



ESMA MiFID 2 Consultation Paper

GFMA CWG Response

The GFMA Commodities Working Group has submitted on 2 March 2015 its response to the ESMA MiFID 2 Consultation Paper ([link](#)) which is included in this document.

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Part 3: Transparency

Section 3.5: Liquid market definition for non-equity financial instruments

Q66. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer detailed per contract type, underlying type and underlying identified, addressing the following points:

- (1) Would you use different qualitative criteria to define the sub-classes? In particular, do you consider the notional currency as a relevant criterion to define sub-classes, or in other words should a sub-class deemed as liquid in one currency be declared liquid for all currencies?**
- (2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?**
- (3) Would you define classes declared as liquid in ESMA's proposal as illiquid (or vice versa)? Please provide reasons for your answer.**

In relation to the definition of a liquid market, we agree with the concerns raised in the separate AFME response, in the Fixed Income context, about the potential negative impact of an inappropriately calibrated transparency regime.

To assess the liquidity of metal commodity derivatives, we understand that ESMA has analysed data collected from five trading venues. We believe this dataset is too narrow and therefore the assessments do not provide an accurate representation of liquidity in the relevant commodity markets. In our view, in order to present a more accurate reflection of liquidity in the relevant contracts, the analysis must at a minimum include data collected from the major EU trading venues (e.g., LME) and the major non-EU trading venues (e.g., CME Group). In the absence of disclosure of the details regarding the underlying data sources it has not been possible to test the underlying data. However, we note at a high level that the data presented in the consultation paper is minimal, that the taxonomy presented is not as detailed as for other asset classes and as a result we have very real concerns regarding the accuracy of this data.

We also note that neither the consultation paper nor the proposed taxonomy explains how ESMA proposes to deal with new categories of commodities related contracts that will become financial instruments under the new MIFID II/R definition (for example, physically settled commodities related derivatives that are traded on an OTF that will fall within the new C(6) definition or may pursuant to the scope of the C(7) category). In this regard, we are concerned that ESMA does not explain how it proposes to obtain a robust dataset for its liquidity assessment of commodities related contracts traded on an MTF or OTF. In addition to our concerns regarding the underlying dataset for existing financial instruments and obtaining a robust dataset for new categories of financial instruments, we note that liquidity in markets changes over time. Given the importance of commodities derivatives in enabling end-users to hedge exposures to underlying risks, it is vital to ensure that the liquidity assessments are appropriately calibrated and the basis on which such assessments have been made are transparent and tested.

Moreover, we note the current difficulties for market participants to access OTC data. Although this information is reported by market participants to trade repositories under the existing reporting regimes which apply to commodity derivatives (e.g., EMIR), these details are accessible only to regulators.

In light of the above, we strongly believe that it is necessary for ESMA to conduct a further market assessment of the liquidity of the commodity derivative contracts which utilises an appropriate data set for assessing whether the relevant derivatives which are ‘traded on a trading venue’ (e.g. excluding bespoke OTC transactions) are liquid for the purposes of the MiFID 2 transparency regime. Such an assessment should be based on complete data available from the major commodities trading venues (including the major non-EU venues) for trading venue contracts, and the data from trade repositories for the contracts which are currently traded OTC. We note that at the end of February 2015 ESMA published an Addendum to this consultation paper, which also covers additional commodities derivatives. However, we have similar concerns regarding the data underlying that analysis and note that there are certain sub-classes (for example, coal and iron ore) which are not addressed in either consultation paper.

Therefore, we recommend ESMA conducts (i) an in-depth analysis, similar to the one performed for other asset classes and (ii) a further consultation which provides market participants with sufficient time to respond, consider the proposals and to review the relevant data and analysis.

Approach and parameters

We note that ESMA favours a COFIA approach that may be workable for commodities derivatives. However, we do not support ESMA's current determination of the relevant sub-classes. In our view, ESMA's sub-classes should be set at a more granular level and we include our initial suggestions for metals in the illustrative assessment below.

In particular, for metals, we believe that a distinction should be made between base metals and precious metals.

We agree that it is appropriate to use the same parameters and thresholds for each sub-class of metal commodity contracts, however we believe that the proposed parameters and thresholds are inappropriate. In particular:

- a) The thresholds of “one trade per day” and “€ 100,000 per day” are too low and do not give a true indication of the liquidity of a market.
- b) Expression of thresholds by reference to notional amount in euros is not appropriate because metal commodity contracts are traded in US dollars. Expressing the thresholds in a currency other than the currency in which the relevant contracts are traded could lead to arbitrary and inconsistent results as contracts become liquid or illiquid based solely on movements in the relevant exchange rate.
- c) Irrespective of currency, the more appropriate parameter would be open interest and units of commodities. The open-interest metric would reflect all relevant market factors relating to the trading of the relevant contract (e.g., maturity, volatility, number and size of market participants, thereby ensuring flexibility to prevailing market conditions for the relevant commodity).
- d) The assessment of the liquidity of all commodity derivatives has to appropriately consider the tenor of the contracts as the liquidity of these instruments varies along the curve and, generally, they become more liquid when closer to the expiry date.

Illustrative assessment

As noted above, we believe that it is imperative that ESMA conducts a full liquidity assessment and makes its liquidity determinations on the basis of a complete set of data from trading venues and trade repositories.

We acknowledge, however, that the assessment will be an extremely complex task and we are therefore keen to assist ESMA in the development of an appropriate framework. Accordingly, we set out below some principles for a taxonomy, which we believe ESMA may be able to use as a starting point in conducting its assessment, and an illustrative assessment of the liquidity of certain metals commodity derivatives.

The proposed tables are illustrative only and, given the absence of data, demonstrate our efforts to reflect a more appropriate framework for the definition of the liquidity of the main metals commodity derivative contracts. We would therefore stress that the taxonomy and liquidity assessments should not be adopted by ESMA without first conducting a detailed assessment of the liquidity of the commodity derivative contracts. Any assessment must utilise data from trading venues and trade repositories. For ease of reference, the tables include the following information:

- for ETD contracts, our initial analysis includes an indicative liquidity test (including thresholds) that we believe more appropriate than the proposed “one trade per day” and “€ 100,000 per day”. The liquidity test is based on the publicly available data from the major trading venues.
- for OTC contracts, due to the difficulties in accessing the data noted above, we have not been able to indicate a more appropriate threshold/liquidity test. However, we have marked the various contracts which may be considered liquid or illiquid on the basis of the information which is available to us.

Tables:

1. Base metals

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Aluminium	≤ 12 months	LME Forward	Liquid	2,500 trades/day; \$ 350 million/week
		LME Option	Liquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Liquid	
		OTC Option	Liquid	
	12 - 24 months	LME Forward	Liquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Liquid	
		OTC Option	Illiquid	
	> 24 months	LME Forward	Illiquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Illiquid	

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
		OTC Option	Illiquid	
Copper	≤ 12 months	LME Forward	Liquid	2,500 trades/day; \$ 350 million/week
		LME Option	Liquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Liquid	
		OTC Option	Liquid	
	12 - 24 months	LME Forward	Liquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Liquid	
		OTC Option	Illiquid	
	> 24 months	LME Forward	Illiquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Illiquid	
		OTC Option	Illiquid	
Nickel	≤ 12 months	LME Forward	Liquid	2,500 trades/day; \$ 350 million/week
		LME Option	Liquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Liquid	
		OTC Option	Liquid	
	12 - 24 months	LME Forward	Liquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Liquid	
		OTC Option	Illiquid	
	> 24 months	LME Forward	Illiquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Illiquid	
		OTC Option	Illiquid	
Zinc	≤ 12 months	LME Forward	Liquid	2,500 trades/day; \$ 350 million/week
		LME Option	Liquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Liquid	
		OTC Option	Liquid	
	12 - 24 months	LME Forward	Liquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Liquid	
		OTC Option	Illiquid	
	> 24 months	LME Forward	Illiquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Illiquid	
		OTC Option	Illiquid	
All other LME metals	≤ 12months	LME Forward	Illiquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Illiquid	
		OTC Option	Illiquid	
	12 - 24	LME Forward	Illiquid	2,500 trades/day; \$ 350 million/week

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
	months	LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Illiquid	
		OTC Option	Illiquid	
	> 24 months	LME Forward	Illiquid	2,500 trades/day; \$ 350 million/week
		LME Option	Illiquid	2,500 trades/day; \$ 350 million/week
		OTC Cash Settled Swap	Illiquid	
		OTC Option	Illiquid	

2. Precious metals

Due to the fact that the precious market is predominantly OTC, there is limited publicly available data on precious metals instruments. Therefore, we have not been able to provide metrics by which liquidity for precious metal instruments can be assessed. However we are able to provide an illustrative assessment of how market participants perceive liquidity in the precious market based on trading knowledge (included in the table below) taking into account as outlined above that (i) the majority of the precious market is physically settled on a bilateral (OTC) basis; and (ii) the list of instruments noted in the table below may not be exhaustive.

We note that ESMA has made an assessment for the liquidity of gold (which in the EU is mainly traded OTC along with silver, platinum and palladium) and we would be grateful if ESMA could disclose the data underlying these assessments. We would then review this data and provide our views on the quality of the data set including whether the source(s) is/are representative of the precious market, whether additional granularity is required and thereafter propose metrics by which liquidity can be assessed.

We offer our availability to continue the discussion with ESMA on this and all other sub-classes on the basis of the information that will be collected from trade repositories.

Specific Commodity	Tenor	Instrument Type	Liquidity Category
Gold	≤ 3 months	OTC Swap	Liquid
		OTC Forward	Liquid
		OTC Option	Liquid
		LME/CME Swap physical	Illiquid
	3 - 12 months	OTC Swap	Liquid
		OTC Forward	Liquid
		OTC Option	Liquid
		LME/CME Swap physical	Illiquid
	12 - 24 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
	>24 months	OTC Swap	Illiquid
		OTC Forward	Illiquid

Specific Commodity	Tenor	Instrument Type	Liquidity Category
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
Silver	≤ 3 months	OTC Swap	Liquid
		OTC Forward	Liquid
		OTC Option	Liquid
		LME/CME Swap physical	Illiquid
	3 - 12 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
	12 - 24 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
	> 24 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
Platinum	≤ 3 months	OTC Swap	Liquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
	3 - 12 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
	12 - 24 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
	>24 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
Palladium	≤ 3 months	OTC Swap	Liquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
	3 - 12 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid

Specific Commodity	Tenor	Instrument Type	Liquidity Category
	12 - 24 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid
	>24 months	OTC Swap	Illiquid
		OTC Forward	Illiquid
		OTC Option	Illiquid
		LME/CME Swap physical	Illiquid

Q67. Do you agree with ESMA’s proposal for the definition of a liquid market? Please provide an answer detailed per contract type, underlying type and underlying identified, addressing the following points:

- (1) Would you use different qualitative criteria to define the sub-classes? In particular, do you consider the notional currency as a relevant criteria to define sub-classes, or in other words should a sub-class deemed as liquid in one currency be declared liquid for all currencies?**
- (2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?**
- (3) Would you define classes declared as liquid in ESMA’s proposal as illiquid (or vice versa)? Please provide reasons for your answer.**

In relation to the definition of a liquid market, we agree with the concerns raised in the separate AFME response, in the Fixed Income context, about the potential negative impact of an inappropriately calibrated transparency regime.

To assess the liquidity of energy commodity derivatives, we understand that ESMA has analysed data collected from seven trading venues. We believe this dataset is too narrow and therefore the assessments do not provide an accurate representation of liquidity in the relevant commodity markets. In our view, in order to present a more accurate reflection of liquidity in the relevant contracts, the analysis must at a minimum include data collected from the major EU trading venues (e.g., ICE Futures Europe) and the major non-EU trading venues (e.g., CME Group). In the absence of disclosure of the details regarding the underlying data sources it has not been possible to test the underlying data. However, we note at a high level that the data presented in the consultation paper is minimal, that the taxonomy presented is not as detailed as for other asset classes and, as a result, we have very real concerns regarding the accuracy of this data. For example, the liquidity assessment for oil related derivatives appears to imply that oil related derivatives traded in the EU are either confined to, or represented by, those traded in Romanian Leu, which is clearly not the case.

We also note that neither the consultation paper nor the proposed taxonomy explains how ESMA proposes to deal with new categories of commodities related contracts that will become financial instruments under the new MIFID II/R definition (for example, physically settled commodities related derivatives that are traded on an OTF that will fall within the new C(6) definition or may pursuant to the

scope of the C(7) category). In this regard, we are concerned that ESMA does not explain how it proposes to obtain a robust dataset for its liquidity assessment of commodities related contracts traded on an MTF or OTF. In addition to our concerns regarding the underlying dataset for existing financial instruments and obtaining a robust dataset for new categories of financial instruments, we note that liquidity in markets changes over time. Given the importance of commodities derivatives in enabling end-users to hedge exposures to underlying risks, it is vital to ensure that the liquidity assessments are appropriately calibrated and the basis on which such assessments have been made are transparent and tested.

Moreover, we note the current difficulties for market participants to access OTC data. Although this information is reported by market participants to trade repositories under the existing reporting regimes which apply to commodity derivatives (e.g., EMIR), these details are accessible only to regulators.

In light of the above, we strongly believe that it is necessary for ESMA to conduct a further market assessment of the liquidity of the commodity derivative contracts which utilises an appropriate data set for assessing whether the relevant derivatives which are ‘traded on a trading venue’ (e.g., excluding bespoke OTC transactions) are liquid for the purposes of the MiFID2 transparency regime. Such an assessment should be based on complete data available from the major commodities trading venues (including the major non-EU venues) for trading venue contracts, and the data from trade repositories for the contracts which are currently traded OTC. We note that at the end of February 2015 ESMA published an Addendum to this consultation paper, which also covers additional commodities derivatives. However, we have similar concerns regarding the data underlying that analysis and note that there are certain sub-classes (for example, coal and iron ore) which are not addressed in either consultation paper.

Therefore, we recommend ESMA conducts (i) an in-depth analysis, similar to the one performed for other asset classes and (ii) a further consultation which provides market participants with sufficient time to respond, consider the proposals and to review the relevant data and analysis.

Approach and parameters

We note that ESMA favours a COFIA approach that may be workable for commodities derivatives. However, we do not support ESMA's current determination of the relevant sub-classes. In our view, ESMA's sub-classes should be set at a more granular level and we include our initial suggestions for energy in the illustrative assessment below.

We agree that it is appropriate to use the same parameters and thresholds for each sub-class of energy commodity derivative contracts, however we believe that the proposed parameters and thresholds are inappropriate. In particular:

- a) The thresholds of “one trade per day” and “€ 100,000 per day” are too low and do not give a true indication of the liquidity of a market.
- b) Expression of thresholds by reference to notional amount in euros is not appropriate because a large number of energy commodity contracts are traded in currencies other than euros (USD, GBP). Expressing the thresholds in a currency other than the currency in which the relevant contracts are traded could lead to arbitrary and inconsistent results as contracts become liquid or illiquid based solely on movements in the relevant exchange rate.
- c) Irrespective of currency, the more appropriate parameter would be open interest and units of commodities. The open-interest metric would reflect all relevant market factors relating to the

trading of the relevant contract (e.g., maturity, volatility, number and size of market participants, thereby ensuring flexibility to prevailing market conditions for the relevant commodity).

- d) The assessment of the liquidity of all commodity derivatives has to appropriately consider the tenor of the contracts as the liquidity of these instruments varies along the curve and, generally, they become more liquid when closer to the expiry date.

Illustrative assessment

As noted above, we believe that it is imperative that ESMA conducts a full liquidity assessment and makes its liquidity determinations on the basis of a complete set of data from trading venues and trade repositories.

We acknowledge, however, that the assessment will be an extremely complex task and we are therefore keen to assist ESMA in the development of an appropriate framework. Accordingly, we set out below some principles for a taxonomy, which we believe ESMA may be able to use as a starting point in conducting its assessment, and an illustrative assessment of the liquidity of certain energy commodity derivatives.

The proposed tables are illustrative only and, given the absence of data, demonstrate our efforts to reflect a more appropriate framework for the definition of the liquidity of the main energy commodity derivatives contracts. We would therefore stress that the taxonomy and liquidity assessments should not be adopted by ESMA without first conducting a detailed assessment of the liquidity of the commodity derivative contracts. Any assessment must utilise data from trading venues and trade repositories. For ease of reference, the tables include the following information:

- for ETD contracts, our initial analysis includes an indicative liquidity test (including thresholds) that we believe more appropriate than the proposed “one trade per day” and “€ 100,000 per day”. The liquidity test is based on the publicly available data from the major trading venues.
- for OTC contracts, due to the difficulties in accessing the data noted above, we have not been able to indicate a more appropriate threshold/liquidity test. However, we have marked the various contracts which may be considered liquid or illiquid on the basis of the information which is available to us.

Tables:

1. Oil and Oil Products

i. Crude Oil

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Crude Oil	≤ 6 months	ICE Brent Future	Liquid	4,000 trades/day; \$ 6 billion/week
		ICE Brent Option	Liquid	4,000 trades/day; \$ 6 billion/week
		ICE WTI Future	Illiquid	4,000 trades/day; \$ 6 billion/week
		ICE WTI Option	Illiquid	4,000 trades/day; \$ 6 billion/week
		OTC Vanilla Swap	Illiquid	N/A
		OTC Vanilla Option	Illiquid	N/A
	>6 months	ICE Brent Future	Illiquid	4,000 trades/day; \$ 6 billion/week

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
		ICE Brent Option	Illiquid	4,000 trades/day; \$ 6 billion/week
		ICE WTI Future	Illiquid	4,000 trades/day; \$ 6 billion /week
		ICE WTI Option	Illiquid	4,000 trades/day; \$ 6 billion /week
		OTC Vanilla Swap	Illiquid	N/A
		OTC Vanilla Option	Illiquid	N/A

ii. Distillates

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Distillates	≤ 4 months	ICE Gas Oil Futures	Liquid	1,000 trades/day; \$ 1.5 billion/week
		ICE Gas Oil Options	Illiquid	1,000 trades/day; \$ 1.5 billion/week
		ICE Heating Oil Future	Illiquid	1,000 trades/day; \$ 1.5 billion/week
		ICE Heating Oil Option	Illiquid	1,000 trades/day; \$ 1.5 billion/week
		OTC Vanilla Swap	Illiquid	N/A
		OTC Vanilla Option	Illiquid	N/A
	> 4 months	ICE Gas Oil Futures	Illiquid	1,000 trades/day; \$ 1.5 billion/week
		ICE Gas Oil Options	Illiquid	1,000 trades/day; \$ 1.5 billion/week
		ICE Heating Oil Future	Illiquid	1,000 trades/day; \$ 1.5 billion/week
		ICE Heating Oil Option	Illiquid	1,000 trades/day; \$ 1.5 billion/week
		OTC Vanilla Swap	Illiquid	N/A
		OTC Vanilla Option	Illiquid	N/A

iii. Light ends

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Light ends	≤ 4 months	ICE NYH RBOB Future	Liquid	500 trades/day; \$ 7.5 million/week
		ICE NYH RBOB Option	Illiquid	500 trades/day; \$ 7.5 million/week
		OTC Vanilla Swap	Illiquid	N/A
		OTC Vanilla Option	Illiquid	N/A
	>4 months	ICE NYH RBOB Future	Illiquid	500 trades/day; \$ 7.5 million/week
		ICE NYH RBOB Option	Illiquid	500 trades/day; \$ 7.5 million/week
		OTC Vanilla Swap	Illiquid	N/A
		OTC Vanilla Option	Illiquid	N/A

2. Natural Gas

We note the difficulties in obtaining data for natural gas. It would be helpful if ESMA could provide more complete data, together with the information underlying its assessment on this product.

We would then review the data and provide our views on those including whether the source(s) is/are representative of this market and propose metrics by which liquidity can be assessed.

For the purpose of an initial discussion we set out below the results of our analysis of our datasets.

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Natural Gas - UK	< 12 Months	Exchange Future	Liquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Liquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
Natural Gas - Dutch	< 12 Months	Exchange Future	Liquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Liquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
Natural Gas - German	< 12 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
Natural Gas - French	< 12 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
Natural Gas - Other	< 12 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	50 trades/day; € 250 million/week

3. Electricity

We note the difficulties in obtaining data for electricity. It would be helpful if ESMA could provide more complete data, together with the information underlying its assessment on this product.

We would then review the data and provide our views on those including whether the source(s) is/are representative of this market and propose metrics by which liquidity can be assessed.

For the purpose of an initial discussion we set out below the results of our analysis of our datasets.

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Electricity - Nordic	< 12 Months	Exchange Future	Liquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
Electricity - German	<12 Months	Exchange Future	Liquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
Electricity - UK	< 12 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
Electricity - France	< 12 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
Electricity -	< 12	Exchange Future	Illiquid	50 trades/day; € 250 million/week

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Italian	Months	OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
OTC Swap		Illiquid	N/A	
Electricity - Spanish	< 12 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
Electricity - Other	< 12 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	12-24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A
	>24 Months	Exchange Future	Illiquid	50 trades/day; € 250 million/week
		OTC Physical Forward (If MIFID 2 Financial Instrument)	Illiquid	N/A
		OTC Swap	Illiquid	N/A
		Option (Exchange or OTC)	Illiquid	N/A

Q68. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer detailed per contract type and underlying (identified addressing the following points:

- (1) Would you use different qualitative criteria to define the sub-classes?**
- (2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average notional amount traded per day) but different thresholds in order to define a sub-class as liquid?**
- (3) Would you define classes declared as liquid in ESMA's proposal as illiquid (or vice versa)? Please provide reasons for your answer.**

In relation to the definition of a liquid market, we agree with the concerns raised in the separate AFME response, in the Fixed Income context, about the potential negative impact of an inappropriately calibrated transparency regime.

To assess the liquidity of agricultural commodity derivatives, we understand that ESMA has analysed data collected from seven trading venues. We believe this dataset is too narrow and therefore the assessments do not provide an accurate representation of liquidity in the relevant commodity markets. In our view, in order to present a more accurate reflection of liquidity in the relevant contracts, the analysis must at a minimum include data collected from the major EU trading venues (e.g., ICE Futures Europe) and the major non-EU trading venues (e.g., CME Group). In the absence of disclosure of the details regarding the underlying data sources it has not been possible to test the underlying data. However, we note at a high level that the data presented in the consultation paper is minimal, that the taxonomy presented is not as detailed as for other asset classes and as a result we have very real concerns regarding the accuracy of this data.

We also note that neither the consultation paper nor the proposed taxonomy explains how ESMA proposes to deal with new categories of commodities related contracts that will become financial instruments under the new MIFID II/R definition (for example, physically settled commodities related derivatives that are traded on an OTF that will fall within the new C(6) definition or may pursuant to the scope of C(7) category). In this regard, we are concerned that ESMA does not explain how it proposes to obtain a robust dataset for its liquidity assessment of commodities related contracts traded on an MTF or OTF. In addition to our concerns regarding the underlying dataset for existing financial instruments and obtaining a robust dataset for new categories of financial instruments, we note that liquidity in markets changes over time. Given the importance of commodities derivatives in enabling end-users to hedge exposures to underlying risks, it is vital to ensure that the liquidity assessments are appropriately calibrated and the basis on which such assessments have been made are transparent and tested.

Moreover, we note the current difficulties for market participants to access OTC data. Although this information is reported by market participants to trade repositories under the existing reporting regimes which apply to commodity derivatives (e.g., EMIR), these details are accessible only to regulators.

In light of the above, we strongly believe that it is necessary for ESMA to conduct a further market assessment of the liquidity of the commodity derivative contracts which utilises an appropriate data set for assessing whether the relevant derivatives which are 'traded on a trading venue' (e.g., excluding bespoke OTC transactions) are liquid for the purposes of the MiFID2 transparency regime. Such an assessment should be based on complete data available from the major commodities trading venues (including the major non-EU venues) for trading venue contracts, and the data from trade repositories for the contracts which are currently traded OTC. We note that at the end of February 2015 ESMA has published an

Addendum to this consultation paper, which also covers additional commodities derivatives. However, we have similar concerns regarding the data underlying that analysis and note that there are certain sub-classes (for example, coal and iron ore) which are not addressed in either consultation paper.

Therefore, we recommend ESMA conducts (i) an in-depth analysis, similar to the one performed for other asset classes and (ii) a further consultation which provides market participants with sufficient time to respond, consider the proposals and to review the relevant data and analysis.

Approach and parameters

We note that ESMA favours a COFIA approach that may be workable for commodities derivatives. However, we do not support ESMA's current determination of the relevant sub-classes. In our view, ESMA's sub-classes should be set at a more granular level and we include our initial suggestions for agricultural in the illustrative assessment below.

We agree that it is appropriate to use the same parameters and thresholds for each sub-class of agricultural commodity derivatives contracts, however we believe that the proposed parameters and thresholds are inappropriate. In particular:

- a) The thresholds of “ten trades per day” and “€ 500,000 per day” are too low and do not give a true indication of the liquidity of a market.
- b) Expression of thresholds by reference to notional amount in euros is not appropriate because many agricultural commodity contracts are traded in US dollars. Expressing the thresholds in a currency other than the currency in which the relevant contracts are traded could lead to arbitrary and inconsistent results as contracts become liquid or illiquid based solely on movements in the relevant exchange rate.
- c) Irrespective of currency, the more appropriate parameter would be open interest and units of commodities. The open-interest metric would reflect all relevant market factors relating to the trading of the relevant contract (e.g., maturity, volatility, number and size of market participants, thereby ensuring flexibility to prevailing market conditions for the relevant commodity).
- d) The assessment of the liquidity of all commodity derivatives has to appropriately consider the tenor of the contracts as the liquidity of these instruments varies along the curve and, generally, they become more liquid when closer to the expiry date.

Illustrative assessment

As noted above, we believe that it is imperative that ESMA conducts a full liquidity assessment and makes its liquidity determinations on the basis of a complete set of data from trading venues and trade repositories.

We acknowledge, however, that the assessment will be an extremely complex task and we are therefore keen to assist ESMA in the development of an appropriate framework. Accordingly, we set out below some principles for a taxonomy, which we believe ESMA may be able to use as a starting point in conducting its assessment, and an illustrative assessment of the liquidity of certain agricultural commodity derivatives.

The proposed tables are illustrative only and, given the absence of data, demonstrate our efforts to reflect a more appropriate framework for the definition of the liquidity of the main agricultural commodity

derivatives contracts. We would therefore stress that the taxonomy and liquidity assessments should not be adopted by ESMA without first conducting a detailed assessment of the liquidity of the commodity derivative contracts. Any assessment must utilise data from trading venues and trade repositories. For ease of reference, the tables include the following information:

- for ETD contracts, our initial analysis includes an indicative liquidity test (including thresholds) that we believe more appropriate than the proposed “ten trades per day” and “€ 500,000 per day”. The liquidity test is based on the publicly available data from the major trading venues.
- for OTC contracts, due to the difficulties in accessing the data noted above, we have not been able to indicate a more appropriate threshold/liquidity test. However, we have marked the various contracts which may be considered liquid or illiquid on the basis of the information which is available to us.

Tables:

1. Corn

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Chicago Corn	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	6-12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Illiquid	N/A

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Matif Maize	<3 Months	Futures	Illiquid	3,000 trades/week; € 500 million/week
		ETD Options	Illiquid	3,000 trades/week; € 500 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	3-6 Months	Futures	Illiquid	3,000 trades/week; € 500 million/week
		ETD Options	Illiquid	3,000 trades/week; € 500 million/week

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	6-12Months	Futures	Illiquid	3,000 trades/ week; € 500 million/week
		ETD Options	Illiquid	3,000 trades/ week; € 500 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/ week; € 500 million/week
		ETD Options	Illiquid	3,000 trades/ week; € 500 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A

2. Wheat

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Chicago Wheat	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	6-12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
Kansas Wheat	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		Swap	Liquid	N/A
		Vanilla Options	Illiquid	N/A
	6-12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
	>12Months	OTC Vanilla Options	Illiquid	N/A
		Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
Minneapolis Wheat	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	3-6 Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	6-12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
Milling Wheat	<3 Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	6-12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A

3. Soft

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
NY Raw Sugar	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	6-12Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
Ldn White Sugar	<3 Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	3-6 Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	6-12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
Coffee (Family)	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
	6-12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
Cocoa (Family)	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	6-12Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A

4. Oil Seeds

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
Soybeans	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	6-12Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	>12Months	Futures	Liquid	3,000 trades/week; \$750 million/week

Specific Commodity	Tenor	Instrument Type	Liquidity Category	Liquidity test (applicable to ETD contracts only)
	hs	ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Illiquid	N/A
Soymeal	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	6-12Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
Soybean Oil	<3 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Liquid	3,000 trades/week; \$750 million/week
		OTC Swap	Liquid	N/A
		OTC Vanilla Options	Liquid	N/A
	3-6 Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	6-12Months	Futures	Liquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A
	>12Months	Futures	Illiquid	3,000 trades/week; \$750 million/week
		ETD Options	Illiquid	3,000 trades/week; \$750 million/week
		OTC Swap	Illiquid	N/A
		OTC Vanilla Options	Illiquid	N/A

Q69. Do you agree with ESMA's proposal for the definition of a liquid market? Please provide an answer per asset class identified (EUA, CER, EUAA, ERU) addressing the following points:

- (1) Would you use additional qualitative criteria to define the sub-classes?**
- (2) Would you use different parameters or the same parameters (i.e. average number of trades per day and average number of tons of carbon dioxide traded per day) but different thresholds in order to define a sub-class as liquid?**
- (3) Would you qualify as liquid certain sub-classes qualified as illiquid (or vice versa)? Please provide reasons for your answer.**

In relation to the definition of a liquid market we endorse the concerns expressed in the separate AFME response, in the Fixed Income context, about the potential negative impact of an inappropriately calibrated transparency regime.

To assess the liquidity of emission allowances commodity contracts, we understand that ESMA has analysed data collected from three trading venues. We believe this dataset is too narrow and therefore the assessments do not provide an accurate representation of liquidity in the relevant commodity markets. In our view, in order to present a more accurate reflection of liquidity in the relevant contracts, the analysis must at a minimum include data collected from the major EU trading venues (e.g., ICE Futures Europe) and the major non-EU trading venues (e.g., CME Group). In the absence of disclosure of the details regarding the underlying data sources it has not been possible to test the underlying data. However, we note at a high level that the data presented in the consultation paper is minimal, that the taxonomy presented is not as detailed as for other products and as a result we have very real concerns regarding the accuracy of this data.

We also note that neither the consultation paper nor the proposed taxonomy explains how ESMA proposes to deal with new categories of commodities related contracts that will become financial instruments under the new MIFID II/R definition (for example, physically settled commodities related derivatives that are traded on an OTF that will fall within the new C(6) definition or may pursuant to the scope of the C(7) category). In this regard, we are concerned that ESMA does not explain how it proposes to obtain a robust dataset for its liquidity assessment of commodities related contracts traded on an MTF or OTF. In addition to our concerns regarding the underlying dataset for existing financial instruments and obtaining a robust dataset for new categories of financial instruments, we note that liquidity in markets changes over time. Given the importance of commodities derivatives in enabling end-users to hedge exposures to underlying risks, it is vital to ensure that the liquidity assessments are appropriately calibrated and the basis on which such assessments have been made are transparent and tested.

Moreover, we note the current difficulties for market participants to access OTC data. Although this information is reported by market participants to trade repositories under the existing reporting regimes which apply to commodity derivatives (e.g., EMIR), these details are accessible only to regulators.

In light of the above, we strongly believe that it is necessary for ESMA to conduct a further market assessment of the liquidity of the commodity derivative contracts which utilises an appropriate data set for assessing whether the relevant derivatives which are 'traded on a trading venue' (e.g., excluding bespoke OTC transactions) are liquid for the purposes of the MiFID2 transparency regime. Such an assessment should be based on complete data available from the major commodities trading venues (including the major non-EU venues), for trading venue contracts, and the data from trade repositories for the contracts which are currently traded OTC. We note that at the end of February 2015 ESMA published an

Addendum to this consultation paper, which also covers additional commodities derivatives. However, we have similar concerns regarding the data underlying that analysis and note that there are certain products (for example, coal and iron ore) which are not addressed in either consultation paper.

Therefore, we recommend ESMA conducts (i) an in-depth analysis, similar to the one performed for other asset classes and (ii) a further consultation which provides market participants with sufficient time to respond to and consider the proposals and to review the relevant data and analysis.

Approach and parameters

We note that ESMA favours a COFIA approach that may be workable for commodities derivatives. However, we do not support the ESMA's current determination of the relevant sub-classes. In our view, ESMA's sub-classes should be set at a more granular level.

In terms of the appropriate parameters, whilst we agree that it is appropriate to use the same parameters and thresholds for each sub-class of emission allowances, we believe that the proposed parameters are inappropriate. In particular the threshold of “five trades per day” and “150,000 tons of carbon dioxide per day” is too low and does not give a true indication of the liquidity of a market.

The assessment of the liquidity of all commodity derivatives has to appropriately consider the tenor of the contracts as the liquidity of these instruments varies along the curve and, generally, they become more liquid when closer to the expiry date.

Illustrative assessment

Due to the very limited availability of publicly available data on Emission Allowances (which are financial instruments), we have not been able to provide an illustrative assessment for this category. However, we offer our availability to continue the discussion also on this sub-class with ESMA on the basis of the information that will be collected from trade repositories.

Section 3.7: Post-trade transparency requirements for non-equity instruments

Q79. Do you agree with ESMA's proposal for commodity derivatives? Please specify, for each type of commodity derivatives, i.e. agricultural, metals and energy, if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

- (4) deferral period set to 48 hours
- (5) size specific to the instrument threshold set as 50% of the large in scale threshold
- (6) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9
- (7) pre-trade and post-trade thresholds set at the same size
- (8) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

Deferral period

We believe that the transparency calibration is critical for ensuring that the Level 1 objective of increased market transparency is achieved without compromising liquidity.

Whilst we support ESMA's extension of the deferral period for LIS trades from end-of-day (as proposed in ESMA's May 2014 Discussion Paper) to 48 hours, the price deferral period remains too short, particularly for truly illiquid markets involving large trade sizes. To ensure a continuation of liquidity by market participants and to reduce the potential negative effects of the post trade transparency regime, in line with the suggestion in the separate AFME response, in the Fixed Income context, we would suggest for large trades in illiquid commodity derivatives a price deferral of at least 28 days.

Setting the thresholds

As noted in our responses to Q66-69, we are extremely concerned that the current proposals for commodity derivatives are based on a dataset which is too narrow and therefore the assessments do not provide an accurate representation of liquidity in the relevant commodity markets. Therefore, we have serious concerns that these proposals are not workable and could have significant adverse consequences if implemented.

In order to establish appropriate thresholds for the SSTI and LIS, we strongly believe that it is necessary for ESMA to conduct an appropriate market assessment of the liquidity of the contracts that will subject to the MiFID2 transparency regime based on complete data available from the major commodities trading venues (including the major non-EU venues), for on venue contracts, and the data from trade repositories for the contracts which are currently traded OTC. We do not believe that the SSTI should be linked to the LIS and remark the need to conduct an analysis in order to consider the potential impact on the

market. On the basis of an initial analysis that we have done in the available timeframe and by mere way of example, we would consider the following values as a more workable LIS and SSTI thresholds for an ICE Brent Future contract: LIS (200 lots, 12 USD million) and SSTI (50 lots; 3 USD million).

In terms of our preference for the system to set the thresholds, we strongly believe that an annual recalculation of the thresholds would be more appropriate.

We offer our assistance to continue the discussion for a more appropriate framework with ESMA after the end of this consultation period.

Q82. Do you agree with ESMA's proposal for emission allowances? Please specify if you agree on the following points providing reasons for your answer and if you disagree, providing ESMA with your alternative proposal:

(9) deferral period set to 48 hours

(10) size specific to the instrument threshold set as 50% of the large in scale threshold

(11) volume measure used to set the large in scale threshold as specified in Annex II, Table 3 of draft RTS 9

(12) pre-trade and post-trade thresholds set at the same size

(13) large in scale thresholds: (a) state your preference for the system to set the thresholds (i.e. annual recalculation of the thresholds vs. no recalculation of the thresholds) (b) in the case of a preference for a system with no recalculation (i.e. option 1) provide feedback on the thresholds determined. In the case of a preference for a system with recalculation (i.e. option 2) provide feedback on the thresholds determined for 2017 and on the methodology to recalculate the thresholds from 2018 onwards including the level of granularity of the classes on which the recalculations will be performed.

We believe that the transparency calibration is critical for ensuring that the Level 1 objective of increased market transparency is achieved without compromising liquidity. Therefore, we strongly believe that it is necessary for ESMA to conduct an appropriate market assessment in order to set these parameters.

Part 7: Commodity Derivatives

Section 7.1: Ancillary Activity

Q168. Do you agree with the approach suggested by ESMA in relation to the overall application of the thresholds? If you do not agree please provide reasons.

We believe that all entities engaged in similar or analogous activities should be regulated in a consistent manner and therefore welcome the overall direction of ESMA's proposals to restrict the availability of the ancillary activities exemption in the case of firms who are active traders in the commodities derivatives markets, subject to the comments below regarding market impact.

Accordingly, we have no objection in principle to the proposed thresholds. However, as many corporates rely on an adequate level of market activity (in terms of liquidity and provision of hedging instruments) to hedge the commodity risks inherent in their businesses, the impact of ESMA's proposals needs to be balanced with any potential market disruption affecting the ability of such organisations to effectively manage such risks. We are concerned that ESMA has not adequately assessed the impact on market liquidity of the proposed thresholds and would encourage ESMA to conduct further assessments in this regard as part of its recently announced cost/benefit assessment.

Q169. Do you agree with ESMA's approach to include non-EU activities with regard to the scope of the main business?

We are supportive of this approach.

Q170. Do you consider the revised method of calculation for the first test (i.e. capital employed for ancillary activity relative to capital employed for main business) as being appropriate? Please provide reasons if you do not agree with the revised approach.

We do not oppose the deduction of privileged transactions from the calculation of capital employed for the first test and from the trading activity for the second test in light of the reduced thresholds.

However, we note that the RTS 28 does not contain a definition of "capital employed" and that it will be difficult to attribute capital to specific activities on the basis of balance sheets and financial statements.

Q171. With regard to trading activity undertaken by a MiFID licensed subsidiary of the group, do you agree that this activity should be deducted from the ancillary activity (i.e. the numerator)?

We do not object to this approach in light of the reduced thresholds.

Q172. ESMA suggests that in relation to the ancillary activity (numerator) the calculation should be done on the basis of the group rather than on the basis of the person. What are the advantages or disadvantages in relation to this approach? Do you think that it would be preferable to do the calculation on the basis of the person? Please provide reasons. (Please note that altering the suggested approach may also have an impact on the threshold suggested further below).

We do not object to this approach in light of the reduced thresholds.

Q173. Do you consider that a threshold of 5% in relation to the first test is appropriate? Please provide reasons and alternative proposals if you do not agree.

We believe that all entities engaged in similar or analogous activities should be regulated in a consistent manner and therefore welcome the overall direction of ESMA's proposals to restrict the availability of the ancillary activities exemption in the case of firms who are active traders in the commodities derivatives markets, subject to the comments below regarding market impact.

Accordingly, we have no objection in principle to the proposed thresholds. However, as many corporates rely on an adequate level of market activity (in terms of liquidity and provision of hedging instruments) to hedge the commodity risks inherent in their businesses, the impact of ESMA's proposals needs to be balanced with any potential market disruption affecting the ability of such organisations to effectively manage such risks. We are concerned that ESMA has not adequately assessed the impact on market liquidity of the proposed thresholds and would encourage ESMA to conduct further assessments in this regard as part of its recently announced cost/benefit assessment.

Q174. Do you agree with ESMA's intention to use an accounting capital measure?

We do not object to this approach in light of the reduced thresholds.

Q175. Do you agree that the term capital should encompass equity, current debt and non-current debt? If you see a need for further clarification of the term capital, please provide concrete suggestions.

We recognise that in the absence of further guidance there may be practical difficulties in attributing capital to specific activities on the basis of balance sheets and financial statements. However, we do not object to the deduction of the capital of privileged transactions from the calculation of capital employed, in the context of the current proposals.

Q176. Do you agree with the proposal to use the gross notional value of contracts? Please provide reasons if you do not agree.

We agree with this approach, provided that the gross notional value is used both as nominator and denominator. However, our members point out that whilst the notional amount is a reportable field under EMIR, the gross notional value is not. Accordingly, we would request that ESMA clarifies how it will ensure that this data is available.

Q177. Do you agree that the calculation in relation to the size of the trading activity (numerator) should be done on the basis of the group rather than on the basis of the person? (Please note that that altering the suggested approach may also have an impact on the threshold suggested further below)

We do not object to this approach in light of the reduced thresholds.

Q178. Do you agree with the introduction of a separate asset class for commodities referred to in Section C 10 of Annex I and subsuming freight under this new asset class?

We do not object to this approach in light of the reduced thresholds.

Q179. Do you agree with the threshold of 0.5% proposed by ESMA for all asset classes? If you do not agree please provide reasons and alternative proposals.

We believe that all entities engaged in similar or analogous activities should be regulated in a consistent manner and therefore welcome the overall direction of ESMA's proposals to restrict the availability of the ancillary activities exemption in the case of firms who are active traders in the commodities derivatives markets, subject to the comments below regarding market impact. Accordingly, we have no objection in principle to the proposed thresholds. However, as many corporates rely on an adequate level of market activity (in terms of liquidity and provision of hedging instruments) to hedge the commodity risks inherent in their businesses, the impact of ESMA's proposals needs to be balanced with any potential market disruption affecting the ability of such organisations to effectively manage such risks. We are concerned that ESMA has not adequately assessed the impact on market liquidity of the proposed thresholds and would encourage ESMA to conduct further assessments in this regard as part of its recently announced cost/benefit assessment.

Furthermore, we note with concern that the 0.5% test is based on a denominator which ESMA suggests "should be undertaken on the basis of TR data". It is possible that a substantial portion of the activity in each of the commodity classes identified by Article 2(b) of the draft RTS is not reportable under EMIR Article 9, and therefore that firms whose trading activity is less than 0.5% of the total market may be above 0.5% of trading activity reported to the TR. Accordingly, we would reiterate the point we made in response to the Discussion Paper that the position reports under Article 58(1) of MiFID II may be a more appropriate source of data for the size of trading in the relevant asset class in the EU.

Q180. Do you think that the introduction of a de minimis threshold on the basis of a limited scope as described above is useful?

It is difficult to assess the usefulness of such test (including the appropriate threshold) without available data in terms of the size of the market.

Q181. Do you agree with the conclusions drawn by ESMA in relation to the privileged transactions?

In principle, we are supportive of the inclusion of all derivatives in the definition of hedging transactions.

We also support the development to take into account only business activity in the EU when calculating privileged transactions.

Q182. Do you agree with ESMA’s conclusions in relation to the period for the calculation of the thresholds? Do you agree with the calculation approach in the initial period suggested by ESMA? If you do not agree, please provide reasons and alternative proposals.

We understand the basis on which ESMA has sought to use average data for 2016 for assessing whether an entity falls within the scope of the exemption upon the entry into force of MiFID II/MiFIR.

Nevertheless, we recognise that market participants who are currently unauthorised will need to apply for authorisation prior to the entry into force of MiFID II/MiFIR to ensure that they are authorised prior to 3 January 2017 and that average data for 2016 will only become available as at 31 December 2016 (at the earliest). Given applications for authorisation can take up to 6 months, it is highly unlikely that market participants who are unsure as to whether they will fall within the scope of the exemption will be able to wait until the end of the assessment period to make a decision as to whether to apply for authorisation. Accordingly, we are doubtful that the average data for 2016 is the optimal data set for determining whether an entity falls within the MiFID II regime upon its entry into force and would encourage ESMA to reconsider its proposal in this regard.

Section 7.2: Methodology for calculating position limits

Q183. Do you have any comments on the proposed framework of the methodology for calculating position limits?

We would like to make the following high level comments in respect of the proposed framework:

Deliverable Supply

As the EU framework is to establish baseline limits for both spot and other months by reference to deliverable supply as defined in RTS 29 (i.e. deliverable supply means that which is used either as settlement for, or a pricing reference to, that commodity derivative), before market participants are able to opine on the appropriateness of the baseline figure of 25% we require clarity regarding how the concept of deliverable supply will be applied by ESMA. At a minimum, we require ESMA to:

- i. publish the methodology for calculating deliverable supply. We believe the proposed deliverable supply definition in Recital (5) and Article 1(2) of the RTS could be interpreted to mean overall trading interest in the commodity derivative whether for pricing purposes (i.e. cash settled commodity derivatives or physical settlement). Alternatively, the definition of deliverable supply (if based on the Article 3 deliverable supply adjustment factor) may be interpreted as the total physical supply of a commodity that meets the delivery specifications of a futures contract. Taking the ICE Brent contract for the spot month and other months as an example, on the first interpretation, deliverable supply could be very low whereas if based on the standard market definition it would be much higher. Furthermore, in our view, limits should be established for the (i) spot month based on deliverable supply and (ii) other months (i.e. aggregate limit) based on an estimate of open interest, subject to a de minimis threshold. Please see our response to question 184 for further details.
In the event that deliverable supply means the quantity of the underlying physical commodity then we propose that deliverable supply should only be used to establish the spot month limit and that other months limits should be established based on open interest, which we believe to be a more suitable metric. Also given the broad scope of commodity derivatives for which position limits will need to be established, it is critical that open interest is defined as overall outstanding trading interest in the commodity derivative instead of the traditional exchange based definition of open interest. Article 4 appears to capture the concept that open interest should reflect overall outstanding trading interest in other financial instruments (e.g. OTC contracts) however we need to ensure that “other financial instruments with the same underlying commodity markets” includes underlyers which are correlated to the exchange traded contract e.g. crude oil and refined petroleum products; and
- ii. publish estimates of deliverable supply for (at minimum) the key commodity contracts. Without estimates of deliverable supply, the industry will be unable to determine with any certainty whether the baseline figure is overly restrictive / appropriate. It is clear for some commodities it will be very challenging to source data to determine deliverable supply. For example, physically settled gold (some of which may be in scope of the regime e.g. physically settled forwards and options traded on-venue) is predominantly traded OTC (i.e. there is no exchange traded contract and only a small portion of OTC is cleared on exchange). Therefore deliverable supply estimates on which limits are to be based will need to be sourced from OTC data which is not publicly available. Another example is refined petroleum products which can be sourced anywhere in the world which may make it very difficult to obtain access to the relevant data in order to achieve a credible estimate of deliverable supply. Also if

a broader definition of deliverable supply applies, the overall outstanding market interest derived from OTC swaps etc. may be difficult to source; and

- iii. provide clarity as to how the adjustment mechanism will work in relation to the factors proposed, in particular, deliverable supply and open interest. For example paragraph 28 of the Consultation Paper provides that the greater the volume of open interest the greater the position limit. However if the baseline figure is low due to no available deliverable supply data, the regulator is only able to increase the limit by a maximum of 15%. Accordingly it is critical that ESMA identify the markets for which it would be difficult to obtain deliverable supply and to provide for further flexibility in the event open interest is the only reliable / available metric.

Risk of real economy impact

In designing the framework for the calculation of position limits, consideration must be given to the impact on those organizations which utilise commodity derivatives to hedge the various business/commodity risks associated with their day to day business (e.g. manufacturers, end users and corporate treasurers). In our view, the position limit regime should be calibrated to ensure that it avoids disruption to the market/real economy. In this regard, we highlight that commodity derivatives markets are global by nature. Market participants need to hedge their risk across multiple contracts (both OTC and on-venue) and regional areas. The EU position limits regime should therefore allow netting on a broad basis in order to accurately reflect:

- a. the global position given it is common for EU risk to be hedged with contracts traded on third country venues, i.e. the real risk exposure. Notwithstanding, we agree that the EU position limits should not apply to third-country venue contracts because this could lead to conflicting rules and requirements applying to the same position;
- b. the reality that end users (e.g. manufacturers, airlines, refiners) require financial institutions to provide hedging instruments to manage price risk for their physical commodity consumption and/or production. Refiners and airlines, for example, depend on financial institutions to assume basis risk in order to hedge their specific grade of fuel oil (e.g. 0.1 Gasoil Rotterdam) used for their commercial activities because these institutions commonly offset this exposure with more liquid exchange traded contracts (e.g. gas oil futures). In addition this dynamic allows financial institutions to aggregate bespoke interests in a diverse client base resulting in an aggregated central pool of liquidity which is highly correlated. The liquidity pool is created by aggregating a highly correlated set of bespoke interests in a commodity type. For example, an airline buys an OTC swap from a financial institution referencing Jet Rotterdam which the financial institution immediately hedges with gasoil futures. The next day a refiner sells a swap to a financial institution referencing Gasoil 0.1 FOB Med which is not exactly the same as Jet Rotterdam but it is highly correlated and therefore that second trade provides a hedge for the first at which point the financial institution can terminate the gas oil futures which provide a temporary hedge until the various OTC flows can be matched;
- c. that these end user entities rely upon the flexibility of financial entities acting as liquidity providers for hedging intermediation to allow them to manage their exact price risk. In order to ensure the availability of hedging instruments and to prevent liquidity pools from shrinking or dissipating, it is critical (in the absence of a pass through hedge exemption) that any positions which the financial institution executes to reduce the risk of that end user hedge can be netted. As demonstrated above, it is vital that hedges that may be non-MiFID instruments or which are highly correlated to an on-venue contract can be taken into account in determining a person's net exposure or, at the very least, that the

limits are established at appropriate levels in recognition of the fact that financial institutions will not benefit from a pass through exemption in respect of end user risk reducing transactions; and

- d. the fact that fabricators / manufacturers look to financial institutions / trading houses for supply of physical commodities (e.g. metal fabricators) and that these financial institutions / trading houses will hedge these physically settled forwards (e.g. non-MiFID financial instruments) with on venue commodity derivatives. To the extent that physical positions remain ineligible for netting, the risk position will not be accurately reflected and the limit will be reached quicker than if netting of OTC physical positions was permitted. In addition if physical positions cannot be netted this may lead to hedges for such physical OTC transactions migrating off venue.

Contracts where there is no "deliverable supply" for the relevant underlying

The definition of "commodity derivatives" includes contracts which relate to underlyings referred to in Section C(10) Annex 1 MiFID2. ESMA's technical advice to the Commission (page 422) indicates that those underlyings will include factors which are not deliverable e.g. environmental variables such as weather factors and indices and other measures of prices or values. ESMA's proposals for setting position limits do not address how position limits should be set where there is no deliverable underlying. In our view, this should be addressed in a supplemental consultation. In addition, this highlights the need for ESMA to provide the methodology for the calculation of deliverable supply to determine the baseline where there is no deliverable supply for the relevant underlying.

Commodity derivatives in the form of listed warrants or similar instruments

The definition of "commodity derivatives" includes transferable securities covered by Article 4(1)(44)(c) MiFID2, such as cash-settled warrants relating to commodities or underlyings covered by section C(10). It is not clear how ESMA envisages that the methodology for setting position limits will be adapted in cases where the commodity derivative takes the form of a warrant listed or traded on a securities trading venue. For example, it is unlikely that trading venues for such warrants will calculate the deliverable supply as contemplated by the recitals to draft RTS 29. It may also be more difficult to determine the "spot month" when a range of similar warrants trade on a particular venue.

ESMA should also make clear that the definition of "commodity derivative" does not include:

- warrants that are physically settled by delivery of the underlying commodity or other deliverable since Article 4(1)(44)(c) MiFID2 only covers instruments "giving rise to a cash settlement" (or instruments exercisable into transferable securities); or
- shares or bonds or other forms of securitised debt, even if they embed derivatives relating to commodities or other underlyings specified in Section C(10) Annex I MiFID2, because Article 4(1)(44)(c) MiFID2 is a residual category covering "other securities" i.e. securities not already covered in Article 4(1)(44)(a) or (b).

Scope of the position limits regime

It is not clear from the consultation paper what ESMA's views are on the scope of the position limits under Article 57. It will be important that Member States take a common approach to the scope of application of these requirements. Accordingly, ESMA should indicate how Member States should apply the requirements.

Equivalence and Flexibility

In our view, given the global nature of the commodity markets, it is imperative that the regime is consistent as possible with other existing regimes, (i.e. the US). In this regard, we note, that the US use open-interest as the metric for other months.

In addition given the issues highlighted above, we believe it is necessary for the regime to be sufficiently flexible in terms of both the expression of limits and measure of the market size to adapt to market changes. We believe the mechanism proposed in which the NCA or central CA can adjust the baseline figure according to the factors proposed in Articles 2-8 of RTS 29 (e.g. the maturity of the commodity derivatives contracts, deliverable supply in the underlying commodity, the overall open interest, number and size of market participants and characteristics of the underlying commodity) is an expression of the type of flexibility the market will require given dynamic nature of the commodity markets. That said, it is critical that participants understand the methodology for calculating deliverable supply in order to determine if the adjustment mechanism proposed builds in an appropriate level of flexibility including a possible de-minimis threshold below which the established position is not applied.

Cash and Physically settled spot

We note with concern that there is no distinction between the baseline for cash settled spot and physically settled spot. In our view it is important that the cash settled spot limit is established at a higher level than the physically settled spot limit. This is because high levels of trading activity in cash settled spot month contracts do not pose the same risk of price distortion in the underlying commodity as physically settled spot.

Q184. Would a baseline of 25% of deliverable supply be suitable for all commodity derivatives to meet position limit objectives? For which commodity derivatives would 25% not be suitable and why? What baseline would be suitable and why?

Deliverable supply

We take the view that ESMA's proposed 25% of deliverable supply baseline limit for spot-month contracts may be appropriate and also support the flexibility granted to national regulators to adjust it by +/- 15%. However in order to come to a conclusive view, market participants (corporates, financial firms) need ESMA to (i) confirm its interpretation of the "deliverable supply" definition, including the methodology for calculating deliverable supply and (ii) provide estimates of deliverable supply (based on the relevant interpretation of the deliverable supply definition) for key contracts to assess whether the 25% is appropriate for all commodities and the adjustment mechanism will provide sufficient flexibility for national regulators.

Furthermore, in our view, limits should be established for the (i) spot month based on deliverable supply and (ii) other months (i.e. aggregate limit) based on an estimate of open interest, subject to a de minimis threshold.

We underline that it will be challenging to obtain estimates of deliverable supply for other month limits and that open interest is the more relevant metric. We note ESMA's concerns that the use of open interest for other months limits may constrain legitimate business in other month contracts along the curve. However this could be addressed by introducing a de minimis threshold, below which limits could not be set, thereby avoiding any constraints on contract growth. In this regard, we believe that a de minimis threshold could be set per contract and calibrated (following a public consultation) to ensure that the position limits are only established for contracts once the total Dollar/Euro notional amount outstanding in such contract exceeds the de minimis threshold set for such contract. In this way the position limit regime would only capture positions above a size which could potentially impact the orderly pricing and settlement conditions of that market or which may lead to market distortions.

In addition, as highlighted in response to Q.183, end user participants rely upon centralised pool of liquidity for correlated underlyers (e.g. refined petroleum products) as a key component of efficient end user hedging intermediation which allows such entities to manage their exact price risk related to the specific grade of fuel oil which they use in their commercial activities. Financial institutions aggregate bespoke interests in a diverse client base resulting in an aggregated central pool of liquidity which is highly correlated. This liquidity pool is created by aggregating a highly correlated set of bespoke interests in a commodity type, for example, an airline buys an OTC swap from a financial institution referencing Jet Rotterdam which the financial institution immediately hedges with gasoil futures which for the financial institution hedge the majority of the OTC risk. The next day a refiner sells a swap to financial institution referencing Gasoil 0.1 FOB Med which is not exactly the same as Jet Rotterdam but it is highly correlated and therefore that second trade provides a hedge for the first at which point the financial institution can terminate the gas oil futures which provide a temporary hedge until the various OTC flows can be matched.

The availability of this centralised pool of liquidity among correlated underlyers is a key component of efficient end user hedging intermediation. If ESMA's vision of the population of underlyers which are eligible for offsets is too narrow then there is a risk that these correlations will be broken, impacting the provision of liquidity for end users (i.e. if financial institutions are restricted from netting the futures with this pool of instruments which reference these correlated underlyers then financial institutions will be restricted in making that pool of liquidity available to end users). It is critical that these correlated underlyers are eligible for netting because the degree of correlation is even tighter in the outer months.

Furthermore reference to deliverable supply raises the following points:

- How ESMA/ national regulators will measure the deliverable supply, including production and storage is very unclear, and notably how they can access data from physical facilities not subject to financial supervision (e.g. oil refineries). Whereas it seems workable for some commodities (e.g. metals), it will present a significant challenge for other commodities, in particular when markets are global (e.g. oil, agriculture).
- What period will be considered as relevant for the measure of deliverable supply compared to the maturity of other month contracts is also unclear as well as how ESMA/ national regulators will distinguish between storable/ non storable commodities, seasonal/ non seasonal commodities.
- What geographical spectrum is to be considered for the measure of the deliverable supply, i.e. European – Global, is also unclear. Whereas some markets remain mostly national (e.g. natural gas and power), some others are global by nature (oil, agriculture).

In the light of the operational challenges that the use of deliverable supply for other months present for market participants and regulators, we generally consider open interest as a better metric for other months contracts as the open interest reflects all relevant market factors relating to the trading of the relevant contract (e.g. maturity, volatility, number and size of market participants) thereby ensuring limit flexibility to prevailing market conditions for the relevant underlying commodity.

Q185. Would a maximum of 40% position limit be suitable for all commodity derivatives to meet position limit objectives. For which commodity derivatives would 40% not be suitable and why? What maximum position limit would be suitable and why?

In the absence of clarity regarding the definition of “deliverable supply” and estimates for deliverable supply we are unable to comment on whether a maximum position limit of 40% is appropriate.

As stated in response to question 184 above, we would advocate the introduction of a de minimis threshold, below which limits could not be set, thereby avoiding any constraints on contract growth. In this regard, we believe that a de minimis threshold could be set per contract and calibrated (following a public consultation) to ensure that the position limits are only established for contracts once the total Dollar/Euro notional amount outstanding in such contract exceeds the de minimis threshold set for such contract. In this way the position limit regime would only capture positions above a size which could potentially impact the orderly pricing and settlement conditions of that market or which may lead to market distortions.

In our view consideration also needs to be given to non-linear position changes which may occur as a result of option expirations for any contract i.e. options on futures expiring ahead of the corresponding future contract expiration. It can be difficult to manage limits during the option expiration window and participants could find themselves over the limit and may not know what the delta will be until the future has expired. Under the CFTC regime, there is a 1 day grace period after option expiration to come into compliance with the limit and we believe that the same flexibility should be provided under the EU regime.

Q186. Are +/- 15% parameters for altering the baseline position limit suitable for all commodity derivatives? For which commodity derivatives would such parameters not be suitable and why? What parameters would be suitable and why?

Without the methodology for calculating deliverable supply, market participants cannot accurately assess whether the +/- 15% adjustment is suitable. It may be more appropriate to allow regulators some flexibility due to factors specific to the commodity asset class (such as open interest, number of market participants) in the event that a higher or lower adjustment is required. Giving recognition to the fact that unique circumstances may exist across the wide range of underlyers which come within the scope of the position limit framework could be a useful concept although it is likely that this could be picked up through open interest if used as the metric for other months.

Q187. Are +/- 15% parameters suitable for all the factors being considered? For which factors should such parameters be changed, what to, and why?

ESMA is required to consider volatility and we recognise that volatility may have a residual value in terms of reflecting illiquidity issues.

We highlight that if open interest is used to determine other month limits, the other factors become incidental. This is because open interest numbers would already factor in such matters as maturity of contracts, volatility, number and size of participants and characteristics of underlying commodity markets.

Q188. Do you consider the methodology for setting the spot month position limit should differ in any way from the methodology for setting the other months position limit? If so, in what way?

Yes, we do believe the methodology for setting other months position limits should differ from the methodology for setting the spot month position.

Subject to the concerns we raised in response to questions 183 and 184 above, we believe deliverable supply is the correct metric for spot month contracts. However, it is important that the cash settled spot limit is established at a higher level than the physically settled spot limit (e.g. a multiple of deliverable supply for the physically settled spot month). This is because cash settled spot contracts are not structured for delivery and are therefore not constrained by available supply of physical inventory. In addition, we acknowledge the logic in ESMA's conclusion (at paragraph 21) that the limit for the spot month should generally be lower than the other month limit given that other months limit will apply to multiple expiries. However we would point out that for certain commodity contracts the limit for the spot month may be higher than the other months as the bulk of trading activity occurs in the spot month. We believe further analysis should be undertaken to test this assumption and no conclusions should be reached until the calculation methodology for deliverable supply is made available.

As stated in response to question 184 above, we would advocate the introduction of a de minimis threshold, below which limits could not be set, thereby avoiding any constraints on contract growth. In this regard, we believe that a de minimis threshold could be set per contract and calibrated (following a public consultation) to ensure that the position limits are only established for contracts once the total Dollar/Euro notional amount outstanding in such contract exceeds the de minimis threshold set for such contract. In this way the position limit regime would only capture positions above a size which could potentially impact the orderly pricing and settlement conditions of that market or which may lead to market distortions.

In relation to the use of open interest for other month limits, as the MiFID II regime applies to a broader range of commodity derivatives than just futures derivatives and will include economically equivalent OTC contracts, it will be necessary for open interest to reflect the notional volumes of OTC contracts relating to the relevant on-venue contracts. It is also the case that certain commodities may not have a related futures contract and competent authorities will need to estimate the deliverable supply, open interest based on notional amounts of swaps and other relevant OTC contracts (e.g. options and forwards). Open interest/deliverable supply data should be available via trade repositories as a result of EMIR reporting.

We also note, the difference between commodities means that some are durable and can be stored indefinitely and some cannot; this means that for some commodities, as well as production, deliverable supply should also include stock levels (i.e. surplus production stored from a prior period). As a general matter, estimated deliverable supply should include the amount of deliverable supply, including volume in storage, that is available to fulfil obligations from current trading of the relevant spot month contract.

We also think that ESMA and/ or national regulators should include an obligation on RMs/MTFs and OTFs to provide data to ESMA/ regulators in order to ensure sufficient data is available to set position limits. This would address ESMA's concern that they may not receive relevant data from OTF's on open interest.

Q189. How do you suggest establishing a methodology that balances providing greater flexibility for new and illiquid contracts whilst still providing a level of constraint in a clear and quantifiable way? What limit would you consider as appropriate per product class? Could the assessment of whether a contract is illiquid, triggering a potential wider limit, be based on the technical standard ESMA is proposing for non-equity transparency?

We think that ESMA should consider mechanisms to ensure that the limits do not hamper developing liquidity in the new contracts.

Low liquidity is not only a characteristic of new contracts, but also of many more regional or specialised commodity products. Where very few market participants exist with respect to a contract, liquidity will naturally be limited. Any consideration and/or methodology adopted for new contracts should therefore be extended to existing illiquid contracts.

We believe that the best approach would be to take each new or illiquid contract separately and consider a reasonable multiple of the current transaction size after a defined period of trading.

New contracts often are illiquid/ immature initially and may be used by a small number of market participants. In order to accommodate the demand of hedges and develop a robust, established market, it may be necessary to permit a small number of market participants to represent a relatively large share of the (small) market. Concerns regarding market abuse can be adequately addressed through enhanced reporting and surveillance, as necessary.

As stated in response to question 184 above, we would advocate the introduction of a de minimis threshold, below which limits could not be set, thereby avoiding any constraints on contract growth. In this regard, we believe that a de minimis threshold could be set per contract and calibrated (following a public consultation) to ensure that the position limits are only established for contracts once the total Dollar/Euro notional amount outstanding in such contract exceeds the de minimis threshold set for such contract. In this way the position limit regime would only capture positions above a size which could potentially impact the orderly pricing and settlement conditions of that market or which may lead to market distortions.

If liquidity in a contract is not present, then it is a clear indicator that trading activity in the contract is either irrelevant or not sufficiently significant to need to limit it. In such case, the threat of distortion should therefore be considered as irrelevant.

Q190. What wider factors should competent authorities consider for specific commodity markets for adjusting the level of deliverable supply calculated by trading venues?

We believe that the seasonal supply outages in the physical market, the perishability of deliverable materials and the capacity constraints (with regard to transportation and delivery) should be taken into account under the “characteristics of the underlying” factor.

We reiterate that the absence of accurate data on production and storage of some commodities should be reflected in the consideration related to the characteristics of the underlying commodity market.

Whilst, subject to our comments at questions 183 and 184 above, we agree that estimated deliverable supply is the appropriate baseline for setting spot month limits, we believe that open interest is the appropriate metric for all other months, and that this metric would take into account all relevant factors particular to the relevant commodity contract: it would then not be necessary to provide for an adjustment mechanism driven by an exhaustive list of factors.

It is also critical that deliverable supply or open interest calculations for other months limits allow for the inclusion of correlated underlyers (e.g. refined petroleum products such as jet ARA, jet Rotterdam, gasoil FOB 0.1). As these correlated underlyers use the commodity derivative as a hedge, it would be inaccurate not to recognise these underlyers for the purposes of calculating deliverable supply and / or open interest.

Q191. What are the specific features of certain commodity derivatives which might impact on deliverable supply?

Please see our response to question 190 above.

Q192. How should ‘less-liquid’ be considered and defined in the context of position limits and meeting the position limit objectives?

Please see our response to questions 184 and 189 above.

We also point out that the test for liquidity should be ‘high hurdle’ because commodity derivative markets are globally dispersed, seasonal and often fragmented between venues.

Q193. What participation features in specific commodity markets around the organisation, structure, or behaviour should competent authorities take into account?

We believe that where a product is traded by a small number of participants, ESMA should seek to understand the composition of market participants before determining the position limit. For example, a market with ten active participants may have two sellers and eight buyers, or just one risk management provider amongst nine participants seeking risk management services. In such markets, a single position limit may have a disproportionate impact on some of the participants.

Appropriate recognition of legitimate offsets is a key component of efficient end user hedging intermediation for liquidity providers. In addition risk monitoring entities within financial institutions have aligned their monitoring and reporting architecture to this dynamic (i.e. offsetting correlated underlyers with exchange based contracts as the instruments are seen as broadly fungible) and this same architecture should serve as a model / broad framework for regulators when trying to accomplish / identify these correlations for the purpose of establishing netting rules for the position limits regime.

As stated in response to question 184 above, we would advocate the introduction of a de minimis threshold, below which limits could not be set, thereby avoiding any constraints on contract growth. In this regard, we believe that a de minimis threshold could be set per contract and calibrated (following a public consultation) to ensure that the position limits are only established for contracts once the total Dollar/Euro notional amount outstanding in such contract exceeds the de minimis threshold set for such contract. In this way the position limit regime would only capture positions above a size which could

potentially impact the orderly pricing and settlement conditions of that market or which may lead to market distortions.

We particularly question ESMA's assertion that overall position limits should move inversely against the number of market participants: we would suggest that the greater the number of participants in a given market segment, the lower the chances of a single actor having a dominant or otherwise inappropriate position. Thus, the logic proposed by ESMA for new or illiquid markets should apply equally to established markets.

Q194. How could the calculation methodology enable competent authorities to more accurately take into account specific factors or characteristics of commodity derivatives, their underlying markets and commodities?

We broadly agree with the principles proposed by ESMA to enable the competent authority to adjust the limits. However we believe that ESMA's assumption that position limits should move up in direct proportion to the flexibility of the relevant commodity market is incorrect. Actually, the reverse is likely to be true, in the sense that the more restricted a market (in terms of few points of delivery, geographic specificity, and seasonality etc.) the greater the tolerance for inadvertent large positions needs to be built into the calibration.

We also believe that ESMA's assumption that position limits should be adjusted downwards in volatile market conditions is incorrect. In volatile markets there is an increase in demand for price risk management services from financial institutions and other liquidity providers. Restricting the ability of price risk management providers to offer these services in volatile markets will have an adverse impact on end users.

As we stress above, we also believe that open interest would factor in the relevant characteristics / specific factors relating to a particular commodity market.

Q195. For what time period can a contract be considered as "new" and therefore benefit from higher position limits?

We think that NCAs should have discretion on a case-by-case basis to take a view on the relative maturity of a contract after its commencement.

For further information, please see our response to questions 184 above and 198 below.

Q196. Should the application of less-liquid parameters be based on the age of the commodity derivative or the ongoing liquidity of that contract.

No. We underline that the age is irrelevant as a contract may never reach trading levels which are sufficiently high to result in the need for a position limit to be applied. In this regard, we feel that the case by case approach is more suitable.

For further information, please see our response to questions 184 and 189 above.

Q197. Do you have any further comments regarding the above proposals on how the factors will be taken into account for the position limit calculation methodology?

We ask that ESMA clarify how it interprets its definition of deliverable supply (ie. clarifies that it is meant to be broader than just the amount of physical commodity, for example the amount stored in a warehouse) and provides current data to test the proposed baseline / adjustment percentages against.

Furthermore, we would highlight that the frequency and timing of limit revisions is critical for monitoring a well-functioning market. From a practical perspective, position limits should not be changed more frequently than annually with a minimum 6 month compliance window.

Q198. Do you agree with ESMA's proposal to not include asset-class specific elements in the methodology?

Yes. We agree with ESMA that the methodology should provide competent authorities with sufficient scope to take into account the specificities of the different markets without incorporating asset-class specific elements in the methodology.

Also, it is critical that open interest is used as the metric for other month limits as open interest will factor in asset specific elements relevant to the particular commodity in question.

Q199. How are the seven factors (listed under Article 57(3)(a) to (g) and discussed above) currently taken into account in the setting and management of existing position limits?

We highlight that the seven factors listed under Article 57(3)(a) to (g) are all relevant but suggest that open interest for other months limits is the universal metric which is collectively reflective of all of them. In addition, differentiation between asset classes would be reflected through open interest and it is, in our view, the more appropriate metric for other months.

Section 7.3: Application of position limits

Q200. Do you agree with the proposed draft RTS regarding risk reducing positions?

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Q201. Do you have any comments regarding ESMA's proposal regarding what is a non-financial entity?

We agree that the term "non-financial entity" should be understood to cover persons that are not either:

- persons who are regulated under the various EU directives or regulations regulating financial entities; or
- persons who would be regulated under those directives or regulations if they were established in the EU.

Q202. Do you agree with the proposed draft RTS regarding the aggregation of a person's positions?

Disaggregation

MiFID II (article 57.1) states that the limits apply to "the net position which a person can hold at all times" and clarifies that the limits "shall be set on the basis of all positions held by a person and those held on its behalf at an aggregate group level".

Whilst, we understand that the level 1 text does not allow disaggregation of positions within the same legal entity, we are of the view that the definition of what qualifies as a position held on behalf of this legal entity does allow disaggregation based on independence of decision. Accordingly, we strongly believe that the basis for disaggregation proposed by ESMA in RTS 30 (Art. 2(2)) in respect of positions held by an intermediary on behalf of a client, is unduly restrictive. ESMA should allow disaggregation of independently managed business to which legal mandatory information barriers already apply (e.g. asset management businesses). These businesses are separated from principal trading businesses by firewalls (which may make it impossible to aggregate due to lack of access to the relevant data)/information barriers designed to ensure no exchange of information can occur between these businesses or no control can be asserted by one business over the other. It is critical that Article 2(2) is expanded to provide for disaggregation on this basis. In our view, any other interpretation would conflict with the independence requirements set out in European legislation (for example UCITS, AIFMD) and ignore the reality of such businesses. Furthermore, we do not believe that positions should be aggregated with other entities within the group where such entities are not included in the same fully consolidated accounting group. This is consistent with Article 3(1) of EMIR. Accordingly, we would propose that Article 5(3) is amended as follows:

"The positions of a person in a commodity derivative... shall be aggregated with the net positions in that commodity derivative held by other persons within the same group which are included in the same consolidation on a full basis as such person..."

Furthermore, whilst we welcome Article 2(2) of the draft RTS 30 which provides that positions that are held by an intermediary on behalf of a client shall not count towards that intermediary's own position limits regardless of whether, for reasons of market practice, operational structure or legal framework, the positions are held by the intermediary as principal. However, we note that in Europe the principal-to-

principal model is used for exchange traded derivatives which means that, as a matter of market practice, positions that are held by an intermediary on behalf of a client will be held as principal. We therefore request that the reference to “regardless of whether” in Article 2(2) is amended to provide further clarity that for exchange traded derivatives such arrangements should not be construed narrowly as an exception, but are in fact market practice in Europe.

Pro rata consolidation

We note that a 100% consolidation, rather than a pro rata consolidation, is likely to lead to double counting positions. We do not think it is appropriate to attribute control twice for the same position. We also urge ESMA to consider that a 100% consolidation provides an opportunity for participants in a 50-50 joint venture to each receive 100% netting benefit from a contra position held in the joint venture.

Parent company holds no positions in commodity derivatives traded on a trading venue

We believe the effect of ESMA's proposals is that where a parent or ultimate holding company itself holds no positions in commodity derivatives traded on a trading venue or economically equivalent OTC contracts, that entity will not be subject to aggregation rules notwithstanding positions may be held by one or more subsidiary undertakings of that entity.

At paragraph 19 of Section 7.3 of the Consultation Paper ESMA states that the aggregation will comprise of the positions of a person together with those of any wholly or partly owned subsidiaries of that entity but 'aggregation with the positions of fellow subsidiaries of a mutual parent or ultimate holding company' is not required. It follows therefore that the parent or ultimate holding company should not have to aggregate its positions with those of its subsidiaries where it holds no positions in commodity derivatives traded on a trading venue or economically equivalent OTC contracts itself as otherwise this could result in the position limits applying on an aggregated basis between the positions of fellow subsidiaries of that mutual parent or ultimate holding company which would be inconsistent with the position as set out in Section 7.3, paragraph 19.

Accordingly, we would welcome further clarification in the RTS that the position limit regime is only applicable where the relevant person holds positions in commodity derivatives and accordingly a parent or ultimate holding company that holds no positions in commodity derivatives is not required to aggregate the positions of its subsidiaries.

Q203. Do you agree with ESMA’s proposal that a person’s position in a commodity derivative should be aggregated on a ‘whole’ position basis with those that are under the beneficial ownership of the position holder? If not, please provide reasons.

It does not make sense to aggregate the positions taken by funds managed by an asset management company with the position taken by its mother company on the basis that the mother company owns more than 50% of the capital of the asset management company. It would in any event conflict with the regulation put in place by the EU to ensure independence of decision making and information in the asset management space.

Please see our response to question 202 above for further information.

Q204. Do you agree with the proposed draft RTS regarding the criteria for determining whether a contract is an economically equivalent OTC contract?

No. The functioning of commodity derivatives markets makes it critical that the definition of Economically Equivalent OTC contracts (EEOTC) recognises the global nature of markets.

As we make clear in our response to question 207 below, narrow netting rules will restrict capacity for financial institutions (and other liquidity providers) to provide liquidity to real economy customers (e.g. commodity producers, suppliers and manufacturers) to execute their price risk management strategies and do not accurately reflect the net risk exposure of a counterparty.

In addition, we point out that although recital 10 of Draft RTS 30 suggests that there would be a conclusive list of EEOTC contracts maintained by the competent authorities/ ESMA, we believe producing such a list may be operationally unworkable given the large number of commodity derivative contracts and the dynamic nature of the market. We therefore believe that market participants should assess for themselves what constitutes an EEOTC contract and note that this approach has worked effectively in the context of EMIR trade reporting.

Q205. Do you agree with the proposed draft RTS regarding the definition of same derivative contract?

Yes, we agree that it is a subset of economically equivalent and that a contract is “the same” if it is at least economically equivalent and in addition has other equivalent properties. However we think that the definition of ‘same contract’ should allow netting between long and short positions transacted on different broker platforms/ exchanges in effectively the same product.

Q206. Do you agree with the proposed draft RTS regarding the definition of significant volume for the purpose of article 57(6)?

We do not think that the ‘3 lot’ rule is appropriate as it is not material enough to be disturbed on a daily basis by relatively minor market activity.

Q207. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

No. In our view, the inability to net non-MiFID instruments with MiFID instruments will make the calculation of positions inaccurate as the resulting net position will not reflect the real risk exposure of market participants. In this regard, we note that the term “economically equivalent OTC contracts” is not defined by the Level 1 text and so in our view there is scope for ESMA to interpret this term broadly.

We also question that the level 1 text does not allow netting between contracts traded on EU venues and contract traded on third country venues. The recognition of third-country venues is a critical feature of the European financial legislation (EMIR as well as MiFID) and it seems arbitrary to state that for the purpose of netting article 57 is bounded at European level.

As noted in response to question 183, consideration must be given to the netting treatment of OTC contracts to ensure that in calculating the net position of an entity that entity is able to net OTC

instruments which are closely correlated to on-venue contracts. We view this as critical to financial institutions to continue to provide efficient end user hedging intermediation.

Specifically, non-financial entities require financial institutions to provide hedging instruments to manage price risk in respect of their physical commodity consumption and/or production. Refiners and airlines, for example, depend on financial institutions to offer OTC derivative contracts to hedge their specific grade of fuel oil (e.g. Jet Rotterdam) as the alternative would be to hedge with on-venue contracts (e.g. gas oil futures) which would involve assuming unwanted basis risk. These financial institutions commonly offset the OTC derivative exposure with exchange traded contracts (e.g. gas oil futures) as the OTC derivatives are closely correlated to the futures. In addition, this dynamic allows financial institutions to aggregate bespoke interests in a diverse client base resulting in a highly correlated centralised pool of liquidity which provides an efficient source of hedging intermediation for non-financial entities. However to ensure financial entities can continue to offer this, it is critical (in the absence of a pass through hedge exemption) that that these correlated OTC instruments continue to operate as legitimate offsets to the futures exposure assumed by financial institutions to deliver this source of liquidity to non-financial entities. Accordingly, we would ask ESMA to clarify that exposures to such OTC swaps can be taken into account in determining the net position.

Furthermore, it is critical that market participants can consider REMIT products and physical positions (which do not constitute MiFID instruments) and commodity index swaps as reducing the net position held in an on-venue commodity derivative. As discussed above, these products are often used to hedge the risk of commodity derivatives. An inability to include them in calculating the net position will restrict the capacity for financial institutions to execute their price management strategies. By way of example, commodity index swaps are hedged through futures positions. An inability to offset cash settled commodity index swaps with the futures positions will limit ability of financial institutions to write swaps for pension funds / asset managers etc. seeking to use such instruments to achieve diversification objectives. Accordingly, it is imperative that commodity index swaps and non-MiFID instruments will receive appropriate recognition as legitimate offsets under the position limits regime and we therefore believe it is necessary for ESMA to clarify that exposures to these non-MiFID instruments and commodity index swaps can be taken into account in determining a person's net position.

Q208. Do you agree with the proposed draft RTS regarding the procedure for the application for exemption from the Article 57 position limits regime?

We would support an ex-post approval procedure, e.g. the firm notifies the competent authority but trades immediately without waiting for approval. This is of fundamental importance if entities are to be able to effectively hedge positions – market participants cannot wait 30 days to do so.

Q209. Do you agree with the proposed draft RTS regarding the aggregation and netting of OTC and on-venue commodity derivatives?

It appears that this question is a repeat of question 207. We assume therefore that this question is instead meant to refer to pages 550 and 551 of the CP. If that's the case, we think the approach that ESMA proposes is sensible. However, this is only likely to be relevant within a workable and wider definition of what constitutes the 'same' commodity derivative, which we would favour.

Section 7.4: Position reporting

Q210. Do you agree with the reporting format for CoT reports?

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Q211. Do you agree with the reporting format for the daily Position Reports?

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Q212. What other reporting arrangements should ESMA consider specifying to facilitate position reporting arrangements?

International consistency

We would strongly encourage ESMA to consider a process for end client reporting close to the form 40 approach used in the US under the CFTC rules pursuant to which the end-client can directly send the relevant information to the CFTC without passing through the chain of intermediaries, which protects client confidentiality vis à vis the intermediaries.

We also point out that the end client reporting provisions, if implemented in a manner that forces clients' information to pass through the whole chain of intermediaries, would conflict with national privacy laws in some jurisdictions.

Scope of obligations of investment firms

An investment firm subject to position reporting under Article 58(2) may have relationships with clients that do not involve commodity derivatives or economically equivalent OTC contracts. The investment firm should only be required to obtain daily information for inclusion in a report required under Articles 58(2) or (3), from a client with whom the investment firm has executed contracts within the scope of Article 58(2) or (3) or for whom the investment firm currently holds positions in products within the scope of Articles 58(2) or (3) for the client (e.g. where the investment firm holds derivative warrants in custody for the client).

General comments

We reiterate that our key concern in relation to the position reporting regime is the significant practical challenges involved in implementing end client reporting. There are significant obstacles in determining the identity and positions of our clients' clients, as well as real confidentiality and commercial interest issues in obtaining and passing client identity details through the account relationship chain. We would therefore ask ESMA to support and work with the industry in the development of a workable solution which fulfils the policy objectives of the Level 1 text. Furthermore, we would like to raise the following specific points:

- Annex I and Annex II: It is possible that an OTC contract may be economically equivalent to contracts traded on two or more venues (perhaps with different competent authorities). It is not clear whether it is expected that a position in those contracts should be reported separately to each relevant competent authority.
- Annex II – field 4: The unique product identifier for warrants may be an ISIN rather than an Alternative Instrument Identifier. Accordingly, field 4 should reference an ISIN or, where the ISIN is not the industry method of identification, the Alternative Instrument Identifier.

- Annex II – field 6: It should be made clear that the spot month is determined in the same way as for position limits. However, the methodology for determining spot months will need to be adapted to take account of the structure of OTC derivatives, warrants and emission allowances.
- Annex II - field 7: For OTC derivatives, derivative warrants and emission allowances, the "number of contracts" may not be a meaningful measure (or possible to calculate). The notional amount, number of warrants, units of allowances, etc. may be more meaningful.
- Annex II – field 9: It is not clear how to report if some but not all of the contracts being reported are risk reducing. The flag to indicate if a position is “risk reducing” is linked to the flag on the client, as per EMIR. This assumes that a single client cannot have one position which is risk reducing and one which is not.