

DIRECTIVES

DIRECTIVE (EU) 2021/338 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 16 February 2021

amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Acting in accordance with the ordinary legislative procedure ⁽²⁾,

Whereas:

- (1) The COVID-19 pandemic is severely affecting people, companies, health systems and the economies and financial systems of Member States. In its Communication of 27 May 2020 entitled 'Europe's moment: Repair and Prepare for the Next Generation' the Commission stressed that liquidity and access to finance will be a continued challenge. It is therefore crucial to support the recovery from the severe economic shock caused by the COVID-19 pandemic through the introduction of limited targeted amendments to existing Union financial services law. The overall aim of those amendments should therefore be to remove unnecessary red tape and introduce carefully calibrated measures that are deemed effective in order to mitigate the economic turmoil. Those amendments should avoid making changes that increase administrative burdens on the sector and should leave complex legislative questions to be settled during the planned review of Directive 2014/65/EU of the European Parliament and of the Council ⁽³⁾. Those amendments form a package of measures and are adopted under the label 'Capital Markets Recovery Package'.
- (2) Directive 2014/65/EU was adopted in 2014 in response to the financial crisis that unfolded in 2007 and 2008. That Directive has substantially strengthened the financial system of the Union and guaranteed a high level of investor protection across the Union. Further efforts to reduce regulatory complexity and investment firms' compliance costs and to eliminate distortions of competition could be considered, provided that investor protection is sufficiently taken into consideration at the same time.
- (3) As regards the requirements that were intended to protect investors, Directive 2014/65/EU has not fully achieved its objective to adopt measures that take the particularities of each category of investors, i.e. retail clients, professional clients and eligible counterparties, sufficiently into account. Some of those requirements have not always enhanced investor protection but at times have rather hindered the smooth execution of investment decisions. Therefore, certain requirements set out in Directive 2014/65/EU should be amended to facilitate the provision of investment services and the performance of investment activities, and those amendments should be made in a balanced way which fully protects investors.

⁽¹⁾ OJ C 10, 11.1.2021, p. 30.

⁽²⁾ Position of the European Parliament of 11 February 2021 (not yet published in the Official Journal) and decision of the Council of 15 February 2021.

⁽³⁾ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

- (4) The issuance of bonds is crucial in order to raise capital and to overcome the COVID-19 crisis. Product governance requirements can restrict the sale of bonds. Bonds with no other embedded derivative than a make-whole clause are generally considered safe and simple products that are eligible for retail clients. In the event of its early redemption, a bond with no other embedded derivative than a make-whole clause protects investors against losses by ensuring that those investors are provided with a payment equal to the sum of the net present value of the remaining coupon payments and the principal amount of the bond that they would have received if the bond had not been called. Product governance requirements should therefore no longer apply to bonds with no other embedded derivative than a make-whole clause. In addition, eligible counterparties are considered to have sufficient knowledge of financial instruments. It is therefore justified to exempt eligible counterparties from the product governance requirements applicable to financial instruments exclusively marketed or distributed to them.
- (5) The call for evidence, launched by the European Supervisory Authority (the European Securities and Markets Authority) (ESMA) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council⁽⁴⁾, on the impact of inducements and costs and charges disclosure requirements under Directive 2014/65/EU and the public consultation conducted by the Commission both confirmed that professional clients and eligible counterparties do not need standardised and mandatory costs information as they already receive the necessary information when they negotiate with their service provider. The information provided to professional clients and eligible counterparties is tailored to their needs and often more detailed. Services provided to professional clients and eligible counterparties should therefore be exempted from the costs and charges disclosure requirements, except with regard to the services of investment advice and portfolio management because professional clients entering into investment advice or portfolio management relationships do not necessarily have sufficient expertise or knowledge to allow such services to be exempted from those requirements.
- (6) Investment firms are currently required to undertake a cost-benefit analysis of certain portfolio activities in cases of ongoing relationships with their clients in which financial instruments are switched. Investment firms are thereby required to obtain the necessary information from their clients and to be able to demonstrate that the benefits of such switching outweigh the costs. As that procedure is overly burdensome with regard to professional clients, who tend to switch on a frequent basis, services provided to them should be exempted from that requirement. Professional clients would, however, retain the possibility to opt in. As retail clients need a high level of protection, that exemption should be limited to services provided to professional clients.
- (7) Clients with an ongoing relationship with an investment firm receive mandatory service reports, either periodically or based on triggers. Neither investment firms nor their professional clients or eligible counterparties find such service reports useful. Those reports have proven to be particularly unhelpful for professional clients and eligible counterparties in extremely volatile markets, as the reports are provided in a high frequency and number. Professional clients and eligible counterparties often react to those service reports either by not reading them, or by making quick investment decisions rather than continuing with a long-term investment strategy. Eligible counterparties should therefore no longer receive mandatory service reports. Professional clients should also no longer receive such service reports, but they should have the possibility to opt in to receiving them.
- (8) In the immediate aftermath of the COVID-19 pandemic, issuers, and in particular small and middle-capitalisation companies, need to be supported by strong capital markets. Research on small and middle-capitalisation issuers is essential to help issuers to connect with investors. That research increases the visibility of issuers and thus ensures a sufficient level of investment and liquidity. Investment firms should be allowed to pay jointly for the provision of research and for the provision of execution services provided certain conditions are met. One of the conditions should be that the research is provided on issuers whose market capitalisation did not exceed EUR 1 billion, as expressed by the end-year quotes, for the 36 months preceding the provision of the research. That requirement relating to market capitalisation should be construed as covering both listed companies and non-listed companies, on the understanding that, for the latter, the balance sheet item on own capital did not exceed the EUR 1 billion

⁽⁴⁾ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC (OJ L 331, 15.12.2010, p. 84).

threshold. It should also be noted that newly listed companies and non-listed companies established for less than 36 months are included within the scope as long as they can demonstrate that their market capitalisation did not exceed the EUR 1 billion threshold, as expressed by end-year quotes since their listing, or expressed by the own-capital for the financial years when they are or were not listed. To ensure that newly established companies that exist for less than 12 months can equally benefit from the exemption, it is sufficient that they did not exceed the EUR 1 billion threshold since the date of their establishment.

- (9) Directive 2014/65/EU introduced reporting requirements for trading venues, systematic internalisers and other execution venues on how orders were executed on terms most favourable to the client. The resulting technical reports contain large amounts of detailed quantitative information about the execution venue, the financial instrument, the price, the costs and the likelihood of execution. They are rarely read, as is evidenced by the very low numbers of views on the websites of trading venues, systematic internalisers and other execution venues. As they do not enable investors and other users to make any meaningful comparisons on the basis of the information they contain, the publication of those reports should be temporarily suspended.
- (10) In order to facilitate communication between investment firms and their clients and thus facilitate the investment process itself, investment information should no longer be provided on paper but should, as a default option, be provided electronically. Retail clients should however be able to request the provision of that information on paper.
- (11) Directive 2014/65/EU allows persons that trade in commodity derivatives or emission allowances or derivatives thereof on a professional basis to make use of an exemption from the requirement to obtain authorisation as an investment firm when their trading activity is ancillary to their main business. Currently, persons applying for the ancillary activity exemption are required to notify annually the relevant competent authority that they make use of that exemption and to provide the necessary elements to satisfy the two quantitative tests that determine whether their trading activity is ancillary to their main business. The first test compares the size of an entity's speculative trading activity to the total trading activity in the Union on an asset class basis. The second test compares the size of the speculative trading activity, with all asset classes included, to the total trading activity in financial instruments by the entity at group level. There is an alternative form of the second test, which consists of comparing the estimated capital used for the speculative trading activity to the actual amount of capital used at group level for the main business. For the purposes of establishing when an activity is considered to be an ancillary activity, competent authorities should be able to rely on a combination of quantitative and qualitative elements, subject to clearly defined conditions. The Commission should be empowered to provide guidance on the circumstances under which national authorities can apply an approach combining quantitative and qualitative threshold criteria, as well as to develop a delegated act on the criteria. Persons that are eligible for the ancillary activity exemption, including market makers, are those dealing on own account or those providing investment services other than dealing on own account in commodity derivatives or emission allowances or derivatives thereof to customers or suppliers of their main business. The exemption should be available for each of those cases individually and on an aggregate basis where the activity is ancillary to their main business, when considered on a group basis. The ancillary activity exemption should not be available for persons who apply a high-frequency algorithmic trading technique or are part of a group the main business of which is the provision of investment services or banking activities, or acting as a market maker in relation to commodity derivatives.
- (12) Competent authorities currently have to set and apply limits on the size of a net position which a person can hold at all times in commodity derivatives traded on trading venues and in economically equivalent over-the-counter (EOTC) contracts. As the position limit regime has proved to be unfavourable for the development of new commodity markets, nascent commodity markets should be excluded from the position limit regime. Instead, position limits should only apply to critical or significant commodity derivatives that are traded on trading venues, and to their EOTC contracts. Critical or significant derivatives are commodity derivatives with an open interest of at least 300 000 lots on average over a one-year period. Due to the critical importance of agricultural commodities for citizens, agricultural commodity derivatives and their EOTC contracts will remain under the current position limit regime.

- (13) Directive 2014/65/EU does not allow hedging exemptions for any financial entities. Several predominantly commercial groups that set up a financial entity for their trading purposes have found themselves in a situation where their financial entity could not carry out all the trading for the group, as the financial entity was not eligible for the hedging exemption. Therefore, a narrowly defined hedging exemption for financial entities should be introduced. That hedging exemption should be available where, within a predominantly commercial group, a person has been registered as an investment firm and trades on behalf of that commercial group. To limit the hedging exemption to those financial entities that trade on behalf of the non-financial entities in a predominantly commercial group, that exemption should only apply to the positions held by such financial entity that are objectively measurable as reducing risks directly relating to the commercial activities of the non-financial entities of the group.
- (14) Even in liquid contracts, only a limited number of market participants typically act as market makers in commodity markets. When those market participants have to apply position limits, they are not able to be as effective as market makers. Therefore, an exemption from the position limit regime should be introduced for financial and non-financial counterparties for positions resulting from transactions undertaken to fulfil obligations to provide liquidity.
- (15) The amendments as regards the position limit regime are designed to support the development of new energy contracts, and do not seek to relax the regime for agricultural commodity derivatives.
- (16) The current position limit regime also does not recognise the unique characteristics of securitised derivatives. Securitised derivatives are transferable securities within the meaning of point (c) of point (44) of Article 4(1) of Directive 2014/65/EU. The securitised derivatives market is characterised by a large number of different issuances, each one registered with the central securities depository for a specific size, and any possible increase follows a specific procedure duly approved by the relevant competent authority. That is in contrast to commodity derivative contracts, for which the amount of open interest, and thereby the size of a position, is potentially unlimited. At the time of issue, the issuer or the intermediary in charge of the distribution of the issuance holds 100 % of the issue, which challenges the very application of a position limit regime. In addition, most securitised derivatives are then ultimately held by a large number of retail investors, which does not raise the same risk of abuse of a dominant position or to orderly pricing and settlement conditions as for commodity derivative contracts. Moreover, the notion of spot month and other months, for which position limits are to be set under Article 57(3) of Directive 2014/65/EU, is not applicable to securitised derivatives. Securitised derivatives should therefore be excluded from the application of position limits and reporting requirements.
- (17) Since the entry into force of Directive 2014/65/EU, no same commodity derivative contracts have been identified. Due to the concept of same commodity derivative in that Directive, the calculation methodology for determining the other months' position limit is detrimental to the trading venue with the less liquid market when trading venues are competing on commodity derivatives based on the same underlying and sharing the same characteristics. Therefore, the reference to 'same contract' in Directive 2014/65/EU should be deleted. Competent authorities should be able to agree that the commodity derivatives traded on their respective trading venues are based on the same underlying and share the same characteristics, in which case the central competent authority within the meaning of the first subparagraph of Article 57(6) of Directive 2014/65/EU should set the position limit.
- (18) Significant differences exist in the way positions are managed by trading venues in the Union. Therefore, position management controls should be reinforced where necessary.
- (19) In order to ensure the further development of euro-denominated commodity markets in the Union, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of all of the following: the procedure by which persons are able to apply for an exemption for positions resulting from transactions undertaken to fulfil obligations to provide liquidity; the procedure by which a financial entity that is part of a predominantly commercial group is able to apply for a hedging exemption for positions held by that financial entity that are objectively measurable as reducing risks directly relating to the commercial activities of the non-financial entities of that predominantly commercial group;

the clarification of the content of position management controls; and the development of criteria for establishing when an activity is to be considered to be ancillary to the main business at group level. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making⁽⁵⁾. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

- (20) The EU Emissions Trading System (ETS) is the Union's flagship policy for achieving the decarbonisation of the economy in line with the European Green Deal. Trading in emission allowances and derivatives thereof is subject to Directive 2014/65/EU and to Regulation (EU) No 600/2014 of the European Parliament and of the Council⁽⁶⁾ and represents an important element of the Union's carbon market. The ancillary activity exemption under Directive 2014/65/EU enables certain market participants to be active in emission allowance markets without having to be authorised as investment firms, provided certain conditions are met. In view of the importance of orderly, well-regulated and supervised financial markets, the significant role of the ETS in achieving the Union's sustainability objectives, and the role that a well-functioning secondary market in emission allowances has in supporting the functioning of the ETS, it is essential that the ancillary activity exemption is appropriately designed to contribute to those objectives. That is particularly relevant where trading in emission allowances takes place on third-country trading venues. In order to ensure the protection of the Union's financial stability, market integrity, investor protection and the level playing field, and to ensure that the ETS continues to function in a transparent and robust manner to ensure cost-effective emission reductions, the Commission should monitor the further development of trading in emission allowances and derivatives thereof in the Union and in third countries, assess the impact of the ancillary activity exemption on the ETS and, where necessary, propose any appropriate amendment as regards the scope and application of the ancillary activity exemption.
- (21) In order to provide additional legal clarity, avoid an unnecessary administrative burden for Member States and ensure a uniform legal framework for investment firms, which will fall within the scope of Directive (EU) 2019/2034 of the European Parliament and of the Council⁽⁷⁾ as of 26 June 2021, it is appropriate to postpone the date of transposition of Directive (EU) 2019/878 of the European Parliament and of the Council⁽⁸⁾ as regards the measures applicable to investment firms. In order to ensure a consistent application of the legal framework applicable to investment firms set out in Article 67 of Directive (EU) 2019/2034, the transposition deadline for Directive (EU) 2019/878 with respect to investment firms should therefore be extended to 26 June 2021.
- (22) In order to ensure that the objectives pursued by the amendments to Directives 2013/36/EU⁽⁹⁾ and (EU) 2019/878 are achieved, and in particular to avoid any disruptive effects for Member States, it is appropriate to provide that those amendments become applicable as of 28 December 2020. While providing for a retroactive application of the amendments, legitimate expectations of the persons concerned are nevertheless respected as the amendments do not encroach on the rights and obligations of economic operators or individuals.

⁽⁵⁾ OJ L 123, 12.5.2016, p. 1.

⁽⁶⁾ Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84).

⁽⁷⁾ Directive (EU) 2019/2034 of the European Parliament and of the Council of 27 November 2019 on the prudential supervision of investment firms and amending Directives 2002/87/EC, 2009/65/EC, 2011/61/EU, 2013/36/EU, 2014/59/EU and 2014/65/EU (OJ L 314, 5.12.2019, p. 64).

⁽⁸⁾ Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures (OJ L 150, 7.6.2019, p. 253).

⁽⁹⁾ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338)

- (23) Directives 2013/36/EU, 2014/65/EU and (EU) 2019/878 should therefore be amended accordingly.
- (24) This amending Directive aims to supplement existing Union law and its objective can therefore best be achieved at Union level rather than by different national initiatives. Financial markets are inherently cross-border and are becoming more so. Because of that integration, isolated national intervention would be far less efficient and would lead to the fragmentation of markets, resulting in regulatory arbitrage and distortion of competition.
- (25) Since the objective of this Directive, namely to refine existing Union law ensuring uniform and appropriate requirements that apply to investment firms throughout the Union, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (26) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents ⁽¹⁰⁾, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (27) In view of the need to introduce targeted measures to support economic recovery from the COVID-19 crisis as quickly as possible, this Directive should enter into force as a matter of urgency on the day following that of its publication in the *Official Journal of the European Union*,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2014/65/EU

Directive 2014/65/EU is amended as follows:

(1) Article 2 is amended as follows:

(a) in paragraph 1, point (j) is replaced by the following:

‘(j) persons:

- (i) dealing on own account, including market makers, in commodity derivatives or emission allowances or derivatives thereof, excluding persons who deal on own account when executing client orders; or
- (ii) providing investment services, other than dealing on own account, in commodity derivatives or emission allowances or derivatives thereof to the customers or suppliers of their main business;

provided that:

- for each of those cases individually and on an aggregate basis, the activity is ancillary to their main business, when considered on a group basis,
- those persons are not part of a group the main business of which is the provision of investment services within the meaning of this Directive, the performance of any activity listed in Annex I to Directive 2013/36/EU, or acting as a market maker for commodity derivatives,
- those persons do not apply a high-frequency algorithmic trading technique, and
- those persons report upon request to the competent authority the basis on which they have assessed that their activity under points (i) and (ii) is ancillary to their main business.;

⁽¹⁰⁾ OJ C 369, 17.12.2011, p. 14.

(b) paragraph 4 is replaced by the following:

‘4. By 31 July 2021, the Commission shall adopt a delegated act in accordance with Article 89 in order to supplement this Directive by specifying, for the purpose of point (j) of paragraph 1 of this Article, the criteria for establishing when an activity is to be considered to be ancillary to the main business at group level.

Those criteria shall take into account the following elements:

- (a) whether the net outstanding notional exposure in commodity derivatives or emission allowances or derivatives thereof for cash settlement traded in the Union, excluding commodity derivatives or emission allowances or derivatives thereof traded on a trading venue, is below an annual threshold of EUR 3 billion; or
- (b) whether the capital employed by the group to which the person belongs is predominantly allocated to the main business of the group; or
- (c) whether or not the size of the activities referred to in point (j) of paragraph 1 exceeds the total size of the other trading activities at group level.

The activities referred to in this paragraph shall be considered at group level.

The elements referred to in the second subparagraph of this paragraph shall exclude:

- (a) intragroup transactions as referred to in Article 3 of Regulation (EU) No 648/2012 that serve group-wide liquidity or risk management purposes;
- (b) transactions in commodity derivatives or emission allowances or derivatives thereof that are objectively measurable as reducing risks directly relating to the commercial activity or treasury financing activity;
- (c) transactions in commodity derivatives or emission allowances or derivatives thereof entered into to fulfil obligations to provide liquidity on a trading venue, where such obligations are required by regulatory authorities in accordance with Union law or with national laws, regulations and administrative provisions, or by trading venues.’;

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

(a) the following point is inserted:

‘(8a) “switching of financial instruments” means selling a financial instrument and buying another financial instrument or exercising a right to make a change with regard to an existing financial instrument;’;

(b) the following point is inserted:

‘(44a) “make-whole clause” means a clause that aims to protect the investor by ensuring that, in the event of early redemption of a bond, the issuer is required to pay to the investor holding the bond an amount equal to the sum of the net present value of the remaining coupon payments expected until maturity and the principal amount of the bond to be redeemed;’;

(c) point (59) is replaced by the following:

‘(59) “agricultural commodity derivatives” means derivative contracts relating to products listed in Article 1 of, and Annex I, Parts I to XX and XXIV/1, to, Regulation (EU) No 1308/2013 of the European Parliament and of the Council (*), as well as to products listed in Annex I to Regulation (EU) No 1379/2013 of the European Parliament and of the Council (**);

(*) Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ L 347, 20.12.2013, p. 671).

(**) Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000 (OJ L 354, 28.12.2013, p. 1).’;

(d) the following point is inserted:

‘(62a) “electronic format” means any durable medium other than paper;’;

(e) the following point is added:

‘(65) “predominantly commercial group” means any group of which the main business is not the provision of investment services within the meaning of this Directive, or the performance of any activity listed in Annex I to Directive 2013/36/EU, or acting as a market maker in relation to commodity derivatives.’;

(3) the following article is inserted:

Article 16a

Exemptions from product governance requirements

An investment firm shall be exempted from the requirements set out in the second to fifth subparagraphs of Article 16(3) and in Article 24(2), where the investment service it provides relates to bonds with no other embedded derivative than a make-whole clause or where the financial instruments are marketed or distributed exclusively to eligible counterparties.’;

(4) Article 24 is amended as follows:

(a) in paragraph 4, the following subparagraphs are added:

‘Where the agreement to buy or sell a financial instrument is concluded using a means of distance communication which prevents the prior delivery of the information on costs and charges, the investment firm may provide the information on costs and charges either in electronic format or on paper, where requested by a retail client, without undue delay after the conclusion of the transaction, provided that both of the following conditions are met:

- (i) the client has consented to receiving the information without undue delay after the conclusion of the transaction;
- (ii) the investment firm has given the client the option of delaying the conclusion of the transaction until the client has received the information.

In addition to the requirements of the third subparagraph, the investment firm shall be required to give the client the option of receiving the information on costs and charges over the phone prior to the conclusion of the transaction.’;

(b) the following paragraph is inserted:

‘5a. Investment firms shall provide all information required to be provided by this Directive to clients or potential clients in electronic format, except where the client or potential client is a retail client or potential retail client who has requested receiving the information on paper, in which case that information shall be provided on paper, free of charge.

Investment firms shall inform retail clients or potential retail clients that they have the option of receiving the information on paper.

Investment firms shall inform existing retail clients that receive the information required to be provided by this Directive on paper of the fact that they will receive that information in electronic format at least eight weeks before sending that information in electronic format. Investment firms shall inform those existing retail clients that they have the choice either to continue receiving information on paper or to switch to information in electronic format. Investment firms shall also inform existing retail clients that an automatic switch to the electronic format will occur if they do not request the continuation of the provision of the information on paper within that eight week period. Existing retail clients who already receive the information required to be provided by this Directive in electronic format do not need to be informed.’;

(c) the following paragraph is inserted:

'9a. Member States shall ensure that the provision of research by third parties to investment firms providing portfolio management or other investment or ancillary services to clients is to be regarded as fulfilling the obligations under paragraph 1 if:

- (a) before the execution or research services have been provided, an agreement has been entered into between the investment firm and the research provider, identifying the part of any combined charges or joint payments for execution services and research that is attributable to research;
- (b) the investment firm informs its clients about the joint payments for execution services and research made to the third party providers of research; and
- (c) the research for which the combined charges or the joint payment is made concerns issuers whose market capitalisation for the period of 36 months preceding the provision of the research did not exceed EUR 1 billion, as expressed by end-year quotes for the years when they are or were listed or by the own-capital for the financial years when they are or were not listed.

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

Research shall also comprise material or services that explicitly or implicitly recommend or suggest an investment strategy and provide a substantiated opinion as to the present or future value or price of financial instruments or assets, or otherwise contain analysis and original insights and reach conclusions based on new or existing information that could be used to inform an investment strategy and be relevant and capable of adding value to the investment firm's decisions on behalf of clients being charged for that research.;

(5) in Article 25(2), the following subparagraph is added:

'When providing either investment advice or portfolio management that involves the switching of financial instruments, investment firms shall obtain the necessary information on the client's investment and shall analyse the costs and benefits of the switching of financial instruments. When providing investment advice, investment firms shall inform the client whether or not the benefits of the switching of financial instruments are greater than the costs involved in such switching.;

(6) in Article 27(3), the following subparagraph is added:

'The periodic reporting requirement to the public laid down in this paragraph shall not apply until 28 February 2023. The Commission shall comprehensively review the adequacy of the reporting requirements laid down in this paragraph and submit a report to the European Parliament and the Council by 28 February 2022.;

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

'The Commission shall comprehensively review the adequacy of the periodic reporting requirements laid down in this paragraph and submit a report to the European Parliament and the Council by 28 February 2022.;

(8) the following article is inserted:

'Article 29a

Services provided to professional clients

1. The requirements laid down in point (c) of Article 24(4) shall not apply to services provided to professional clients except for investment advice and portfolio management.
2. The requirements laid down in the third subparagraph of Article 25(2) and in Article 25(6) shall not apply to services provided to professional clients, unless those clients inform the investment firm either in electronic format or on paper that they wish to benefit from the rights provided for in those provisions.
3. Member States shall ensure that investment firms keep a record of the client communications referred to in paragraph 2.;

(9) in Article 30(1), the first subparagraph is replaced by the following:

'1. Member States shall ensure that investment firms authorised to execute orders on behalf of clients, and/or to deal on own account, and/or to receive and transmit orders have the possibility of bringing about or entering into transactions with eligible counterparties without being obliged to comply with Article 24, with the exception of paragraph 5a thereof, Article 25, Article 27 and Article 28(1), in respect of those transactions or in respect of any ancillary service directly relating to those transactions.;

(10) Article 57 is amended as follows:

(a) paragraph 1 is replaced by the following:

'1. Member States shall ensure that competent authorities, in line with the calculation methodology determined by ESMA in the regulatory technical standards adopted in accordance with paragraph 3, set and apply limits on the size of a net position which a person can hold at all times in agricultural commodity derivatives and critical or significant commodity derivatives that are traded on trading venues, and in economically equivalent OTC contracts. Commodity derivatives shall be considered to be critical or significant where the sum of all net positions of end position holders constitutes the size of their open interest and is at a minimum of 300 000 lots on average over a one-year period. The limits shall be set based on all positions held by a person and those held on his or her behalf at an aggregate group level in order to:

- (a) prevent market abuse;
- (b) support orderly pricing and settlement conditions, including preventing market distorting positions, and ensuring, in particular, convergence between prices of derivatives in the delivery month and spot prices for the underlying commodity, without prejudice to price discovery on the market for the underlying commodity.

The position limits referred to in paragraph 1 shall not apply to:

- (a) positions held by, or on behalf of, a non-financial entity, and which are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity;
- (b) positions held by, or on behalf of, a financial entity that is part of a predominantly commercial group and is acting on behalf of a non-financial entity of the predominantly commercial group, where those positions are objectively measurable as reducing risks directly relating to the commercial activity of that non-financial entity;
- (c) positions held by financial and non-financial counterparties for positions that are objectively measurable as resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue as referred to in point (c) of the fourth subparagraph of Article 2(4);
- (d) any other securities as referred to in point (c) of point (44) of Article 4(1) which relate to a commodity or an underlying as referred to in Section C.10 of Annex I.

ESMA shall develop draft regulatory technical standards to determine a procedure by which a financial entity that is part of a predominantly commercial group may apply for a hedging exemption for positions held by that financial entity that are objectively measurable as reducing risks directly relating to the commercial activities of the non-financial entities of the group.

ESMA shall develop draft regulatory technical standards to determine a procedure setting out how persons may apply for an exemption for positions resulting from transactions entered into to fulfil obligations to provide liquidity on a trading venue.

ESMA shall submit the draft regulatory technical standards referred to in the third and fourth subparagraphs to the Commission by 28 November 2021.

Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in the third and fourth subparagraphs of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.;

(b) paragraphs 3 and 4 are replaced by the following:

‘3. ESMA shall draw up a list of critical or significant commodity derivatives referred to in paragraph 1 and develop draft regulatory technical standards to determine the calculation methodology that competent authorities are to apply when establishing the spot month position limits and other months’ position limits for physically settled and cash settled commodity derivatives based on the characteristics of the relevant derivative concerned.

When drawing up the list of critical or significant commodity derivatives referred to in paragraph 1, ESMA shall take into account the following factors:

- (a) the number of market participants;
- (b) the commodity underlying the derivative concerned.

When determining the calculation methodology referred to in the first subparagraph, ESMA shall take into account the following factors:

- (a) the deliverable supply in the underlying commodity;
- (b) the overall open interest in that derivative and the overall open interest in other financial instruments with the same underlying commodity;
- (c) the number and size of the market participants;
- (d) the characteristics of the underlying commodity market, including patterns of production, consumption and transportation to market;
- (e) the development of new commodity derivatives;
- (f) the experience of investment firms or market operators operating a trading venue and of other jurisdictions regarding the position limits.

ESMA shall submit the draft regulatory technical standards referred to in the first subparagraph to the Commission by 28 November 2021.

Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in the first subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

4. A competent authority shall set position limits for critical or significant commodity derivatives and agricultural commodity derivatives that are traded on trading venues, based on the calculation methodology laid down in the regulatory technical standards adopted by the Commission pursuant to paragraph 3. Such position limits shall include economically equivalent OTC contracts.

A competent authority shall review the position limits referred to in the first subparagraph where there is a significant change on the market, including a significant change in deliverable supply or open interest, based on its determination of deliverable supply and open interest, and reset those position limits in accordance with the calculation methodology laid down in the regulatory technical standards adopted by the Commission pursuant to paragraph 3.’;

(c) paragraphs 6, 7 and 8 are replaced by the following:

‘6. Where agricultural commodity derivatives based on the same underlying and sharing the same characteristics are traded in significant volumes on trading venues in more than one jurisdiction, or where critical or significant commodity derivatives based on the same underlying and sharing the same characteristics are traded on trading venues in more than one jurisdiction, the competent authority of the trading venue where the largest volume of trading takes place (“central competent authority”) shall set the single position limit to be applied on all trading in those derivatives. The central competent authority shall consult the competent authorities of other trading venues on which those agricultural commodity derivatives are traded in significant volumes or on which those critical or significant commodity derivatives are traded, on the single position limit to be applied and any revisions to that single position limit.

Competent authorities that do not agree with the setting of the single position limit by the central competent authority shall state in writing the full and detailed reasons why they consider that the requirements laid down in paragraph 1 have not been met. ESMA shall settle any dispute arising from a disagreement between competent authorities in accordance with its powers under Article 19 of Regulation (EU) No 1095/2010.

The competent authorities of the trading venues where agricultural commodity derivatives that are based on the same underlying and that share the same characteristics are traded in significant volumes or critical or significant commodity derivatives that are based on the same underlying and that share the same characteristics are traded, and the competent authorities of position holders in those derivatives, shall put in place cooperation arrangements, which shall include the exchange of relevant data, in order to enable the monitoring and enforcement of the single position limit.

7. ESMA shall monitor at least once a year the way competent authorities have implemented the position limits set in accordance with the calculation methodology established by ESMA under paragraph 3. In doing so, ESMA shall ensure that a single position limit effectively applies to the agricultural commodity derivatives and critical or significant contracts based on the same underlying and sharing the same characteristics irrespective of where they are traded in line with paragraph 6.

8. Member States shall ensure that an investment firm or a market operator operating a trading venue which trades commodity derivatives applies position management controls, including powers for the trading venue to:

- (a) monitor the open interest positions of persons;
- (b) obtain information, including all relevant documentation, from persons about the size and purpose of a position or exposure entered into, information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market, including, where appropriate, positions held in commodity derivatives that are based on the same underlying and that share the same characteristics on other trading venues and in economically equivalent OTC contracts through members and participants;
- (c) request a person to terminate or reduce a position, on a temporary or permanent basis, and to unilaterally take action to ensure the termination or reduction of the position where the person does not comply with such request; and
- (d) require a person to provide, on a temporary basis, liquidity back into the market at an agreed price and volume with the express intent of mitigating the effects of a large or dominant position.

ESMA shall develop draft regulatory technical standards to specify the content of position management controls, thereby taking into account the characteristics of the trading venues concerned.

ESMA shall submit those draft regulatory technical standards to the Commission by 28 November 2021.

Power is delegated to the Commission to supplement this Directive by adopting the regulatory technical standards referred to in the second subparagraph of this paragraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.;

(d) in paragraph 12, point (d) is replaced by the following:

‘(d) the definition of what constitutes significant volumes under paragraph 6 of this Article;’

(11) Article 58 is amended as follows:

(a) in paragraph 1, the following subparagraph is added:

‘Position reporting shall not be applicable to any other securities as referred to in point (c) of point (44) of Article 4(1) that relate to a commodity or an underlying as referred to in Section C.10 of Annex I;’

(b) paragraph 2 is replaced by the following:

‘2. Member States shall ensure that investment firms trading in commodity derivatives or emission allowances or derivatives thereof outside a trading venue provide, on at least a daily basis, the central competent authority referred to in Article 57(6) or – where there is no central competent authority – the competent authority of the trading venue where the commodity derivatives or emission allowances or derivatives thereof are traded, with a complete breakdown of their positions taken in economically equivalent OTC contracts and, when relevant, in commodity derivatives or emission allowances or derivatives thereof traded on a trading venue, as well as of those of their clients and the clients of those clients until the end client is reached, in accordance with Article 26 of Regulation (EU) No 600/2014 and, where applicable, of Article 8 of Regulation (EU) No 1227/2011.;

(12) in Article 73, paragraph 2 is replaced by the following:

‘2. Member States shall require investment firms, market operators, APAs and ARMs authorised in accordance with Regulation (EU) No 600/2014 that have a derogation in accordance with Article 2(3) of that Regulation, credit institutions in relation to investment services or activities and ancillary services and branches of third-country firms to have in place appropriate procedures for their employees to report potential or actual infringements internally through a specific, independent and autonomous channel.’;

(13) in Article 89, paragraphs 2 to 5 are replaced by the following:

‘2. The delegation of power referred to in Article 2(3), Article 2(4), second subparagraph of Article 4(1)(2), Article 4(2), Article 13(1), Article 16(12), Article 23(4), Article 24(13), Article 25(8), Article 27(9), Article 28(3), Article 30(5), Article 31(4), Article 32(4), Article 33(8), Article 52(4), Article 54(4), Article 58(6), Article 64(7), Article 65(7) and Article 79(8) shall be conferred on the Commission for an indeterminate period of time from 2 July 2014.

3. The delegation of power referred to in Article 2(3), Article 2(4), second subparagraph of Article 4(1)(2), Article 4(2), Article 13(1), Article 16(12), Article 23(4), Article 24(13), Article 25(8), Article 27(9), Article 28(3), Article 30(5), Article 31(4), Article 32(4), Article 33(8), Article 52(4), Article 54(4), Article 58(6), Article 64(7), Article 65(7) and Article 79(8) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 2(3), Article 2(4), second subparagraph of Article 4(1)(2), Article 4(2), Article 13(1), Article 16(12), Article 23(4), Article 24(13), Article 25(8), Article 27(9), Article 28(3), Article 30(5), Article 31(4), Article 32(4), Article 33(8), Article 52(4), Article 54(4), Article 58(6), Article 64(7), Article 65(7) or Article 79(8) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of three months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by three months at the initiative of the European Parliament or of the Council.’;

(14) in Article 90, the following paragraph is inserted:

‘1a. By 31 December 2021, the Commission shall review the impact of the exemption laid down in point (j) of Article 2(1) with regard to emission allowances or derivatives thereof, and shall accompany that review, where appropriate, with a legislative proposal to amend that exemption. In that context, the Commission shall assess the trading in emission allowances and derivatives thereof in the Union and in third countries, the impact of the exemption laid down in point (j) of Article 2(1) on investor protection, the integrity and transparency of the markets in emission allowances and derivatives thereof and whether measures should be adopted in relation to trading that takes place on third country trading venues.’.

Article 2

Amendments to Directive (EU) 2019/878

In Article 2, paragraph 1 is replaced by the following:

‘1. Member States shall adopt and publish, by 28 December 2020, the measures necessary to comply with:

- (a) provisions of this Directive insofar as they concern credit institutions;
- (b) Article 1(1) and (9) of this Directive as regards Article 2(5) and (6) and Article 21b of Directive 2013/36/EU, insofar as they concern credit institutions and investment firms.

They shall immediately inform the Commission thereof.

They shall apply those measures from 29 December 2020. However, the provisions necessary to comply with the amendments set out in point (21) and points (29)(a), (b) and (c) of Article 1 of this Directive as regards Article 84 and Article 98(5) and (5a) of Directive 2013/36/EU shall apply from 28 June 2021 and the provisions necessary to comply with the amendments set out in points (52) and (53) of Article 1 of this Directive as regards Articles 141b, 141c and Article 142(1) of Directive 2013/36/EU shall apply from 1 January 2022.

Member States shall adopt, publish and apply by 26 June 2021 the measures necessary to comply with the provisions of this Directive insofar as they concern investment firms, except for those measures referred to in point (b) of the first subparagraph.

When Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.’.

Article 3

Amendments to Directive 2013/36/EU

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

‘For the purpose of identifying staff whose professional activities have a material impact on the institution’s risk profile as referred to in Article 92(3), except as regards staff in investment firms, EBA shall develop draft regulatory technical standards setting out the criteria to define the following:

- (a) managerial responsibility and control functions;
- (b) material business unit and significant impact on the relevant business unit’s risk profile; and
- (c) other categories of staff not expressly referred to in Article 92(3) whose professional activities have an impact on the institution’s risk profile comparably as material as that of those categories of staff referred to therein.

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

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

(*) Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ L 156, 19.6.2018, p. 43).’.

Article 4

Transposition

1. Member States shall adopt and publish by 28 November 2021 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall immediately communicate the text of those measures to the Commission.

They shall apply those measures from 28 February 2022.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

3. By way of derogation from paragraph 1, the amendments to Directives 2013/36/EU and (EU) 2019/878 shall apply from 28 December 2020.

*Article 5***Review**

By 31 July 2021, and based on the outcome of a public consultation conducted by the Commission, the Commission shall review, inter alia, (a) the operation of the structure of the securities markets, reflecting the new economic reality after 2020, data and data quality issues related to market structure, and the transparency rules, including issues related to third countries; (b) the rules on research; (c) the rules on all forms of payments to advisers and their level of professional qualification; (d) product governance; (e) loss reporting; and (f) client categorisation. If appropriate, the Commission shall submit a legislative proposal to the European Parliament and to the Council.

*Article 6***Entry into force**

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

*Article 7***Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 16 February 2021.

For the European Parliament
The President
D. M. SASSOLI

For the Council
The President
A. P. ZACARIAS
