

ISDA response to FCA’s first consultation on Brexit: Proposed changes to the Handbook and Binding Technical Standards – CP18/28

The International Swaps and Derivatives Association (“ISDA”) welcome the opportunity to respond to FCA’s first consultation paper on Brexit: Proposed changes to the Handbook and Binding Technical Standards.

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has more than 900 member institutions from 68 countries. These members comprise a broad range of derivatives market participants, including corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks. In addition to market participants, members also include key components of the derivatives market infrastructure, such as exchanges, intermediaries, clearing houses and repositories, as well as law firms, accounting firms and other service providers. Information about ISDA and its activities is available on the Association’s website: www.isda.org.

In particular, we wish to highlight the following points, which we elaborate on in the body of our response:

1. We understand that the FCA is looking for the respondents to this consultation to identify key implementation challenges and any areas of their onshoring that do not work. That is a challenging task. In our response, we have focussed on identifying specific challenges in implementing the onshored transaction reporting regime. Our members ask the FCA for a period of forbearance post 29 March 2019 from the proposed transaction reporting changes and seek to comply on a best efforts basis.
2. ISDA details a further six areas, specific to its mission of fostering safe and efficient derivatives markets, where treating the EEA as a third country would result in a cliff edge. We would welcome confirmation from the FCA that it will either phase in these requirements or not follow its baseline approach. These relate to:
 - a. Definition of OTC derivatives under EMIR;
 - b. Availability of intragroup exemptions for transactions between UK and EEA counterparties;
 - c. Equivalence of EEA trading venues for the purposes of the UK derivatives trading obligation;

- d. Capital treatment of exposures to EEA counterparties;
- e. Use of ratings published by EEA eligible credit assessment institutions; and
- f. Impact on EMIR REFIT and derogations under EMIR.
- g. Lastly, the EU commodity derivative regime, including position limits, has traditionally been an area where ISDA and others have sought clarity and we put several markers down in this response where we would be happy to engage with the FCA to ensure that this regime works once onshored.

Q1: Do you think that any of the proposed changes in this CP or in relevant SIs represent a significant risk to compliance for your firm in time for exit day? If yes, please specify which and explain why this is the case, including projected time needed to comply with requirements were they to come into effect on exit day.

The cumulative impact of all the proposed changes as a result of onshoring, in this CP and in others, means that it is exceedingly challenging to respond to this CP with a projected time needed to comply with the requirements were they to come into effect on exit day, save to say that a period of transitional relief and forbearance would be necessary. Should the scenario occur in which the UK sees itself leaving the EU in March without a withdrawal agreement, we understand that the FCA would seek to issue a series of communications and plan of close engagement with firms, setting out FCA expectations of readiness. At that point, it may be more possible to detail compliance challenges in more depth and the evidence you have requested for the duration of transitional relief.

ISDA supports broader industry comments calling for an FCA period of relief during which firms would be able to continue to treat EU27 exposures and assets preferentially, to ensure firms are not disproportionately disadvantaged by the sudden increase in capital requirements envisaged by the removal of the preferential risk-weighting treatment currently afforded to exposures to EEA central governments and EEA central banks. This would also give regulators leeway to consider potentially amending this requirement in the longer term. Likewise, the transitional power could also be used similarly for firms currently relying on assessments made by EEA ECAs which would (on the basis of the baseline approach) no longer be eligible. It is noted that the changes in Section 4.2 of this CP pertain to those firms that are solely regulated by the FCA.

We note that the PRA in CP25/18 confirms that for the duration of the transitional relief firms would be able to continue to treat EU27 exposures and assets preferentially.

We would welcome confirmation from the FCA that its approach is aligned with that of the PRA. We will be responding to the PRA consultation, as the PRA is probably the primary regulator for most of our larger members, but nevertheless wish to lay down this marker here.

Some of our members may have legal entities which are prudentially regulated by the FCA and so it is important to stress that the FCA approach must be aligned with that of the PRA.

ISDA asks the FCA for a period of forbearance from the proposed transaction reporting changes. Whilst some of our members are advancing these efforts, others have followed the HM Treasury and FCA advice not to start implementation efforts for a no-deal Brexit until it is clear that such a scenario will materialise. Therefore the readiness of their systems will vary greatly, and will also depend on the readiness of others on whom they rely. Greater detail on the challenges posed by the changes to MiFID transaction reporting are given in our response to Q.15 below. Compliance challenges identified with the sudden increase in capital requirements will be answered as appropriate in our responses to the PRA.

Q2: Do you agree that we have correctly identified all relevant amendments in our draft Handbook and BTS text related to the cross-cutting issues set out above? Do you have any other points you wish to raise regarding our approach to these cross-cutting issues?

The key message we wish to make here, with regards to identifying areas of onshoring which do not work technically, is that we would recommend that the FCA consider setting up an expedited approach by which they can quickly correct any deficiencies found in onshoring post exit (or when these are identified, if before exit). Our members are concerned that (a) it may not be possible to identify all deficiencies within the timescale of this consultation and (b) any deficiencies may be the result of the cumulative effect of many moving parts and therefore may not come to light before exit, or until such times as relevant systems are operating for example.

We welcome the FCA's approach to cross-cutting issues, subject to the comments set out below.

References to EU legislation and to "relevant implementing measures"

We understand that the FCA's general approach will be to amend the Handbook to refer to new or revised UK legislation rather than the EU equivalent, but that there will be some exceptions where the FCA has found good reason to retain a reference to EU legislation. Does the FCA intend to publish a list of these exceptions and the reasons for retaining them?

In some places (e.g., COBS 6.2B.29), the Handbook includes extracts from the relevant EU legislation. Some of these extracts refer to other provisions of EU legislation (e.g., to particular articles of MiFID2). The FCA's proposed Handbook changes would replace these references to provisions of EU legislation with a reference to the relevant UK legislation or Handbook provision. However, where these extracts refer to a provision of EU legislation "and the relevant implementing measures", it is unclear where firms should look for the relevant implementing measures. Where the Handbook currently refers to "the relevant implementing measures" without specifying what those implementing measures are, does the FCA intend to include a specific reference to the relevant Handbook rule or BTS?

Our members opine that the most helpful approach they would like to see is for the Handbook to reflect both the references to the original source EU legislation [in square brackets] and new or revised UK legislation and that the references to ‘and relevant implementing measures’ are replaced by a specific reference to the relevant implementing measure. Whilst we understand that this is unlikely to be possible in the time available before 29th March, members would encourage FCA to consider making these changes in the near future.

Our members also request that the FCA set out their approach to onshoring the recitals to EU legislation – i.e. by confirming that recitals are onshored in their entirety (and identifying places where this does not work). While we understand that the FCA considers that all of the detail contained in the recitals will be reflected in the relevant onshoring legislation, in practice members obtain a significant level of guidance from recitals to EU legislation. We would welcome confirmation that members may continue to interpret onshored EU legislation in line with existing recitals in the absence of specific UK guidance to the contrary.

Co-ordination between UK and EU in relation to reporting and data

We would welcome confirmation that UK FIRDS and EU FIRDS will be synchronised to enable "cross-pollination" between the two systems. This would remove a reliance on market infrastructure to ensure that data is included in one or both FIRDS systems, and should reduce the risk of under or over reporting.

We would also welcome confirmation that the FCA has considered co-operation with ESMA to synchronise any data that is reported to both the EU and to the UK, and to avoid double reporting (e.g., where a UK firm and an EU firm trade with one another).

Q3: Are there any proposed changes reflected in the instruments in Appendix 1 that are not cross-cutting in nature (see Chapter 3) or discussed in this chapter where you think we should re-consider our approach? If so, why?

REMIT carve out under UK MiFID: – We understand that the combined effect of the FCA proposals and of HMT’s SI would be that under UK MiFID a C6 derivative traded on an EU27 platform would not be subject to the UK MiFID REMIT carve out (because it would not be a contract traded on a UK OTF). As a result, these contracts may be in-scope under C7. We can see this implements the logic of mirroring existing EU legislation on the UK statute book post Brexit but we would question whether there is now a possibility that some contracts could come back into scope. The current C6 carve out is clear – the relevant contracts are completely out of scope. If we fall back to having to assess them under C7, there is a possibility that some contracts could come back into scope. We welcome the approach taken with the UK Ancillary Activities Exemption (which continues to refer to trading volumes in both the UK and EU27 countries).

Q4: Are there any proposed changes where you think we should not follow the baseline approach of treating the EEA as a third country? If so, why?

Whilst we understand that the FCA follows HMT's baseline approach of treating the EEA as a third country, there are a number of provisions which would require UK firms to give different treatment to third country firms depending on whether or not an equivalence decision exists in relation to the relevant third country. Since no such requirement currently exists in relation to UK firms' treatment of EEA firms, if no equivalence decision is made before exit day this will have a significant impact on UK firms' dealings with EEA firms.

We have summarised these provisions below.

We understand that the FCA intends to use its powers to phase in new requirements in a proportionate manner, bearing in mind the FCA's statutory objectives and the implementation challenges faced by firms, and we would welcome confirmation from the FCA that it will either phase in these requirements or not follow its baseline approach of treating the EEA as a third country, as appropriate.

- **Definition of OTC derivatives under EMIR:** Under onshored EMIR, a derivative transaction that is executed on an EEA trading venue will qualify as an "OTC derivative" unless the EEA or the relevant EEA jurisdiction has been determined to be equivalent. As a result, that transaction will count towards a UK entity's clearing threshold and may have an impact on whether or not they are required to comply with the margin and clearing obligations, among others. We would welcome confirmation from the FCA that UK entities may continue to treat derivatives executed on EEA trading venues as exchange traded derivatives.
- **Availability of intragroup exemptions for transactions between UK and EEA counterparties:** We understand that the FCA has the power to make technical standards specifying the procedures for counterparties to follow when applying for intragroup exemptions from the clearing and margin requirements under onshored EMIR. We would welcome confirmation from the FCA that it will phase in the clearing and margin requirements for transactions between UK and EEA counterparties that would qualify for an intragroup exemption if an equivalence decision existed in relation to the EEA. We would also welcome confirmation that the FCA will consider extending the existing derogations for intragroup transactions where one counterparty is established in a third country but no equivalence decision yet exists in relation to the relevant third country.
- **Equivalence of EEA trading venues for the purposes of the UK derivatives trading obligation:** A UK counterparty would only be able to comply with the mandatory derivatives trading obligation by executing derivatives on an EEA trading venue if the EEA or the relevant EEA jurisdiction has been determined to be equivalent. We would welcome confirmation from the FCA that UK counterparties that execute OTC derivatives subject to the mandatory trading obligation on EEA trading venues would be treated as compliant with the mandatory trading obligation.

- **Capital treatment of exposures to EEA counterparties:** Under CRR (and BIPRU), UK firms may apply preferential capital treatment for certain types of exposures originating from EEA institutions. This would cease to apply after exit day unless the EEA or the relevant EEA jurisdiction is determined to be equivalent, meaning that UK firms will be subject to higher capital requirements in respect of the relevant exposures. We would welcome confirmation from the FCA that UK firms subject to FCA prudential regulation may continue to apply this preferential capital treatment for exposures to EEA institutions.
- **Use of ratings published by EEA eligible credit assessment institutions (ECAIs):** UK firms may currently rely on ratings provided by EEA ECAIs in order to risk weight certain exposures. If they can no longer use those ratings, they may need to obtain new ratings in short order or may be required to give a higher risk weighting to the relevant exposures if an eligible rating is not available. We would welcome confirmation from the FCA that UK firms subject to FCA prudential regulation may continue to use ratings provided by EEA ECAIs.
- **Impact on the EMIR REFIT and derogations under EMIR:** The proposed baseline treatment of the EEA as a third country is also likely to have other impacts under EMIR. For example:
 - **Pension scheme exemptions from clearing and CVA under EMIR:** The temporary exemption from the clearing obligation for pension scheme arrangements expired on 17 August 2018. However, it is expected to be renewed as a result of the changes made by the EMIR REFIT. In the interim, ESMA has published a communication indicating that it does not expect national competent authorities to take enforcement action against pension schemes or EU counterparties dealing with pension schemes where they do not comply with the clearing obligation. If EMIR REFIT does not come into force before exit day, we understand that this renewal of the exemption for pension schemes will not be reflected in onshored EMIR. As a result, it is unclear whether UK firms dealing with UK or EEA pension schemes may continue to treat those transactions as exempt from the clearing obligation. Members ask the FCA to clarify what the status will be of transactions entered into by UK banks with EU pension schemes during the forbearance period (i.e., transactions entered into after the exemption expired).

We understand that the SI onshoring EMIR will not make any changes to the definition of "pension scheme arrangement" under EMIR, and we would welcome confirmation as soon as possible that the UK intends to renew the exemption for pension scheme arrangements (in line with the EMIR REFIT) and that this exemption will continue to be available in relation to both UK and EEA pension schemes. If any exemption in onshored EMIR only applies to UK

pension schemes all UK banks will need to off board all EU pension schemes if those EU pension schemes want the benefit of the exemption. For all these reasons, our member view is that the onshored EMIR should apply the pension scheme exemption as at present – i.e. to the UK scheme and EU schemes. We would welcome confirmation from the FCA that the baseline approach of treating the EEA as a third country will not affect the continued ability of UK firms to rely on any exemption in relation to EEA pension scheme arrangements.

- **Other impacts in relation to the EMIR REFIT:** We would also welcome confirmation from the FCA regarding the proposed approach to amending onshored EMIR to reflect any changes arising from the EMIR REFIT in the event that the EMIR REFIT comes into force after exit day. While this is not strictly connected to the proposed baseline treatment of the EEA as a third country, we welcome this opportunity to ask for confirmation that the UK onshored EMIR will also reflect at least some of the EMIR REFIT changes (e.g., the power for the FCA to suspend the clearing and trading obligations).

Q5: Do you agree with our proposal to amend the term ‘regulated market’ as it applies in INSPRU?

We do not offer a response to this question.

Q6: Do you agree we should continue to permit exposure to stock-lending transactions with EEA-authorised counterparties on the same basis as under the current rules in INSPRU 3.2?

We do not offer a response to this question.

Q7: Do you agree we should continue to allow ISPVs assuming risks from EEA insurers to do so under COBS 18.6A?

We do not offer a response to this question.

Q8: Do you agree we should continue to allow exposure to stock-lending transactions with EEA-authorised counterparties on the same basis as under the current rules in COBS 21.3?

We do not offer a response to this question.

Q9: Do you agree that we should continue to allow exposure to loans or deposits made with an approved financial institution on the same basis as under the current rules in COBS 21.3?

We do not offer a response to this question.

Q10: Do you agree with our proposed changes to COBS 2, 3, 6, 9, 10 and 22?

While we understand the logic of treating the EEA as a third country in relation to the COBS sourcebook, we are concerned that the resulting changes will involve significant work for firms to implement, particularly where these changes would require firms to revisit the MiFID2 implementation exercise that has only recently been completed.

We would urge the FCA to provide for transitional provisions. For example:

- **Territorial scope:** The changes to the territorial scope of COBS under COBS 1 will require EEA firms that currently rely on the passport and that intend to apply for authorisation in the UK to comply with COBS in the same way as any other UK authorised third country firm. Since these firms will already comply with equivalent requirements in their home Member State, and since they have only recently completed an exercise to ensure that they are compliant with the new conduct of business requirements imposed by MiFID2, we would welcome confirmation that these firms will have a transitional period within which to achieve compliance with COBS. There may also be situations where requirements under COBS conflict with the equivalent requirements under the law of the firm's home Member State. Firms will need some time to establish whether any such conflicts will arise and to work out how to deal with them. Again, a transitional period would assist with this process.
- **Reliance on EEA investment firms:** We would welcome confirmation from the FCA that firms currently relying on a suitability or appropriateness assessment performed by an investment firm authorised in an EEA state will be able to continue to rely on those assessments and will not be required to revisit these assessments solely because they were performed by an investment firm authorised in an EEA state prior to exit day. If firms are required to reassess clients immediately upon exit day this is likely to cause delays in provision of services to those clients until the firm is comfortable that they are able to continue to provide the relevant services, and this may lead to market disruption and a lack of continuity in services provided to clients.
- **Client categorisation:** Again, we would welcome confirmation from the FCA that firms which have categorised a local public authority or municipality in accordance with the criteria for EEA local public authorities and municipalities prior to exit day will be able to continue to use this categorisation after exit day and will not be required to re-categorise these clients solely because of Brexit.

Q11: Do you agree that UK UCITS schemes should have the same freedom to invest in EEA (non-UK) assets as they do now?

We do not offer a response to this question.

Q12: Do you agree with our proposal to amend FUND and COLL to remove references to a depository of an authorised fund that is a UK branch of an EEA firm?

We do not offer a response to this question.

Q13: Do you agree that we have correctly identified all relevant amendments in our draft BTS text related to the cross-cutting issues set out in Chapter 3? Are there any proposed changes in the instruments in Appendix 2 or discussed in Chapter 5 where you think we should re-consider our approach?

Our members identified the following challenges with respect to the onshored short selling regulation:

- **The scope of the onshored SSR will be limited to UK Financial instruments:** i.e. financial instruments that are listed on a UK trading venue. This impacts firm's notification (to regulators) and the public disclosure of net positions. Notification will now need to be to the FCA (rather than ESMA) on a new FCA form. This means that, for firms also needing to notify/disclose EEA-listed financial instruments, they will also have to continue to comply with the EU SSR.
- **Third country principal trading venue exemption:** The EU SSR provides certain exemptions from the reporting requirements, the buy-in regime and restrictions on uncovered short selling for shares which are principally traded in a third country. EEA Member States will be third countries for the purposes of this exemption. Under the UK SSR, the FCA will take on responsibility for collating and publishing the list of shares principally traded in a third country and we note that, to ensure continuity, the FCA states that they may recognise ESMA's existing list for up to two years following exit day. We would welcome confirmation from the FCA and early notification of the FCA's final approach. We would welcome any additional information on the status of the 'appropriate cooperation arrangements' as referred to in Article 8(g) of the BTS. We support the broader industry responses that any calculations determining the principal trading venue should refer to a date that reflects the new UK regime.
- **Cross cutting impact between UK MIFIR and UK SSR:** EU MiFIR Article 26 (3) requires a designation to identify a short sale when transaction reporting (short selling flag). This is a cross cutting issue with the EU SSR. We would flag this to the FCA and would welcome confirmation that onshoring means that no divergent approaches will be taken between UK MiFIR and SSR which would give rise to complications.

Q14: Do you have any comments on the proposed guidance on our approach to EU Level 3 materials set out at Appendix 3 to this CP?

We think the proposed guidance is helpful and appropriate. We understand that the materials produced by the ESAs after the UK's withdrawal from the EU will not constitute UK guidance,

and that the FCA will need to consider (for example) whether to amend its Handbook references. We agree in general with the FCA's proposed approach to EU Level 3 materials, subject to the following comments:

- **Status of MiFID2 validation rules:** The Annex does not mention the MiFID2 transaction reporting validation rules. These rules are implemented by APAs and ARMs, so any changes to the validations would require infrastructure / system changes. If the FCA intends to make any changes to the validation rules that would apply, this needs to be communicated as soon as possible so that firms can start planning to adjust their build if required.

Q15: Do you foresee any specific challenges in implementing the changes described above?

Of the changes described in this section of the CP, our response to this question will focus on MiFID transaction reporting. Changing the time references for firms' activities such as transaction reporting, best execution and others from CET to BST and/or GMT will raise significant implementation challenges, as firms have built their MIFID reporting systems based on references to CET. Changes to CET are particularly relevant for transaction reporting as the obligation relates to both UK and EU instruments and transactions in EU instruments will need to be reported to both the FCA and to the relevant EEA regulator where the trade is between a UK and EU counterparty. It is difficult to consider these issues in isolation from firms' transparency-related obligations.

Time zones

The FCA's general onshoring approach is to replace references to Central European Time (CET) with references to Greenwich Mean Time (GMT) and British Summer Time (BST). Simply changing the time zone without a change in the corresponding adjustment to the represented time, we think this will cause two problems: (1) systems changes for firms and (2) an hour's difference in the public disclosure of trades. It also then leads to complications, such as the proposed retention of CET in RTS23, which would result in some systems being changed to GMT/BST and others not. Members have a strong preference for retaining CET for all obligations. For the avoidance of doubt, the instance of global time should not change, so that firms do not have to change their systems, at least in the transition.

Dependency on others

Firms are reliant on the different actors involved with, and impacted by, MiFID reporting: banks of varying sizes, corporates, middleware providers, vendors and trading venues – as well as on the various lists and systems that the FCA now have to provide. Each of those actors will have different timelines for implementing the new requirements outlined in these CPs. Because there are interconnected relationships for MiFID transaction reporting, the timeline of one actor may/will impact the timeline of others. Firms are therefore dependent on others to develop and

release their required changes, before the full MiFID reporting infrastructure can be in place. Sufficient time needs to be given over to pre-deployment testing both at company and at industry level and changes will need to be coordinated and tested with the firm's ARMs.

Some of the aspects of the new technical build that firms may have to consider are set out below. We have not been able to consider this in full and so this is a non-exhaustive list of matters that immediately stand out:

- **Branch identifier.** Onshoring means that it will be essential to identify the branch of a firm. A more granular means to differentiate between the branches of an entity is required. LEIs by themselves will no longer be sufficient as an entity identifier. ISDA stand ready to discuss this matter further with the FCA. This new data will need to be consumed as part of firm's routing logic and therefore will be part of the development requirement for most (if not all) firms.
- **Trader Nexus.** If a trader nexus is to become a UK MiFID requirement, the scale of a firm's build will be larger, as nexus is not an existing concept within MiFID and firms will need confirmation from the FCA on what that will mean.
- **FCA systems.** It is necessary to have all the relevant information on how firms will interact with FCA systems in order to understand the scale of a firms build and provide a more detailed implementation timeline. We would welcome the earliest possible release by the FCA regarding the schemas on their systems firms need to interact with, as the earlier this information is revealed, the sooner firms can identify the scale of their builds. We understand that the UK FIRDS will be available for firms to use by 29 March 2019. We would welcome provision of the specifications of UK FIRDS as early as possible ahead of 29 March as our members need to update their systems.
- **Systematic Internaliser Regime.** Firms would welcome clarity from the FCA in the event, under a no deal, a firm may be an SI for UK reporting, but not for EU reporting (or vice versa). SI calculations will be impacted and should be taken into account.

ISDA wishes to support the broader industry view on the compliance challenges and new systems build facing trading venues and firms: that we consider that all the changes should be phased in unless the FCA identifies a particular change as necessary for it to satisfy its statutory objectives.

Furthermore, we understand that over reporting, i.e. reporting both to UK FIRDS and ESMA FIRDS, gives rise to two issues. First, EU27 firms may have an issue with their regulators about over-reporting, as this is actively discouraged. Secondly, that EU27 firms may have an issue with their clients if they publish details of quotes or trades or report trades to regulators when there is no regulatory obligation to do so. Even though pre- and post-trade transparency disclosures do not identify the client, they may still have an adverse impact on client interests, as they disclose trading behaviour. Disclosures and reporting not required by law may also

contravene the firms' obligations of confidentiality to their clients but this may depend on the terms on which firms' contract with clients and the law governing their obligations of confidentiality. We ask for a period of forbearance and a phase in of the reduced obligation to report to either the ESMA FIRDS or the UK FIRDS may be helpful to alleviating some of these problems.

Impact on trading venues

UK trading venues that are currently operating as regulated markets, MTFs or OTFs will need to update their systems so that they are able to capture transactions by EEA firms as they will become third country firms (and will therefore not have an obligation to report to the FCA). UK Trading venues should not, however, report for UK branches of EEA firms as after exit day these firms should be reporting to the FCA. Therefore, operators of trading venues will need to update their systems so that they are able to capture transactions by such EEA firms and, in addition, within that group of firms, the operators of the trading venues must distinguish between transactions executed by the UK branch and those executed from other locations.

Impact on firms

Firms must identify which EEA firms within their groups are members of UK trading venues and will no longer be required to transaction report to the FCA. Internal systems will need to be updated to enable such firms to be able to distinguish between their reporting requirements depending on whether or not a transaction is executed from an EEA firm or a UK branch of such a firm. Firms will need to respond to new information requests from trading venues.

Furthermore, UK onshoring means that the transmission of orders to an EEA firm by a UK firm now requires a transaction report by the UK firm. Whilst this may be in the bounds of possibility if the firm is already used to transaction reporting in other areas, it is likely to bring compliance challenges to the firm who does not currently transaction report.

ISDA asks the FCA for a period of forbearance with the proposed transaction reporting changes. Whilst some of our members are advancing these efforts, others have followed the HM Treasury and FCA advice not to start implementation efforts for a no-deal Brexit until it is clear that such a scenario will materialise. Therefore the readiness of their systems will vary greatly, and will also depend on the readiness of others on whom they rely.

Q16: How long do you anticipate it will take to implement the changes? Please describe the changes you are referring to.

The cumulative impact of all the proposed changes as a result of onshoring, in this CP and in others, means that it is exceedingly challenging to respond to this CP with a projected time needed to comply with the requirements were they to come into effect on exit day, save to say that a period of forbearance would be necessary. Please note that while some firms have started implementation efforts, others have followed the HM Treasury and FCA advice not to start

implementation efforts for a no-deal Brexit until it is clear that such a scenario will materialise. Even when firms have decided to assumed a no-deal Brexit and have started preparing for it, their new system builds are taking place at a time when there are already resource constraints, especially over the time at the end of the year where there are typically tech freezes and limited resources. Should the scenario occur in which the UK sees itself leaving the EU in March without a withdrawal agreement, we understand that the FCA would seek to issue a series of communications and plan of close engagement with firms, setting out FCA expectations of readiness. At that point, it may be more possible to detail compliance challenges in more depth and the evidence you have requested for the duration of transitional relief. Please note that, in many cases, firms are dependent on the readiness of others and the timelines they are working to – see Q15 for further detail on this. We would echo other industry comments to the effect that, with a phased-in approach, the industry will be able to focus resource on the first tranche of changes and so deliver those more quickly than a situation in which all of the changes are required to be delivered at the same time.

Q17: Are there any other impacts that you have identified?

We have identified the additional impacts described below:

Definition of "traded on a trading venue": ESMA published an opinion on 22 May 2018 clarifying what is meant by "traded on a trading venue", indicating that this would cover instruments traded on regulated markets, OTFs and MTFs, as well as OTC derivatives that share the same reference data details. ISDA would welcome confirmation from the FCA that it will continue to follow this opinion as if references to a "trading venue" were references to a UK OTF, UK MTF or UK regulated market. This is particularly important since we understand that references to "trading venue" will not always be interpreted as references to a UK trading venue under onshored MiFID2.

Changes to the transaction reporting data in Annex G: The FCA proposes to amend Article 6 of the relevant BTS so that the nationality of natural persons would be reported according to the country code of the nationality which appears first in the ISO 3166-1 alpha-2 code. This is a different approach from that currently used under MiFID2, and may result in some traders or decision makers being reported under different nationalities depending on whether the report is being made to the UK or under the EU regime. For example, if a trader has both Spanish and Canadian nationality, the transaction report made under the EU regime would show that they have Spanish nationality, while the FCA report would show them as Canadian. This may make it challenging to trace traders and decision makers that change firms.

Amendments to commodity derivative position limits in Annex B: The changes to MAR will mean that the FCA has the power to set position limits in relation to any commodity derivative traded on a UK trading venue, even though another EU competent authority may also have the power to set position limits in relation to that contract. As a result, some contracts may become subject to position limits under both the UK and EU regimes. We would welcome

confirmation from the FCA that it will keep EU position limits under review and will aim not to make UK position limits significantly more restrictive than the equivalent EU position limits in light of the interaction between UK and EU markets in the relevant contracts.

Annex M: BTS on position limits: The BTS would remove the references to "same commodity derivatives", so UK firms could no longer count commodity derivatives traded on EU trading venues towards / against their net position on the basis that they are the same commodity derivative. We would welcome confirmation of whether contracts traded on non-UK venues would qualify as "economically equivalent OTC contracts" and so may continue to count towards a person's net position.

Annex O: Format and timing of position reports: The deadlines for submitting weekly reports would be set in GMT / BST, rather than CET. This will require firms to adjust their systems to comply with the new time zone. Please see our answer to Q15 where we advocate for time zones to be kept to CET.

Q18: Have you identified any specific provision in EU non-legislative material which should be specifically reviewed and amended because you think that the interpretative approach proposed will not be enough to ensure the regulatory framework remains fit for purpose? If so, please explain why you think this is the case.

We wish to highlight the following ESMA level 3 material which is particularly crucial to ISDA members:

- ESMA Q&As on MiFID II and in particular the Q&A on the operation of the ancillary activities exemption is crucial for understanding the commodities derivatives regime.
- ESMA EMIR Q&As clarify the treatment of derivatives executed on non-EU exchanges or outside a regulated market but processed by an exchange and cleared by a CCP and the relationship between intragroup and external transactions for the purposes of calculating the clearing threshold.
- ESMA MAR Q&As assists market participants in interpreting the boundaries of lawful behaviour. There were certain areas of uncertainty for buy-side participants in the directly applicable wording of the Level 1 and Level 2 MAR texts that were in need of clarification to ensure the optimal functioning of the regime that have been subsequently dealt with in the Q&As, for example, in relation to order cancellation policies and the meanings of the word 'order' and 'quote' in MAR and its implementing instruments.

Whilst we don't want to suggest at this point that the interpretative approach is not sufficient for these crucial issues, we do wish to put a marker in the ground. ISDA would be pleased to discuss these further with the FCA at a later stage following exit day, if problems were to result.