subparagraph, point (c), of Directive 2014/65/EU to the competent authority which sets the position limit for that commodity derivative.
2. The person referred to in paragraph 1 shall submit to the competent authority the following information which demonstrates how the positions result from transactions entered into to fulfil obligations to provide liquidity in that commodity derivative on a trading venue as referred to in Article 2(4), fourth subparagraph, point (c), of Directive 2014/65/EU.
 - (a) the list of commodity derivatives in which that person provides liquidity on a trading venue in accordance with points (b) and (c) of this paragraph;
 - (b) the provisions under which that person is required by a regulatory authority to provide liquidity in a commodity derivative on a trading venue or the written agreement signed with the trading venue setting out the liquidity provision obligations to be met by the person on the trading venue per commodity derivative;
 - (c) a description of the nature and value of the person's mandatory liquidity provision activities in the relevant commodity derivative and of the expected resulting positions thereof;
 - (d) any position limit that may have been set in its internal policy per commodity derivative for such mandatory liquidity provision.
3. The competent authority shall approve or reject the application within 21 calendar days after it has received the application and shall notify the person of its approval or rejection of the exemption.
4. The person shall notify the competent authority if there is a significant change to the nature or value of the person's trading activities in commodity derivatives and the change is relevant to the information set out in paragraph 2, and shall submit a new application for the exemption if it wishes to continue to use it.

*Article 10***Positions qualifying as resulting from mandatory liquidity provision**

1. For the purpose of Article 9(1), a position held by a person in an agricultural or a critical or significant commodity derivative traded on a trading venue qualifies as resulting from transactions undertaken to fulfil mandatory liquidity provision obligations where the position directly results from transactions in a commodity derivative undertaken in compliance with obligations required by regulatory authorities in accordance with Union law or with national laws, regulations and administrative provisions, or the written agreement entered into with the trading venue and identified as such by the trading venue.
2. For the purpose of Article 9(1), a qualifying position resulting from mandatory liquidity provision is one for which the person holding the position contains the following in its internal policies:
 - (a) the types of commodity derivatives included in the portfolios in which mandatory liquidity provision is provided;
 - (b) the link between the position held in a commodity derivative and the transactions undertaken to fulfil mandatory liquidity provisions in that derivative in accordance with paragraph 1 of this Article;
 - (c) the measures adopted to ensure that any position not resulting from transactions undertaken to fulfil mandatory liquidity provision or serving a different purpose can be clearly identified.

CHAPTER III

METHODOLOGY FOR COMPETENT AUTHORITIES TO CALCULATE POSITION LIMITS

SECTION 1

Determination of baseline figures*Article 11***Methodology for determining the baseline figure for spot month limits**

1. Competent authorities shall determine a baseline figure for the spot month position limit in an agricultural commodity derivative or a critical or significant commodity derivative by calculating 25 % of the deliverable supply for that commodity derivative. Where the deliverable supply is substantially higher than the total open interest, competent authorities shall determine the baseline figure for the spot month limit by calculating 25 % of the open interest in that commodity derivative.

That baseline figure shall be specified in lots.

2. Where a competent authority establishes different position limits for different times within the spot month period, those position limits shall decrease on an incremental basis towards the maturity of the commodity derivative and shall take into account the position management arrangements of the trading venue.

3. By way of derogation from paragraph 1, competent authorities shall determine the baseline figure for the spot month position limit for any commodity derivative with an underlying that qualifies as food intended for human consumption with a total combined open interest in spot month and other months' contracts exceeding 50 000 lots over a consecutive 3-month period by calculating 20 % of the deliverable supply in that commodity derivative. Where deliverable supply is substantially higher than total open interest, competent authorities shall determine the baseline figure for the spot month limit for such a commodity derivative by calculating 20 % of the open interest in that commodity derivative.

*Article 12***Deliverable supply**

1. Competent authorities shall calculate the deliverable supply for an agricultural commodity derivative or a critical or significant commodity derivative by identifying the quantity of the underlying commodity that can be used to fulfil the delivery requirements of the commodity derivative.

2. Competent authorities shall determine the deliverable supply for a commodity derivative referred to in paragraph 1 by reference to the average monthly amount of the underlying commodity available for delivery based on the most recent available data covering:

- (a) a 1-year period immediately preceding the determination for a critical or significant commodity derivative;
- (b) a 1 to 5-year period immediately preceding the determination for an agricultural commodity derivative.

3. In order to identify the quantity of the underlying commodity meeting the conditions of paragraph 1, competent authorities shall take into account the following criteria:

- (a) the storage arrangements for the underlying commodity;
- (b) the factors that may affect the supply of the underlying commodity.

*Article 13***Methodology for determining the baseline figure for other months' limits**

1. Competent authorities shall determine a baseline figure for the other months' position limit in an agricultural commodity derivative or a critical or significant commodity derivative by calculating 25 % of the open interest in that commodity derivative.
2. That baseline shall be specified in lots.

*Article 14***Open interest**

1. Competent authorities shall calculate the net open interest in an agricultural commodity derivative or a critical or significant commodity derivative by aggregating the number of lots of that commodity derivative that are outstanding on trading venues and reported positions in economically equivalent OTC contracts over a representative period of time. Competent authorities shall calculate the net open interest in that commodity derivative based on position reporting data.
2. By way of derogation from paragraph 1, when trading in a commodity derivative is transferred from one Union trading venue to another, or a third country trading venue to a Union trading venue, following a merger, business transfer or other corporate event or from one or more existing commodity derivatives to a commodity derivative newly admitted to trading on the same trading venue or in other similar circumstances, the competent authority shall calculate the open interest in that commodity derivative by taking into account the open interest on the former venue or in the former commodity derivatives. After a 6-month period, the competent authority shall calculate the open interest in accordance with paragraph 1.

*Article 15***Methodology for determining the baseline figure in respect of certain commodity derivatives**

1. By way of derogation from Article 11, competent authorities shall determine the baseline figure for the spot month position limits for critical or significant cash settled spot month commodity derivatives which are included under Section C, point (10), of Annex I to Directive 2014/65/EU and which have no measurable deliverable supply of their underlying commodities by calculating 25 % of the open interest in those commodity derivatives.
2. By way of derogation from Articles 11 and 13, where a commodity derivative provides that the underlying is delivered constantly over a specified period of time, the baseline figures calculated pursuant to Articles 11 and 13 shall apply to related commodity derivatives for the same underlying to the extent that their delivery periods overlap. The baseline figure shall be specified in units of the underlying.

SECTION 2

Factors relevant for the calculation of position limits*Article 16***Assessment of factors**

Competent authorities shall set the spot month and other months' position limits for an agricultural commodity derivative or a critical or significant commodity derivative by taking the baseline figure determined in accordance with Articles 11, 13 and 15 and adjusting it according to the potential impact of the factors referred to in Articles 18 to 21 on the integrity of the market for that derivative and for its underlying commodity to either of the following limits:

- (a) between 5 % and 35 %;
- (b) between 2,5 % and 35 %, for any derivative contract with an underlying that qualifies as food intended for human consumption with a total combined open interest in spot month and other months' contracts exceeding 50 000 lots over a consecutive 3-month period.

Article 17

New and less liquid agricultural commodity derivatives

1. By way of derogation from Article 16, for agricultural commodity derivatives traded on a trading venue with a total combined open interest in spot month and other months' contracts not exceeding 20 000 lots over a consecutive 3-month period, competent authorities shall set the spot month and other months' limit of positions held in those commodity derivatives at 10 000 lots.
2. The trading venue shall notify the competent authority when the total open interest of any commodity derivative referred to in paragraph 1 reaches 20 000 lots over a consecutive 3-month period. Competent authorities shall review the position limit upon receiving such notifications.

Article 18

Deliverable supply in the underlying commodity

Where the deliverable supply in the underlying commodity can be restricted or controlled or if the level of deliverable supply is low relative to the amount required for orderly settlement, competent authorities shall adjust the spot month position limit downwards. Competent authorities shall assess the extent to which that deliverable supply is used also as the deliverable supply for other commodity derivatives.

Article 19

The overall open interest

1. Where there is a large volume of overall open interest, competent authorities shall adjust the position limit downwards.
2. Where the open interest is significantly higher than the deliverable supply, competent authorities shall adjust the other months' position limit downwards.
3. Where the open interest is significantly lower than the deliverable supply, competent authorities shall adjust the other months' position limit upwards and, except where the baseline figure for the spot month limit is based on the open interest, shall adjust the spot month position limit downwards.

Article 20

The number of market participants

1. Where the daily average number of market participants holding a position in the commodity derivative over a period of one year is high, the competent authority shall adjust the position limit downwards.
2. By way of derogation from Article 16, competent authorities shall adjust the position limit upwards and set the spot month and other months' position limit between 5 % and 50 % of the reference amount if:
 - (a) the average number of market participants holding a position in the commodity derivative in the period leading up to the setting of the position limit is lower than 10; or

- (b) where the commodity derivative is an agricultural commodity derivative with a net open interest below 300 000 lots, the number of investment firms acting as a market maker in accordance with Article 4(1), point (7), of Directive 2014/65/EU in the commodity derivative at the time the position limit is set or reviewed is lower than three.

For the purposes of the first subparagraph, competent authorities may establish different position limits for different times within the spot month period, the other months' period or for both periods.

Article 21

Characteristics of the underlying commodity market

1. Competent authorities shall take into account how the characteristics of the underlying commodity market impact on the functioning and trading of the commodity derivative and on the size of the positions held by market participants, including having regard to the ease and speed of access which market participants have to the underlying commodity.
2. The assessment of the underlying commodity market referred to in paragraph 1 shall take into account the following criteria:
 - (a) whether there are restrictions on the supply of the commodity, including the perishability of the deliverable commodity;
 - (b) the method of transportation and delivery of the physical commodity, including the following:
 - (i) whether the commodity can be delivered to specified delivery points only;
 - (ii) the capacity constraints of specified delivery points;
 - (c) the structure, organisation and the operation of the market, including the seasonality present in extractive and agricultural commodity markets whereby physical supply fluctuates over the calendar year;
 - (d) the composition and role of market participants in the underlying commodity market, including consideration of the number of market participants which provide specific services that enable the functioning of the underlying commodity market such as risk management, delivery, storage, or settlement services;
 - (e) macroeconomic or other related factors that influence the operation of the underlying commodity market including the delivery, storage, and settlement of the commodity;
 - (f) the characteristics, physical properties and lifecycles of the underlying commodity.

Article 22

Repeal

Delegated Regulation (EU) 2017/591 is repealed.

References to Delegated Regulation (EU) 2017/591 shall be construed as references to this Regulation and shall be read in accordance with the correlation table in the Annex to this Regulation.

*Article 23***Entry into force and application**

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 20 April 2022.

For the Commission
The President
Ursula VON DER LEYEN

ANNEX

Correlation table

Delegated Regulation (EU) 2017/591	This Regulation
Article 1	Article 1
Article 2	Article 2
Article 3(1)	Article 3(1), point (a)
–	Article 3(1), points (b) and (c)
–	Article 3(2)
Article 3(2)	Article 3(3)
Article 3(3)	Article 3(4)
–	Article 3(5) and (6)
Article 3(4)	Article 3(7)
Article 4	Article 4
Article 5(1)	–
Article 5(2)	Article 5(1)
Article 5(3)	Article 5(2)
Article 6	Article 6
Article 7(1)	Article 7(1)
–	Article 7(2)
Article 7(2)	Article 7(3)
–	Article 7(4)
Article 8(1) and (2)	Article 8(1) and (2)
–	Article 8(3) and (4)
Article 8(3)	Article 8(5)
Article 8(4)	Article 8(6)
–	Article 8(7)
–	Article 9
–	Article 10
Article 9(1)	Article 11(1)
Article 9(2)	Article 11(2)
Article 9(3)	Article 11(3)
Article 9(4)	Article 11(4)
Article 10(1)	Article 12(1)
–	Article 12(2)
Article 10(2)	–
Article 10(3)	Article 12(3)

Article 11(1)	Article 13(1)
Article 11(2)	Article 13(2)
Article 12	–
–	Article 14
Article 13(1)	Article 15(1)
Article 13(2)	–
Article 13(3)	Article 15(2)
Article 14	Article 16
–	Article 17(1)
Article 15(1)	–
Article 15(2)	Article 17(2)
Article 16	–
Article 17	Article 18
Article 18(1) and (2)	Article 19(1) and (2)
–	Article 19(3)
Article 18(3)	–
Article 19(1)	Article 20(1)
Article 19(2), first subparagraph, point (a)	Article 20(2), first subparagraph, point (a)
–	Article 20(2), first subparagraph, point (b)
Article 19(2), first subparagraph, point (b)	–
Article 19(2), second subparagraph	Article 20(2), second subparagraph
Article 20	Article 21
Article 21	–
–	Article 22
Article 22	Article 23
