NYSE Euronext	**Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP** **Review of the Markets in Financial Instruments Directive**

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

Theme	**Question**	**Answers**
Scope	1) Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?	The exemptions in article 2 and the optional exemptions in article 3 are appropriate as drafted[1].
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	It is appropriate to include emission allowance and structured deposits. However, structured deposits should not only be mentioned in the recital of the Directive but also in the core text to give it legal force.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	The inclusion in the official list of investment services and activities as listed in Annex 1 of the Directive of services of safekeeping and administration of financial instruments for the account of clients including custodianship are appropriate.
	4) Is it appropriate to regulate third country access to EU markets and, if so,	The regulation of third country access to EU markets has to reflect two objectives which include 1) the need to avoid any unlevel playing field in terms of the reciprocity

[1] However, if the operator of an OTF were to be authorised to deal on own account on the OTF, then, article 2.1.d.ii should be amended so that the Directive would apply to members or participants in a regulated market, MTF and OTF.

	what principles should be followed and what precedents should inform the approach and why?	test and the equivalence test as currently proposed and 2) the need to ensure investor protection.
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?	The proposed requirements on corporate governance as listed in articles 9, 48 and 65 are appropriate. However, articles 9 and 48 could be amended so as to avoid the combination of the holding of an executive directorship in an investment firm with the holding of an executive directorship in an organised trading venue by the same management body member, even in cases where the investment firm and the organised trading venue belong to the same group. This would limit the risk of conflicts of interests to which the combination of these functions may give.
Organisation of markets and trading	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?	The OTF has been proposed to address two different issues: (i) bringing platforms which are not currently regulated as trading venues within the scope of the legislation in the cash equities space and (ii) to help meet the G20 trading mandate on the derivatives side. NYSE Euronext agrees with the objective of seeking to bring the trading venues which developed in the equities OTC space in MiFID 1 back into a regulated environment. However, we do not believe that regulation should simply mirror existing market practices: it should instead strongly **assert what is acceptable and unacceptable market practice**, both between on-market and off-market (OTC) trading and between multilateral and bilateral trading in the on-market space. **A new OTF category should be contingent upon a legally binding definition of OTC being included in the text for cash equities trading**. *Objective 1: Bringing 'unregulated' cash equities platforms into a regulated space* The European Commission is proposing to position the OTF in the same family of multilateral venues as Regulated Markets and MTFs, with the same transparency regime. However, the European Commission also proposes that the OTF may exercise

		discretion over how orders are matched. This discretion will mean that the pre-trade data of an OTF (published under the same regime as an RM or MTF) will be meaningless with respect to price formation and its informational content. Furthermore, we are unsure whether the OTF category will be able to provide a regulatory home for the **existing business models of Broker Crossing Networks**. This is because the prohibition on own account flow means that the operator will not be able to facilitate client orders with their own capital within the structure of an OTF. If the European Parliament maintains the European Commission's proposal to allow the OTF operator to **exercise discretion over the order matching process** and / or considers **allowing own account flow** into OTFs, then an appropriate set of controls should be put in place on this activity to **preserve the price forming role** of lit (*binding quote, price forming*) markets and to **protect the investor**. In **cash equities**, these requirements are (i) a minimum size on orders that can be traded on an OTF, with smaller orders being executed on lit (*binding quote, price forming*) markets; and (ii) controls on the execution price (midpoint only) to avoid price formation occurring away from lit (*binding quote, price forming*) markets. Tailored controls would also have to be put in place for non-fungible products. Finally, we believe the European Parliament should carefully address the **potential for loopholes** to be exploited by linking OTFs, Sis and internal books, either within or between separate corporate entities of a single investment firm. As one example, any sort of linkages and / or routing arrangements between SIs and OTFs should be forbidden: once an order is routed to a SI, it should not be allowed to be subsequently routed to an OTF. *Objective 2: Helping meet the G20 trading mandate for derivatives – see question 11*

	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?	In our view, **the definition of OTC cash equities trading** is a fundamental pre-requisite for efficient cash equities market functioning. As long as there is no legally enforceable definition of OTC for cash equities trading, market innovations will continue to naturally gravitate to what is dark and undefined – **even with the introduction of any new trading categories**. Without a binding definition, there will be nothing to prevent trades continuing to be executed illegitimately in the OTC space, with market participants retaining the ability to circumvent trading venues' obligations. **This has incontrovertibly been the experience under MiFID 1**. A 2010 **study by Celent and Goethe Universität** conducted between April 2008 and June 2010 found that 73% of OTC trades in highly liquid stocks are below the size at which they would face a risk of market impact if carried out on lit markets. This study also found that only 13% of OTC reported trades would be allowed to be executed under the large in scale waivers if they had been executed on a dark regulated venue[2]. OTC should also exclude any form of algorithmic trading given that this activity, by its very nature, is systematic and not ad-hoc. Intermediaries facilitating OTC trades should not use electronic matching systems, as it is in contradiction with the OTC definition, namely "ad-hoc". If the policy and regulatory objective is to **limit OTC only to circumstances where it is legitimate** (that is to say for trades between eligible counterparties, that are ad-hoc, unsystematic and irregular, and that are either large in scale, complex or technical by nature), it is necessary to adopt a **clear and legally binding definition of OTC**. This should be backed up by a clear, comprehensive and standardised system of flagging for all trades, under the responsibility of ESMA and along the lines of the work that is currently carried out by industry participants in the Market Model Typology Initiative to better monitor the transactions that are carried out in the OTC space. NYSE Euronext therefore proposes that the existing **OTC definition be made legally**

[2] Celent and Goethe Universität, Gomber and Pierron, MiFID, Spirit and reality of a European Financial Markets Directive, September 2010

		binding by moving it from Recital 18 in MiFIR to Article 2, also in MiFIR. The definition should state that to be considered as executed on an OTC basis, a **transaction should comply with all the following criteria**: (i) takes place between eligible counterparties, (ii) is ad-hoc, unsystematic and irregular, (iii) is characterised by transactions that are large in scale, complex or of technical nature and (iv) falls into a set of categories defined by ESMA.
	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?	*Our response to question 8 covers the provisions in article 17, direct electronic access and collocation while our views on systems resilience are included in question 9.* As a general comment, NYSE Euronext is concerned by the extremely **broad definition of algorithmic trading** in the European Commission's proposals. This would encapsulate a whole host of different types of market participants, including institutional buy-side firms, sell-side brokers as well as high frequency trading firms. This definition of algorithmic trading could even cover the handling of retail orders, where the broker uses algorithms for routing these orders or even where the broker makes available to their clients desktop "algorithmic" decision making tools, such as charting or momentum defined trades. In relation to the requirements on algorithmic trading firms, NYSE Euronext's main concern lies with the **de facto market making obligation** contained in MIFID Article 17(3). Market making is a highly specialised activity which many firms are not willing, or able, to conduct. As a matter of principle, NYSE Euronext believes it is imprudent to force market participants who are not specialist market makers to expose themselves to market risk which they are unable to manage or control in an effective manner, particularly as they would be obliged to maintain their exposures on a continuous basis and in all market conditions without exception. Today, our registered market makers benefit from exemptions providing for their absence in the market under certain circumstances. The imposition of an intra-day continuous quote obligation could, in contrast, create a significant risk of financial distress for the market participants

		concerned, raising the prospect of defaults, insolvency and potential contagion. In relation to **direct electronic access** (MIFID Article 51(4)), NYSE Euronext considers that it should be recognised that a trading venue does not have a contractual relationship with the customers to whom member firms provide direct electronic access. Therefore, the trading venue cannot ensure that "appropriate criteria are set and applied regarding the suitability of persons to whom such access may be provided". This is, instead, a matter for the member firm and its competent authority. NYSE Euronext agrees that the rules on **co-location services** and **fee structures** should be transparent, fair and non-discriminatory.
	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?	It is essential that all trading venues (Regulated Markets, MTFs and OTFs) implement **appropriate controls** in order to enable the orderly conduct of business on their markets. The necessary practical arrangements will need to **be tailored to the markets and financial instruments in question** and should be subject to the approval of the relevant competent authority. MIFID should thus avoid being prescriptive about the types of controls to be implemented as these will differ depending on the type of product and the market structure concerned. For example, MIFID Article 51(3) mandates the use of order to trade ratios, which will be appropriate for some products, but not for others. Instead, MIFID should establish a comprehensive set of principles for the management of trading activity by trading venues, within which each trading venue and its competent authority should agree appropriate controls. MiFID should also recognize that market operators **cannot ensure that disorderly trading** will never occur (MIFID Article 51(3)); and in MIFID Article 51(6) it should avoid confusing the relative responsibilities of the market operator on the one hand and the competent authority on the other (it is the responsibility of the market operator to monitor – both in real time and post-trade - trading which takes place in its order book; in contrast, it is the responsibility of the competent authority to satisfy itself that the monitoring capabilities of the market operator are adequate, bearing in mind the nature

		and scale of trading activity which takes place on the market in question). Finally, a **market operator can identify and reject an order** which is manifestly mispriced (e.g. where the "big figure" is incorrect) but it cannot identify an order whose volume is incorrect (MIFID Article 51(2)). Nor can it set a meaningful generic volume threshold for all orders, because the needs of one client/trading desk will differ from those of another. The clients and their specific needs are only known to the brokers with whom they have a business relationship, so – as is the case today - volume restrictions need to be imposed by firms, not at market operator level.
	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	
	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?	**To be effective, the trading obligation in MIFIR and the clearing obligation in EMIR must be mutually supportive.** Trading on Regulated Markets and MTFs is capable of facilitating a virtuous circle, in which trading in these venues produces reliable and robust pricing points which can be used for mark-to-market purposes in a CCP's risk management processes. In times of crisis, such venues also facilitate the unwinding by the CCP of positions held by a defaulting participant. Thus, trading on Regulated Markets and MTFs and clearing by CCPs ensure that the G20 clearing and trading mandates work together effectively to create a virtuous circle. **Some of the "virtuous circle" benefits would be lost if an OTF** were fulfilling the G20 trading mandate. This is because as proposed OTFs – unlike Regulated Markets and MTFs – will be permitted to operate on the basis of discretionary (i.e. non-objective) rules in relation to trade matching. This must raise a question mark over the quality of the price formation process in the OTF. As such, an OTF should only be

		permitted to facilitate the G20 trading mandate for derivatives if no Regulated Market or MTF is doing so. NYSE Euronext does not believe it is necessary to **subject "clearing eligible" OTC derivatives** to a liquidity test (MIFIR Article 26) prior to including them within the MIFIR trading obligation. This is because to be deemed eligible for clearing, OTC derivatives will necessarily meet the criteria for multilateral trading – i.e. the need to be suitably standardised and capable of being valued on a continuous basis. This is the approach that has been taken under the **Dodd-Frank Act**. Moreover, any liquidity test is likely to be backward, not forward looking. Multilateral trading, for instance on a Regulated Market, would further enhance the liquidity of OTC derivatives because of the participation of specialist proprietary trading firms which are excluded from the OTC environment but which typically provide up to half of the liquidity in products traded on Regulated Markets. **Liquidity tests are therefore likely significantly to underestimate the liquidity of an OTC derivative were it to be traded on a Regulated Market or MTF**.
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	NYSE Euronext believes that improving SME's access to finance is vital for future growth and job creation in Europe. Listing on exchanges has unique advantages for SMEs and the economy. It gives SMEs recognition and visibility and allows shareholders or bondholders to benefit from the performance of dynamic and innovative companies on their way to growth. Improving the visibility and investor reach for SMEs by attributing the label of an **SME Growth Market** to those MTFs that respond to a common set of criteria is not unwelcome in itself. However, SMEs should remain free to seek a listing on the exchange (Regulated Markets or MTFs) they believe is most beneficial to them and their stakeholders. It is, moreover, questionable whether the introduction of the **SME Growth Market** as proposed by MiFID II will improve SMEs access to capital markets. NYSE Euronext is concerned that the concept of SME Growth Markets does not address the fundamental

		issues surrounding SME access to finance. In this respect, **supply and demand** is the key issue, requiring great care to be taken with the design of the infrastructure for SME-specific markets, in order that investment scale and proximity can be maximised. **For a viable public listing market, SMEs must want to list (supply), and investors must want to invest (demand).** As in any marketplace, supply and demand must meet at an optimal point that delivers a low cost of capital to companies while being an attractive investment option for investors. Currently, the market is much smaller than it could be primarily because investor demand is too small. **Scarce resources and effort should therefore be allocated to the development of investor demand.** In the European Commission's proposals, we are concerned, however, that the provision in article 35(7) MiFID allowing the shares of companies listed on SME Growth Markets to be transferred to other SME Growth Markets without the consent of the issuer will **reduce liquidity** and weaken **SME issuers' control over where their stock is traded**. Investor confidence depends on the **efficiency and quality of the price formation process**. A fragmentation in the liquidity of an SME stock, coupled with a lack of market research and consolidated market data, would produce price discrepancies across the venues on which the SME stock was traded and result in a loss of investor confidence in the price formation process. This is because investors would not have a complete overview of the market (i.e. of all the buyers and sellers). Moreover, volumes in SME trading would not be large enough to allow brokers to create arbitrage trading. Fragmentation has already occurred in blue chip stocks as a result of MiFID 1 but, unlike blue chips, SME markets are characterized by a **strong 'home bias' of investors**, where the proximity of the investor to the issuer is key. Furthermore, liquidity fragmentation in SME may increase the risk of **market manipulation** in the absence of efficient supervisory oversight from the home regulator. **Overall this proposal would impact negatively on investor demand.**

		The second key consequence of the provision would be that **SME issuers would lose control over where their stock is traded**. Small issuers on our Regulated Markets have repeatedly expressed concerns about their stock being fragmented across venues, as a result of MiFID 1. This fragmentation feeds the negative impact on liquidity described above and would **impact negatively on issuer supply.** Therefore, NYSE Euronext considers that the trading of SME stock on other SME Growth Markets should only occur with the **explicit consent of the SME issuer.** While more can be done to address the difficulties SMEs experience in accessing capital markets, **regulatory changes and tailored measures for SMEs must be balanced with investor needs and ensuring a high level of investor protection.** The quality of regulation relating to companies' initial and ongoing disclosure duties has a direct impact on their image and attractiveness to investors. Improvements in this area can be achieved through appropriate changes to legislation regulating the duties of issuers (Prospectus and Transparency directives) and of market participants (Market Abuse Regulation), not through MiFID. **Lighter reporting requirements** for issuers (like the proposed elimination of quarterly reports under the Transparency Directive) should be complemented with **greater flexibility in the means by which ongoing disclosure requirements are fulfilled.** One option could be to provide companies with a choice between electronic and hard copy media for their disclosure of regulated information in the Transparency Directive.
	13) Are the provisions on non-discriminatory access to market 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	The proposed changes could have far **reaching consequences** for the operation of Europe's key financial market infrastructure. These consequences need to be thought through more carefully before firm conclusions can be drawn about their efficacy. It is important to recall that during the financial crisis the key elements of market infrastructure – comprising Regulated Markets and Central Counterparties ("CCPs") – were a major stabilizing factor. For example, they managed the default of major financial institutions such as Lehman Brothers and remained orderly and liquid whilst

	EMIR?	liquidity in many OTC venues dried up. While it is not yet completely clear what the access proposals would mean in practice, NYSE Euronext would be concerned if the **integrity of Europe's transparent and liquid central markets or the integrity of existing CCP solutions** were undermined by them. NYSE Euronext would also be concerned about anything which put **Europe's infrastructure at a disadvantage** compared with the infrastructure in other G20 jurisdictions.
	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?	NYSE Euronext believes that strong oversight of positions in commodity derivatives markets is an essential element in ensuring that markets remain fair and orderly and that the price formation and delivery processes operate smoothly. The European Commission has proposed that trading venues should be required to **implement position limits - or alternative arrangements with equivalent effect** - in order to deliver three policy objectives: to support liquidity; to prevent market abuse; and to support orderly pricing and settlement conditions. NYSE Euronext supports those objectives. It also believes that the inclusion of "alternative arrangements with equivalent effect" is essential because **market structures and physical commodities are extremely diverse** and regulatory solutions need to be tailored accordingly. Each market is structured differently and the physical commodities themselves differ – for example, some are perishable, others are not; and each has its own bespoke delivery mechanism reflecting the operation of the physical market. The ability for "alternative arrangements with equivalent effect" to be put in place will allow market operators to introduce a regime which is suitably tailored to each product, market structure and the needs of its participants. The position limits or alternative arrangements will need to operate within the context of wider **position management processes**. Position limits are not a panacea in themselves, but they can be a useful addition to a trading venue's regulatory tool kit.

		Their use does need to be carefully targeted because, by their very nature, position limits are intended to alter – and may well distort - supply and demand conditions in the market place. If applied inappropriately they could unduly inhibit legitimate activity. As the pressures which can cause technical or abusive market squeezes typically manifest themselves in the period immediately prior to the maturity of the relevant commodity futures contract, NYSE Euronext considers that **spot month delivery limits** would be a targeted way of helping to address such pressures and plans to introduce a more transparent and prescriptive approach on its London markets. Spot month delivery limits are a form of position limit which restrict the size of position: • which can be held by each market user in the approach to maturity of the relevant futures contract (e.g. in the last 2 weeks of trading); and • which a market user can take to delivery (i.e. this restricts the amount of physical goods which a market user can take delivery of or make delivery of under the futures contract concerned). NYSE Euronext strongly supports giving the **primary role for setting and enforcing limits** to trading venues. However, more clarity is needed on the way in which the reserve powers of other authorities (i.e. the European Commission, ESMA and the competent authorities) would be used in practice. This is important because, by their very nature, position limits are intended to alter – and may well distort – supply and demand conditions in the market in question. Ultimately, and in view of the different characteristics of underlying commodity markets (including patterns of production, consumption and transportation), NYSE Euronext believes that effective position management arrangements demand a level of experience that trading venues are best positioned to offer.
Investor protection	15) Are the new requirements in Directive Article 24 on independent	The new requirements of Article 24 seem appropriate.

	advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	Article 25 helps to clarify the lack of common understanding on the inclusion or exclusion of many complex instruments through, for example UCITS.
	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?	Article 27 should take into account the risk of **conflicts of interests** that may arise in respect of user-owned platforms. When venues are user-owned, it means that the same entity combines the following activities: (i) shareholding in the platform, (ii) routing of client flow to the platform; (iii) provision of its proprietary flow to the platform; (iv) responsibility for the surveillance and market integrity of the venue; and (v) operation of routing facilities to internal dark pools. In combining these activities, the firm can face conflicting interests between, on one hand, its best execution obligations towards its clients as an intermediary, and, on the other, its interests as a trading venue owner / operator, whose revenues derive from the volumes routed to the platform. Therefore, **strict disclosure obligations** should be adopted. The requirement in the current drafting of article 27.5 MiFID according to which investment firms would have to make public a summary of the top five execution venues where they route client orders on a yearly basis is insufficient in this respect. It is vital to reestablish investor confidence in financial markets: even the perception of conflicts of interest can have a damaging effect on this confidence. In the competitive environment successfully created by MiFID, almost a third of lit equity trading occurs on user-controlled

		execution venues. Best execution depends just as much on the intermediary as on the market quality of individual execution venues. We therefore propose a **more stringent disclosure regime from intermediaries to their clients**, possibly inspired by rule 606 of Reg NMS in the US. In particular, intermediaries should provide their clients with best execution reports that detail, for example, where the order was routed, the price improvements obtained, the nature of the intermediaries relationship with the platform (e.g. shareholding in an MTF, in-house BCN), and whether any maker rebates were earned by the intermediary in executing the client order. In a similar vein, we also believe that trading venues should disclose high level details on their shareholder base and regular statistics concerning the number of market abuse cases investigated by that venue.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	The protections available to retail clients, as currently drafted, appear insufficient. In order to ensure a high level of retail investor protection, retail client orders should not be executed in the OTC space as this does not provide any pre-trade transparency or protection in respect to the execution price (these could, in contrast, be executed on SIs). Similarly, if OTFs are allowed to execute orders on a discretionary basis, retail client orders should not be sent to this type of execution venue.
Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes are needed and why?	Pre-trade transparency requirements as stated under Articles 3, 4 and 13 are appropriate. For ETFs, the requirements should take into account the average trade size, in order to be appropriately calibrated.
	21) Are any changes needed to the pre-trade transparency requirements in	NYSE Euronext welcomes the pre-trade transparency regime in respect of bonds, structured products, emissions allowances and derivatives. In particular, NYSE

	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?	Euronext agrees that there should be a **basic presumption of transparency** in these markets, with trading venues given the ability to apply for a waiver where this is justified, for example on the grounds of market structure or transaction size. It is also important that, as proposed by the European Commission, the **same transparency arrangements apply to all multilateral trading venues**, i.e. Regulated Markets, MTFs and OTFs. It is particularly important that economically equivalent (albeit non-fungible) derivatives available in different trading venues should be subject to the same pre-transparency requirements. NYSE Euronext supports the provisions in articles 7 and 17. However we consider that article 8 could be amended to **take into account the importance of pre-trade transparency for non-equity products**. Imposing pre-trade transparency requirements on non-equity products will ensure a higher level of investor protection and enhance the liquidity of non-equity markets. It is especially important in the **bond markets**. While originally debt market instruments were traded on exchange, they are now traded OTC in their vast majority. This poses significant risks in terms of investor protection and overall market integrity. Recent initiatives, such as the Cassiopeia Committee in France, have attempted to address the issues raised by the recent crisis, highlighting the importance of redefining the current bond market structure, as well as promoting more pre-trade transparency to increase the liquidity of this market and strengthen investor protection. Therefore, article 8 should be based on the principle that pre-trade transparency requirements should cover as many bonds as possible and that all bonds should be traded in a multilateral organized environment no matter the size, method of trading or price type. However, for **orders that are large in size**, pre-trade transparency could be minimized. It is therefore important to clearly define large in size orders: an appropriate threshold could be a percentage of the outstanding of any given bond, for instance 5%. All orders with a size above this threshold would then be considered as large in size and become eligible for 'minimized' pre trade transparency requirements. Moreover,

		delayed post trade publication could also be envisaged for these orders. In terms of the **method of trading**, order-driven platforms and RFQ platforms should be subject to pre-trade transparency requirements. The same should apply to the status of the market (i.e. Regulated Market, MTF, OTF and SI). Pre-trade transparency requirements should be identical for actionable indications of interest, and quotes and orders alike. All stakeholders, be they B/S or S/S firms, shareholders of the platforms or not, etc. should have equal access to markets and to fair prices.
	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?	*Please see the answer to Question 21 in relation to appropriateness.* In relation to **calibration**, NYSE Euronext believes that it will be necessary to apply a series of tests in order to determine whether any waivers from the pre-trade transparency requirements are justified. In NYSE Euronext's view, the tests should be conducted within the context established by MIFIR Article 8(4)(b). In the derivatives space, a possible set of questions for the calibration could include **the following**: • Is pre-trade transparency required by users of the derivatives product in question (or a significant subset of users) in the interests of enabling them to price or value it properly? • Is pre-trade price transparency required for the process of matching buyers and sellers (i.e. counterparty discovery) to operate in an efficient manner? • Is the derivatives product generally traded on a reasonably regular basis by market participants or is it traded on an extremely infrequent or "one off" basis? • Can the key characteristics of bids and offers be recorded and published in a readily understandable manner which avoids misleading users? • Can pre-trade price transparency be achieved without impairing market liquidity, e.g. in a manner which is positive or neutral in terms of the willingness of market participants to make competitive prices in reasonable

		size? • Are there some forms of business in the product which would be facilitated by limitations on pre-trade transparency in specified circumstances, e.g. for large trades? Different criteria may be required for bonds, structured products and emission allowances.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	NYSE Euronext notes that MIFIR Article 8(3) requires that before a competent authority grants a waiver, it **must notify ESMA** and other competent authorities six months before the waiver is intended to come into effect. This will cause significant delay and will put trading venues in the EU at a disadvantage compared with their international competitors. A **much more streamlined process** is therefore required (e.g. replacing the six month notification period with a one month period and bringing ESMA into the process at an earlier stage). Moreover, it is crucial, in order to promote a level playing field, to ensure that **waivers are applied consistently** across all Member States. There is no reason to believe that national specificities should justify inconsistent application of European regulation. Therefore, while the application of waivers **may** be left to national regulators, ESMA should be granted with the power to issue binding decisions in respect of **both** a Member State's request for the use of waivers **and the review of existing waivers**. In addition, NYSE Euronext considers it is vital that **the European Parliament and Council** set out, at the very least, the types of waiver that are appropriate rather than leaving this crucial decision to delegated acts. This is because, along with the OTC definition, the future waiver framework will be the primary mechanism to **manage the balance between lit and dark trading** that is at the core of the European Commission's proposals. An inadequately calibrated waiver framework has the

		potential to undermine the drive to greater transparency.
	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)?	The competition successfully enabled by MiFID 1 should be maintained going forward by a competitive framework for **post-trade transparency**. The market transparency issues we are experiencing today in cash equities are the direct result of fragmentation and the fact that trades are now reported from a diverse population of platforms with inconsistent practices and interpretations of their reporting obligations. These factors, coupled with a lack of specific guidelines and an organised regime for facilitating the collection and dissemination of post-trade data, result in poor quality information which does not support investors' ability to distinguish relevant market activity from other non-relevant events. The Commission proposals recognise that the multiplication of trading venues post MiFID I has made the efficient comparison of prices and trades across cash equities venues much more difficult. They identify the area of market data in terms of quality, format, cost and ability to consolidate and introduce requirements for market data to be reliable, timely and available at a reasonable cost. **NYSE Euronext considers that the emergence of CTPs, APAs and ARMs will help address the issue of data fragmentation, ensure that brokers demonstrate best execution and deliver better access to information for investors**. While post-trade transparency is not a substitute for pre-trade transparency (as post-trade data only informs the next move the price of a security will take) reliable and timely market data, available at a reasonable cost, is crucial for investors as it allows efficient comparison of prices and trades across different venues. We believe that the proposed **APA regime** is the appropriate remedy for post-trade transparency and will ensure that OTC trades are reported in a standardised and consistent manner. This should remedy the single most important source of post-trade transparency burdens: **the quality of OTC trade report data**. Trade reporting requirements, however, will need to be prescribed specifically to be effective and

		reduce ambiguity as to the type of trade being reported, which party reports the trade, where the trade is reported and when. **If implemented correctly and overseen by ESMA, this regime will restore post-trade transparency**. Addressing these fundamental issues will allow users of consolidated market data to be better informed and accurately monitor market activity. NYSE Euronext also welcomes the Commission's proposals to encourage the emergence of competing **commercial providers of a consolidated tape**. In the MiFID consultation we argued against the adoption of a mandated utility model on the grounds that it would further deteriorate information quality, add significant costs, further exacerbate the issues of transparency and distort the competition that MiFID has successfully created. In taking forward the Commission's proposals for CTPs, we suggest that the **main regulatory focus should be on improving the data which is provided to these consolidators**, as opposed to overly focusing on restrictive approval criteria for CTPs which could stifle innovation and competition between different information providers. . Finally, NYSE Euronext considers that **extending the need to provide data to a broader range of instruments** – i.e. non fungible contracts – is unnecessary and potentially misleading. By definition the latter are not homogenous and include tailor made instruments that meet the needs of individual clients. It follows that information on these instruments would not contribute to the 'price discovery' of other financial instruments of interest to a larger group of investors and market participants.
	25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent	As an operator of regulated, public markets, our core product of price discovery relies on transparency and the broad interaction of investor orders. A broad participation in our market requires our data to be accessible by all investors and is the reason NYSE Euronext has already offered unbundled products (pre and post trade) as well as free delayed data (via a "**European Tape of Record**" to the public accessible online and eliminating all end user cost).

	authorities receive the right data?	**Regarding transferable securities**, OTC trade reporting standards and specific guidelines should be codified into regulation and enforced by ESMA via the proposed APA regime (as above in Q. 24). To recap, these standards should include trade reporting types which identify the specific type of trade which took place, timing requirements, unique trade identifiers and standardised security identifiers. Specific trade reporting guidelines should be prescribed by ESMA to OTC market participants in order to eliminate ambiguity over which party reports a trade, how the trade is reported and when. The APAs would be responsible for ensuring that these guidelines are met and followed consistently with penalties for failure. With regard to **derivatives**, we welcome the post-trade transparency regime proposed by the European Commission. This regime is in line with the G20 objective of providing further transparency to the OTC derivatives markets. Nonetheless, as with bond markets, it is inappropriate to envisage a mere extension of requirements from one market to another. We therefore **welcome the suggestion to calibrate** such a transparency regime **by type of derivative product/market/commodity derivatives** as we consider that some calibration may need to be performed because products and markets are very different from each other.
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	Stronger collaboration is needed and a clear definition of roles has to be adopted.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the	In order for competent authorities to supervise effectively, efficiently and proportionately, a level playing field in legal and regulatory obligations needs to be applied.

	requirements effectively, efficiently and proportionately?	
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	The key interactions are with MAD and MAR (updating the market abuse framework to reflect the current trading landscape), UCITS (in particular to address issues around complex products), the Prospectus Directive (to address SMEs) and finally with EMIR in respect of clearing.
	29) Which, if any, interactions with similar requirements in major jurisdictions outside the EU need to be borne in mind and why?	Equivalence and reciprocity tests should apply instead of identifying specific jurisdictions.
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	The sanctions regime foreseen under MiFID contains **draconian new powers** that regulators would be able to exercise over Regulated Markets and CCPs. For example, these would apply in circumstances where a Regulated Market had failed to maintain an orderly market. The powers include rights of public censure and a right for the regulator to impose a fine of up to 10% of the annual turnover of the Regulated Market's corporate group. NYSE Euronext believes that the proposed sanctions are **not proportionate and fail to recognise the unique position of Regulated Markets** as front-line regulators of the member firms which use their facilities. Regulated Markets and CCPs are partners in regulation with the statutory regulators and the proposed sanctions over them are not justified by any demonstrable failure in existing regulatory practices. NYSE Euronext believes that the constructive relationship between Regulated Markets/CCPs and regulators would be jeopardized by the proposed sanction regime. In turn, this runs the risk of **undermining the ability of the statutory regulator and the**

		Regulated Market to work together effectively – making use of their respective knowledge, powers and regulatory reach – in the interests of the regulatory system as a whole. NYSE Euronext therefore recommends that Regulated Markets and CCPs be taken out of the scope of the sanctioning powers set out in Articles 73-78 or, at the very least, that the fining (MIFID Article 75(2)(a)) and public censure (MIFID Article 75(2)(e)) powers be disapplied to them.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	Pre-trade transparency waivers should not only be addressed in Level 2. As the cornerstone of efficient financial markets and investor protection we consider it is necessary to involve, as much as possible, the European Parliament and Council in the definition of pre-trade transparency waivers. Along with the OTC definition, the future waiver framework will be the primary mechanism to **manage the balance between lit and dark trading** that is at the core of the European Commission's proposals. An inadequately calibrated waiver framework has the potential to undermine the drive to greater transparency. Accordingly, the definition (list) of these waivers should be adopted in a Level 1 text (MiFIR). However, the detailed specification of these waivers could be left to a more technical level, that is to say adopted in a level 2 text.