ISDA Safe, Efficient Markets

afme/ Finance for Europe

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ISDA and AFME Response to FCA CP 23/27 on commodity derivatives

ISDA and AFME (the "**Joint Associations**") welcome the opportunity to respond to the FCA's consultation on changes to the UK's commodity derivatives regime[1]. We have set out below a high level summary of our key comments, with more detailed response to each of the FCA's questions in the sections below.

1. General comments on the proposals

Question 1: Taking into account the proposals outlined below, do you have any specific comments regarding implementation of the new regime? Please explain your answer.

Timing for implementation: We note that the FCA proposes a timeframe of one year for implementation from the date of publication of the relevant instruments. We would welcome confirmation of whether this timeframe includes both the time for trading venues to make the relevant changes to their rules as well as the time for participants to implement the rule changes, or whether this timeframe would just be for the trading venue rulebook changes (with the trading venue to set a timeframe for implementation by its participants separately).

If the timeframe is intended to include time for participants to implement these changes, we consider that 1 year is very unlikely to be sufficient. Trading venue rulebook changes typically require a period of consultation with participants and in this case, where the relevant requirements are being introduced into rulebooks for the first time, we would expect participants to have detailed comments and questions based on their experience of implementing previous position limit and reporting regimes. Factoring in time for the FCA to review the rulebook changes and proposed position limits, as well as time for participants to implement the necessary systems and documentation changes, we would suggest a phased implementation period, allowing a period of 18 months for trading venues to introduce their rulebook changes taking into account feedback from participants on the changes and then a further period for participants to comply with their rules. Based on implementation of other reporting requirements, ISDA members anticipate that it would take a minimum of 24 months for participants to make the necessary operational and technological changes.

To give some context for the timing for implementation, although elements of the proposal give trading venues flexibility to set and monitor position limits, it nevertheless gives rise to important compliance challenges for all firms active in the commodity market with a newly

[1] CP 23/27: https://www.fca.org.uk/publication/consultation/cp23-27.pdf

fragmented commodity derivatives framework. Without clear guidance and a clearly defined approach by the FCA as well as the trading venues, it leaves the regulatory requirements open to interpretation and potentially creates an additional layer of risk.

In addition, developing non-harmonized logic to support each trading venue could lead to complex management as well as risk profiling and would be heavily dependent on technology development. This would need advance planning and budget approvals to implement the changes over an extended period requiring extensive testing for each trading venue and contract.

2. Scope of the position limits regime – critical and related contracts

Question 2: Do you agree with the approach outlined, including the criteria to assess the criticality of contracts? If not, please explain why.

Question 3: Do you agree with the approach outlined above with respect to related contracts? If not, please explain why.

Question 4: Are there any specific types or classes of contracts that should not be included in the related contract concept? If so, please explain why.

Question 5: Do you agree with the proposed approach to update the list of critical contracts? If not, please explain why.

Question 6: In notifying us of a particular market that requires closer monitoring, are there any other factors that trading venues should consider? If you think there are, please explain what the additional factors are and why they should be considered.

The Joint Associations strongly agree that the MiFID II position limits regime has proved to be too broad in scope and welcomes the FCA's proposal to apply a narrower position limits regime that is more proportionate to the risks associated with certain commodity derivative contracts, in line with the IOSCO Principles. We also welcome the removal of position limits for "economically equivalent OTC contracts" as this is a concept that has proved difficult to apply in practice.

In response to the FCA's questions on the regime:

- **Identifying critical contracts**: we agree with the FCA's proposed criteria for determining which contracts will be critical contracts, and that not all limbs may need to be met. We also agree that the FCA (rather than trading venues) should identify which contracts are critical and we welcome establishment of a register listing critical contracts.

- **Identifying related contracts**: we are concerned that the FCA's proposed approach to identifying related contracts is too prescriptive given the wide diversity of commodities subject to position limits, and could lead to unnecessary complexity. For example, approximately 150 IFEU contracts could be said to "reference" the Brent Futures Contract although in practice the number of such contracts in which there are material positions is much smaller. Therefore, for the purpose of mitigating market abuse and supporting orderly pricing and liquidity, only related contracts that are material to the critical contracts should be bucketed together. As an alternative approach we would suggest that the FCA outline what outcomes the identification and bucketing of contracts should achieve (e.g. identification of related contracts should enable trading venue to see a market participant's overall position where there is sufficient correlation in price/exposure and should mitigate the circumvention of the position limit regime) and allow trading venues to identify related contracts as appropriate on this basis.
- We would welcome coordination by the FCA regarding the related contracts that will fall within scope of the position limits regime, to ensure that trading venues are applying appropriate criteria for identifying related contracts. Many firms are subject to position limits in multiple jurisdictions and it would be useful to aim for consistency in approaches regarding the methodology adopted by trading venues to identify related contracts (e.g., the treatment of options against futures position limits).
- In addition, in a situation where overlap exists between contracts traded on in-scope trading venues, firms could end up having to apply different position limits to similar contracts depending on which trading venue they are trading on. While this is not the case today for UK trading venues, it may be the case in the future.
- We would also welcome clarification that trading venues may only identify contracts as "related contracts" where they are traded on the same venue as the relevant critical contract.

We are concerned that a period of 30 days (following publication of a published decision) for trading venues to implement position limits in connection with a new critical contract (which we understand would include the time for participants to introduce systems to comply with the relevant position limit) may not be sufficient for trading venues and their participants to put in place the necessary technical and operational changes. We would ask the FCA to consider providing for a longer period, or else specifying that 30 days is the period for the trading venue to impose the position limit but that participants may have a longer period to implement and comply with the position limit.

We would also welcome further explanation from the FCA regarding the statement in paragraph 3.35 of the consultation paper that trading venues might only allow trade at settlement (TAS) transactions to be netted with TAS positions. In particular, we would

welcome confirmation from the FCA as to why they intend to have particular regard to these transactions in the context of position limits and also whether they have an expectation that trading venues would restrict the types of contracts that participants may net.

Question 7: Do you agree with the list of critical contracts above? If not, please explain why.

Question 8: Should any of the three cash settled contracts mentioned above (Dated Brent Future, Dubai 1st Line Future, Singapore Gasoil (Platts) Future) or the physically settled Permian WTI Future be added to the list of critical contracts? If yes, please explain why.

Question 9: Taking account of our proposals on position management and the reporting of additional information, do you consider that the risks arising from positions held OTC are adequately dealt with despite the fact that position limits do not apply to OTC contracts? If not, please explain why.

We agree with the FCA's proposal to apply position limits only to contracts traded on trading venues (i.e., critical or related contracts). We consider that trading venues should be able to address any risks to their markets arising from OTC positions through use of their position management tools and any other rights or powers that exist under their rulebooks.

In any event, if there are other concerns regarding risks arising from OTC positions, we do not consider it appropriate for these to be addressed as part of a position limits regime imposed by trading venues.

3. Setting position limits

Question 10: Do you agree with the approach and framework outlined above for setting position limits? If not, please explain why.

Question 11: Do you agree with the criteria trading venues shall consider when developing their position limit setting methodology and when setting position limits? If not, please explain why.

We have the following comments on the approach and framework for setting position limits:

- We are concerned that the combination of accountability thresholds and position limits in both spot and other months may lead to a position limit regime that is more burdensome and complex than that in other jurisdictions (including the EU and US), potentially making the UK and its trading venues less competitive internationally. A potential alternative would be to follow a similar approach to the CFTC, applying a

position limit to the spot month for in-scope contracts and accountability thresholds for all other months.

- We would also welcome confirmation that, when setting position limits, trading venues would have flexibility in setting their methodology for assessing deliverable supply in order to achieve the aims of the position limit regime (i.e., preventing market distortion as a result of large positions), and would not be required to base this only on individual exchange inventory.
- While we do not disagree with the FCA's proposal for position limits to be set by trading venues, in the event that similar contracts may be traded on different trading venues, there may be a risk that different trading venues set different limits (as well as setting different exemption thresholds or accountability thresholds, as discussed further below). As well as creating additional administrative and operational burdens for firms accessing those venues, this could also make the UK less competitive internationally, as incoming firms would need to comply with multiple different position limit regimes rather than a single regime (as is the case in other jurisdictions). It may be useful to have a further review by the FCA of any position limits to ensure that limits that apply to similar contracts are harmonised to the extent possible and appropriate. However, we note that this is not currently a concern as the two trading venues in scope for this regime offer materially different contracts.
- It would be helpful if the register of critical contracts could refer expressly to the exchange on which each contract is traded, in order to help avoid the situation described above. The current list in the consultation paper does not do this consistently (e.g., Table 1 refers to LME Copper but also to London Cocoa Futures without specifying the name of the exchange).
- **Scope of FCA position limits**: While MAR 10.2.2D provides that a person must comply at all times with position limits set by the FCA, it does not go into detail about the basis for calculating a net position for these purposes beyond re-stating the wording currently set out in the RTS, which provides that position limits shall apply to the positions held by a person together with those held on its behalf at an aggregate group level. While this is the wording currently set out in the RTS, it does not clarify whether "group" here is a reference to "group" as defined in the FCA Glossary, or whether the intention is to apply position limits only to positions held on behalf of a person by its affiliates, or whether the intention is to apply position limits to the aggregate position held by all group members (in line with the current approach and the approach proposed for trading venues).

  It also does not indicate how a person should calculate their net position (e.g., which contracts can be netted against one another – for example, if the FCA applies a position

limit to a contract which already has a trading venue position limit, should a person calculate their net position by reference to that contract and also any related contracts identified by the trading venue, or only by reference to the contracts identified by the FCA as subject to the position limit?). Is the intention that the FCA would provide the relevant detail in its direction setting position limits?

4. Exemptions from position limits

Question 12: Do you agree with the approach to granting exemptions outlined above? If not, please explain why.

Exemptions from trading venue position limits: Making the trading venues responsible for granting and monitoring exemptions will result in more work for entities that are participants on multiple venues (as they are likely to need to apply to benefit from the relevant exemption on more than one venue, rather than submitting a single application to the regulator, and will need to comply with different application processes for different trading venues), and may also result in the exemptions being applied differently on different trading venues.

We are also concerned that setting ceilings on use of exemptions will limit the ability of firms to engage in vital hedging or liquidity provision activities (and their ability to offer hedging to non-financial entities that are not direct participants on exchanges). It is unclear what the justification is for proposing exemption ceilings as well as accountability thresholds. Trading venues should be able to manage the potential risks associated with significant positions through the use of accountability thresholds and their existing position management powers. It should not be necessary to limit the use of exemptions as well – this seems likely to result in discouraging participation in UK trading venues.

This is a general concern in relation to exemption ceilings, but will particularly be the case if exemption ceilings can be applied on a participant-by-participant basis based on creditworthiness or risk management profile of the individual participant, rather than being set at predetermined levels that apply to all participants who share a similar profile.

If the FCA does intend to propose for trading venues to set exemption ceilings, it would also be helpful for the FCA to clarify whether the intention is that exemption ceilings should constitute a hard cap on use of an exemption (and also whether trading venues are required to treat a firm that has exceeded its exemption ceiling as being in breach of the rules of the trading venue), or whether a firm may exceed an exemption ceiling but would then be subject to additional reporting or notification obligations. The latter approach does not appear to add much to the accountability threshold regime, while the former approach seems likely to discourage participation in UK trading venues as discussed above.

Exemptions from FCA position limits: We note that MAR 10.2.3A G only provides for exemptions from the position limits set by trading venue operators, and not for exemptions from the position limits set by the FCA. Should the proposed rulebook text set out exemptions from the position limits set by the FCA along with the process for obtaining such an exemption?

If the FCA applies position limits to commodity derivatives to which position limit requirements imposed by a trading venue already apply, under MAR 10.2.2A, would a person that has obtained an exemption from the trading venue also benefit from an exemption from the FCA position limits in the same circumstances, or would they need to reapply for the exemption to be available?

Question 13: Do you agree with the approach to the hedging exemption outlined above and the information to be provided to evidence use of the exemption? If not, please explain why.

Applying the exemption regime: While we acknowledge that if trading venues are responsible for administering and monitoring compliance by their participants with exemptions, they will need to be comfortable that participants meet the criteria for the exemptions. However, requiring trading venues to satisfy themselves that participants are able to manage their exempt positions reasonably and are able to unwind them in an orderly way during times of market stress may run the risk of putting trading venues in a quasi-regulatory position with respect to their participants. Ultimately, trading venues do not have the same powers as regulators to require information from participants on their systems and controls, or the same obligations with respect to confidential treatment of the information (while trading venues may have contractual confidentiality obligations and are in any event unlikely to disclose confidential information, disclosure of information to a commercial institution will always present very different considerations from disclosure of information to regulators). This puts trading venues in the position of having to determine whether or not exemptions are available, while not being in a position to have visibility into the systems and controls of a participant beyond the information that the participant is willing to share. It would be more straightforward to administer the exemptions, and present fewer risks to trading venues, if the assessment criteria for the exemption are purely factual and objective, and the trading venue may rely entirely on the information provided by the participant. This should also make it easier to achieve a consistent approach to granting exemptions across all trading venues.

In addition, it is unclear why a trading venue would need to satisfy itself that a participant can reasonably manage its exempt positions before granting a hedging exemption. Any concerns about failure to manage positions can be more appropriately dealt with using the trading venue's existing position management and other enforcement powers.

Grandfathering for current exempt positions: We would also welcome an express provision in the FCA's rules, providing for grandfathering of positions that currently benefit from a hedging exemption.

Question 14: Do you agree with the approach to the pass-through hedging exemption outlined above and the information to be provided to evidence use of the exemption? If not, please explain why.

We strongly agree that there should be a pass-through hedging exemption available to financial firms providing hedging services to non-financial firms. However, we have the following comments on the information to be provided to evidence use of the exemption:

- It would be useful to understand when the FCA considers that futures and OTC positions would be "substantially related", and whether this is a separate assessment from the hedging assessment, or whether a firm can assume that if it meets the criteria for "hedging" that the transactions would be considered to be "substantially related".
- We would also welcome further clarification from the FCA regarding the requirement to provide information on current and anticipated hedging activity over the year ahead. Depending on a firm's client base, it may be difficult (or even impossible) to predict this in connection with the pass-through exemption. We would welcome clarity from the FCA on what its expectations are from a trading venue in the event that a firm is unable to accurately anticipate client hedging activity. Is the FCA's expectation that this would have an impact on continued availability of the exemption or on application of exemption ceilings?
- The FCA proposes introducing rule MAR 10.2.15R, which would provide that a trading venue operator may only grant the pass-through exemption where "a financial entity has obtained written confirmation from a non-financial entity that the position entered into […] qualifies as a hedging contract under a hedging exemption". We would propose amending this to provide that the financial entity should confirm that it has taken appropriate steps to confirm that the position qualifies as a hedging contract. This would give flexibility for a financial entity to satisfy itself appropriately that the non-financial counterparty is entering into the transaction in order to hedge another exposure, without specifying the wording of a representation that the financial counterparty would need to obtain (which is essentially what MAR 10.2.15R does as currently drafted). There are a number of reasons why a financial counterparty may not be able to obtain a representation from its counterparty that it is entering into a position that "qualifies as a hedging contract under a hedging exemption", including:

- The precise wording of the representation is likely to be a factor in determining whether or not a non-financial entity will give the representation. Entities are often reluctant to give representations with respect to compliance with specific regulatory obligations, as this can result in both regulatory and contractual liability in the event that the representation is not correct (and in the early days of implementing a new regime this risk may be higher).
- The definition of "hedging exemption" proposed by the FCA only covers the hedging exemption granted to a non-financial entity by a trading venue with respect to on-exchange transactions. If the non-financial entity is hedging an OTC position, it would not fall within a hedging exemption under the position limits regime, as the position limits regime does not apply to OTC positions. It would be useful to clarify what the FCA means by a "hedging exemption" for these purposes (and either delete the reference to a hedging exemption or delink it from the proposed Glossary definition and provide guidance on what will qualify).

- The FCA consultation paper would require futures and OTC positions to be “substantially related” and seems to work on the basis that hedging of OTC activity is done on 1:1 basis. However, this is not always the case and there may be instances where an OTC exposure is legitimately higher or lower the futures position. The most common scenario would be if a client had an existing OTC position which was thereafter reversed/unwound. However, in the interests of maintaining an orderly market, the futures position may be unwound rateably across a number of hours/days leading to a potential mismatch between our OTC and futures position. We would consider it appropriate for that futures position to still be exempt from the position limit but we would welcome FCA’s clarification on this.

Question 15: Do you agree with the approach to the liquidity provider exemption outlined above and the information to be provided to evidence use of the exemption? If not, please explain why.

We support the proposal to introduce an exemption for firms providing liquidity in the relevant market and with the criteria that the FCA proposes in relation to availability of the exemption.

However, while we acknowledge that a trading venue may need information on use of the liquidity provider exemption on its venue, the information that the FCA proposes to require as part of the application for an exemption could potentially be more usefully provided by way of periodic reporting while the relevant firm relies on the exemption, rather than as a condition of relying on the exemption.

5. Position management controls and reporting

Question 16: Do you agree that trading venues should establish accountability thresholds for critical contracts?

Question 17: Do you agree with the approach outlined above and the factors that should be considered as part of the trading venues' accountability threshold setting methodology? If not, please explain why.

The Joint Association members agree with the FCA's proposal to require trading venues to establish accountability thresholds for critical contracts and their related contracts only and not for all commodity derivatives. However, we would welcome guidance around the application of accountability thresholds by trading venues and the actions that trading venues may take if accountability thresholds are exceeded. In particular, trading venues should only direct members not to accept further orders or to reduce their positions where there are other concerns regarding market stability, and not solely as a result of exceeding an accountability threshold. We would welcome a periodic review by the FCA of the setting and operation of accountability thresholds and the action taken by trading venues, to ensure that a similar approach applies across all trading venues and that a best practice develops.

We broadly agree with the approach outlined for setting accountability thresholds and the factors that trading venues should consider when assessing the need for further action following breach of an accountability threshold. However, we consider that these factors should be objective and capable of being assessed in a consistent way across all market participants. As a result, we do not consider that "the extent and quality of the participant's engagement with the trading venue and response to inquiries" should be a relevant factor when a trading venue is considering whether or not to direct a participant not to accept further orders or to reduce their positions. Any action following breach of an accountability threshold should be targeted at addressing potential risks or market instability. Other issues can be dealt with using the trading venue's normal disciplinary measures.

We are also concerned by the proposal for trading venues to be able to ask participants to reduce positions which are in excess of the accountability thresholds but below the relevant position limit. The proposed rule (MAR 10.3.3AR) refers to "excessive or unjustified" positions. It is unclear what would constitute an "excessive" position where the position is below the relevant position limit, and whether a position might be "excessive" simply as a result of being in excess of the accountability threshold, regardless of whether it is justified or not. In this case, it is not clear what the difference would be between a position limit and an accountability threshold – firms would need to manage their positions to remain under the accountability threshold rather than the position limit. This is particularly concerning given that the accountability thresholds would include positions entered into subject to exemptions,

so if they are set below the position limit, a firm carrying on hedging or liquidity management activity could exceed the accountability threshold long before they approach the position limit, and find that they are required to reduce their position. We would welcome deletion of the reference to "excessive" positions, or else clarification that trading venues should apply position management powers to positions that are both excessive and unjustified, so that it is clear that position management powers would not be applied if the trading venue considers that the position is justified.

Question 18: Do you agree with the set of conditions that result in the requirement to provide additional reporting? If not, please explain why.

Question 19: Do you agree with the information to be reported once the additional reporting requirement is triggered? If not, please explain why.

Question 20: Do you agree with the definitions of related OTC contracts and overseas contracts? If not, please explain why.

While we agree that trading venues should be able to request additional information or temporary periodic reports from members in order to address concerns about market stability or unusual market activity (whether on or off the relevant venue), we would strongly oppose any proposal that trading venues should be required to impose reporting obligations on their members covering client positions all the way to the end client.

We understand that the FCA does not consider that its draft rules would impose a mandatory obligation for trading venues to request additional information from participants, and that trading venues would have flexibility in all circumstances to decide whether or not to request additional information. We support this flexible approach, but we are concerned that this is not clearly reflected in the draft rules. In particular, we would welcome clarification of MAR 10.3.3D to ensure that it reflects the FCA's understanding that trading venues have flexibility over whether or not to impose additional reporting. In particular:

- MAR 10.3.3D(1) should read "a trading venue operator **may** ~~must~~ require additional reporting…"
- MAR 10.3.3D(2) should read "a trading venue operator **should** ~~must~~ require…"

Our preferred approach would be to avoid imposing any obligation on trading venues to request additional information and let trading venues use existing powers under their rulebooks to request this information if necessary. If the FCA does retain MAR 10.3.3 then we would welcome clarification of MAR 10.3.3F so that it clearly enables trading venues to decide that they already have appropriate information available to them. In particular:

- The words "in the case of over-the-counter derivative contracts" should be deleted to make it clear that trading venues may rely on information they already hold in relation to any impacted contracts (including contracts traded on non-UK venues).
- The words "as a result of services provided otherwise than in the operation of a trading venue" suggest that trading venues may not rely on information that they have obtained in other ways. If the intention was to clarify that trading venues may rely on any information that they have in their possession regardless of how they obtained it, MAR 10.3.3F should make this clear.

Imposing reporting obligations that extend to off-exchange or client positions raises a number of concerns (and even more so where the information may extend to entities that are clients of clients, with whom an exchange participant would not have any direct relationship), including:

- **Confidentiality and other prohibitions on disclosure**: we note that the FCA acknowledges potential confidentiality or secrecy concerns in paragraph 6.57 of the consultation paper. However, we would welcome further consideration of the difficulties that these concerns can raise where information is reported under contractual obligations to private commercial undertakings, rather than under statutory obligations to a regulator or other authority. Where clients (or clients of clients) are located in jurisdictions outside of the UK, firms providing services to those clients may be subject to statutory or other regulatory confidentiality obligations regarding disclosure of client information. This issue has arisen previously in the context of obligations to report to an entity other than a regulator, or where the obligation is not imposed under relevant legislation or regulation but is a purely contractual obligation (which would be the case for a reporting obligation imposed through trading venue rules). While a confidentiality obligation may be capable of being waived with the consent of the client, some clients may not be willing to provide this consent (particularly where they do not have a direct relationship with the firm doing the reporting) or may only do so where disclosure is made subject to restrictions on the use that will be made of the information. Depending on the information requested, there may be regulatory restrictions or prohibitions on providing the requested information, which cannot be waived by obtaining client consent (e.g., if the information is considered to be confidential supervisory information in the US).
- While we acknowledge that the FCA's position (as set out in paragraph 6.57) is that participants should take all reasonable steps to comply with trading venue rules, we would emphasise that it is also necessary for trading venue rules to be capable of being complied with (bearing in mind that these are not regulatory rules, but a contractual agreement).

- If the FCA does decide to require trading venues to impose additional reporting requirements, it should be clear that members would not be in breach of a reporting requirement where they are unable to provide all relevant information or where they consider it necessary to provide the information on a masked basis (i.e., omitting the identity of the relevant client).
- The FCA should make it clear that trading venue rules should only impose an obligation that is in line with normal contractual standards (rather than regulatory standards, which are typically more absolute) – e.g., the obligation to provide additional information should be on a reasonable efforts basis, or should provide that participants may exclude information or provide it on a masked or redacted basis where they reasonably consider this is necessary.
- **Competition law issues**: trading venue members may have concerns about competition law issues where trading venues are able to access information on trading activity taking place outside of their venue. These issues may arise with respect to OTC positions entered into by participants outside of the relevant venue, as well as positions entered into on non-UK trading venues. Where UK trading venues require their participants to report positions that they hold (or their clients hold) on non-UK trading venues, those other trading venues may be concerned about the use that will be made of this information. Trading venues often use information on trading activity on their venue to develop other commercial products (e.g., benchmarks). If UK trading venues are obtaining this information through their participants, they may obtain a competitive advantage and potentially trigger retaliatory action by other venues or their regulators (e.g., prohibiting local entities from providing the information). In this context, we note that in the US any information of this sort is reported directly to the CFTC and not to the individual exchanges.
- **Fragmented picture of the market**: where each trading venue requests only information that it considers to be relevant to its market, using its own format for reporting and setting different frequencies for reporting, this is likely to result in the FCA having a fragmented picture of overall market activity. This also goes to the point raised below regarding the competitiveness of UK markets, as this also raises potentially significant operational costs for market participants in implementing different reporting regimes.
- **Competitiveness of UK markets**: We are concerned that the proposal may have a negative impact on the competitiveness of UK markets and may discourage participation in UK trading venues by non-UK participants. If the proposed changes are introduced as described in the consultation paper, the UK would have one of the most onerous position limits regimes as well as multiple position reporting requirements

which may act as a barrier to entry for some market participants, making it preferable to trade OTC or on non-UK venues. This could result in a concentration of futures positions held by participants who are able to comply with the UK regime, and OTC positions held by participants who are less able to comply, reducing visibility regarding positions and risks. There may also be a reduction in liquidity on UK venues if firms consider that they need to cap their positions at the level of the accountability thresholds (e.g., because of the risk that they would be required to reduce their positions if they exceed those thresholds, regardless of whether or not they exceed the relevant position limit).

- While the LME has already implemented some OTC reporting, this relates to positions of Members and Members' affiliates, the requirements in the FCA proposals go wider covering positions held by client independent of the Member (and in this context we would note that even in respect of the LME's current reporting requirement some clients have withheld their permission to report their OTC positions). Further, no venue to date requires the reporting of positions held on other exchanges and this unique obligation would need to be implemented from scratch.

If the FCA does decide to implement this additional information regime, we would welcome guidance or clarification on the following points:

- It would be useful for the FCA to provide further guidance on how trading venues should apply the additional reporting requirement. For example, it is not currently clear what is meant by the "end client" (this is an existing problem under MiFID). While trading venues can clarify this when implementing the requirement in their rulebook, this may lead to inconsistent application where a harmonised approach would enable trading venue members to take a consistent approach when requesting this information from their clients.

- It would be helpful to have further guidance clarifying the additional information that trading venues may request, or else confirmation that participants may respond with redacted information or an explanation for why they are not able to provide the requested information. Similarly, it would be helpful to understand the FCA's expectations for the actions trading venues should take if a participant is unable to provide the requested information (e.g., will this be a rulebook breach or grounds for suspending or removing access to the venue or to particular services?). If participants are required to provide information without having the protection that the information is required by applicable law or regulation, or that the information is being requested by a regulator or similar authority, they may avoid trading on UK venues in order to avoid triggering potential liability for breach of restrictions or prohibitions on disclosure.

Question 21: Do you consider that additional reporting requirements should apply at a group level rather than entity level for the reasons highlighted in paragraph 6.33 above? If not, please explain why.

The Joint Association members do not consider that additional reporting requirements should apply at a group level in connection with OTC positions. Where UK entities have entered into commodity derivatives, these would be subject to reporting under UK EMIR (whether entered into OTC or on UK or non-UK trading venues). Where the relevant transaction is not within scope of an existing reporting regime, it would be more appropriate to develop a separate reporting regime addressing these transactions. Also, if the entity that is required to report at a group level is not the parent undertaking of the relevant group, obtaining information from other group entities may be challenging (particularly if the definition of the in-scope instruments is not clear).

As discussed in a number of places in our response, we are concerned that the proposal may have a negative impact on the competitiveness of UK markets and may discourage participation in UK trading venues by non-UK participants.

Question 22: Do you agree with the proposal for trading venues to develop a periodic market risk analysis report? If not, please explain why.

Yes, we agree with the proposal for trading venues to develop a periodic market risk analysis report.

Question 23: Do you agree that trading venues are best placed to determine for which contracts CoT reports should be published or do you have views on how the criteria should be amended? Please explain your answer.

Question 24: Are there any other changes to the public reporting of aggregated positions that you consider appropriate? If yes, please explain the changes you propose and why they are necessary.

We would like to emphasise the usefulness of the MiFID CoT and consider that these should be maintained for the value they bring market participants. We encourage trading venues to continue publishing the data for all the contracts (not just for some contracts).

We would welcome some enhancements to the reports, in particular with respect to:

- The timeliness with which they are published (the sooner they are published after the end of each week, the more value the reports have for market participants); and

- to the presentation of some of the information (e.g., increased granularity in defining the categories).

6. Perimeter

Question 25: Do you agree with the proposed guidance on the AAT? If not, please explain why.

We welcome confirmation that the annual notification requirement will not be reintroduced.

Question 26: Do you have any other views on the points outlined above?

N/A

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About ISDA

Since 1985, ISDA has worked to make the global derivatives markets safer and more efficient. Today, ISDA has over 1,000 member institutions from 78 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. Follow us on LinkedIn, Facebook and YouTube.

About AFME

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors, and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society. Information about AFME and its activities is available on the Association's website: www.afme.eu.