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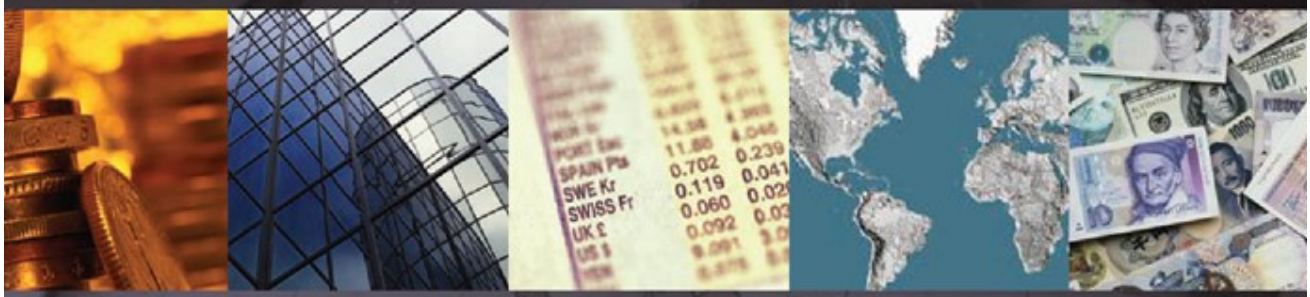

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Article

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Position limits in commodity derivatives: a quantitative regulatory technique for the efficiency of financial markets?

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Abstract

The article aims to carry out an exegetical and systematic analysis of position limits in commodity derivatives, according to a tripartite structure. In the first part, the problems that have arisen in financial markets at a supranational level are outlined, identifying the reasons and functions of the legislative-regulatory intervention. The second part focuses on the concept of position limits, critically reconstructing the objective scope of application, delving into the controversial calculation method functional to the identification of position limits and determination of net position size. The examination of the subjective application perimeter then follows, identifying precisely the reach of the exemption regime. The third part is devoted to reporting obligations. In a global policy perspective, the study will enable some broader reflections on the regulatory technique to be used to improve market efficiency and reduce excess speculation, seeking to ascertain whether, and within which thresholds, it is optimal for the legislator to use a quantitative approach for these purposes or whether it risks unduly rigidifying the overall system and hindering the birth of new commodity derivatives, in addition to the development of the current ones.

Introduction and objectives of the analysis

One of the most significant innovations in the field of commodity derivatives, introduced by Directive 2014/65/EU—Market in Financial Instruments (s.c. MiFID II), is represented by the introduction of position limits,[1] which are intrinsically based on a quantitative regulatory approach.[2] This regulation is

[1] In this respect, see ESMA, 'MiFID II Review report on position limits and position management' (1 April 2020) 9–10 <www.esma.europa.eu> accessed 18 July 2025: 'MiFID II introduced a new set of provisions governing trading in commodity derivative markets. Those commodity derivative provisions are one of the key changes in MiFID II compared to MiFID I'. This regulatory intervention is explained as a response to the agreement of the G20 Pittsburgh summit in 2009 to strengthen the regulation, functioning and transparency of financial and commodity derivatives markets and to the request of the G20 Cannes summit in 2011 for market regulators to have formal position management powers. Similarly, the statements of V Ross, 'Keynote speech at IDX 2015' (London, 9 June 2015) ibid 5: 'We are on the verge of implementing the world's most ambitious and comprehensive position limits regime to date'.

[2] eg these limits have become applicable since 3 January 2018, following the implementation of the aforementioned supranational legislation into Italian law by means of Legislative Decree 3 August 2017, no 129.

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part of a broader trend of extensive regulation which, in recent years, has generally characterized derivative contracts, and in particular derivative products with an underlying consisting of physical goods (ie commodities), following a prior lack of interest in the point by European and national lawmakers.[3]

Moreover, the topicality of the issue and its centrality in financial market regulation are also confirmed by Directive 2021/338/EU of 16 February 2021,[4] then implemented at the internal levels, limiting the application of position limits to derivatives on agricultural commodities, as well as those considered critical and significant, with the aim of reducing their complexity and calibrating their compliance burdens in the *post*-Covid recovery phase.[5] Additionally, the publication of the Commission Delegated Regulation 2022/1302/EU of 20 April 2022, which sets the application of position limits, as well as the procedures for requesting exemption.[6] Most recently, with Directive 2024/790/EU, s.c. MiFID III, amending the MiFID II, the European Legislator has clarified the scope from trades 'in commodity derivatives or emission allowances or derivatives thereof' to trades 'in commodity derivatives or in derivatives of emission allowances'.[7] Nevertheless, in its entirety, the topic

[3] This has led some scholars to discuss evocatively a legislative 'tsunami': A Sciarrone Alibrandi and E Grossule, 'MiFID II e commodity derivatives' in V Troiano and R Motroni (eds), *La MiFid II: Rapporti con la clientela—regole di governance—mercati* (Wolters Kluwer-Cedam 2016) ch 20, para 1. For a broad survey of the regulatory innovation trend that, starting from the economic situation of 2008, has affected the commodity derivatives sector, see J Black, 'What is a Regulatory Innovation?' in J Black, M Lodge and M Thatcher (eds), *Regulatory Innovation: A Comparative Analysis* (Elgar 2005) 8–11.

[4] This Directive is part of the package of regulatory initiatives adopted to enable economic recovery following the Covid-19 pandemic (s.c. *Capital Markets Recovery Package*), which led to the revision of the rules applicable to commodity derivatives markets pursuant to arts 57 and 58 MiFID II. The centrality of the provision is also highlighted by European Parliament, 'Capital markets recovery package: MiFID and EU recovery prospectus' (February 2021) <www.europarl.europa.eu> accessed 18 July 2025; ESMA (n 1) 9–12; F Urbani, 'Rassegna dei principali interventi legislativi, istituzionali e di policy a livello europeo in ambito societario, bancario e dei mercati finanziari' [2021] Riv Soc 209-10.

[5] As far as the Italian legal framework is concerned, the implementation took place by means of Legislative Decree 10 March 2023, no 31, which amended arts 68ff Legislative Decree 24 February 1998, no 58 (s.c. Consolidated Text on Finance). See also Consob, 'Modifiche al Regolamento Mercati. Adeguamento nazionale al regolamento (UE) 2019/2175 che modifica MiFIR, alla direttiva (UE) 2021/338 che modifica MiFID II. Documento per la consultazione' (15 June 2023) <www.consob.it> accessed 18 July 2025, through which the amendments to Consob Regulation 28 December 2017, no 20249 (s.c. Markets Regulation) aimed at completing the adaptation of the national system to the European reforms on simplification of the rules on position limits for agricultural commodity derivatives and critical or significant commodity derivatives, pursuant to European Parliament and Council Directive 2021/338/EU of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and 2019/878/EU as regards their application to investment firms, to help the recovery from the COVID-19 crisis [2021] OJ L68/14, as part of the Capital Markets Recovery Package were submitted to public consultation. This adaptation of the Markets Reg. (see following n 9) occurred with Consob Resolution 6 September 2023, no 22804, on which see the editorial note 'Servizi di comunicazione dati e derivati su merci: modifiche al Regolamento Mercati' (11 September 2023) <www.dirittobancario.it> accessed 18 July 2025. Furthermore, this document specifies that the aforementioned reforms have been implemented at the primary level through amendments to Section V, Chapter II, Title I-*bis*, Part III, Legislative Decree no 58/1998. The mirror document on the results of the consultation is also presented in identical terms: Consob, 'Relazione illustrativa degli esiti della consultazione, delle conseguenze sulla regolamentazione, sull'attività delle imprese e degli operatori e sugli interessi degli investitori e dei risparmiatori' (7 September 2023) <www.consob.it> accessed 18 July 2025.

[6] See also the editorial commentary 'MiFID II position limits technical standards: publication in Official Journal' (25 August 2022) UK Practical Law, as well as 'Limiti di posizione ai derivati su merci e procedure per la richiesta di esenzione. Gli RTS in Gazzetta Ufficiale UE—Regolamento delegato (UE) 2022/1302' (26 July 2022) <www.dirittobancario.it> accessed 18 July 2025.

[7] This will need amendments of: (i) Commission Delegated Regulation 2022/1299/EU of 24 March 2022 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the content of position management controls by trading venues [2022] OJ L197/1, which contains regulatory technical standards (RTS) on position management controls, (ii) Commission Implementing Regulation 2017/1093/EU of 20 June 2017 laying down implementing technical standards with regard to the format of position reports by investment firms and market operators [2017] OJ L158/16, and (iii) art 83 Commission Delegated Regulation 2017/565/EU of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [2016] OJ L87/1. On this see ESMA, 'Final Report. On the amendments to certain technical standards for commodity derivatives' (16 December 2024) <www.esma.europa.eu> accessed 18 July 2025; ESMA 'Consultation Paper. On the amendments to certain technical standards for commodity derivatives' (23 May 2024) <www.esma.europa.eu> accessed 18 July 2025. See also European Commission, 'Targeted Consultation Document. Review of the functioning of commodity derivatives markets and certain aspects relating to spot energy markets' (February 2025) <www.finance.ec.europa.eu> accessed 18 July 2025.

has received particularly limited scientific attention, as not many specific analyses have been devoted to it.[8]

Based on the foregoing, the article aims to carry out an initial exegetic and systematic analysis of the topic, on the premise that to correctly frame the relevant legislation, it is essential to synergistically establish a dialogue between the multiple sources, both domestic and European. Furthermore, it is necessary to take into account the detailed provisions contained in MiFID II that are instrumental to defining the limits and are not implemented at the primary legislative level.[9] Indeed, Article 57 MiFID II confers on relevant national authorities the power to apply a position limit regime in compliance with the calculation methodology established by the European Securities and Markets Authority (ESMA), implementing the European procedural standards for the identification of such limits.[10] At a supranational level, in addition to the above, it is essential to systematize each step of the legislation with the Delegated Regulation 2022/1302/EU, which has an integrating function of the said Directive.[11]

It should not be overlooked that the considerable technical complexity of this discipline, with the related interpretative problems due to not always univocal readings, often determines the need for the regulation in question to be accompanied by a set of documents, such as questions and answers, recommendations, guidelines *et similia*, which, despite their formal non-binding nature, become of necessary application for the reasons mentioned. These are pragmatic instruments of convergence aimed at promoting common supervisory approaches and practices pursuant to Article 29, paragraph 2, Regulation 2010/1095/EU of the European Parliament and Council establishing the ESMA.

The aim of the work is to start from an initial part of analysis focused on the problems that have arisen in the financial markets at a European level, thus identifying the reasons and functions of the normative-regulatory intervention, which will act as a first hermeneutic guide while waiting for an ever greater sedimentation of the legal experience on this discipline[12] (paragraphs 2 and 3).

The second area of research will focus on the concept of position limit, and particular attention will be devoted to the reconstruction of the objective scope of application of the discipline (paragraph 4). The heart of the work will lie in the in-depth analysis of the controversial calculation method functional both for the identification of the position limits, which essentially consist of an arithmetic formula illustrated in the regulations provided by national competent authorities, and for the determination of the size of the net position (paragraphs 5 and 6). The study of the subjective perimeter of application will then follow, taking care to analyse the scope and relevance of the general exemptions' regime in reference to the trading of commodity derivatives. The distinction between financial and non-financial entities will also have to be reconsidered in light of the recent amendment, to identify the exact scope of application of the hedging exemption (paragraphs 7, 7.1 and 7.2). This examination is completed by some considerations of intertemporal law and on the differentiation of the discipline based on the multiple types of commodities (paragraphs 8 and 9).

The third part of the essay will be the direct corollary of the previous one and will focus on daily and weekly reporting obligations; these are profiles that are in some ways particularly linked to the controls of the manager of trading venues on positions in commodity derivatives (paragraphs 10 and 11).

[8] Apart from those in some works of a commentary nature: in the italian context, see L Orciani, 'Commento agli artt. 68 ss. tuf' in V Calandra Buonaura (ed), *Commentario breve al Testo unico della finanza* (Wolters Kluwer-Cedam 2020) 515ff; as well as the commentary on the same provisions contained in G Cavallaro (ed), *Commentario al Testo Unico della Finanza* (Pacini 2021) 327ff. To these must be added the essay, although not entirely focused on position limits, by E Grossule, 'Regulatory Strategies towards the Commodity Market Financialization Risk: Position Limits' Regime, Transparency and Enforcement Tools' [2019] Eu Bus Org L Rev 323.

[9] At a national level, you may consider, arts 61ff Italian Markets Regulation, adopted by the public authority responsible for regulating the Italian financial markets (ie Consob) with Resolution 28 December 2017, no 20249, which perform the function of reproducing specific European rules.

[10] On this point, see Consob, 'Implementation of Directive 2014/65/EU (MiFID II) and implementation of Regulation (EU) no 600/2014 (MiFIR). Amendments to the Market Regulation. Consultation document' (31 July 2017) 6, 80ff <www.consob.it> accessed 18 July 2025.

[11] Which, pursuant to the provisions of its art 22, replaced and repealed the previous Delegated Regulation 2017/591/EU 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 [2017] OJ L87/479.

[12] Also considering that at present, with reference to many countries such as Italy, the role trading venues play in relation to commodity derivatives is particularly limited: on this point see para 13 of this essay.

Furthermore, in the context of the product intervention, the information and limiting powers recognized to national competent authorities will be critically addressed (paragraph 12).

Finally, the entire analysis considered globally will allow us to carry out some broader reflections on the regulatory technique to be used to improve the efficiency of financial markets and reduce excessive speculation, trying to ascertain whether and, if so, within which thresholds it is optimal for the legislators to use a quantitative approach for these purposes, precisely by using position limits that are based on numbers, or whether it is sufficient to limit this quantitative path only to reporting obligations without providing direct constraints on the positions that can be held, or whether all this risks inappropriately stiffening the overall system and thus hindering the creation of new derivatives on commodities, in addition to the development of current ones. In other words, is there any certainty that such arithmetic limits put a stop to excessive speculation on financial markets? Do exemptions aimed at tempering the discipline end up allowing easy loopholes? Furthermore, how do such limits affect the quantitative determination of the prices of commodity derivatives? These are just some of the questions to which we will try to provide some hypotheses for answers.

Alternatively, one might ask whether, compared to this arithmetic and quantitative approach, it is preferable and more effective to rely on a normative technique focused on qualitative and more substantial metrics that ignore the rigidity of numerical data, placing their fulcrum on a factual situation to be found in abuse.

The conclusions that will be reached, which are briefly anticipated here, will be in the sense of the probable impossibility in this sector to depart from the first type of approach and thus of the importance of preparing adequate exemption regimes capable of attenuating, or rather managing, the problems related to the aforementioned approach; all this at the level of strict interpretation of the law in force or sometimes in a perspective of reform of the same, seeking the right balance between flexibility and stiffness of the discipline (paragraph 13).

The underlying reasons for regulatory intervention: from the socially useful function of commodity derivatives to the markets' financialization

To carry out a precise analysis, it is fundamental to clarify the problems that have arisen in the financial markets at the European level, thus identifying the underlying reasons for the legislative-regulatory intervention. In other words, this implies carrying out a brief examination of the key features of the commodity derivatives markets prior to MiFID II.

The extension of the commodity derivatives market was initially extremely limited, so much so that this matter was underestimated both by the legislators and by the legal and economic doctrine, save for limited exceptions.[13] Commodity derivatives were used by buyers and sellers to manage the risks characterizing the basic markets, and particularly the risk connected to the sudden change for the worse in the prices, transferring this to subjects willing to cover them in exchange for profits. This reflects the socially useful function of speculation in this sector, as it can preserve the necessary liquidity for the derivatives market.[14]

The deep change that occurred in the commodity derivatives markets in the first eight years of the new millennium has seen a broad strengthening of financial speculation, as well as of the volatility of

[13] In the International literature, see NC Schofield, *Commodity Derivatives: Markets and Applications* (Wiley 2021) 1–17; PE Peterson, *Commodity Derivatives. A Guide for Future Practitioners* (Routledge 2018) passim; E Parker and M Perzanowski (eds), *Commodity Derivatives: Documenting and Understanding Commodity Derivative Products* (Globe Law and Business 2010) 7–36; in the Italian one, see M Lamandini and C Motti (eds), *Scambi su merci e derivati su commodities. Quali prospettive?* (Giuffrè 2006) passim.

[14] Add to this a price discovery function: on this point, *amplius*, see CL Culp, 'The Social Functions of Financial Derivatives' in RW Kolb and JA Overdahl (eds), *Financial Derivatives. Pricing and Risk Management* (Wiley & Sons 2010) 58, and, more generally, RW Kolb and JA Overdahl, *Futures, Options, and Swaps* (5th edn, Blackwell 2005) 3ff; alongside to that see Commission, 'A Better Functioning Food Supply Chain in Europe' COM (2009) 591 final, 8 October 2009, 8.

raw material prices.[15] These effects appear to be attributable to a plurality of causes, such as the greater centrality assumed by the raw material markets that had become the destination of institutional investors, also due to the lack of effective sector regulations, as well as the high average profitability of the relevant markets, where the economic crisis had conversely generated an increase in risks with reference to various activities which was correlated with a contraction of the relative rates of return. This has determined the strengthening in these markets of the role of financial players, specifically investment banks, pension funds, hedge funds, and so on, with the direct consequence of the exponential increase in investments in the sector considered.

Instability and unpredictability of commodity prices have been specifically traced back to the failures of these markets, which depend essentially on the opaqueness of the information operators could access, as well as on their potentially irrational behaviour that leads in certain cases to overestimate or vice versa to underestimate the prices of raw materials. In addition to these causes, there is the absence of rules, which can well determine the excessive assumption of risks or the abuse of one's position by operators.[16] The extremely problematic social and food security implications of agricultural product prices must also be mentioned, just as the consequent requests for more efficient and tighter regulation.[17]

At the beginning, namely before the financial crisis of 2008 and later, attempts were made to resolve the problems of the commodity markets by adopting the regulatory paradigm of implementing information obligations which should have had the effect of orienting operators and the market towards optimal choices[18]: this is precisely the path towards which Directive 2004/39/EC (MiFID I) was oriented.[19]

Position limits from a genetic and functional perspective

The financial crisis has made it necessary to rethink the regulatory methods, especially in order to improve the stability of the markets and limit the excessive price volatility, starting a process aimed at arriving at a new discipline; as discussed more fully below, this is because the framework prior to MiFID II had not been able to fulfil the desired functions precisely because the related regulatory instruments had largely been subject to regulatory capture by those same interests that should have been governed.[20] The mandate of the G20 in Pittsburgh is essentially of the same opinion, where the objective of improving the regulation, functioning and transparency of the financial and raw materials markets was made explicit.[21]

From this perspective, it is interesting and useful, for carrying out the following analysis with good reason, to quickly consider the genesis of the position limits discipline, which historically has seen a

[15] In relation to the general problem of financialization see, *ex pluribus*, M Falkowski, 'Financialization of Commodities' (2011) IV Contemp Econ 4–17.

[16] A Sciarrone Alibrandi and E Grossule, 'Commodity Derivatives' in G Ferrarini and D Busch (eds), *Regulation of the EU Financial Markets. MiFID II and MiFIR* (OUP 2017) 443: 'With regard to regulation, however, we must not ignore the fact that, with specific reference to agricultural commodities, such concerns were (and still are) closely connected with those relating to food security and scarcity, and their dramatic geopolitical implications. This reason might lead to a differentiation of the treatment of the regulations of agricultural derivatives in comparison to others, as has already happened in France with peculiar regard to the position limits regime'.

[17] On this topic, please refer to Commission, 'Food Prices in Europe' COM (2008) 821 final, 9 December 2008, 2ff; D Heady and S Fan, 'Anatomy of a Crisis: The Causes and Consequences of Surging Food Prices' (2008) 39 Agric Econ 375 ff.

[18] It comes to the theoretical construction known as the efficient capital market hypothesis, explained by EF Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' (1970) 25 J Fin 383 ff.

[19] N Moloney, 'Building a Retail Investment Culture Through Law: The 2004 Markets in Financial Instruments Directive' (2005) Eur Bus Org L Rev 341 ff.

[20] J Petry, 'Regulatory Capture, Civil Society and Global Finance in Derivative Regulation: An Analysis of Commodity Derivative Regulation in Europe' (ECPR Standing Group on Regulatory Governance 5th Biennial Conference, Barcelona, 25–27 June 2014) 1–2 <www.ssrn.com> accessed 18 July 2025.

[21] G20, 'Leaders' Statement, Pittsburgh Summit: A Framework for Strong Sustainable and Balanced Growth' (2009) para 12. In the same direction, see the *Guidelines* by the *International Organization of Securities Commissions* (IOSCO, 'Principles for Regulation and Supervision of Commodities Derivatives Market, Final Report' (2011) 26–38).

contrast between two large groups of interests or bearers of two different visions of legal policy in this area. The first group is represented by the financial sector, considering that the 'stakes' to foresee or not these limits were (and in part are) high, since derivatives on goods represent an excellent market for profits, it being sufficient to consider that in 2008 the top ten world banks had registered them for 14.1 billion dollars.[22] As a secondary matter, the idea supported by this group is that if a discipline must intervene, it is better that it is not of European origin, but rather national, especially in the quantitative determination of such limits, so as to leave room for regulatory arbitrage, with the connected existence of as many internal disciplines as there are various countries of the European Union (EU), allowing reference to the State with the most permissive legislation.

Then there was a second group of interests with a bipartite composition: on the one hand, there were civil society organizations, that is non-profit organizations in the European sense, or structured lobbies that had adhered to the position that speculation on goods, especially agricultural goods, led to significant spot (namely immediate) prices, making food inaccessible to significant parts of the population, with alarming food security problems; on the other, there was an alliance of these organizations with agribusiness groups, as this type of speculation seriously put farmers in difficulty. So, even though for different values, that is moral and ethical principles for the former and more economic interests for the latter, there was a strong oriented position against speculation, placing a ceiling on it through position limits and ensuring that these were not set by the Member States, but at a centralized level by ESMA, so as to counter the phenomenon of regulatory arbitrage.[23]

The EU, with the MiFID review, has deemed it appropriate to give precedence to this second approach and has introduced, within a multiplicity of specific regulations on the negotiation and execution of commodity derivatives, those concerning the provision of *ex ante* limits on positions in such derivatives for non-hedging purposes primarily targeting financial entities,[24] placing a ban on operators from holding such products beyond a certain quantitative threshold.

The primary objective pursued by the supranational legislator, first and then by the domestic one, can be identified in the stabilization of commodity markets, making them more reliable and less exposed to speculation and market abuse, thus ensuring the convergence between derivatives prices and spot prices of the underlying raw materials. In other words, this means avoiding an excessive financialization of commodity derivatives markets, as well as promoting clear conditions for setting prices and settlement.[25] Upon closer inspection, similar objectives to those pursued with the provision of position limits can be found in Directive 2014/57/EU (s.c. CSMAD) and in Regulation 2014/596/EU (s.c. MAR), despite the fact that these sources refer to the notion of market abuse figured as conduct consisting in the abuse of price sensitive information, its illicit dissemination, along with the manipulation in relation to derivatives and the underlying markets.[26]

The legislator's will can be seen as a compromise choice suitable for achieving a balance of different interests: on the one hand, that aimed at limiting the adverse effects of speculation; on the other, that aimed at avoiding excessively restraining risk coverage operations (hedging), as they constitute the centrepiece of derivative products, guaranteeing the necessary liquidity to the market.[27] In

[22] G Meyer and N Hume, 'Wall Street Banks Count Commodities Trading Profits: Big Firms Mine Rich Seam as Cold US Winter Drove Up Energy Prices' *Financial Times* (London, 14 May 2014): 'Revenues of the top 10 banks from trading natural resources fell to $4.5 bn last year, down from a record $14.1 bn in 2008'.

[23] Petry (n 20) 17–21: 'The financial industry first lobbied against the introduction of position limits and then for them to be introduced by national authorities. Setting limits at the national level would lead to regulatory arbitration and states that were already against the introduction of limits (eg the UK) would adopt only light regulation. In contrast, a coalition of CSOs, agribusiness groups and politicians pushed for a stricter regulation of commodity trading, advocating the introduction of position limits as well as a regulation through ESMA that prevented regulatory arbitrage'; C Staritz and K Küblböck, 'Re-regulation of Commodity Derivative Markets: Critical Assessment of Current Reform Proposals in the EU and the US' (2013) ÖFSE Working Paper 45/2013, 20 <www.oefse.at> accessed 18 July 2025; ST Omarova, 'The Merchants of Wall Street: Banking, Commerce, and Commodities' (2013) 98 Minn L Rev 266.

[24] But on this point see next para 4ff, considering that the exemption regime starting from Directive 2021/338/EU has been partly extended also to financial entities.

[25] Sciarrone Alibrandi and Grossule (n 16) 456.

[26] K Alexander and V Maly, 'The New EU Market Abuse Regime and the Derivatives Markets' (2015) 9 Law Financ Mark Rev 243–250.

[27] Reference is made to the apology of speculation that emerges from financial studies, given that where one intends to protect oneself from a risk it is necessary to find another subject willing to take it on, naturally in order to make a profit, that is, for speculative purposes: among others, in general terms, see PA Samuelson and WD Nordhaus, *Economics*

technical terms, the legislator has promoted hedge-hedge and speculative hedge operations. It should be noted that the economic intention of the counterparty can be a reference point for carrying out a classification of derivatives too.[28]

In any case, it must be specified that the existence of a relationship of direct proportionality between the fluctuations of the derivatives market (and therefore financial speculation) and the volatility of spot prices of commodities is particularly debated and uncertain at the level of economics.[29] However, it should be noted that the provision of a position limits regime aimed at safeguarding the futures markets from excessive speculation that could determine an unreasonable or unjustified instability of prices is also present in the US legal system, where through the Commodity Exchange Act, the Commodity Futures Trading Commission (which carries out the function of promoting the integrity, resilience and activity of the American derivatives markets through sound regulation) has been authorized to impose limits on the size of speculative positions in the futures markets.[30]

Concept and objective scope of application

We must now start from the definition of the object of this work, that is, the position limits, remembering that they represent the instrument through which the legislator establishes the maximum number of contracts that can be held by a single subject. The purpose of these limits is to prevent the accumulation of positions capable of destabilizing the market, in accordance with what has already been noted.[31]

In identifying the objective scope of application of these limits, and therefore of Article 57ff. MiFID II, it is preliminarily useful to specify, albeit incidentally, that according to a first conceptual exemplification, derivatives on goods are understood to be contracts whose value derives from an underlying commodity.[32] These products are also characterized, similarly to the general case of the derivative, by the fact that they have as their object a differential represented by the comparison between the value of an economic entity at the time of stipulation and the value of the same entity at the time of contract execution.[33]

According to the initial approach of the European legislator, the objective scope of application was very broad, in the sense that the position limits[34] were applicable to all commodity derivatives traded

(McGraw-Hill 2010) 189; H Minsky, *John Maynard Keynes* (Columbia University Press 1975) passim; on derivatives, in a critical manner too, see LA Stout, 'Risk, Speculation, and OTC Derivatives: An Inaugural Essay for Convivium' (2011) 1 Acc Econ L 2ff. Therefore, it has been established that speculation serves to improve market liquidity, since it is also true that it fulfils the function of *price discovery* (n 14), because by monitoring the progress of speculators' activities it is sometimes possible to understand whether there is some information on the market that can be incorporated into the price of the financial instrument.

Now, although this reconstruction is to a certain extent shareable and sensible, it is necessary not to overemphasize the socially useful function of speculation, since it also intrinsically presents critical points or rather negative externalities, so much so that in our context it must be a little detailed, which is even more true for agricultural goods and therefore for essential goods in general, because otherwise access to food is limited. In this order of ideas, consider that the volume of derivatives on goods stands at a nominal value that goes from twenty to thirty times compared to the value of the goods on the market (see A Silvennoinena and S Thorp, 'Financialization, Crisis and Commodity Correlation Dynamics' (2013) 24 J Int Fin Markets Inst Money 43), so from this point of view it is understood that speculation is not used to provide coverage, but is an end in itself and this cannot be ignored. As regards the *price discovery function specifically*, the problem is that this idea assumes a theoretical model which is the informational efficiency of capital markets, according to which the market is capable of processing all the information and transforming it into prices (n 18), an approach which the financial crisis of 2007–2008 has shown to be at the very least dangerous; furthermore, it is an approach which fails to take into account that investors also have criteria which are not always rational when making prices and therefore it is not a given that this mechanism will work.

[28] TE Lynch, 'Gambling by Another Name: The Challenge of Purely Speculative Derivatives' (2012) 17 Stan J L Bus Fin 75ff.

[29] Sciarrone Alibrandi and Grossule (n 3) ch 20, para 3.

[30] On this point, reference is made to *Cftc.gov*, *US Commodity Futures Trading Commission*.

[31] The definition is taken from Borsa Italiana spa, 'Position Limit' in *Financial Glossary* <www.borsaitaliana.it> accessed 18 July 2025. Similarly, see the same entry in *la Repubblica, Economy & Finance Section* <www.repubblica.it> accessed same date, where the position limit is defined as maximum number of derivative instruments of the same category on a given underlying asset, which can be owned by a single investor.

[32] Kolb and Overdahl, 'Futures, Options, and Swaps' (n 14) 2.

[33] See E Girino, *I contratti derivati* (Giuffrè 2010) 13, who specifies how in a derivative contract the object of the purchase is not the good, but rather the difference in value.

[34] As well as position reporting.

on the various trading venues falling within the definitional regime of MiFID II,[35] as well as to contracts traded over-the-counter (OTC), that is, outside the price list, and which were economically equivalent (EEOTC), regardless of the underlying commodity. From this point of view, the provision was modified regarding the type of underlying of the derivatives and their relevance, although the reference to the various trading venues remained unchanged.

As already anticipated, Directive 2021/338/EU[36] has limited the application of position limits[37] to contracts having agricultural commodities as underlying, just as critical or significant contracts.[38] On the one hand, the intention is to prevent the stifling of liquidity and growth of less developed commodity markets, which also include energy markets, considered crucial for the relaunch of the economic system following the pandemic crisis, and, on the other hand, to preserve the integrity of the financial markets in which derivatives are traded, with particular reference to cases in which the commodity consists of agricultural ones, given the fundamental role that they play. At the level of European legislation, it is useful to note that commodity derivatives are considered critical or significant where the sum of all net positions of the closing position holders constitutes the size of their open positions and is equal to a minimum of 300,000 lots on average over a period of 1 year.

To complete what has been clarified then, it must be considered that OTC contracts are economically equivalent to contracts negotiated on a trading venue when the former are valued in relation to the same underlying commodity, deliverable in the same place and under the same contractual conditions as the latter, furthermore the economic result is strictly correlated between them, regardless of diversifications relating to detailed aspects, such as the size of the lots and the delivery date. The restrictive definition of this contractual typology can only be of strict interpretation, with the aim of avoiding fictitious compensations, in contempt of the position limits regime.[39]

Functional and preparatory to the exact understanding of the objective scope of application of the provision and therefore of the definitional regime of commodity derivatives, as resulting from the implementation of the MiFID II, is the logical-descriptive distinction between physical markets, in which goods are directly exchanged through spot contracts or forward contracts, and derivative contract markets. The latter, in turn, are distinguished on the one hand into regulated markets and other organized markets (such as, for instance, multilateral trading systems) and on the other into OTC markets.[40]

The differentiation based on the segment of the derivatives market has a far from marginal importance, as it allows us to identify various types of derivatives that are fundamental for the correct classification of the discipline: first, those of a purely financial nature, since they are standardized, traded on regulated markets and settled through the payment of a differential (futures and options); second, those in which the contractual component is prevalent, since they provide for tailor-made terms and conditions and are traded OTC.[41]

The MiFID I Directive included derivatives on commodities settled by delivery within the definition of financial instruments only if they were traded on a regulated market or on a multilateral trading

[35] ie regulated markets, multilateral trading facilities (MTFs), as well as new trading platforms consisting of organized trading facilities (OTFs).

[36] See n 4. It may be worth noting that Italian Legislative Decree 10 March 2023, no 31, implementing the amended arts 57 and 58 MiFID II, amended the Italian Consolidated Text on Finance, impacting the position limits regime, so as to exclude its application to new and small-sized commodity derivatives markets.

[37] But not, it should be noted, also of the *reporting obligations.* Thus it seems important to clarify that the amendment intervention concerned exclusively the position limits, whereas the one relating to the regime of communications in this matter has remained essentially unchanged and continues to apply to all commodity derivatives traded on a trading venue, without regard to the underlying commodity.

[38] The list of critical or significant commodity derivatives and position limits in force on EU markets is published by ESMA and available at <www.esma.europa.eu>.

[39] In these terms, see art 6 Delegated Regulation 2022/1302/EU 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 [2022] OJ L197/52, together with recital no 7 of the same. Similarly, see also Consob, 'Guida operativa, Derivati su merci: Esenzioni, Limiti di Posizione e Position Reporting' (1 August 2019) 7 <www.consob.it> accessed 18 July 2025.

[40] More extensively, see E Clark, JP Lesourd and R Thiéblemont, *International Commodity Trading: Physical and Derivative Markets* (Wiley 2001) 13–17, as well as in the Italian literature E Manzo, 'Commodity derivative market e ruolo dell'informazione: profili istituzionali' in Lamandini and Motti (n 13) 166.

[41] See n 40; as well as Girino (n 33) 147.

system, hypotheses which, even under the MiFID review, continue to be classified as financial instruments. Following this direction, MiFID II has further extended the definition of financial instruments, ending up including those which require the physical delivery of the underlying asset and which are traded in OTF, namely in a new category of trading venue residually delimited with respect to traditional ones and envisaged for the purpose of regulating platforms previously exempt from the scope of MiFID; in this context, a discipline similar to that dictated in reference to regulated markets and multilateral trading systems has been envisaged, that is the need for authorizations to operate, together with compliance with transparency obligations.[42]

Wholesale energy products traded in an organized trading system (OTS),[43] just as Exchange Traded Commodities, do not fall within the broad definition of commodity derivatives under MiFID II, and therefore do not fall within the scope of financial instruments subject to the application of this regime. The latter are in fact debt instruments subject to an autonomous classification.[44]

To complete this objective delimitation work, it is specified that the limits in question, following the Directive 2021/338/EU, no longer apply to securitised derivatives, having one or more goods as underlying.[45] This exclusion is designed to reduce the reporting complexity and prevent potential liquidity distortions in markets for instruments that are highly diverse in type and often have low trading volumes. Conversely, they continue to be applicable to derivatives on transport tariffs, as well as to indices predominantly based on goods (when the latter account for more than 50 per cent of the composition of the index), understood as any fungible good that can be delivered; as well as to 'spread' or 'diff' contracts, namely based on cash settlement, the value of which is obtained from the difference between two reference goods.[46]

The calculation methodology

For the identification of position limits

A key point in the reconstruction of the position limits is certainly represented by the identification of the calculation methodology, considering that the primary legislation, namely the Article 57 MiFID II, only provides for the power of national relevant authorities to apply a position limit regime in accordance with the calculation methodology established by ESMA, thus implementing the supranational level procedure for identifying the limits. The detailed operational legislation, functional to the application of these limits, is contained in various national secondary rules of implementation, where the said power is exercised by the relevant local authorities; functional criteria are identified, aimed at defining the limits, together with the classification of the subjects operating on the trading venues. This is the re-proposal of the provisions of the MiFID II not implemented at the primary level.[47]

[42] The concept of OTF can be exemplified by platforms generally set up by brokers, which have as their object the *trading* of non-equity financial instruments: see L Parola and M Miccoli, 'Direttiva MiFID II: i nuovi confini tra prodotti energetici all'ingrosso, derivati su merci e strumenti finanziari e impatto sugli operatori' (2015) Dir Comm Int 568–572, n 15.

[43] But for this derogating profile and the problems generated by specific energy commodities, please refer to para 9 of this article.

[44] See ESMA, 'Questions & Answers on MiFID II and MiFIR commodity derivatives topics' (23 September 2022) 17ff <www.esma.europa.eu> (Questions & Answers Section) accessed 18 July 2025, as well as Consob (n 39) 8. For further information on the concept of derivatives and in particular that of commodity derivatives, please refer to art 1, para 2-*ter*, lett b), as well as Annex I, Section C, Points 5, 6, 7 and 10, Italian Consolidated Text on Finance. See also Sciarrone Alibrandi and Grossule (n 16) 449–455; together with Parola and Miccoli (n 42).

[45] For instance, it comes to derivatives referred to in art 1, para 1-*bis*, lett c), Italian Consolidated Text on Finance. This means any other security which permits the acquisition or sale of the securities referred to in letters a) and b) (that is, shares of companies and other securities equivalent to shares of companies, partnerships or other entities and share depositary receipts; as well as bonds and other debt securities, including depositary receipts relating to such securities) or which involves a spot settlement determined by reference to securities, currencies, interest rates or yields, commodities or other indices or measures; this definition is also found symmetrically in art 4, para 1, point 44, lett c), Dir 2014/65/EU.

[46] ESMA (n 44) 20.

[47] It can consider art 61 Italian Markets Regulation: see Consob, 'Recepimento della direttiva 2014/65/UE (MiFID II) e attuazione del Regolamento (UE) 600/2014 (MiFIR)' (31 July 2017) 80–81 <www.consob.it> accessed 18 July 2025.

To identify the calculation methodology, reference must be made to the Delegated Regulation 2022/1302/EU[48]: this can be justified based on the assumption aimed at ensuring a harmonized approach to the application of position limits on commodity derivatives. Central to the regulation is the intention to improve the stability and integrity of financial markets through the preparation of a harmonized calculation methodology, capable of avoiding regulatory arbitrage operations and thus implementing congruence, granting the competent authorities' margins of elasticity to be able to consider differences between the various commodity derivatives markets and the underlying commodity ones.[49]

With this regulation, the Commission considered it appropriate to maintain the diversification of the methodology for calculating position limits essentially between contracts in the expiry month (s. c. spot month) and those in other months: this was followed by specific provisions placed respectively in Articles 11 and 12 and in Articles 13 and 14 of the said regulatory source.

The position limits in the expiry month relating to physically settled and cash settled commodity derivatives shall be based on the deliverable supply. It should be clarified that spot month means the period immediately preceding delivery at maturity, in accordance with the rules established by the relevant trading venue. Having taken note of this, the Commission has adopted an extensive approach, specifying that the expiry month period does not necessarily have to correspond to a monthly period, but may be declined in relation to each specific commodity derivative and considering the rules of the relevant trading venue.[50] As regards the concept of deliverable supply, however, it is sufficient to consider that it is the *quantum* of underlying commodity suitable for being used to meet the delivery needs of the commodity derivative.[51]

Position limits in other months are differently parameterized on open positions, which must be calculated by aggregating the number of lots of the derivative instrument relevant for the purposes of this discipline still present in the trading venues at a given time,[52] in view of the position notification data. It is useful to remember that lots means the value units of the reference base.

The determination of the baseline value for the limits in the expiry month for agricultural commodity derivatives or significant derivatives is done by calculating a percentage of the deliverable supply for the commodity derivative set at 25 per cent, considering empirical data from other markets and other jurisdictions.[53] A significant exception is represented by the position limit in the expiry month for commodity derivatives with an underlying considered food intended for human consumption with a combined total of open positions on contracts in the expiry month and in other months exceeding 50,000 lots for a period of three consecutive months, the calculation of which is set at 20 per cent of the deliverable supply for the commodity derivative. A further exception is referred to position limits in the expiry month concerning critical or significant commodity derivatives settled in cash without deliverable supply,[54] which are based on a percentage of the total of open positions in the relevant month.

[48] See n 6.

[49] More specifically, Recital no 2 of the aforementioned Regulation clarifies that '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'.

[50] Recital no 13 of Reg 2022/1302/EU, which largely recalled recital no 11 of the previous Reg 2017/591/EU. This approach should serve the function of preventing the accumulation of dominant positions by individual entities, preventing them from damaging the market by reducing access to goods, precisely because it limits the quantity of underlying deliverable supply that each entity can deliver or take delivery of.

[51] For the rest postponing to art 12 Reg 2022/1302/EU.

[52] art 14 Reg 2022/1302/EU.

[53] It is specified that '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' (art 11, para 1, Reg 2022/1302/EU).

[54] eg the commodity derivatives listed in Annex I, Section C, Point 10, Italian Consolidated Text on Finance, such as those related to weather conditions, inflation rates, freight rates or other official economic statistics.

As regards the limits of the other months on derivatives relating to agricultural commodities or critical or significant derivatives, it is envisaged that the reference value will be identified by the competent authorities using an identical 25 per cent calculated on open positions.

ESMA, whose draft regulatory technical standards were then incorporated into the previously mentioned regulation and therefore also into the current one, has adopted a rather rigorous line also in terms of assessing the relevant factors for the purposes of calculating position limits: competent authorities are allowed to make adjustments by increasing the limit up to 35 per cent, or reducing it up to 5 per cent.[55] The relevant factors are those referred to in articles from 18 to 21 of the Regulation and refer to circumstances that require an adjustment based on the expiry of contracts, the deliverable supply of the underlying commodity, the overall open positions, the number of market participants and the characteristics of the underlying goods market.[56]

With reference to new and illiquid contracts, the methodology for calculating position limits that national competent authorities will be required to follow, pursuant to Article 17 of the aforementioned Regulation, is peculiar and advantageous: that is, a procedure is envisaged in successive phases, consisting in the determination of a fixed level of the position limit for the expiry month and for the other months, set at 10,000 lots for commodity derivative instruments, until a threshold of 20,000 lots is exceeded.[57]

Although local authorities are required to provide prior notification to ESMA of the position limits it intends to adopt, it should be noted that the latter's opinion is not absolutely binding, as they may also illustrate the arguments for which they decide not to modify the limits set, unlike the indications of the European Authority.

The determination of net position size

Different from the calculation methodology for the competent authorities, which concerns the determination of the limit to be imposed, is the procedure for calculating the size of the net position held by a person, which consists of the aggregation of the various positions held by a person in relation to a specific commodity derivative negotiated on a trading venue and in economically equivalent OTC contracts. In this sense central appears to be the problem of mutual compensation of long and short positions in a commodity derivative.[58] The main aspect lies in the fact that a different calculation methodology is not envisaged in relation to the spot month and the other ones,[59] therefore making compensation necessary after splitting the two different types of positions. Positions with different maturities for the limits of the other months will also have to be subject to compensation to determine the net position.[60]

From the need to offset long and short positions in a commodity derivative instrument relevant for interest purposes to determine the net position in relation to a certain instrument, a further corollary can be drawn: the position limits will apply to the net position regardless of whether it is long or short. So, the calculation of the positions must take place by aggregating them, whether long or short, in relation to contracts in the expiry month. Similarly, but separately from the contracts in the expiry month, all long and short positions in a commodity derivative instrument will be subject to aggregation with reference to the other months and for the purposes of determining the net position.[61]

[55] art 16 Reg 2022/1302/EU.
[56] It should be noted that art 63 Italian Markets Regulation, which provided for specific reporting obligations for trading venues that recalled the circumstances referred to in arts 16–20 of Regulation 2017/591/EU, has been repealed so that Consob could proceed with the adjustment of position limits (see what will be found in relation to art 58 MiFID II). This operation was necessary to limit the burdens on the obliged entities, providing that the information can be collected by Consob upon specific request.
[57] The new regulation no longer refers to securities issued for securitized derivative financial instruments having a commodity as the *underlying asset* (2.5 million securities, corresponding to a threshold of 10 million securities for a period of three consecutive months). See Consob (n 39) 9. As regards the interrelations of this profile with the information obligations, please refer to the discussion of position reporting (paras 10–12 of this essay).
[58] However, permitted by art 3, para 3, Reg 2022/1302/EU.
[59] See preceding para 5.
[60] ESMA (n 44) 16.
[61] ibid 17.

It must be noted that it is impossible to offset a hedging exemption[62] with derivative positions that are not objectively measurable, as the reduction of risks is directly connected to the activity of such a subject. This assumption can be simply justified by emphasizing the lack of applicability of the limits to such positions. In fact, if one wanted to argue otherwise, one would end up realizing an undue benefit of risk reduction 'squared', since the position would first be relevant for the purposes of the exemption and subsequently for the purposes of reducing a speculative position.[63]

The notion of 'same derivative instrument' traded in another trading venue[64] has been removed from the new regulation, so that there is no longer any reason to raise the thorny question, still in relation to compensation, regarding the complex identification of this element, which could determine interpretations aimed at artfully reducing the net position of a subject.[65] This choice enhances the integrity of the position limits regime by deterring loopholes that could exploit interpretative uncertainties in identifying the aforementioned notion across different trading venues, thereby strengthening the effectiveness of supervision and curtailing opportunities for regulatory arbitrage.

As regards the method of calculating positions for legal entities included in a corporate group, the net position of the holding company is determined by aggregating its position with all those of the subsidiary companies.[66]

The application of the single position limit with reference to agricultural commodity derivatives having the same underlying and the same characteristics, or critical or significant commodity derivatives having the same underlying and identical characteristics, can be systematically and broadly included in the questions relating to the calculation methodology.[67] This limit does not appear to give rise to interpretative questions, given that it will generally be placed if the trading of the same commodity derivative instrument reaches a significant quantity with reference to trading venues in a plurality of Member States. It is necessary to distinguish between two different situations: first, where national authority is the central competent one, since the venue where the highest quantity is traded falls within its jurisdiction; second, where national authority is not such, having to adapt or raise in writing the reasons why it does not agree with the imposition of the limit as carried out by the respective central competent authority. The reciprocal exchanges of data aimed at verifying and complying with the said position limit are also fundamental.

The national authority also has the power to review position limits if significant changes are recorded in the market that could impact the deliverable supply or open positions in relation to new market operating dynamics.[68]

Finally, in exceptional cases, this authority may impose an enhanced position limit regime. It comes to cases in which this is objectively justified and proportionate to the liquidity and regular functioning of the specific market.[69]

Subjective scope of application and some national peculiarities

The MiFID II has limited the scope of the general exemption regime in reference to the trading of commodity derivatives. Given that the exemption in favour of persons who trade on their own account (s.c. dealing on own account exemption) is no longer applicable to commodity derivatives, just as to

[62] See next para 7.2.
[63] ESMA (n 44) 20–21.
[64] Which was dealt with in the previous art 5 Reg 2017/591/EU.
[65] In particular, it was required that the two derivatives had identical contractual specifications, terms and conditions (with the exception of post-negotiation risk management agreements). In addition, it was necessary for the derivative instruments to integrate a single fungible group of open positions, referring not only to those derivatives on commodities cleared at the level of the same central counterparty, but also to those referring to central counterparties and characterized by interoperability, which can also be closed between them through clearing. See again ibid 19.
[66] Pursuant to art 4 of the specific Regulation.
[67] The reference is directed to art 57, paras 6 and 7, MiFID II, and art 68, paras 4–6, Italian Consolidated Text on Finance.
[68] art 57, para 4, MiFID II, as well as art 61, para 3, Italian Markets Regulation.
[69] art 57, para 13, MiFID II, together with art 68, para 7, Italian Consolidated Text on Finance.

emission quotas and related derivatives, as provided for by Article 2, paragraph 1, lett d), MiFID II, only the ancillary exemption remains, as far as is relevant here.[70]

The ancillary exemption concerns, first, those subjects who trade on their own account derivative instruments on commodities or emission quotas or derivatives thereof, without prejudice to the inapplicability of the exemption to those who trade such financial instruments on their own account but in execution of client orders; second, it concerns those subjects who provide other investment services, different from trading on their own account on said derivative instruments, but exclusively towards clients and suppliers of their main activity.[71]

Furthermore, it should be noted that the supranational regulatory intervention already mentioned, namely Directive 2021/338/EU, has also affected the ancillary activity exemption under discussion.[72] More specifically, the tests aimed at ascertaining the ancillary nature of the activity have been simplified, and the obligation to formally notify the national competent authority, on an annual basis, of the intention to access the exemption has also been eliminated. In line with the new approach, the communication must be made exclusively in response to a specific request made by the authority, within which it will be necessary to indicate the criteria underlying the assessment of the ancillary nature of the trading activity in commodity derivatives, emission allowances or derivatives thereof.[73]

However, what is crucial to understand for the purposes of interest is, in addition to the subjective dimension further characterized by the type of activity, the exact regulatory object of the exemption, to be able to critically evaluate the applicability of the position limits to such entities. In this way, it is highlighted that the internal legislators have punctually and textually transposed into the national regulatory frameworks Article 2, paragraph 1, lett j), MiFID II on the exemption regime in relation to derivative instruments on commodities.

Notwithstanding this, a peculiarity of the Italian legal system deserves to be pointed out, given that there is a notable difference that can well be interpreted as an intention to strengthen the scope of the position limit discipline, making them applicable also in relation to entities that do not fall within the scope of application of the MiFID II, since they can be traced back to the accessory exemption; this seems true at least whether one intends to attribute high value to the law letter.

This exegesis is clearly supported by the wording of Article 4-*terdecies*, paragraph 1, lett l), Italian Consolidated Text on Finance: the provision expressly states that the exemptions apply only to Part II of this source, which regulates intermediaries (covering authorization, governance, capitalization requirements, and related matters). Critically, the position limits regime is not located in Part II, but rather in Part III of the same statute, which is devoted to market regulation, specifically within Chapter II concerning trading venues. Such a structural separation implies that entities benefiting

[70] For the articulation of which, see art 2, para 1, lett j), MiFID II and, among various legal systems, an implementation provision can be found in art 4-*terdecies*, para 1, lett l), Italian Consolidated Text on Finance. Parola and Miccoli (n 42) 573–576, where it is stated that the ancillary exemption is provided for in favour of entities that negotiate financial instruments on their own account or that provide investment services in derivative instruments on commodities or provide s.c. exotic derivative contracts to the clients of their main activity, provided that this constitutes an ancillary activity to their main activity considered within the group, and provided that such main activity does not consist in the provision of investment services or banking services subject to reservation.

[71] In addition to this, there is the need for four further conditions to be met jointly. This essentially concerns the accessory nature of the activity with respect to the main one considered within the group, as well as the circumstance that these subjects are not part of a group whose main activity is the provision of investment services or related activities and the failure on their part to apply a high-frequency algorithmic trading technique; furthermore, these subjects must have made the communications required by relevant national authorities (such as Consob) regarding the qualification of their activity in the sense of the text. For the Italian perspective see L Mulas, 'Commento all'art. 4-terdecies tuf' in V Calandra Buonaura (ed), *Commentario breve al Testo unico della finanza* (Wolters Kluwer-Cedam 2020) 83ff.

[72] Indeed, as will be explained in more detail in the text, the exemption relating to ancillary activities, as implemented in our internal legal system, is limited to the provisions contained in the second part of the Italian Consolidated Text on Finance, that is to say the regulation of intermediaries and not also to the third part dedicated to the regulation of markets, which is not without critical issues (see next para 13).

[73] Having regard to the criteria specified in the delegated acts of the European Commission. In particular, one has to consider amendments made to art 2, para 1, lett j), MiFID II concerning the exemption for ancillary activities with respect to the main activity. It is interesting the choice made by the Italian legislator who has provided that these entities shall communicate to Consob, *upon request of the latter*, the criteria on the basis of which they have assessed that their activity pursuant to points i) and ii) is ancillary to the main activity, in accordance with what is established in the delegated acts issued by the European Commission pursuant to art 2, para 4, Dir 2014/65/EU: art 4-*terdecies*, para 1, lett l), no 1-*bis*, Italian Consolidated Text on Finance.

from the ancillary exemption under Article 4-*terdecies* are excluded from the intermediary regulations in Part II, while remaining subject to the position limits regime in Part III. This differs significantly from the symmetrical Article 2, paragraph 1, lett j), MiFID II, where the broader and more general phrase 'this directive does not apply' is used instead, thereby exempting qualifying entities from the entire Directive, including provisions on position limits.

The hermeneutic reconstruction according to which the exemptions under Article 4-*terdecies*, paragraph 1, lett l), Italian Consolidated Text on Finance do not extend *ex se* to the regulation of position limits, which is to a certain extent also corroborated by secondary legislation, namely Article 65 Markets Regulation. In governing the procedure for obtaining the authorization to benefit from the hedging exemption,[74] this provision takes into consideration the case where the subjects referred to in points i) and ii) of the lett l) do not intend to submit a request for authorization to the public authority responsible for regulating the Italian financial markets, which must evidently be considered aimed at the hedging exemption. In fact, even if the subjects in question must generally request authorization to benefit from the hedging exemption, this means that they are not exempted from the position limits from the outset, but are merely exempted from the application of the provisions of the second part, provided that the further conditions to which the operation of the exemption in question on the ancillary activity is subject are met.[75]

The domestic legislator appears to have intended to strengthen the impact and scope of position limits even beyond what is provided for by the MiFID II, which, by maintaining the exemptions,[76] means that the provisions of the Directive in their entirety, including those on position limits, are not applicable to the subjects falling within them.

The subsequent loss of centrality of the distinction between financial and non-financial entities

According to the initial legislative framework, the position limits applied, *ratione personae*, only to positions held by financial entities; conversely, they did not apply in cases where the positions were held, directly or indirectly, by non-financial entities (s.c. NFEs) for hedging purposes, that is, when such positions were objectively measurable as a reduction in risks directly related to the commercial activity of the said counterparty. Following the implementation of Directive 2021/338/EU, the distinction between the two types of entities has lost relevance, albeit only partially, considering that the cases in which the exceptions are also applicable to financial entities are limited, as will be seen later in the discussion.[77] Therefore, it remains important to examine the specific provisions aimed at distinguishing such positions from other and different negotiations, initially with reference to entities.

The distinction between a financial entity and a non-financial one maintains a central relevance for the purposes of determining the subjective scope of application of position limits; however, MiFID II does not identify certain criteria capable of discerning such counterparties. In this regard, the regulatory investigation must indeed focus on Article 2, paragraph 1, point 1, Regulation 2022/1302/EU, which has structurally borrowed the definition of a non-financial entity from that dictated by Regulation 2012/648/EU (s.c. EMIR). In a nutshell, the definition of a financial entity can be traced back to the concept of an investment firm, such as that resulting from the regulatory framework of the MiFID II. If we want to decline this at a phenomenological level, we are then dealing with entities authorized by virtue of various disciplines to the specific exercise of financial activities.[78] The concept

[74] That is, the coverage exemption, on which see next para 7.2.
[75] The exemption to which the legislator of the new law referred in art 65, para 4, Italian Market Regulation is undoubtedly the ancillary exemption, as can also be seen from the reference to art 2 Commission Delegated Regulation 2021/1833/EU of 14 July 2021 supplementing Directive 2014/65/EU of the European Parliament and of the Council by specifying the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level [2021] OJ L372/1, and the necessary compliance with the procedures set out in art 6 of the same, expressly and entirely dedicated to this. This is the regulation regarding the criteria for establishing when an activity must be considered ancillary to the main activity at group level.
[76] Although with certain restrictions compared to the scenario prior to the review intervention.
[77] See next para 7.2.
[78] Consider, for example, insurance companies, banks, investment fund managers.

of non-financial entity, on the other hand, takes on an essentially negative role, since it is a company established in the EU but not included in the scope of financial entities.[79]

It should be underlined that not all non-financial entities are exempt from the applicability of the provision in question, since there may be NFEs carrying out activities without any systemic relevance, which negotiate derivative contracts for non-hedging purposes and therefore do not benefit at all from the exemption referred to in paragraph 1, last sentence, Article 57 MiFID II. These entities will not be required to fully comply with the regulations envisaged for financial entities, but will have to limit themselves to producing a report to be included in the data repository on derivative contracts and to employ certain risk mitigation techniques, which are less burdensome than those provided for financial counterparties, by transmitting data on their profitability in derivative contracts.[80]

The underlying reason for the distinction between the two types of entities, even before the hedging exemption level, must be identified in the EMIR Regulation, which was established with the aim of balancing and adapting the rules, especially regarding transparency obligations, and cautiously addressing the multiple risks posed by the financialization of commodity markets.[81]

Hedging exemption and teleological application profiles

The position limits apply exclusively to operators other than non-financial and commercial entities,[82] as well as financial entities that meet the requirements that will be discussed immediately, in relation to which the coverage exception may apply.[83]

This greater extension of the perimeter of the hedging exemption from the regulation of position limits beyond the boundaries of non-financial entities is, as just specified, due to the oft-mentioned Directive 2021/338/EU. More specifically, it is interesting to note that the exemption in question is also applicable in favour of financial entities if they belong to a predominantly commercial group and act on behalf of a non-financial entity of the same group. In other words, we are witnessing an extension also in favour of financial entities, in addition to non-financial ones, of the exemption from the regime for hedging purposes, originally applicable only with reference to the latter. The purpose would appear to be that of also allowing investment firms established within commercial groups to trade in derivatives to reduce exposure and risks directly connected to the commercial activity of the group to which they belong, such as those linked to the price trend in the market of the underlying commodity.

The same provision also introduced the liquidity exemption: an exemption also relating to positions held by an entity, regardless of its financial or non-financial nature, which are objectively measurable as deriving from transactions concluded to comply with the obligation to provide liquidity to a trading venue.[84]

While this last exception in practice generates fewer problems, the same cannot be said for the hedging exception, in relation to which it is necessary to specify that the mere subjective qualification of the operator, according to the above schemes, is a necessary but certainly not sufficient condition for the mentioned purposes, since it is required that such qualification be connoted teleologically: namely the entity must hold commodity derivatives for purposes other than hedging and thus fall outside the special derogation regime.

[79] In this sense, consider art 2, para 9, European Parliament and Council Regulation 2012/648/EU of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012] OJ L201/1. It should also be clarified that at an international level, an entity from a third country must be classified as non-financial only if the test to hypothesize the headquarters of the counterparty in the European Union has a positive outcome and it is therefore subject to EU law, with the direct non-necessity of authorization.

[80] Sciarrone Alibrandi and Grossule (n 16) 457, n 42.

[81] See preceding para 1, as well as ESRB, 'Advice of the European Systemic Risk Board' (31 July 2012) <www.esrb.europa.eu> accessed 18 July 2025.

[82] See previous para 7.1.

[83] Naturally, without prejudice to the new objective scope of application limited to the position limits of contracts having agricultural goods as underlying, as well as critical or significant contracts.

[84] Consob, 'Modifiche al Regolamento Mercati. Adeguamento nazionale al regolamento (UE) 2019/2175 che modifica MiFIR, alla direttiva (UE) 2021/338 che modifica MiFID II. Documento per la consultazione' (n 5) 4ff. The newly introduced para 2-*bis* of art 68 Italian Consolidated Text on Finance provides for Consob's competence to decide on exemption requests in terms of hedging and liquidity support activities.

Therefore, it is essential to focus the investigation lens on this exception of coverage referred to in paragraph 1 of Article 57 MiFID II. The rationale for the exemption can be directly identified by referring to the objectives pursued through the introduction of position limits,[85] ie to limit speculative intentions, but categorically avoiding to preclude them entirely, given that speculation also fulfils a socially useful function, because it contributes to preserving the liquidity of the markets, which is an essential element for their functioning; furthermore, it absorbs the imbalance that can be recorded between long coverage positions (forward purchases) and short positions (forward sales).[86]

First, it is specified that, similarly to what has been stated about the teleological scope of application, even at a negative level (exemption), not all entities, financial and non-financial, are exempt, as the derogating condition must exist. It is therefore essential to understand exactly which positions have an objectively measurable capacity to reduce the risks directly connected to the commercial activity, to limit its scope.[87]

So, it is necessary to refer to Article 8 Regulation 2022/1302/EU, which includes the standards developed for the purposes of the EMIR Regulation, even though in this regulatory source the netting-hedging exemption specifically concerns the applicability of the more stringent rules concerning derivatives traded OTC.[88] These criteria are expressed in the suitability of the position to reduce the risks associated with the potential change in value of elements such as assets, services, and products that non-financial counterparties have in the normal course of business, as well as in the possibility of classifying the position as a hedging contract in line with the International Financial Reporting Standards (IFRS). It has not invoked the further condition provided for by the Article 10 Regulation 2013/149/EU concerning the hedging of risks arising from fluctuations in interest rates, inflation rates and foreign exchange rates, as well as related to credit risks.[89] The differences between the regime resulting from the MiFID review and that under the EMIR Regulation, according to ESMA, are not fundamental and can be explained based on the consideration that commodity derivatives are not normally used for treasury financing purposes.[90]

For the coverage exemption to operate, it is not sufficient that the condition-purpose mentioned be met, as the need for the non-financial entity to follow a specific procedure has been established.[91] In other words, the intention was to avoid the automatic and mechanical operation of the exemption, to prevent potential abuses. The procedure for requesting direct authorization to obtain the exemption, together with the related information obligations, can be found in the secondary national regulation.[92] Notification by the interested entity is required, which must be followed by subsequent approval by the relevant local authority, within 21 days of receipt by the entity of the exemption request.[93]

As regards the specific content of the request for exemption from the application of the position limits regime, Article 8 Delegated Regulation 2022/1302/EU, limiting the observations here to that what must be indicated, essentially consists of the description of the entity's commercial activities in relation to the underlying of the derivative, as well as the trading activities and positions held in the related commodity derivatives, just as the exposures and risks associated with the goods in question;

[85] See above para 3.
[86] Kolb and Overdahl, *Futures, Options, and Swaps* (n 14) 100. A clear distinction between hedgers and speculators based on a subjective and a temporal criterion can be found in L Valle, *Il contratto «Future»* (Cedam 1996) 72, n 179.
[87] art 57, para 1, MiFID II.
[88] See, on these issues, at a regulatory level, art 10 Commission Delegated Regulation 2013/149/EU of 19 December 2012 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP [2013] OJ L52/11, as well as art 10, para 4, lett a), Reg 2012/648/EU.
[89] This is a treasury financing activity.
[90] ESMA, 'Final Report on the Draft Regulatory and Implementing Technical Standards MiFID II/MiFIR' (28 September 2015) <www.esma.europa.eu> accessed 18 July 2025.
[91] It should be noted that in 2021, the European Commission amended the previous regulatory technical standards in order to determine the procedure that financial entities must follow to be exempted from the application of position limits for risk hedging positions taken on behalf of non-financial entities of the group.
[92] Such as, for the Italian framework, art 65 Italian Markets Regulation.
[93] Consob, 'Modifiche al Regolamento Mercati. Adeguamento nazionale al regolamento (UE) 2019/2175 che modifica MiFIR, alla direttiva (UE) 2021/338 che modifica MiFID II. Documento per la consultazione' (n 5) 8.

together with a specific explanation of the coverage capacity. As has been pointed out by some scholars, these requirements for the coverage exemption procedure are very similar to the notification schemes for the coverage exemption provided for by the EMIR Regulation.[94]

A necessary clarification concerns the verification of the existence of the need for entities (financial or otherwise), when they consider requesting the national authority for the exemption, that this has full extension, including in its object all the contracts in which they hold positions. The interpretative question can be resolved negatively, that is in the sense that what is necessary is only the request for exemption by an entity that falls within the derogation perimeter, that is when it expects that it is due to allow it to hold a position suitable for reducing the risk of its commercial activities and that would actually exceed the position limit for that specific commodity derivative as dictated at national level. The request for exemption does not appear to be necessary if the entity, with reference to other contracts, does not foresee needing it based on its ordinary operations. Furthermore, it should be noted that in no case is there an obligation to request an exemption, since the request is always left to the discretion of the entity itself.[95]

As developed by the supranational legislator and implemented by the domestic one, the subjective-teleological operational area of the hedging exemption (interpreted and reconstructed jointly and inseparably with the formal procedure for the authorization to use it) is revealed as limited to specific and well-identified positions, having to on the contrary exclude the configurability of a general coverage exemption for certain types of subjects and suitable to integrate a derogation for all activities relating to all derivative contracts on commodities. In essence, the effective operationality of the exemption, in addition to the subject and the purpose, must refer to a certain and determined position.[96]

Once a given entity has received approval from national authority to benefit from the exemption, if significant changes occur there will be an obligation to re-examine the limits, so that a new notification will have to be made, which will have as its object a real application from scratch in the event that the change has impacted the nature and value of the related activities for trading and positions held in the relevant commodity derivatives.

Minimum considerations on the position limits applicability *ratione temporis*

A fundamental issue that allows us to circularly complete the analysis of the application areas of the position limits regime lies in the presentation and resolution of the main issues of intertemporal law.

It is needed to specifically assess the applicability of Article 57 MiFID II on positions in contracts whose conclusion occurred prior to the amendment of the internal legislation, provided that these are contracts falling *de plano* within both the subjective and objective scope of application. Reference is thus made to contracts negotiated by entities (not subject to exemptions of any kind) in a trading venue, or in the OTF segments, as well as to OTC contracts that are economically equivalent to those negotiated in a trading venue, in accordance with everything already illustrated.[97]

From the overall articulation of the legislation under examination, it emerges with sufficient clarity that the moment of formation of the contract does not become a reference element for the purposes of assessments regarding the applicability *ratione temporis*, since the regulation concerns every position in commodity derivatives referred to trading venues and economically equivalent OTC contracts. Therefore, relevance must be given to the nature of the financial instrument and specifically of a commodity derivative in accordance with the MiFID review.[98] There does not appear to be a need for a verification regarding the existence of an express and specific legal derogation.

[94] Sciarrone Alibrandi and Grossule (n 16) 459.
[95] This solution was also proposed in relation to art 57 MiFID II and arts 8 and 9 of the previous Reg 2017/591/EU, as shown by ESMA (n 44) 21. In the Italian framework see likewise above n 93.
[96] Sciarrone Alibrandi and Grossule (n 16) 449.
[97] See paras 4, 7, 7.1 and 7.2 of this article.
[98] By way of example, see also Annex I, Section C, Points 5, 6, 7 and 10, Italian Consolidated Text on Finance.

The case that may arise in relation to this scope of applicability is essentially divided into two hypotheses. The first is that an objectively relevant financial instrument could not be classified as such at the time of the contract conclusion, to be resolved in the sense that when a financial instrument becomes objectively subject to the position limits regime, these will be applied to the positions of the holders of such instruments, with the consequent reporting and permanent monitoring obligations.[99] In this regard, consider, at a purely demonstrative level, derivative instruments on commodities settled by physical delivery, even if traded on an OTF prior to the entry into force of the related legislation.[100]

A second hypothesis could be that in which the subject was the holder of an exemption,[101] although, in all fairness, this latter case is effectively irrelevant at the level of the national legal system considered in each case, since the regime of position limits has been made independent from that of exemptions based on subject and activity.[102]

The need for differentiation of the discipline based on the type of commodity: energy derivatives

The above discipline generally concerns commodity derivatives, without making any distinctions with reference to the underlying asset. However, there are some provisions aimed at exempting certain specific categories of commodity derivatives from the general discipline.

A fundamental differentiation in this sense and in relation to the particularity of the goods can be found for wholesale energy products traded in an OTF, which are exempted from the broadened definition, including also derivative instruments on goods settled with physical delivery, even if traded in an OTS.[103]

The C6 exception, also known as REMIT carve-out, can be argued from a regulatory perspective with the consideration that contracts having as their object wholesale energy products traded in OTF fall within the scope of application of Regulation 2011/1227/EU on the integrity and transparency of the wholesale energy market (s.c. REMIT), which follows the need to avoid an unnecessary and detrimental duplication of regulation that would have a negative impact on trading in the energy market. The trading activity of such products will therefore be exclusively subject to the REMIT regulation, as technically specified by the Commission Implementing Regulation 2014/1348/EU, with a corresponding total exemption of the contracts in question from the applicability of position limits.

On a broader level, consider the increasingly marked need to differentiate the applicable regulations based on the type of underlying goods: this would allow the development of more adequate and intelligible regulations, since they refer to the specific characteristics of each product, with the main corollary of easier and less onerous applicability, especially in terms of compliance, by the recipients. This is even more important for those underlying assets that are characterized by singular risk profiles, such as first and foremost agricultural raw materials.[104]

[99] art 58 MiFID II.

[100] For instance, in Italy, the Legislative Decree no 129/2017. But, in terms of qualification, see art 1, para 2-*ter*, lett b), Italian Consolidated Text on Finance.

[101] For instance, the specialization exemption, the dealing on own account exemption, or the ancillary exemption previous to MiFID II formulation.

[102] In relation to the relevant profiles referred to in the text, see also all the considerations made in para 7ff; as well as ESMA (n 44) 24. It is also suggested to consider art 4-*terdecies* Italian Consolidated Text on Finance.

[103] eg Annex I, section C, point 6, Italian Consolidated Text on Finance. S Guarnieri, 'La normativa finanziaria dei commodity derivatives con particolare riferimento ai mercati energetici' (2018) Riv Trim Dir Econ 28ff.

[104] M. Vander Stichele, 'Financial Instruments and Legal Frameworks of Derivatives Markets in EU Agriculture: Current State of Play and Future Perspectives' (2014) 63ff <www.europarl.europa.eu> (*Studies Section*); Sciarrone Alibrandi and Grossule (n 3) ch 20, para 7.

The foundation of position reporting discipline

Complementary to position limits, the reporting obligations regime under Article 58 MiFID II should be considered. This is an instrument that is oriented towards one of the fundamental objectives of the MiFID review, namely the strengthening of transparency and circulation of information on price building and volumes traded, both at the level of trading venues and in OTC. In this regard, the EMIR Regulation in Article 9, with specific reference to OTC contracts, provides for the obligation to report trading data to the trade repositories.[105]

The rationale is inspired by the transparency of the market players' behaviour and has as its direct purpose the prevention of market abuse. In addition, the reporting obligations in this area fulfil the function of allowing the national authority to correctly determine the position limits and to possibly proceed with their review.[106] The use of a common format and the standardization of reports is essential to guarantee the comparability of data, by ESMA too.

A critical aspect, leaving aside the contents, lies in the once again extremely complex and not always coherent architecture of the normative sources, deriving from the use of a multi-level legislative procedure structured by committees, which risks overshadowing the objectives by which the legislation was originally oriented, in addition to making the adaptation by the operators of the financial markets who are its recipients excessively burdensome.[107] The specificity and technicality of the matter mean that, by virtue of delegation, the lawmakers are the same competent authorities, which are equally often called upon to draft detailed documents, which are also binding in fact.[108] However, this delegation of power inevitably grants national authorities a significant margin of discretion in modulating reporting requirements, leading to a degree of regulatory fragmentation that could be problematic.

Weekly and daily reporting obligations

The reporting obligations regime is structured around two time frames, weekly and daily, each characterized by different prerequisites, content requirements, and reporting entities: the analysis follows this dual structure.

With regard to weekly reporting obligations, each manager of a trading venue must publish and transmit to the relevant competent authority (such as Consob in the Italian context) a weekly report containing aggregate information on the trading of commodity derivatives in the venue for which it is responsible.

The relevant report does not have to be submitted when the number of persons and their open positions do not reach the following minimum parameters set out in Article 83 Delegated Regulation 2017/565/EU: (i) the existence of 20 holders of open positions in a given contract or on a given trading venue; (ii) the absolute amount of the gross volume in long and short positions of the total open positions, expressed as the number of lots of the relevant commodity derivative instrument, exceeds a level equal to four times the deliverable supply of the same commodity derivative, also expressed in

[105] That is, repertoires open to supervisory authorities, with the aim of providing a picture of the general situation of the markets, allowing the adoption of appropriate political choices in this area.

[106] art 57 MiFID II.

[107] More widely N Moloney, 'Lawmaking Risks in EC Financial Market Regulation after the Financial Services Action Plan' in S Weatherill (ed), *Better Regulation* (Hart Publishing 2007) 321.

[108] See above para 1; Sciarrone Alibrandi and Grossule (n 3) ch 20, para 7. With reference to Italian sources, it is necessary to interpret and reconstruct the regulation in question together with art 62 Italian Markets Regulation, through which Consob, exercising the delegation referred to in para 4, lett a), of the regulation in question, has identified the specific content, terms and methods of the main communication obligations aimed at setting position limits. The technical implementing rules concerning the format of position reports by investment firms and market operators, in compliance with the need for standardization and comparability, are contained in the Commission Implementing Regulation 2017/1093/EU. The detailed legislation on weekly reports pursuant to art 58, para 1, lett a), MiFID II can be found in art 83 Delegated Regulation 2017/565/EU of the Commission, which has the function of integrating the directive. Finally, the systematization of all the discipline on *reporting obligations* with the delegated regulation 2022/1302/EU is essential.

number of lots. Even if the non-existence concerns only one of the two parameters, the manager will not be required to publish the report.[109]

The transmission of the weekly report to ESMA, as well as to local authorities, is essential. In fact, the former is required to publish a centralized report on commodity derivatives trading, based on the weekly aggregate reports of the venues, with reference to a specific moment of the week.

Turning to daily reporting obligations, it is necessary to carry out a preliminary analysis mirroring the relevant European legislation, to clarify the content of the provision and identify a threefold order of communication requirements. Unlike weekly ones, daily reporting obligations are characterized by greater complexity and are structured across three distinct categories, each involving different reporting entities, recipients, and triggering conditions, as will be examined in turn.

The first category of daily reporting obligation concerns managers of trading venues (at the domestic level) and also investment firms (at the European level) in relation to their respective trading venues. The regulatory basis is found in Article 58, paragraph 1, lett b), MiFID II.[110] This obligation is activated upon a prior specific request from the competent authority and consists of communicating at least once a day a complete breakdown of the positions of all persons, including members or participants and their clients, relating to the trading venue concerned.[111] This is closely interconnected with the controls that these managers of the trading venue carry out on the open positions pursuant to Article 57, paragraph 8, MiFID II.

Within this framework, the 'request-triggered' configuration represents a significant instance of occasional national divergence, as the frequency and criteria for such requests may vary significantly across Member States depending on local supervisory priorities. For market participants operating on a cross-border basis, this lack of uniformity can easily turn into a potential compliance trap, requiring them to maintain highly flexible reporting infrastructures capable of responding to heterogeneous and often sudden disclosure demands from different national regulators.

The second category of daily reporting obligation concerns investment firms, specifically banks and SIMs operating OTC. This obligation is governed by Article 58, paragraph 2, MiFID II, and, unlike the first category, exists regardless of any specific request from the competent authority.[112]

The third category of daily reporting requirement is imposed on each operator of a trading venue, meaning members or participants of regulated markets, multilateral trading facilities and clients of organized trading facilities, pursuant to Article 58, paragraph 3, MiFID II.

From the perspective of subjective applicability, the first important current distinction can be identified between these obligations. In fact, the first two obligations are imposed on investment firms or on the managers of a trading venue and the information is therefore immediately directed to the national competent authority of the trading venue, with the further distinction whereby only investment firms that trade derivatives on commodities or emission quotas or derivative instruments on the same outside of a trading venue (these are economically equivalent OTC contracts) are required to present position reports pursuant to paragraph 2 of Article 58 MiFID II. The third category instead

[109] There is no longer any reason to dwell on the exemption from the obligation for managers of trading venues to publish reports on weekly aggregate positions and to communicate them to Consob where *securitized derivatives are relevant*, given that the latter, as already specified, are no longer subject to the reporting of positions pursuant to art 58, para 1, MiFID II: see ESMA (n 44) 31. This choice by the legislator can be justified by recalling the function performed by the reports in question, ie that of guaranteeing investors transparent information on the market, to avoid their decision-making process being undermined. Now, such a function is relevant with reference to certain basic contracts for market operators, but not so for securitized derivatives on commodities characterized by an endless typological multiplicity and often low liquidity. It is therefore clear that the publication of a very high number of securitized derivatives on commodities would have a counterproductive effect on operators, ending up generating uncertainty in them.

[110] At the internal level, see art 68-*quater*, para 4, lett a), Italian Consolidated Text on Finance, along with art 62, para 2, Italian Markets Regulation.

[111] In this case, there seems to be a discrepancy with the Italian provisions mentioned in the previous footnote, which differently are not based on a request by the competent authority in order to activate the daily reporting obligations.

[112] It is useful to note that also the Italian Legislator by art 68-*quater*, para 2, Consolidated Text on Finance, provides for it at the same way independently of a specific request and whose sending frequency is at least daily (Legislative Decree no 31/2023). Furthermore, this paragraph has been amended by Legislative Decree, 25 November 2019, no 165 of laying down supplementary and corrective provisions to Legislative Decree, 3 August 2017, no 129, which identified the recipient of the information under consideration more generically in the competent authority of the trading venue.

involves, primarily, as recipients of the information, the investment firm or the manager of a trading venue.

A further element of differentiation can be seen, from a content point of view, in the information to be transmitted. The daily position reports (prepared by the managers of a trading venue) must consist of a complete breakdown of the positions exchanged in the specific trading venue and pertaining to all persons, including members or participants and their respective clients. This has the direct consequence that investment firms in the reports must limit themselves to including data relating to economically equivalent OTC contracts. At the level of internal regulations, such as in the Italian context, however, there is no reason to raise the question of whether or not the positions exchanged during trading should be included in the report just mentioned, given the lack of subjective extension of the report to investment firms,[113] whilst the opening proposition of Article 58, paragraph 1, MiFID II refers alternatively to investment firms or market operator operating a trading venue.[114]

The report on investment firms trading in OTC commodity derivatives requires banks and SIMs to provide the competent authority of the trading venue with a complete breakdown of their positions, just as much as those of their clients and the clients of such clients, up to the final one. The technical models of such reports can be found in the implementation of Regulation 2017/1023/EU, to which full reference is made. An investment firm dealing with or on behalf of clients or clients of clients who cannot be identified in the position report for the most varied reasons would therefore not be compliant with the obligations.

Always with reference to this report, it is noted that end-of-day positions equal to zero do not have to be reported, despite the provision in question requiring completeness as a requirement for disaggregation. An exception to what has been noted is integrated by the hypothesis in which the investment firm has not recorded a positive or negative position in the previous report, such that the first time an open position is reduced to zero, the report to the national authority must still be made.[115]

Non-financial entities that trade for hedging purposes cannot report every transaction as if it were for speculative purposes but must report hedging positions as such only when the relevant conditions exist.[116] In particular, the reports should clearly describe whether the position is intended to reduce risk in relation to commercial activities. This is the case, for example, where the financial entity does not request a hedging exemption, since it is convinced that its aggregate positions arising from hedging and non-hedging activities exceed the limit set for a given commodity derivative contract.[117]

The problem also arose of figuring out exactly which operator is responsible, without the reporting obligations in the case of groups of investment firms. While on one side it can be stated with certainty that the obligation to report a complete breakdown of the positions held (up to the end customer) falls on each of the investment firms, on the other side it is necessary to avoid duplication and overlapping of reporting, given that this could occur in the case, which is not particularly unusual, in which two or more of the investment firms in the group are members of a trading venue and thus have the obligation to inform the same venue in detail.[118] A solution to this long-standing problem could be found in the externalization of reporting by the companies in the group, without prejudice in any case to the responsibility for reporting being held by the investment firm, and the transfer of the same to the figure of the reporting person in the name and on behalf of third parties having to be excluded. Such a solution, albeit in reference to Article 58, paragraph 3, MiFID II, has been proposed by ESMA and seems fully predictable also in reference to the internal contexts.[119]

Finally, for the sake of completeness, it may be useful to underline that in some legal systems such as the Italian one, the public authority responsible for regulating the financial markets decided to

[113] Differently from art 58, para 1, lett b), MiFID II, see art 68-*quater*, para 2, Italian Consolidated Text on Finance and related art 62, para 2, Markets Regulation.
[114] ESMA (n 44) 31ff. This is a general rule on the base of which reports must be delivered by 10:00 p.m.: ibid 33; arts 62, para 2, Italian Markets Regulation; Consob (n 39) 10ff.
[115] See preceding footnote. Furthermore, in accordance with the two Authorities already mentioned, it is possible to outsource to another entity the reporting of positions referred to art 58, para 2, MiFID II.
[116] art 57 MiFID II.
[117] Similarly see ESMA (n 44) 31ff.
[118] art 58, para 3, MiFID II.
[119] See above n 114.

add a reporting obligation on trading venues, which is aimed at providing the same supervisory authority with data for the determination of position limits and for their possible review. In Italy, this is the case of Article 62, paragraph 3, Markets Regulation. The object of this obligation is closely correlated with Article 17, paragraph 2, Regulation 2022/1302/EU, which constitutes an exception to the assessment of the relevant factors for the purposes of calculating position limits on new and illiquid contracts.[120] This is a duty of notification to the national authority by trading venues when the overall open positions in relation to one of the derivative instruments on agricultural commodities are at least equal to the quantity of lots, with the simultaneous indication of the relevant reference threshold. This notification must be made when the total number of lots reaches 20,000 for a period of three continuous months.

A significant systematic discrepancy to be interpretatively corrected could be identified with reference to new and illiquid contracts (such as securitized derivatives), in the relationship between the obligation to inform the relevant national authority and Article 17 Delegated Regulation (referred to in the first provision), in one way, and the obligation to provide daily information, in the other. Indeed, the postponements to Article 17 and even before that the consideration for which the latter is contained in a self-executing European regulatory source have meant that also the internal legal system has adopted the ESMA approach aimed at not hindering the development of new commodity derivatives or at not impeding the correct functioning of market segments characterized by less liquidity, therefore taking into consideration the market adjustment times.[121] This explains the peculiar and favourable calculation methodology for these contracts, which provides for a procedure in subsequent phases, consisting in the determination of a fixed level of the position limit for the expiry month and for the other months.[122]

Product intervention as an effective enforcement mechanism

It is worth considering what the consequences are if the position limits are not respected, for example, by starting an out-of-control negotiation. From this perspective, the clear choice of the provision of quantitative limits is accompanied by the clear approach of attributing to national authorities, just as to the European supervisory authority, an extremely strong power of intervention, sometimes allowing it to forbid the negotiation of these derivatives.

Two complementary aspects are involved. First, there are the powers of local authorities to request information from any person about positions and exposures in commodity derivatives, as well as the powers to establish stringent position limits determined subjectively. Second, there are the obligations to collaborate with the competent authorities of other Member States, which include the obligation to notify them in advance of the exercise of the powers to limit these positions, except in cases where this is not possible. All this with the aim of preparing suitable tools to provide adequate and effective application of the limits.

The powers of supervision, investigation, and enforcement granted to national authorities in relation to positions on commodity derivatives can be traced back to the more general set of measures

[120] See previous para 5.
[121] Recital no 23 of Reg 2022/1302/EU.
[122] Finally, it should be noted that the inapplicability of *reporting obligations* to securitized commodity derivatives established by Dir 2021/338/EU has brought the system back to unity also from this perspective, eliminating an intrinsic contradiction, given that in placing the daily *reporting* obligation on trading venue managers *pursuant to* art 62, paragraph 2, Markets Regulation, the Italian legislator, like the supranational one, had not foreseen any exception with reference to this type of commodity derivatives, so much so that it was asked why such an obligation should have been applied in the event that the securitized commodity derivatives were overall less than two and a half million securities, ie the position limit set for said instruments by the legislator. This seemed to be a legal nonsense, simply considering the founding *rationale* of the daily reporting obligation, aimed at allowing permanent monitoring in the face of potential violations of the limits. See Orciani (n 8) 534, together with ESMA (n 44) 34; Consob (n 39) 13; as well as ACEPI-Italian Association of Certificates and Investment Products, 'Comments on the consultation document concerning the amendments to the market regulation in compliance with the MiFID II and MiFIR directives' (29 September 2017) <www.acepi.it>.

that, following the financial situation, the European legislator has adopted to preserve the integrity and correct functioning of relevant markets.[123]

One needs to consider in more detail the multiple and specific informative and limiting powers recognized to national authorities,[124] which materialize in the possibility to undertake position management actions aimed at obtaining information from any person regarding the size and purposes of a position. These informative powers are accompanied by the power of the supervisory authority to intervene in the markets, limiting the ability of a given subject to conclude a derivative contract on commodities, also through the introduction of limits on the size of a position. This is realized in the creation of *ad hoc* limits as such relating to a single subject.[125]

National authorities are expected to have only a notification obligation, which, unlike what happens in the context of Regulation 2014/600/EU (s.c. MiFIR), is not accompanied by a prior obligation to consult the other competent national authorities of the various Member States, not even when the restrictive measure can have significant effects on their respective legal systems.[126] The core of this regulation lies in any case in the fact that the legislator has provided for an additional legitimacy condition for the adoption of the restrictive measure that is not limited to a mere knowledge of the same after its application, despite the fact that the deadline for the same is made to expire backwards from the entry into force of the interventions and/or measures.[127]

Additionally, a systematic completion of this perspective must take place through the analysis of the connected provisions of the MiFIR Regulation, which provides for a multiplicity of intervention powers that are added to those provided for in the MiFID II, while still pursuing the aim of protecting and controlling commodity derivatives and spot markets. In this regard, one may speak of product intervention, a term which designates a general power of intervention on financial products conferred to national and European sector authorities by the said regulation with the aim of temporarily prohibiting or limiting their marketing, distribution or sale for reasons of investor protection, the regular functioning and integrity of the markets, or the stability of the system itself. In concrete terms, these are restrictions on the circulation of certain financial instruments or on the conclusion of the related contracts, as well as on the conduct of trading activities based on them.[128]

Specifically, as far as it is relevant, with reference to derivative instruments, national authorities are granted powers of intervention when these have a negative effect on the price formation mechanism and in spot markets. The regulatory point of emergence of this is identified in the provision of Article 42, paragraphs 1 and 2, MiFIR Regulation: the goal is to prevent activities specific to financial markets from having negative impacts on those of goods.[129] The competent national authority will be able to act limited to its own territory, so that the prohibitions and limitations can operate only within its own State or, in any case, starting from the latter.

For the purposes of exercising the powers of intervention, it is not required that the threat to protected interests be objectively existent; it being instead sufficient that the decision to intervene rests on logical and coherent factual motivations. This direction is supported by the regulatory provision

[123] For an analysis of the broad change in European Union policy resulting in the adoption of purely interventionist forms of market regulation, see E Ferran and others, *The Regulatory Aftermath of the Global Financial Crisis* (CUP 2012) 186ff.

[124] For Italy, reference is made to arts 62-*octies*, 62-*novies*, 62-*decies*, Italian Consolidated Text on Finance.

[125] That is, by limiting the possibility of a subject to conclude derivative contracts on commodities or by requiring the activation of measures aimed at reducing the size of a position in such instruments, in line with art 69, para 2, letters j), o), p), MiFID II.

[126] For these differential profiles with respect to the MiFIR regulatory framework, please refer below in this same paragraph. No particular questions arise with reference to the content and methods of notification pursuant to art 68-*quinquies*, para 2-*bis*, Italian Consolidated Text on Finance, which must be carried out by Consob one day in advance and, if possible, must also include the information referred to in para 1, lett a) of the previous mentioned provision.

[127] It follows that the emergency procedure in which it is possible to derogate from the daily deadline, as well as the circumstances that legitimize it, can only be interpreted restrictively. It should also be noted that the communication referred to in para 2 of the provision mentioned in the previous note is addressed, differently from what is provided for by the mirror directive MiFID II, only to the authorities of the other Member States: on closer inspection, a systematic interpretation would require adhering to the supranational provision and also requesting its forwarding to the ESMA.

[128] On this point, see, at length, F Guarracino, 'I poteri di intervento sui prodotti finanziari (la c.d. product intervention)' in Troiano and Motroni (n 3), ch 9, para 1; V Lemma, 'La sicurezza degli strumenti finanziari derivati dopo le nuove definizioni della MiFID II', in idem ch 13, para 3.

[129] See F Corleto, 'I contratti futures su prodotti agricoli ed il Chicago Board of Trade' in Lamandini and Motti (n 13) 581ff.; as well as Manzo (n 40) 171.

referred to in the cited paragraph 2, to which reference must also be made for the criteria concerning the evaluation of the prerequisites for intervention.

The use of product intervention tools represents the last resort; that is, the insufficiency of ordinary instruments to contain the danger must exist; therefore, it is necessary to respect the principle of proportionality and that of non-discrimination, as articulated by the European Court of Justice. So, there is an obligation to consult the competent national authorities of the other Member States on which such measure could have an impact.[130] The measure to be taken must be the subject of a notification to the competent European authorities of the sector and, if applicable, to the competent national authorities of other Member States 30 days in advance of its execution date.

To complete the system, there are the intervention powers recognized to ESMA (Article 40 MiFIR Regulation),[131] which have a subsidiary nature, as they can be exercised only if the competent national authorities have not taken any action, or this does not appear adequate,[132] after consultation with the competent national authorities responsible for the markets involved. The objectives of such temporary interventions, which can be carried out after consultation, will always be those of preventing, prohibiting, or limiting the trading of financial instruments, including commodity derivatives.

It should be considered that, similarly to how local authorities can determine themselves pursuant to the provision, ESMA also has powers regarding the management of positions also recognized on a subsidiary basis.[133] This authority may therefore request from a certain subject all relevant information regarding the volume and purposes of a position or exposure assumed through a derivative instrument and, following the analysis of this information, may request that subject to adopt measures aimed at reducing or removing the size of the position or exposure, up to reaching the most incisive measure aimed at compressing the possibility of concluding a certain derivative.

Concluding remarks: a quantitative regulatory tool for streamlining financial markets?

In light of this analysis, it can be conclusively stated that, in the face of an instrument with an extremely complex and technical discipline, not without a certain heterogeneity of content and purposes, it was intended to seek a common thread, so as to verify to what extent the position limits are effective and therefore suitable for strengthening the stability and integrity of the financial markets.

Even earlier and more radically, it seems that at this point we should ask ourselves whether the law needs to regulate positions in commodity derivatives,[134] and, if the answer is affirmative, we should ask ourselves whether *ex ante* limits are actually the best way.[135] It is clear that the law intervention naturally generates costs, and it is possible that such costs exceed the benefits, and there is no advantage for the law to intervene, according to the well-known Coase theorem.[136] With reference to the sensitive sector of commodity derivatives, it may be argued that the intervention of the legislator is unavoidable and must be based on the instruments that are the subject of this article; after

[130] It also provides for an obligation to consult with public bodies competent for supervision, management and regulation, albeit limited to physical agricultural markets only and in the event of specific conditions as per art 42, lett f), para 2, MiFIR Regulation, to which reference is made.

[131] On the subject, see E Grossule, 'Risks and Benefits of the Increasing Role of ESMA: A Perspective from the OTC Derivatives Regulation in the Brexit Period' (2019) Eu Bus Org L Rev 397–401.

[132] Or again in other cases referred to in the same MiFIR Regulation.

[133] See art 45 MiFIR Regulation.

[134] It is a question of using a broader reasoning, which can be drawn from the following question posed by A Perrone, *Il diritto del mercato dei capitali* (Giuffrè 2020), 31ff: why does law regulate capital market?

[135] That the effectiveness of this regulatory technique is not obvious can also be found in J. Petry (n 20) 17: 'In the MiFID II regulatory process, the main struggle was whether position limits should be introduced. First, if at all, and, later on, who should introduce them. Position limits restrict how much commodity derivatives are allowed to be held by non-commercial investors (those who do not use them for hedging). Introducing strict position limits directly targeted against speculation and would henceforth represent a "meaningful" regulatory change'.

[136] See RH Coase, 'The Problem of Social Cost' (1960) 3 J Law Econ 1ff, according to which, in short, in the absence of transaction costs, the parties interested in solving a problem of social life could still conclude the dispute with maximum efficiency by means of an agreement, regardless of the specific legal rule applicable to the case in question.

which the modalities of such regulation could be, at least abstractly, of two typologies and conceivably combined with each other according to various articulations.

The first consists of a quantitative approach to curb financial speculation, which can be structured jointly or, to a certain extent, separately, using, on one side, position limits which are naturally based on numerical elements, and on the other reporting obligations, which are still focused on arithmetic data, but without providing direct constraints on the positions that can be held. This path certainly has the virtue of being objective and so also ensuring a certain harmonization at a supranational level, but in its 'pure' version it has the defect of excessive rigidity, to mitigate which it needs to provide for numerous exceptions that must be clearly understandable, to avoid easy escapes. The path aimed at setting aside position limits and providing exclusively for reporting on positions (thus a simple information obligation, also with reference to the fight against speculation) would be open to criticism that it would be complex to understand when the permitted threshold has been exceeded without a precise benchmark.

The second regulatory technique that could be hypothesized is focused on qualitative and more substantial metrics that ignore the rigidity of the numerical data and place their focal point on a factual situation of abuse and speculation that leverages the circumstances of the concrete case and that favours narration rather than numerical representation, as far as reporting of data to the supervisory authority specifically concerns. In other words, the rule could prohibit the abuse of derivative instruments on commodities and therefore excessive speculation, even without identifying thresholds, but this would be lacking in generality and difficulty in enforcement. While it is true that such a path is characterized by greater flexibility, it is equally clear that the risks of easy infringements increase significantly, due to the vagueness of the concept of speculation and abuse of the instrument of commodity derivatives.

It seems possible to affirm that the quantitative approach in this area is not only preferable and functional, but also, in some ways, indefectible: it will still be necessary to identify the right balance between the rigidity of quantitative limits and the flexibility of clear and intelligible exceptions, to avoid excessively restraining and penalizing the financial markets.

Otherwise, one might be tempted to consider a more drastic solution to reach the equilibrium point, namely the one that was already known well before the 2000s: the mandatory restriction of commodity derivatives trading exclusively to sufficiently transparent and liquid regulated markets,[137] while if OTC derivatives are authorized, another choice is made and that is, it is decided to move in a different field.[138] Rather than a rhetorical simplification, this represents an approach that has been historically debated to ensure maximum transparency and control. However, such a path has been consistently rejected by European and international regulators in favour of the current quantitative-limits framework. The main reason for this reluctance lies in the need to preserve market flexibility: a rigid focus on regulated venues would have unduly constrained the ability of commercial operators to manage risks through bespoke OTC instruments, which are essential to the real economy. Ultimately, thus, the current regulatory challenge remains to refine a quantitative technique that balances oversight with the fluidity of financial markets.

[137] LA Stout, 'Derivatives and the Legal Origin of the 2008 Credit Crisis' (2011) 1 Harv Bus L Rev 2ff, particularly 36–37 (from which the quotation is taken): 'Philosopher George Santayana supposedly said that those who do not remember the past are condemned to repeat it. This Article has tried to remind us of the history of derivatives regulation and has argued that studying that history is essential to avoiding a repeat of the disastrous credit crisis of Fall 2008 […]. There is, however, another and deeper lesson to be learned from the 2008 crisis. That lesson is that law matters. All significant markets, including financial markets, must be built on some underlying legal infrastructure. (A completely "free" market without laws is a Hobbesian world where the strong and fast seize what they want from the weak and slow). Without a deep understanding of the nature and importance of the legal rules that organize financial markets it is impossible either to understand the markets, or to predict their behavior'. Such an approach could avoid the problems underlying the European Union's choice to set quantitative position limits, namely the exceptions (the result of very strong compromise choices, but which complicate the application of this institution considerably), just think for example of the exemption of securitized derivatives, a type of derivatives that nevertheless presents risks.

[138] On OTC derivatives see A Perrone, 'I contratti derivati «over the counter»'in G Gitti, M Maugeri and M Notari (eds), *I contratti per l'impresa. II. Banca, mercati, società* (il Mulino 2013) 255ff.

All this is even more important if we consider that it would be desirable to encourage the creation of new commodity derivatives and the development of existing ones, given their essentiality for the *post*-pandemic economic recovery. The role of trading venues in relation to commodity derivatives is currently quite marginal.[139]

From the perspective of reforming the current law, it should be considered that the general exception for ancillary activities has been, perhaps unknowingly, implemented by some legislators, like the Italian one, in a much more severe way than the European legislation would have led one to believe, as we have tried to demonstrate in the previous pages,[140] so it would seem appropriate to extend it also to derivatives on commodities, thus widening the scope of the derogations in a more uniform manner avoiding competitive law phenomena between states.

More generally, it is argued that effective use of the rules applicable to commodity derivatives markets implies a certain proportionality to the risk to be mitigated, which means that a decrease in the objective scope of position limits reduces unnecessary costs, in compliance with international best practices. After all, even the supranational regulator itself, despite having identified the usefulness of position limits and their introduction, seems to have figured that their excessive use could have very problematic effects,[141] so much so that in 2021 the scope of application of these limits was reduced, correlatively extending the possibility of benefiting from exemptions for risk reduction and liquidity provision, just as providing for numerous simplifications on the ancillary test.[142]

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[139] By way of example, in the Italian context, the only most active market, in terms of trading, is the SeDeX multilateral system managed by Borsa Italiana and relating to securitized derivatives, which are now exempt from the regime of position limits and reporting obligations (see above para 4). For the rest, the data are particularly clear in showing how transactions on these markets have significantly reduced in the 3-year period 2013–2015, to the point of reaching values that are currently almost irrelevant: Reference is made to the IDEX segments (for derivatives on electricity) and AGREX (for derivatives on agricultural goods) of the regulated market IDEM of Borsa Italiana, as shown by Consob, 'Relazione illustrativa degli esiti della consultazione, delle conseguenze sulla regolamentazione, sull'attività delle imprese e degli operatori e sugli interessi degli investitori e dei risparmiatori' (n 5) 7, n 14.

[140] See previous para 7.

[141] Reference is made to the negative effects in terms of liquidity in the new *commodity markets*, in addition to the limited direct impacts on the prevention of market abuse, elements that have led the Commission to review art 57 MiFID II.

[142] Refer to n 140.

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