Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

Responses from ICE Futures Europe and ICE Clear Europe

Question	Response
6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why?	1. The purpose of the Organised Trading Facility (OTF) category is unclear to us. Furthermore it is not clear how this category is differentiated from the other two categories of organised trading venues: regulated markets or MTFs. Paragraph 3.4.1 of the MiFID proposal states that 'the requirements in terms of organisational aspects and market surveillance applicable to all three venues are nearly identical'. We fully support this principle, and believe it is crucial in ensuring a 'level playing field'. 2. However, this principle does not appear to be the borne out in the specific provisions. Articles 19 and 20 set out requirements for OTFs and MTFs which differ markedly, for reasons which are not apparent. For example it is not clear why there should be differences in the conflicts-of-interest provisions or the circumstances under which they need to comply with Article 51. 3. Furthermore, there are a wide range of requirements for regulated markets set out in Title III (Articles 47 – 58) which do not appear to apply to either MTFs or OTFs, including provisions relating to management, organisational requirements, admission of instruments to trading, monitoring of compliance with rules, etc. 4. We believe that the transparency, organisational and market surveillance arrangements applying to regulated markets, MTFs and OTFs should be identical

	wherever possible – differences should only exist to the extent there is a clear rationale. 5. Similarly, it is critically important that transparency requirements be defined by instrument, and should not differ between trading venues. Otherwise it is likely that a number of market operators will gravitate towards the form of trading venue with the least onerous transparency requirements. It will also lead to the development of private markets which cannibalise the main, lit market. Accordingly, pre-trade transparency requirements for systemic internalisers should not differ from pre-trade transparency requirements for other organised trading venues. 6. Finally, the current wording of the definition of OTF could, in theory, capture clearing houses. It would be helpful to expressly carve-out to prevent any uncertainty on this point.
7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and, if so, which type of venue?	This question is addressed in the response to question 6. We believe the regulation and directive should seek to ensure competition between different venues and different types of venues. This competition should take place on a level playing field – ie no venue should have competitive advantage or disadvantage based on the category under which it is regulated.
8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	1. We agree with the approach set out by the Commission that robust systems and controls should be used to ensure that markets remain orderly. 2. The definition of algo trading is extremely wide ranging and will encompass client execution strategies, arbitrage systems, and a range of automated facilities operated by participants which do not make two-way markets and do not resemble high frequency trading systems. The liquidity provided by all trading sources which fall under this definition is very substantial.

	3. A large proportion of such systems do not generate two way markets and such a mandatory requirement would result in the trading systems being modified or discontinued. This would result in significant loss of market efficiency and liquidity. 4. Furthermore, mandatory requirements on liquidity provision on a continuous basis, regardless of market conditions, is impractical even under the most onerous market-making regimes. 5. A more practical approach might be for the proposal to focus on firms providing automated market making services to do so for a minimum period (such as a 'mandatory quote period').
9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	We agree broadly with the requirements set out in Articles 18,19,20 and 51 with regards to resiliency, contingency and business continuity arrangements. We would point out that activity on MTFs and OTFs should be transparent and may affect price formation in the broader market for a financial instrument or commodity and hence would regard it as more appropriate that the provisions in Article 51 should apply to those venues in addition to Regulated Markets.
11) What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	The G20 commitment stated that OTC derivatives be traded on exchanges or electronic platforms where appropriate. The draft MiFID proposals have focussed instead on the migration of business to regulated platforms, whether electronic or not. The MiFID proposals do not therefore satisfy the G20 commitments.
13) Are the provisions on non-discriminatory access to market	1. The provisions relating to open access to market infrastructure are likely to result in unintended damage to the liquidity and efficiency of the listed derivatives markets,

infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? **If not, what else is needed and why? Do the proposals fit appropriately with EMIR?**	causing increased fragmentation, systemic risk and market volatility. Proper evaluation of the effects of these provisions has been temporarily diverted by consideration of the NYSE-Euronext merger with Deutsche Börse. However, the consequences on the operation of European markets should not be underestimated. 2. For those derivatives markets that are global in scope (including most commodities markets) the impact of such fragmentation and reduction in liquidity will be to encourage the movement of business to competing products outside the European Union, which are unaffected by MiFID. This will further compound the reduction of liquidity of such products in the Europe. 3. The stated aim of the provisions relating to access is to provide for effective competition. However, there is already strong competition between full service providers for many listed derivatives. For example ICE, which provides execution and clearing services for energy products, competes vigorously with CME in the US, which also provides a full service for similar, substitutable products. This active and effective competition takes place throughout the service chain, covering both execution and clearing. To the extent that providers do not face effective competition, then we believe this matter should be addressed by the competition authorities, rather than through regulation. 4. We believe that the provisions set out in Article 28 and 29 would, to the extent they introduce further competition, inevitably result in greater fragmentation of liquidity at the execution level. For listed derivatives markets, the depth of the liquidity pool is of supreme importance, given the crucial role that the listed derivatives play in enabling organisations to rapidly manage exposure, even in turbulent market conditions – indeed, especially in such conditions. Such fragmentation would therefore inevitably result in an increase in systemic risk. 5. Such fragmentation would also result in less resilience to large one-sided market interest, and an increase in bid-offer spreads at times of major price moves. Arbitrage between trading venues would likely give a false impression of market

	quality through tight bid-offer spreads, but would disguise a lack of depth. The consequence would be greater price volatility in the listed derivative markets. 6. In addition, for each listed product, there are multiple CCPs which would be capable of clearing, but netting benefits will inevitably result in a concentration of open interest. The consequence is that the proposals will result in the downsides set out above, with little practical introduction of clearing choice. 7. These factors were previously considered and discussed in the context of EMIR, with the conclusion that the access provisions should be limited in scope to OTC derivatives, for which the considerations differ. The OTC derivatives markets, which are already fragmented, do not have the same key characteristic and strength of forming central deep pools of liquidity, as for listed derivatives market. We believe that the decision taken in the EMIR was correct, and that these provisions should not be extended to listed derivatives in MiFID.
14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	1. All venues which offer trading in commodity derivatives will be required to have in place appropriate position limits or suitable alternative arrangements designed to support liquidity, prevent market abuse, and ensure orderly pricing and settlement conditions. For cash-settled contracts, position limits would limit liquidity and have no utility as such contracts are not subject to delivery/expiry squeezes. The accumulation of a large futures position in a cash-settled contract can have no effect on the underlying commodity, because the position does not acquire or procure a corresponding delivery. Taking a large position to expiry merely produces a sum of money which the position owner can use to buy the commodity. In extreme cases they could act against maintaining an orderly market by removing from it the bids and offers of those who have reached their position limit and can no longer trade. Therefore, position limits should apply only to contracts that give rise to physical delivery. The limit should apply to the number of contracts taken to physical delivery, since an excessive delivery could produce a squeeze. Limiting the size of actual deliveries to what is operationally feasible thus limits the scope for market

	abuse while having no detrimental impact on liquidity. It would tend to support liquidity and orderly pricing and settlement in physically delivered contracts in the lead up to expiry. 2. Powers are also granted to the Commission to impose general limits or alternative arrangements on the number of contracts a person may enter into over a specified time period. Presumably, this is intended to cover only commodity derivatives contracts, although this is not stated. This requirement is superfluous, given that platforms will be required to impose limits (or alternative arrangements) on a self-regulatory basis and, under Article 59(2), report these to regulators. The intention behind granting this power to the Commission is presumably to harmonise the treatment of position limits across the EEA. However, the Commission should achieve this policy instead by allowing market operators and national regulators to deal with the issue and through regulatory coordination. 3. Furthermore, the emergency power set out in Article 59(4) for national regulators to impose more stringent position limits in "*exceptional cases*" lacks clear parameters. More specific wording on when these powers may be used would be welcome.
17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	We are supportive of Article 27, including the supporting requirements on execution quality. We have some comments relating to the related provisions in Article 60, as set out in the section at the end of the questionnaire, requesting detailed comments on specific articles of the draft Directive
18) Are the protections available to eligible counterparties,	These distinctions are not directly relevant to ICE as all the clients of ICE Futures Limited and ICE Clear Limited are wholesale market participants.

professional clients and retail clients appropriately differentiated?	
21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	1. In principle ICE is supportive of the proposals relating to increased transparency, both pre-trade and post-trade. 2. The pre-trade and post-trade transparency arrangements for each market should, as pointed out by the Commission, accommodate the specific characteristics of each market. The characteristics taken to account should include, inter alia, the structure of the market, liquidity, frequency of trading, number of relevant instruments, related instruments, the nature of participants and the relative size of transactions. 3. It is of crucial importance that transparency arrangements for each particular instrument should be identical for each trading venue on which the product is traded. A level playing field is necessary to avoid regulatory arbitrage. This point is discussed also in our response to Question 6.
22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	See response to question 21.

23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	1. We believe that specific pre-trade transparency requirements should be calibrated for each product, as described in the response to question 21. These calibrations should accommodate waivers for different sized orders, depending on the asset class, with a view to optimising liquidity. 2. As set out in our response to questions 21 and 6, we believe that it is of crucial importance that transparency arrangements for each particular instrument should be identical for each trading venue on which the product is traded. Otherwise it is likely that a number of market operators will gravitate towards the form of trading venue with the least onerous transparency requirements. It will also lead to the development of private markets which cannibalise the main, lit market.
24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	As the Commission proposals state in a number of instances, there are substantial differences in the characteristics of different markets and products. It is critical that these different characteristics be fully and properly reflected in the regulations. This is very relevant to the regulations and parameters relating to CTPs, ARMs and APAs. As an example to illustrate this point, whilst it is general practice that data be made available free of charge 15 minutes after execution for equities, it is likely that this parameter might be very different for other asset classes which have different product and market characteristics. As an example, ICE Data currently supplies commodity derivatives data free on an end-of-day basis, for a nominal fee on a 30 minute delayed quote basis, and on reasonable commercial terms for real-time quoting. Similar arrangements apply to third party data vendors licensed by ICE.
25) What changes if any are needed to the post-trade transparency requirements by trading venues	1. As outlined in the response to question 24, it is critical that different product / market characteristics be fully and properly reflected in the regulations. 2. Furthermore, for any given product, it is important that all trading venues should

and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	have identical post-trade transparency requirements, as set out in our response to question 6.
26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	Whatever the nature of the supervisory and authorisation arrangements put in place, it is of crucial importance that they provide clarity about respective responsibilities, and facilitate a rapid and streamlined authorisation process.
27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	See comments relating to position management set out in response to question 14.
28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	See comments relating to access to market infrastructure set out in response to question 13.
31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	In a number of instances the degree of discretion delegated to Level 2 measures could have a very major overall impact of the regulation / directive. Examples include the Level 2 measures relating to pre-trade and post-trade transparency, and the definition of

	the class of derivatives subject to the trading obligations set out in Article 24. Guidance should be included in Level 1 to limit this degree of discretion.

Detailed comments on specific articles of the draft Directive	
Article number	**Comments**
Article 4 (4):	As is widely known, the existing MiFID definition of "execution of orders on behalf of clients" does not expressly capture principal-to-principal trading. The back-to-back model is widely used for customer trading and clearing models in Europe. Some national regulators have issued guidance clarifying this point. Under the proposed MiFID II wording it would remain unclear that the execution of orders on a back-to-back principal model (for example, in respect of cleared customer trades) would be viewed as the execution of a client order. It would be useful for this to be clarified in MiFID II.
Article 32 (1), 53 (1) and Recital 50:	The effect of Articles 32(1) and 53(1) is that, when an MTF or regulated market takes a decision to suspend trading in a financial instrument it must make public its decision, and communicate it to other trading venues and its national regulator. Where the grounds for the decision to suspend trading in the instrument are non-disclosure of information about the issuer or the financial instrument, national regulators must require all regulated markets, MTFs and OTFs trading the same instrument to suspend trading in that instrument, unless this could cause significant damage to investors' interests or the orderly functioning of the market. Under Article 32(1), where MTFs decide to suspend trading in a particular instrument, regulated markets would effectively be required to follow suit. This proposal moves away from the current model where regulated markets have a primary self-regulatory market stability role with an objective of maintaining orderly market conditions. Notably, during the recent emission allowances scandal, the regulated market ICE Futures took a more robust view (in line with European Commission policies) to the acceptability of allowances for deliveries than some MTFs and spot

	markets. Being obliged to follow the decisions of MTFs would arguably place a disproportionately heavy burden on regulated markets given the number of MTFs currently trading. MTFs are less strongly regulated and it is inappropriate to give them powers of this nature. Although the requirement to cease trading will, in theory, not be imposed if orderly market functioning could be affected, the existence of the obligation may in itself create uncertainty, distort market conditions and in practice lead to more frequent market closures. Moreover, the reference to disclosure obligations is not relevant to derivatives. Instead, other trading venues should follow the decision of a regulated market to cease trading in a particular instrument, as currently set out in Article 53(1), ***but regulated markets should not be required to follow decisions of MTFs***.
Article 54 (1), 18 (8), 58 and Recital 50:	Under a new requirement in Article 54(1), operators of regulated markets will be required immediately to inform other operators of regulated markets, MTFs and OTFs of disorderly trading conditions, suspected market abuse and system disruptions. There is no indication as to the scope of this requirement or how a trading platform operator can identify the other market operators that it must inform. Under Articles 58 and 18(8), ESMA will establish a list of regulated markets, MTFs and OTFs authorised in the EU but it is not clear whether data will be published on the instruments that are traded on them. It is unreasonable to require trading platform operators to disclose information to all EEA regulated markets, MTFs and OTFs. Recital 50 further provides that "*it is necessary to formalise and improve the exchange of information and the cooperation of trading venues in cases of exceptional conditions* **in relation to a particular instrument that is traded on various venues** (emphasis added)." ESMA is required to develop regulatory technical standards to determine the circumstances triggering an information requirement. Presumably such guidance would also cover the scope of the obligation, but it would be helpful for the scope to be outlined in the provision. Reporting would also preferably be made to the regulator rather than other platforms. The requirement to disclose to other regulated markets, MTFs and OTFs any conduct indicative of market abuse is not appropriate. Requiring regulated market operators to inform other platforms of conduct that "may indicate" abusive behaviour (i.e. unconfirmed suspicions) would expose them to libel claims. Regulated markets are required to report any conduct that may involve market abuse to national regulators. The notification requirements under the market abuse regime will also apply. National regulators should disseminate information to other market operators

	as they deem appropriate.
Article 60:	Under a new obligation in Article 60(1), venues on which commodity derivatives are traded must provide regulators with a complete breakdown of the positions of market members or participants including any positions held on behalf of their clients, upon request. For the purposes of this obligation, Article 60(3) provides that clearing members, participants and their clients shall be classified according to the nature of their main business, taking into account any applicable authorisation (i.e., as investment firms, credit institutions, investment funds, commercial undertakings etc). At the moment, such information is obtained (where necessary) by regulated markets only on an *ad hoc* basis. Making the necessary systems adjustments to capture the required information on clients of clearing members as a standard procedure is likely to be labour-intensive and costly, involving major changes to systems and procedures, and will inevitably lead to greater delays in the registration of new clients, reducing the effectiveness of clearing arrangements. It is also important for regulated markets and CCPs to ensure they can continue to exclude any liability or obligations in relation to clients of members and are exposed to defaults only on their Clearing Members or Exchange Members. The requirement that members report their positions and positions held on behalf of their clients in real time is particularly onerous and probably impossible to implement. Platforms are required to publish reports on a weekly basis under Article 60(1)(a). Requiring members to provide the information on a daily basis would therefore be adequate and proportionate.
Article 2 (26):	The term "CCP" is used in MiFIR but not defined. In MiFID II all references are to "central counterparties". This should be conformed, with the abbreviation CCP being added to the MiFIR definition of central counterparty (if required).