To: **Mr Markus Ferber**
Rapporteur for the Markets in Financial Instruments Directive (MiFID II)
Member of the European Parliament and Vice-Chair of the Committee on Economic and Monetary Affairs

Cc: **Annelise Dodds**
Kay Swinburne
Cora Van Nieuwenhuizen
Fabio De Masi
Sven Giegold
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Shadow rapporteurs for the Markets in Financial Instruments Directive (MiFID II)
Members of the European Parliament

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Re: Markets in Financial Instruments Directive (MiFID II) level 2 – appropriate implementation of the position limits regime for commodity derivatives

Brussels, 19 May 2015

Dear Mr Ferber,

When the new Markets in Financial Instruments Directive (MiFID II) was adopted last year, you rightly heralded the introduction of strict limits on speculating on food commodities as "one of the greatest successes" of the reform. Indeed, in the recent past, high and volatile food prices have pushed millions into poverty and hunger. Our organisations now fear your promise to "*put an end to scandalous purely speculative trading of derivatives linked to food commodities*" will not come true. If approved, the rules to implement MiFID II currently proposed by the European Securities and Markets Authority (ESMA) will turn limits on speculation decided by the European Parliament into an empty shell.

We trust you will do everything within your power to prevent the adoption of regulations that would make the position limits regime of MiFID II ineffective. The threat of speculation contributing to a new global food price crisis is real. Poor, food-import-dependent countries would be hit hard. Farmers in the EU and elsewhere would also be affected, as high price volatility will undermine their ability to plan production and investments in agriculture.

We therefore call on you to put forward a resolution objecting to the Commission's adoption of the delegated acts implementing MiFID II unless the most serious flaws in the draft technical standards and implementing acts currently on the table are addressed. The following changes are essential to preserve the effectiveness of the position limits regime adopted by the Parliament and the Council:

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1- Speculators should not be allowed to control more than 15% of the underlying deliverable supply of commodities

Draft Regulatory Technical Standard (RTS) 29, article 1 must be amended. The baseline figure for position limits should be set at 10% of the underlying deliverable supply with a possible variation of +/-5% according to the methodology set out in RTS 29, articles 2-8. The proposed baseline figure of 25% and variation of +/-15% would allow a single market player to control up to 40% of the market. Such generous limits are inspired by EU competition law and tailored to tackle only instances of market abuse such as the cornering of markets. This is unacceptable as the proposed regulation ignores the mandate given by the legislator not only "*to prevent market abuse, including cornering the market*" but also "*to support orderly pricing and settlement conditions including the prevention of market distorting positions*" (MiFID II, recital 127 and article 57.1).

2- Only positions aimed at hedging risks directly related to commercial activities should be exempted from limits

Draft RTS 30, article 1 must be amended. The proposed definition of the commercial hedges that will be exempted from position limits violates the mandate given by the legislator to only exempt positions "*reducing risks directly relating to commercial activities*". The proposed definition extends the scope of the exemption to positions only indirectly related to commercial activities, introducing an exemption for positions related to treasury financing activities which has been explicitly rejected by the legislator.

It is essential that draft RTS 30, article 1 (b) is deleted because it states a contract will be exempted from position limits if "*it covers the risk arising from the potential indirect impact on the value of assets, services, inputs, products or liabilities (...) resulting from fluctuation of interest rates, inflation rates, foreign exchange rates or credit risk*". This paragraph is copied from delegated regulation implementing the 'EMIR' regulation on OTC derivatives, central counterparties and trade repositories, which defines derivative contracts objectively measurable as reducing risks directly relating to a commercial activity or treasury financing activity (Commission Delegated Regulation N°149/2013, art. 10).

3- Loopholes watering down limits or allowing market players to circumvent them must be closed

Draft RTS 29, article 4 allows national authorities to set higher limits for a commodity derivative based on the overall open interest in other financial instruments with the same underlying commodity. The use of this factor to loosen limits is entirely inappropriate. The legislator had mandated ESMA to take into account the overall open interest to "*avoid circumvention of the position limits regime through the ongoing development of new commodity derivative contracts*" (MiFID II, recital 131 and article 57.3), not to set higher limits. RTS 29, article 4 must be amended to reflect the legislative intent.

Similarly draft RTS 30 defining what constitutes the same commodity derivative should be amended to prevent the circumvention of limits. Draft RTS 30, article 4 (c) must be deleted to remove the need for contracts to be traded "*under or with reference to the same set of trading venue rule*s" to be considered as the same. Such a restrictive definition of what constitutes the same commodity derivative will encourage market players to circumvent limits by trading on several venues. It disrespects MiFID II, article 57.7, which mandates ESMA to "*ensure that a single position limit effectively applies to the same contract irrespective of where it is traded*".

4- Commodity derivatives markets should be made genuinely transparent

The draft delegated acts currently on the table do not respect the mandate given by the legislator to improve the transparency of derivatives markets in line with G20 commitments (MiFID II, recitals 125-127). The proposal to set the threshold for reporting at 30 position holders combined with a total open interest of four times the deliverable supply of the underlying commodity is unacceptable. Such a high threshold carries the risk that many commodity derivatives contracts will not be subject to any position reporting. The threshold should be set no higher than 10 position holders combined with a total open interest equivalent to the deliverable supply of the underlying commodity. Moreover, the obligation to report should kick in no later than a week after the threshold has been reached and continue at least 6 months after trading fell below the threshold.

We look forward to your response and are available to discuss these issues with you at the earliest date convenient to you.

Yours sincerely,

Natalia Alonso

Deputy Director of Advocacy & Campaigns
Oxfam International

On behalf of

Finance Watch, Friends of the Earth Europe, Oxfam, Global Justice Now – formerly the World Development Movement, SOMO – Center for Research on Multilateral Corporations

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