

~~NYSE Euronext~~ NYSE Euronext

[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: vrijdag 13 januari 2012 14:44
Aan: [REDACTED]
Onderwerp: "Equity Trading Systems in Europe" report
Bijlagen: NYSE Euronext - Equity Trading Systems in Europe.pdf
Urgentie: Hoog

Dear Sir,

Further to your request please find attached the "Equity Trading Systems in Europe" report.
Kind regards,

[REDACTED]

 NYSE Euronext.

[REDACTED]

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[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: dinsdag 7 februari 2012 13:42
Aan: [REDACTED]
Onderwerp: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Beste allen,

Na wat heen en weer geschuif in de agenda's lijkt vrijdag 2 maart de beste optie voor de meerderheid. Mijn voorstel is om in de loop van de ochtend af te spreken, op het [REDACTED] indien dat jullie allemaal uitkomt. Details volgen nog. In ieder geval zullen van onze zijde [REDACTED] EU Cash & Listing, [REDACTED] Derivatives, [REDACTED] Government Affairs en ik aanschuiven.

Vriendelijke groet,

From: [REDACTED]@minfin.nl]
Sent: donderdag 2 februari 2012 14:41
To: [REDACTED]@afm.NL'
Subject: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Beste allen,
Wat mij betreft is zowel 27/2 (ochtend) als 2/3 voor akkoord.
Gr.
[REDACTED]

Van: [REDACTED]
Verzonden: woensdag 1 februari 2012 18:13
Aan: [REDACTED]@nyx.com'; [REDACTED]@afm.NL'
CC: [REDACTED]
Onderwerp: Re: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Zal morgen nog even overleggen met [REDACTED] maar snelle blik op mijn agenda leert dat alleen vrijdag 2 maart goed uitkomt. Jou ook [REDACTED] (in CC)?

27 [REDACTED] zou ochtend wel kunnen, maar middag niet.

Groet, [REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: Wednesday, February 01, 2012 04:31 PM
Aan: [REDACTED]@afm.NL>
Cc: [REDACTED]
Onderwerp: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Veel dank [REDACTED]
[REDACTED] is er een datum in de week van de 27^e die voor jou en eventuele collega's zou schikken?

From: [REDACTED]@afm.NL]
Sent: woensdag 1 februari 2012 15:36
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Beste [REDACTED]

De week van de 20^e kan ik zelf niet, maar mijn collega's [redacted] en [redacted] kunnen op verschillende tijdstippen.

De week van de 27^e kunnen we alle drie op maandag 27/2 vanaf 15.00, dinsdag 28/2 vanaf 13.00, woensdag 29/2 vanaf 15.00 en vrijdag 2 maart de hele dag.

Groet,

From: [redacted]@nyx.com]

Sent: woensdag 1 februari 2012 9:55

To: [redacted]

Cc: [redacted]

Subject: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Beste allen,

Ik neem aan dat het handiger zou zijn als zo veel mogelijk mensen aan kunnen schuiven. Laten we anders een nieuwe datum proberen. De week van de 20^e of de 27^e?

Wellicht is een vrijdag een optie i.v.m. minder andere vergaderingen?

Ik hoor graag.

From: [redacted]@afm.NL]

Sent: maandag 30 januari 2012 9:26

To: [redacted]

Cc: [redacted]

Subject: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Beste [redacted]

Beide data zijn voor ons niet heel erg gelukkig.

Donderdag de 16^e kan ik, maar mijn collega's [redacted] en [redacted] niet.

Vrijdag de 17^e kan alleen [redacted]

Groet,

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]

From: [redacted]@minfin.nl]

Sent: vrijdag 27 januari 2012 17:02

To: [redacted]

Cc: [redacted]

Subject: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Hoi [redacted]

16 middag zou ik kunnen, 17 ochtend eventueel ook.

Groet,

Van: [redacted]@nyx.com]

Verzonden: vrijdag 27 januari 2012 15:54

Aan: [redacted]

CC: [redacted]

Onderwerp: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Voordat ik meer data onderzoek: een van mijn collega's uit Brussel zal 16 en 17 februari in A'dam zijn. Zou dat evt. schikken?

Van: [redacted]@minfin.nl]

Verzonden: dinsdag 24 januari 2012 15:46

Aan: [redacted]

CC: [redacted]

Onderwerp: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Hoi [redacted]

Heb even met [redacted] (in cc) geschakeld (we doen "stakeholdergesprekken" inzake MIFID samen, is wel zo efficiënt), Lijkt ons nuttig om binnenkort met jullie te spreken. Mijn collega [redacted] (in cc) zal dan ook aanschuiven.

Stuur jij een aantal datumvoorstellen aan Hans en mij? En snelle blik leert dat ik 9/10 feb en 20/21 feb nog ruim in m'n tijd zit.

Groet,

Van: [redacted]

Verzonden: donderdag 19 januari 2012 14:08

Aan: [redacted]

Onderwerp: RE: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Hoi [redacted]

Dank voor de respons. Bijpraten lijkt me goed, ik kom er maandag even op terug , is nu wat hectisch

Groet,

Van: [redacted]@nyx.com]

Verzonden: dinsdag 17 januari 2012 14:13

Aan: [redacted]

Onderwerp: FW: NYSE Euronext Response - Questionnaire on MiFID 2/MiFIR by Markus Ferber MEP

Beste [redacted]

Hierbij stuur ik jullie de respons die wij hebben ingezonden op en EP questionnaire. Mijn collega's in Brussel hebben hem ook al aar [redacted] verzonden.

Misschien een idee om binnenkort eens bij te praten?

Groet,

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[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: woensdag 15 februari 2012 15:53
Aan: [REDACTED]
CC: [REDACTED]
Onderwerp: FW: Position on MiFID II (MiFIR)
Bijlagen: NYSE Euronext MiFID II - MiFIR Position Paper Feb 2012.pdf.html; NYSE Euronext MiFID II - MiFIR Summary of Recommendations Feb 2012.pdf.html

Beste [REDACTED]

Hierbij stuur ik je onze meest recente position papers inzake MiFID II en MiFIR.

We zien elkaar begin maart en wellicht kunnen we dan e.e.a. toelichten.

Vriendelijke groet,

[REDACTED]

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NYSE Euronext

**NYSE Euronext
MiFID II / MiFIR
Position Paper**

February 2012

Introduction

This document outlines the views of NYSE Euronext with regards to the review of the Market in Financial Instruments Directive (MiFID) and the European Commission legislative proposals for MiFID II and MiFIR. This **comprehensive position paper** outlines our positions in detail, while the accompanying summary paper gives an overview of the main policy recommendations NYSE Euronext would like to suggest.

In the debates on the MiFID II / MiFIR proposals it is important that all financial market participants recognize that markets are not the sole concern of the exchanges or of the banks, but rather that their health is vital to European citizens who invest their savings and pensions in them. Ultimately, legislation must protect the interests of all market users, right down to the end investor, and this objective should be the cornerstone of the review process.

MiFID I **successfully introduced competition** into equity trading in Europe: users have more choice, costs have fallen and, most importantly for economic growth, possibilities for investment have been significantly augmented. New entrants now account for over 1/3 of 'lit', or transparent, equity trading and Europe's largest share-trading platform is a 'new entrant' Multilateral Trading Facility (MTF).

However, at the same time MiFID has led to **greater complexity of the trading landscape through fragmentation**, a migration of trading away from full price transparency and the emergence of an unlevel playing field, as new entrants have been able to avoid the more onerous rules that Regulated Markets (RMs) have to follow. In addition, the cost savings from increased competition have not flowed equally to all market participants and have not always been passed on to the end investors, be they retail or wholesale.

These are the challenges facing the EU legislator in the adoption of a revised MiFID framework. NYSE Euronext, as a leading global operator of financial markets and a provider of innovative trading technologies, supports the Commission's objectives in the MiFID Review, particularly those **structural reforms** necessary for the establishment of a safer, sounder, more transparent and responsible financial system working for the economy and society as a whole. These reforms fall within the scope of the objectives set by the **G20 Summit in Pittsburg** (September 2009) to tackle the less regulated and more opaque parts of the financial system; NYSE Euronext concurs with the Commission that significant changes are required in MiFID concerning the organization, transparency and oversight of a range of market segments, particularly those in the cash equities OTC space.

Further information on our MiFID positions can be accessed through our **EU Regulatory Policy Channel**¹. This website includes:

- An animation explaining the background to MiFID and the evolution in the trading landscape over the last decade;
- Videos on some of the key themes running through the MiFID proposals;
- Links to further written background materials on MiFID.

¹ <http://corporate.nyx.com/en/who-we-are/advocacy/eupolicy>

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SECTION I: MARKET STRUCTURE

1. Market Structure – OTC Cash Equities Definition & OTF

MiFID introduced transparency obligations to reconcile two potentially conflicting objectives underpinning the legislative framework, these being: (i) creating investor choice through increased competition (leading to inevitable market fragmentation); and (ii) protecting investors and ensuring markets remained efficient (in spite of the resulting fragmentation). A general requirement for **full pre- and post-trade transparency** constituted the requisite basis for allowing competition to deliver its benefits, while preserving investor protection and guaranteeing the price formation process. However, NYSE Euronext does not believe that this ‘transparency deal’ in equity trading has been respected. While MiFID enabled competition between various lit trading platforms, it also resulted in competition between lit and unregulated dark trading (e.g. OTC – over-the-counter trading).

To understand why, one needs to acknowledge the natural tension between the individual and collective interests in markets, with the interests of the individual leaning towards trading in the dark, while the collective or public interest is best served by lit trading. *There is nothing wrong per se with these competing interests; however it is the role of regulation to strike a balance between them: if not, the interests of the individual will drive an increase in dark trading to the detriment of the public interest.* NYSE Euronext considers that the legislative proposals currently before the European Parliament and Council provide the perfect opportunity to review this balance and ensure it is being respected.

a) A binding definition of OTC for cash equities trading

MiFID manages the balance between lit and dark trading in two ways:

- *A system of waivers from pre-trade transparency;*
- *Recognition that business can take place OTC for large, occasional and professional business.*

OTC cash equity trading is fundamentally different from the running of a trading platform, either on a multilateral or bilateral basis. In OTC trading, there is **no explicit liquidity pool**. MiFID provided for investment firms to trade for clients on an ad hoc and irregular basis *only* for large trades that could not have been executed on trading platforms without market exposure risk (current MiFID Recital 53). As this trading should be inconsequential and non-systematic, it is not subject to any market rules, i.e. order transparency, predictable execution, open access for investors and market surveillance; instead it is sufficient for the investment firm to simply comply with the usual conduct of business rules vis-à-vis the client. Maintaining the option for OTC trading is important and this regulatory flexibility is justified when the original purpose is respected, i.e. providing a trading option for large, ad hoc trades executed by the investment firm on their own account.

Today, however, NYSE Euronext considers that this system is not working: **OTC reported trades in the cash equities space** across the EU accounted for 38% of January 2012 reported equities volumes². While a portion of this may be accounted for by technical and duplicative trades, a substantial part is **addressable liquidity** which should be part of the price formation process on lit

² Thomson Reuters reported figures

markets. Furthermore, a significant proportion of OTC trades are **not** actually large in scale. A study by Celent and Goethe Universität (2010) 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 engender market impact if carried out on lit markets. This study also found that only 13% of OTC reported trades would have been executed on a dark regulated venue had the ‘large in scale’ waivers from pre-trade transparency been applied *sensu stricto*³. This situation means that trades that should have been executed on regulated trading venues and subject to appropriate pre-trade transparency requirements have been excluded from contributing to the price formation process.

Since the introduction of MiFID, **OTC has become, in practice, a default category** for cash equities trading, providing a home to trading venues that do not meet the criteria of a RM, MTF or systematic internaliser (SI). Banks have used loopholes and regulatory gaps to establish **broker crossing networks** (BCNs) or retail internalisation services in the OTC space. As long as there is no legally enforceable definition of OTC for cash equities trading, market innovations will naturally gravitate to what is dark and undefined – even with the introduction of new trading categories.

NYSE Euronext suggests **defining OTC cash equities trading** by **giving legal force** to the definition currently included in MiFID Recital 18 by moving it into the main body of the text in MiFID Article 2. In addition, we suggest making concrete reference to a **system of OTC flags** defined by ESMA so there is clarity on what types of trades are contained within the OTC category. Finally, we consider that **algorithmic trading** should be prohibited from occurring in the non-SI OTC space, where trades should be irregular, ad hoc, carried out by wholesale counterparties and part of a business relationship which itself is characterised by dealings above standard market size.

This is a simple change to fix much of what is wrong today while retaining an OTC category in share trading for intermediaries to execute large complicated orders, in the spirit of the current Recital 18.

Summary:

- NYSE Euronext considers it essential to define an appropriate category for **OTC cash equities** trading of large, ad-hoc and infrequent orders via the introduction of a legally binding definition in the main body of the text. This can be simply achieved by moving the **existing definition** from Recital 18 in MiFIR into the main body of the text (article 2), thereby giving it legal force. This is a **fundamental pre-requisite** to addressing the significant structural issues in European cash equities markets
- In addition, we consider that concrete reference should be made in the definition to a **system of OTC flags defined by ESMA** so there is clarity on what types of trades are contained within the OTC category.
- We also suggest **prohibiting algorithmic trading** from occurring in the non-SI OTC space, where trades should be irregular, ad hoc, carried out by wholesale counterparties and part of a business relationship which itself is characterised by dealings above standard market size.

b) **Organised Trading Facility (OTF)**

The Commission has proposed the creation of a new trading venue, the ‘Organised Trading Facility’ (‘OTF’). This has been proposed to address two different issues: first, to bring platforms which are not currently regulated as trading venues within the scope of the legislative framework in the cash equities space and second, to help meet the G20 trading mandate in the derivatives markets.

³ Celent and Goethe Universität, Gomber and Pierron, MiFID, Spirit and reality of a European Financial Markets Directive, September 2010

The Commission has proposed the following characteristics and requirements for OTFs:

- *OTFs will perform functionally the same activity as RMs and MTFs in bringing together third party buying and selling interests.*
- *OTFs will be subject to the same transparency regime as RMs and MTFs and will have ‘nearly identical’ organisational and market surveillance requirements.*
- *However, unlike RMs and MTFs, OTFs will be permitted to exercise discretion over how a transaction is executed, as well as the ability to restrict access to the platform. In return, the Commission proposes that the OTF be subject to the rules of best execution and client order handling.*

As outlined in the previous section, NYSE Euronext considers that the creation of any new trading venue category must be contingent upon the introduction of a legally enforceable definition of OTC for cash trading (moving the current definition from a recital to an article in MiFIR). If not, the efforts of the Commission to make the new legislation ‘future-proof’ will be in vain, since new types of trading venues will continue to gravitate towards the unregulated OTC space.

Once this legally enforceable OTC definition is in place, we believe that any new category must reflect a clear distinction between **multilateral and bilateral trading**. The two are fundamentally different in nature and should be subject to different sets of obligations concerning the matching of orders, access to the system, transparency and reporting.

1. Multilateral: multilateral venues play a fundamental role in price formation, by ensuring the equal treatment of all participants and by offering a high level of transparency, both of which are central to investor confidence in the fairness and efficiency of financial markets. Their key characteristic is one of **neutrality**, both in respect of:

- (i) The absence of any **discretion** for the venue operator to intervene in the order matching process, including via trading on own account (acting as a buyer to a client sell-order and as a seller to a client buy-order), and;
- (ii) The provision of **non-discriminatory access** to their matching systems, meaning that there are transparent and non-exclusive rules governing access which are applicable to all participants. This guarantees that all trading participants are treated equally, avoiding conflicts of interest and ensuring a well-balanced market and efficient price formation.

2. Bilateral: in contrast, in a bilateral trading system, the operator controls access to the platform on a discriminatory basis, can exercise discretion over how the orders are matched and determines how firms interact with both each others and the operator’s own account flows. Such discretion in the treatment of client orders is a normal part of the intermediation process and should be subject to an appropriate set of rules.

The Commission has proposed positioning the OTF category as a ‘multilateral’ venue with full pre- and post-trade transparency and no own account flows (like RMs and MTFs), but with the operator having discretion over the order matching process and an ability to restrict access to the platform (unlike RMs and MTFs, which must organise trading in an objective and non-discriminatory manner). NYSE Euronext has the **following concerns** about this construct.

1. OTF exercising discretion over the order matching process

NYSE Euronext considers that the attribution of discretion to a *multilateral* OTF raises two important issues, namely investor protection and price formation. In terms of **investor protection**, the ability of a multilateral and pre-trade transparent trading venue to execute (that is to say to match) orders on a discretionary basis raises doubts as to the level of protection the platform offers investors. This is because investors would not necessarily receive an execution price identical to the one displayed on the order book of the venue. In order to mitigate this risk, the Commission has suggested subjecting OTFs to the same **best execution requirements** as those borne by investment firms toward their clients. While, in theory, such a measure appears to adequately address the risks faced by the execution of investors' orders on a multilateral, pre-trade transparent and discretionary venue, the practical implementation of the best execution requirements could prove problematic. This is due to the concept of best execution being broad and more than just about the price: this means that it remains open to interpretation, a fact which leaves scope for investment firms and, as proposed by the Commission, multilateral OTFs to apply it according to their own interests, and not necessarily in the best interests of their clients.

In addition, applying best execution requirements to multilateral OTFs would not, in any case, mitigate the risks that arise for the **overall efficiency of the price formation process** as a result of the discretionary execution of orders on a multilateral and pre-trade transparent trading venue. If OTFs are to be multilateral venues, contributing to price formation, it is not coherent for the operators to have discretion over prices or order handling, since the prices displayed would not be subject to objective rules and could thus be arbitrary. Non-discretionary execution is the only way of ensuring that the price at which a transaction is executed corresponds to the one displayed at the time of its execution in the order book. As 'multilateral' venues, OTFs will publish pre-trade data under the same transparency regime as RMs and MTFs. However, if an OTF enjoys discretion over how orders are matched, then the pre-trade quotes from the OTF will effectively be **non-binding** as the orders will not necessarily be executed at the displayed prices and will not contribute to price formation. For pre-trade transparency to be meaningful it must be based on binding quotes, which cannot be the case with a discretionary platform.

2. Prohibition on dealing on own account

If the OTF is to be multilateral as proposed by the Commission, then NYSE Euronext fully supports the proposal to prohibit **OTF operators from dealing on own account** on the OTFs they operate. This is essential for investor protection if OTFs are to be multilateral trading venues, that is to say matching third parties buying and selling interests. The provision of own account flow by the operator of a multilateral OTF would give rise to important conflicts of interests, since the interests of own account traders and multilateral venue operators are intrinsically contradictory. Traders on own account are primarily interested in the execution price, since their revenue directly derives from the execution price they get. On the contrary, the operator of a truly multilateral trading venue, that is to say, a venue which only enables the matching of third parties trading interests, has absolutely no direct interests in the execution price, since its revenue is not derived from it. Its only interest resides in ensuring fair and orderly trading, and in the objective setting of the execution price, which must reflect the meeting of buying and selling interests. The neutrality of the venue operator in this respect is crucial to protecting the interests of the final investor. Moreover, while we strongly support the prohibition of own account flows, we believe it is also crucial to remove any scope for its circumvention.

Notwithstanding the above comments, we note that one of the main stated objectives of the OTF category - providing a regulatory home for **bank crossing networks (BCNs)** – may well be impractical within the Commission’s proposed structures. This is because without the ability to introduce proprietary flow into a multilateral OTF, the value proposition of a BCN to its buy-side customers is likely to be severely diminished, undermining the ability of BCNs to function within their current business models.

If, during the review process, the European Parliament and Council were to look at permitting **own account flow to mingle with client-client flows** in a single platform, thereby accommodating the business models of BCNs, we believe that this framework should be regulated as a **bilateral entity**, where the intermediary can fulfil their role of facilitating order execution. Such an entity should be **non-price forming** (and therefore able to benefit from a pre-trade waiver) with **safeguards** to (i) preserve the role of lit, price-forming markets and (ii) to protect the interests of the investor. We believe that this could be achieved by:

- (i) Imposing a **minimum size on transactions** that can be executed in an own account, dark and bilateral OTF. This would ensure that all small orders, which do not create price impact, contribute to price formation on lit markets.
- (ii) Controlling the discretion on the price at which orders are executed on the OTF. By **limiting the discretion to mid-point only**, we will ensure that price formation does not occur away from public price-forming markets and ensure that the interests of investors are protected.

Concerning **derivatives markets**, NYSE Euronext considers that **discretionary OTFs** would not be capable of efficiently fulfilling the trading mandate established by MiFIR to move the trading of standardised OTC derivatives onto trading venues. Only non-discretionary trading on RMs and MTFs is capable of producing the reliable and robust pricing points required for mark-to-market purposes in a CCP’s risk management processes. In times of crisis, multilateral venues also facilitate the unwinding by the CCP of positions held by a defaulting participant.

The Commission has also proposed that alongside the qualifying clearing eligibility criteria pursuant to EMIR, a liquidity test should also be carried out on OTC derivatives. In contrast, NYSE Euronext considers it is not necessary to subject “clearing eligible” OTC derivatives to any liquidity tests prior to determining that they are suitable for exclusive trading in a multilateral trading venue. 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 on a RM or MTF 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.

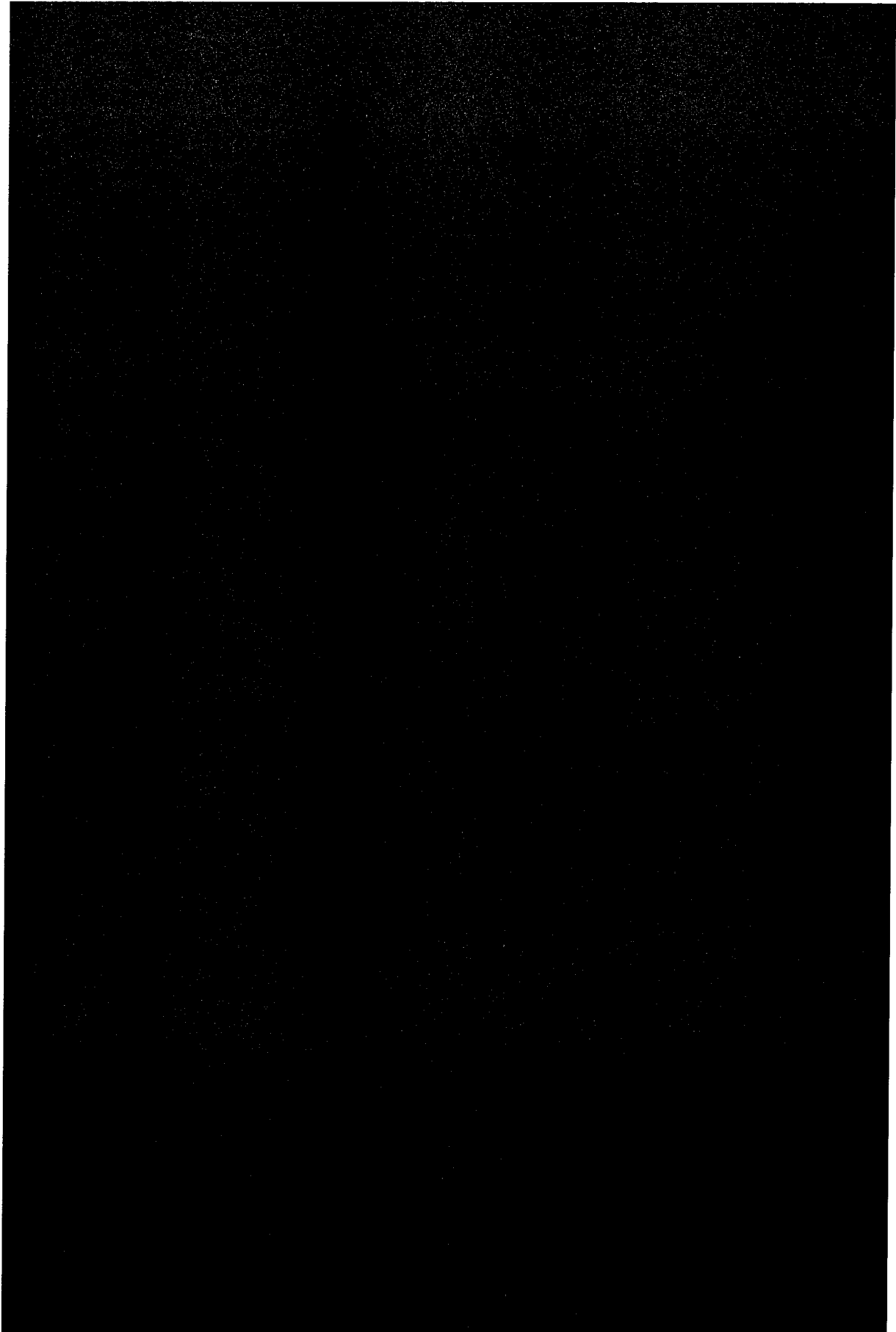
Overall summary of the NYSE Euronext position on the OTF

In principle, NYSE Euronext has nothing against the creation of this new category on condition that:

- A strict and legally binding definition of OTF for cash equities trading is introduced in the main body of the text.
- If the legislator follows the rationale of a multilateral OTF as proposed by the Commission, it will be critical to ensure a true level playing field between the OTF and other multilateral trading venues, notably in maintaining the proposal's prohibition of trading on own account by the OTF operator, while removing its ability to perform discretionary execution. This will ensure the new category is a properly multilateral venue.
- If the legislator wishes to attribute bilateral characteristics to the new category, to allow it to perform client trade facilitation (for example, through the inclusion of own account flows alongside the proposed discretion) then the OTF should be placed within the bilateral space and appropriately regulated.

2. Market Structure: Transparency as the key to efficient, well functioning markets

Transparency is not only crucial for efficient price formation, but also for investor protection. MiFID sought to establish a balance between competition on the one hand, and investor protection on the other, making transparency the cornerstone of this framework. Transparency enables investors to compare prices and allows execution quality to be upheld across competing execution venues. It takes two forms – pre- and post-trade transparency - both of which are necessary and subject to review under the Commission's proposals.



b) Consolidated data: Improving post-trade transparency

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, results 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 has made the efficient comparison of prices and trades across cash equities venues much more difficult. The proposals focus on **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. The proposed provisions set the conditions for the emergence of **Consolidated Tape Providers (CTPs)**, **Approved Publication Arrangements (APAs)** – for trades executed on an OTC basis by investment firms) and **Approved Reporting Mechanisms (ARMs)**.

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, 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. Moreover, 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 committing to the delivery of free delayed data (via a "**European Tape of Record**" to be launched in the first half of 2012).

NYSE Euronext welcomes in particular the **proposed APA regime** as a means of remedying the single most important source of post-trade transparency issues: **the quality of OTC trade reporting data**. Today there are no standard means of identifying the type of transaction or how OTC trades should be reported, nor any enforcement oversight: the proposed regime should go along way to rectifying this. In anticipation of likely regulatory change, NYSE Euronext has chaired an industry working group composed of the Federation of European Securities Exchanges (FESE) and market data vendors to establish a **single trade reporting standard** across RMs, MTFs and OTC markets to allow data to be effectively consolidated. With the standards in place, the key will be their consistent application and ensuring that trades are reported in a timely and non-duplicative fashion. The Commission proposals also give ESMA the power to develop draft regulatory technical standards to determine common formats, data standards and technical arrangements facilitating the consolidation of information. NYSE Euronext considers that in this process a priority should be the elaboration of a **set of clear and specific guidelines on trade reporting** for both the APAs and reporting parties. This is needed to

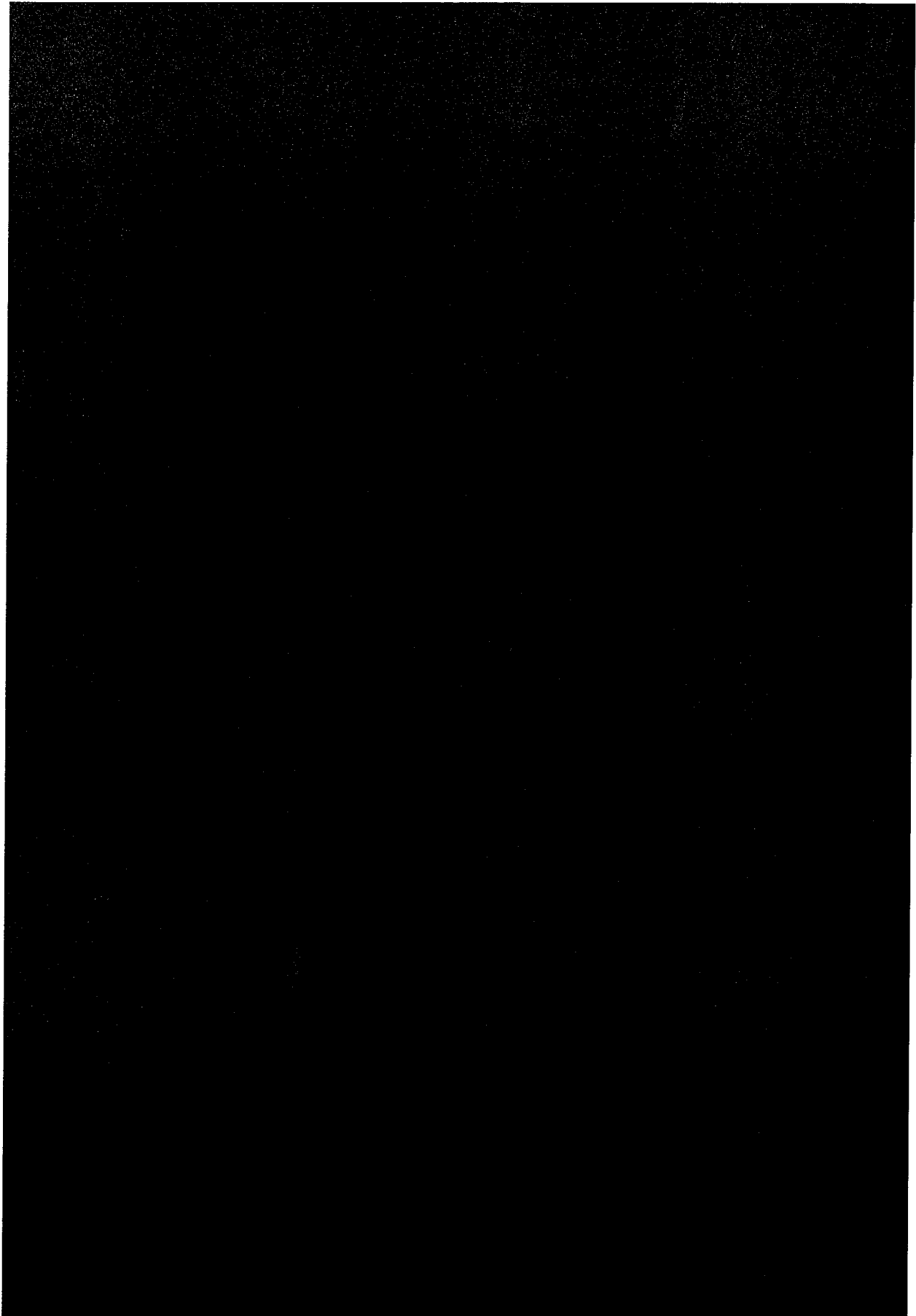
address the issues of duplicative reporting and ensuring the accuracy of certain trade report characteristics.

NYSE Euronext also welcomes the Commission's proposals to encourage the emergence of competing **commercial consolidated tape providers (CTPs)**. 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 excessive 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.

Summary:

- NYSE Euronext broadly supports the direction being taken in the development of consolidated tape providers (CTPs) (with the one caveat that it should be clarified that the scope is limited to transferable securities), approved publication arrangements (APAs) and approved reporting mechanisms (ARMs): the key objective should be to **improve the quality of trade report data arising from market fragmentation**, particularly in the OTC space.
- A set of **clear and specific guidelines on trade reporting** should be developed for both APAs and the reporting parties to ensure the accuracy of trade reports and avoid duplicative reporting.



3. Market Structure: Conflicts of Interest

The competition that MiFID 1 has so successfully created has been almost exclusively driven by **user-sponsored entry** into the execution business: almost a third of lit equity trading occurs on user-controlled execution venues. This means, however, that there is no longer any reason to preserve the proportionality principle that was adopted originally in order to favour the emergence of new entrants (MTFs). It is now crucial to level the playing field between trading venues performing the same functional secondary market activity, in order to ensure an even level of investor protection and market integrity throughout the European Union: MTFs should bear the exact same regulatory requirements in their role as secondary markets as RMs do.

The legislator should also address significant conflict of interest issues in MTFs. **Best execution** depends just as much on the intermediary as on the market quality of individual execution venues, however, MiFID 1 has created a situation in which the same entity – an investment firm – can combine the following activities: (i) shareholding in the platform, (ii) routing of client flow to that 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. We consider that this situation can give rise to the following potential conflicts of interest:

- Between the investment firm's **best execution obligations** to their clients with their interests as shareholders of a trading venue. Firms may be incentivised to route client orders to the venues in which they hold shares, irrespective of the execution quality on these venues, and therefore at the expense of investors.
- A conflict and tension in respect of **market surveillance** in that an entity responsible for a platform, to which it also provides its own flow, might experience a tension between its surveillance duties and commercial goals.

In the current context, it is vital to reestablish investor confidence in financial markets: even the perception of conflicts of interest can have a damaging effect on confidence. NYSE Euronext therefore suggests that there is a need for a **more stringent disclosure regime from intermediaries to their clients**, possibly inspired by rule 606 of Reg NMS in the US.

This is because we view the requirement in MiFID Article 27(5) on investment firms to make public a summary of the top five execution venues to which they route client orders on a yearly basis as insufficient. In contrast, NYSE Euronext believes that client reports should be produced on a **monthly basis** and should detail where the order was routed (including routing algorithms), 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 consider that **trading venues** should disclose public high-level details on their shareholder base (a user-shareholder of a trading venue should be required to **publicly disclose shareholdings which exceed a threshold of 20% in any platform to investors**) as well as periodical aggregate statistics concerning the number of **market abuse cases** investigated by that venue, together with the number and types of sanctions actually taken.

Finally, from a **corporate governance** perspective, the combination of an executive directorship in an organised trading venue with an executive directorship in an investment firm may give rise to risks of conflicts of interests. The interests of investment firms and the interests of an organised trading venue are different and may conflict, at the expense of the interests of the final investor and of the integrity of European financial markets. Therefore, the combination of executive directorships in entities routing client orders with executive directorships in execution venues should be prohibited.

Taken as a whole, these measures would provide competent authorities with the requisite tools to assess potential conflicts of interest between platform operators and the routing systems they run and would be preferable to more arbitrary limits on platform ownership by users. This is because ultimately platform users have been responsible for the success of MiFID in creating competition in the execution space for equities.

Summary:

- While new entrants have brought considerable benefits there is no longer any need to preserve the proportionality principle which was adopted in MIFID 1 to favour the emergence of new entrants. MTFs should bear the exact same regulatory requirements in their role as secondary markets as RMs do.
- There is also a need for **greater disclosure on best execution** given the combination of roles performed by user-shareholders of trading platforms.
- NYSE Euronext suggests that platform user-shareholders should be obliged to **disclose on a monthly basis** detailed best execution reports, including details on maker rebates earned by the intermediary in executing the client order. The Commission has only proposed disclosure on an annual basis of the top five execution venues to which platforms route orders.
- In addition, trading venues should disclose public high-level details on their shareholder base (we suggest a requirement for **user-shareholders of a trading venue to disclose shareholdings** above 20% to investors) as well as **aggregate, periodical statistics on market abuse cases** investigated and the number / type of sanctions taken.
- Finally from a **corporate governance** perspective, the combination of an executive directorship in an organised trading venue with an executive directorship in an investment firm should be prohibited given the potential conflicts of interests it may give rise to, notably any combination of roles across entities routing client orders and execution venues.

4. Market Structure: Algorithmic and High Frequency Trading

Algorithmic trading encompasses a number of different trading strategies and methodologies, their overall aim being a more efficient treatment of orders. The range of market participants which employ trading algorithms to enter orders, in part to address **best execution** requirements, include

institutional buy-side firms, retail and sell-side brokers. **High frequency trading (HFT)** is a specific subset of algorithmic trading, whose development has been driven mainly by technological innovation and by the fragmentation resulting from the opening up to competition of the European trading landscape.

In a fragmented marketplace, algorithmic trading and, more specifically HFT, provide **important benefits to the markets**, in the form of a more efficient treatment of orders, greater market liquidity, greater price synchronicity and lower bid-ask spreads. It must also be recognised that **abusive trading strategies and behaviours** can be implemented manually as well as through electronic means. It is therefore incorrect to only associate algorithmic trading with fraudulent trading strategies. Regulations prohibiting these practices should apply equally whether the practices are conducted manually or electronically.

NYSE Euronext's main concern with the Commission's proposals lies with the requirement in MiFID Article 17(3) that algorithmic trading strategies should be in **continuous operation during the trading day, posting permanent quotes**. This amounts to the introduction of a quasi market making obligation on all firms running algorithmic trading strategies. NYSE Euronext considers that this represents an extremely imprudent step in that it would require firms to be exposed to market risk on a continuous basis, whether they are willing to bear that risk or not. Furthermore, it contrasts with the approach taken to **market makers** on our markets. Even in normal conditions, market makers are only required to maintain permanent quotes up to 80% or 90% of the trading day; and in extreme situations can withdraw from the market. In these cases, the market maker will not lose any of its market maker benefits as long as it provides a reasonable explanation for the withdrawal to the Exchange. As well as increasing market risk, we consider that the introduction of a quasi market making obligation will likely lead algorithmic trading to shift away from the markets where such a rule is applied, resulting in lower liquidity and therefore increased volatility in Europe.

Instead of introducing requirements for the posting of permanent quotes with the resultant increase of market and systemic risk, NYSE Euronext considers that existing controls on **systems resilience** provide a better tool for managing algorithmic trading. As an operator of regulated markets, NYSE Euronext has **significant experience of automated trading and expertise in the necessary range of controls**. These range from conformance tests on algorithms before they are admitted to the exchange, to order message allocations (on a daily or per second basis) and order to trade ratios. These are backed up by a set of provisions on the surveillance side to deal with cases of flooding of the trading system through, for example, the temporary suspension of an algorithm's access to the trading system.

Accordingly NYSE Euronext broadly supports the measures in MiFID Article 51(3) requiring trading venues to have in place effective systems, procedures and arrangements to ensure that algorithmic trading systems cannot create or contribute to disorderly trading conditions on the market. However NYSE Euronext cautions **against the introduction of a one size fits all approach**: the legislative framework should recognise the need for exchanges to have a variety of tools at their disposal, with competent authorities granted the responsibility of ensuring that the appropriate controls are in place.

Moreover, NYSE Euronext considers that it is important to underline the **respective responsibilities of market operators and competent authorities** in addressing disorderly trading. Market operators cannot guarantee that disorderly trading will never occur, but they are responsible for the monitoring – both in real time and post trade – of trading which takes place on their markets. 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 (for more information please see the section on the proposed sanctions regime).

Finally, it is important to ensure that **systems resilience requirements** are applied consistently across all trading venues and Member States, so as to limit the scope of regulatory arbitrage. The adoption of these requirements in MiFIR rather than in MiFID could be a first step toward a greater regulatory convergence across European Member States.

Summary:

- Given the significant danger it would generate in obliging participants to be present in the market on a continuous basis whether they are willing to bear the risk or not, NYSE Euronext strongly suggests deletion of the requirement in MiFID Article 17(3) for algorithmic trading strategies to be in **continuous operation posting permanent quotes on an intraday basis, regardless of prevailing market conditions**.
- Instead, NYSE Euronext considers that trading venues should be allowed to use the full range of tools they have at their disposal to ensure **systems resilience**, avoiding a prescriptive one-size-fits-all approach and tailoring arrangements to particular markets and financial instruments, in order to ensure fair and orderly market functioning.
- It will also be important to maintain the **respective responsibilities of trading venues and competent authorities**. Competent authorities should have the responsibility of ensuring the appropriate controls are in place and that the **requirements** are applied consistently across all trading venues and jurisdictions where the same product is available for trading.

5. Market Structure: SME Growth Markets

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. At the same time, SMEs should remain free to seek a listing on the exchange (RMs or MTFs) they believe is most beneficial to them and their stakeholders.

It is, however, questionable whether the introduction of a **SME Growth Market label** will improve SMEs access to capital markets. NYSE Euronext is concerned that the introduction of a SME Growth Market will not address the fundamental issues surrounding SME access to finance, these being **supply and demand**. Great care must 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 Commission's proposals, we are concerned, however, that MiFID Article 35(7) allowing the shares of companies listed on SME Growth Markets to be traded on other SME Growth Markets without the consent of the issuer will **reduce liquidity, impact investor confidence** and diminish **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) and 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 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 SMEs 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. 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.

Summary:

- The fundamental challenge surrounding SME access to finance and the facilitation of viable public listing markets is ensuring that SMEs want to list (supply) and that investors want to invest (demand). 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**.
- The provision in MiFID Article 35(7) allowing the shares of companies listed on SME Growth Markets to be traded on other SME Growth Markets without the consent of the issuer will lead to a fragmentation in the liquidity of SME stock which, coupled with a lack of market research and consolidated market data, will 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 will be compounded by the strong 'home bias' of investors in SMEs, where the proximity of the investor to the issuer is key
- Accordingly, NYSE Euronext proposes that the trading of SME stock on other SME Growth Markets should only occur with the **explicit consent of the SME issuer**.

SECTION II: COMMODITY DERIVATIVES: Transparency and Position Limits

Commodity derivatives markets play an important role in price discovery and in the transfer of risk from market participants that have an interest in hedging physical commodities to agents that are prepared to assume price risk. NYSE Euronext's Regulated Markets in Paris and London provide a forum for the trading of a wide-range of futures and options contracts based on soft and agricultural commodities. These contracts have long been relied upon as trusted European and global benchmarks, facilitating price discovery and risk management.

The Commission's proposal in MiFID for commodity derivatives markets sits within a broader context of **policy development in the G20**. This, in turn, has been influenced by concerns over price levels and price volatility, as well as broader issues such as productive capacity and food security. The Commission has recognised that many factors have influenced commodity prices over the past four years, including *"a series of changes in global supply and demand patterns as well as short term shocks in key commodity and raw material markets"*⁴. Like all markets, commodity derivatives markets need appropriate rules in place to ensure that they function efficiently; serving the price discovery and hedging needs of all market participants. At the Cannes Summit in November 2011, the G20 reiterated its previous calls for enhancements to the operation of those markets. These are reflected in two key components of the Commission's proposals, namely: **greater transparency** and **enhanced position management**.

1. Transparency

The Commission has proposed that trading venues should publish a weekly report setting out aggregate positions held by different categories of market user. NYSE Euronext believes this will enhance market confidence by putting more information about the use of the commodity derivatives markets into the public domain. In October 2011 NYSE Euronext began publishing **weekly position reports** in respect of commodity futures contracts which are traded on our regulated market in London. These reports are similar to those proposed by the Commission under MiFID. Our only suggestion for improving the Commission's proposal would be to remove the requirement for position reporting by member firms to be done in real time as this would not only pose significant practical problems, but is not necessary for the production of a weekly position report.

2. Enhanced Position Management

The 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:

- Supporting liquidity;
- Preventing market abuse;
- Supporting orderly pricing and settlement conditions.

NYSE Euronext supports those policy objectives and believes that strong oversight of positions in commodity derivatives markets is an essential element in ensuring that markets remain fair and

⁴ Communication from the Commission entitled "Tackling the Challenges in Commodity Markets and on Raw Materials", page 2, 2 February 2011.

orderly and that the price formation and delivery processes operate smoothly. We also believe 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 – some are perishable, others are not; and each has its own bespoke delivery mechanism reflecting the operation of the physical market.

The Commission’s proposal calls for **limits to be placed on the number of contracts** a person can enter over a specified period of time. NYSE Euronext believes that the limits need to be expressed in terms of **open contracts** that a participant holds rather than the number of contracts traded, as it is the former that is relevant in terms of ensuring orderly pricing and settlement and deterring market abuse. Moreover, 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 believes that spot month delivery limits would be a targeted way of helping to address such pressures. NYSE Euronext already has such a spot month delivery limit system in Paris and has been undertaking its own review in London where, subject to further consultation with market users and regulatory authorities, our intention is to introduce a more transparent and prescriptive policy than the one we have today. This is likely to focus on the use of accountability levels in all delivery months and delivery limits in the approach to maturity of the spot month.

Conversely, ‘**hard**’ **position limits** running throughout the lifetime of a contract risk causing distortions that could damage market liquidity and curtail the ability of physical market users (e.g. processors, refiners) to use relevant contract to manage price risk in an effective manner.

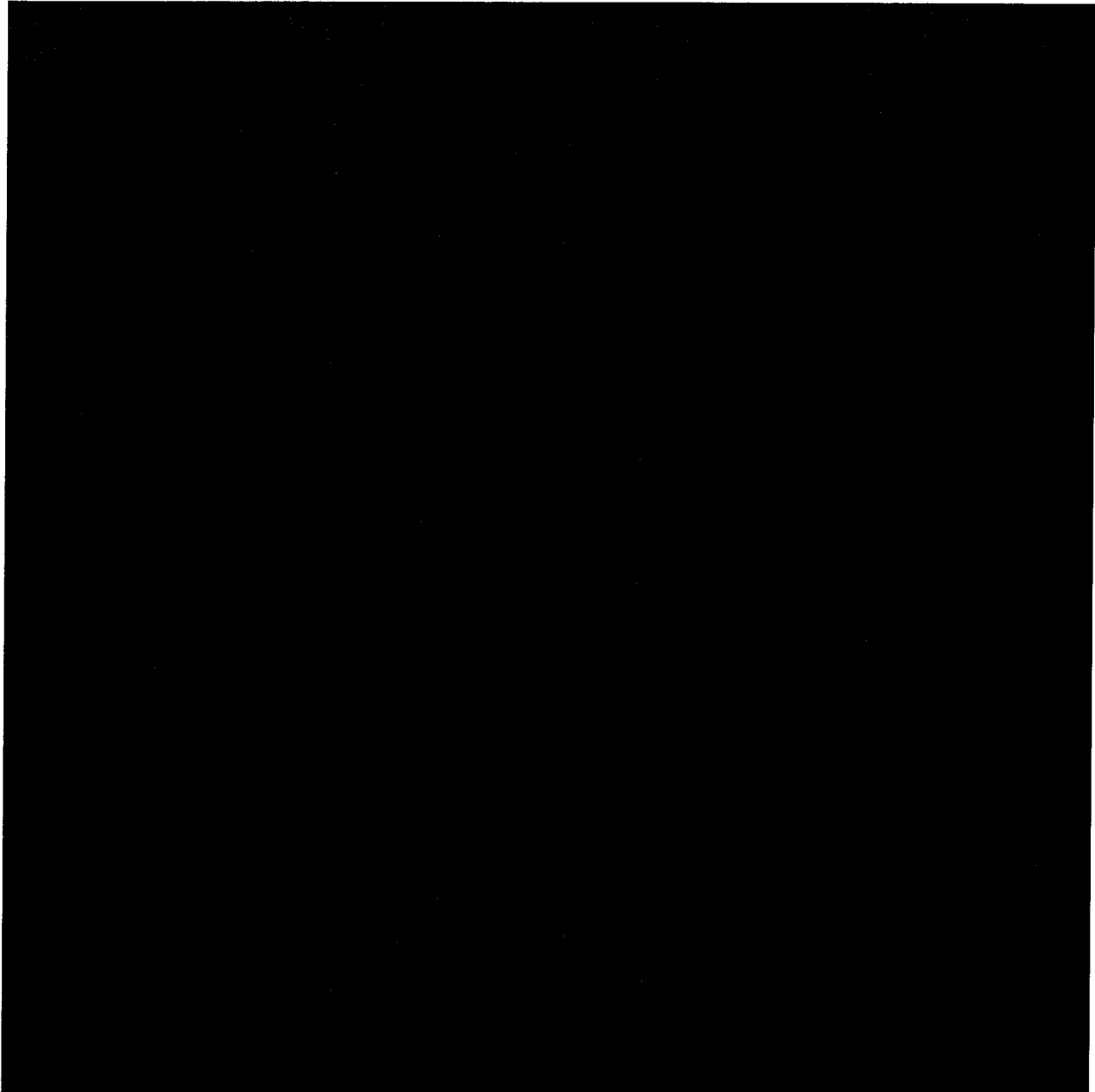
Finally, NYSE Euronext strongly supports the fact that the **primary role for setting and enforcing limits is given to trading venues**. However, more clarity is needed on the way in which the reserve powers of other authorities would be used to adopt more restrictive position limits, particularly on the interplay between the proposed powers for the Commission and ESMA to set position / delivery limits and the established practice of this being the responsibility of RMs. This is important because, by their very nature, position limits are intended to alter – and may well distort – demand and supply 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.

Summary:

- NYSE Euronext supports the Commission’s policy objectives and 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.
- It is essential to retain flexibility in the arrangements that are applied due to the diversity of market structures and physical commodities. This can be achieved through provisions allowing for “**alternative arrangements with equivalent effect**” to position limits.
- Moreover, NYSE Euronext believes that the position limits need to be expressed in terms of **open contracts** that a participant holds rather than the number of contracts traded, as it is the former that is relevant in terms of ensuring orderly pricing and settlement and deterring market abuse. The Commission has proposed **limits to be placed on the number of contracts** a person can enter over a specified period of time.
- The responsibility for **setting limits** should be the primary responsibility of the market operators, with appropriate oversight by the competent authorities. More clarity in the

proposed application of reserve powers at the European level is required.

- The **weekly report setting out aggregate positions** held by different categories of market users does not require position reporting by member firms to be done in real time. This would pose significant practical problems and is, in any case, not required for a weekly position report.



SECTION IV: TRANSACTION REPORTING: Extension of scope & application to non-EU financial institutions

Transaction reporting is a critical part of MiFID in allowing supervisors to monitor the activities of market participants, ensure compliance with MiFID and monitor for abuses under the Market Abuse

Directive (MAD). The Commission proposals would require all transactions in financial instruments to be reported to competent authorities, except for transactions in financial instruments which are not traded in an organised way, are not susceptible to market abuse and cannot be used for abusive purposes. NYSE Euronext considers that **transaction reporting should only apply to products** that need to be monitored on a transaction-by-transaction basis in order to prevent or identify abuses such as insider dealing. If a product is not prone to an abuse of this type, there is little justification in requiring it to be subject to potentially onerous and costly transaction reporting arrangements. Competent authorities should consider the real need for information before requesting it from a trading venue. For example, in practice most, if not all, commodity derivatives products are not susceptible to abuses such as insider dealing: this makes transaction reporting unnecessary and unjustified. They are, however, potentially susceptible to position-related pressures, such as technical and or abusive squeezes, which is why **position monitoring** is the relevant tool used by exchanges in order to maintain contract and market integrity in respect of such products.

In any case, under the proposals trading platforms will be obliged to archive their trading data for a period of at least five years, which should provide sufficient information to supervisory authorities for any investigatory proceedings undertaken *ex post*. Competent authorities will have **full access to a trading platform's records** from the placing of the initial order on the market, through to its execution and post-trade processing. NYSE Euronext already stores its trading data across all markets for five years.

The Commission has also proposed that RMs, MTFs and OTFs report **customer facing details of transactions executed by third country firms trading on EU markets** and which are not subject to the general reporting obligations under MiFID. Currently, EU financial institutions are under the obligation to report both the customer ('back-to-back' contract) and market (financial institution – RM/MTF) side of transactions to the relevant competent authorities. In addition, **NYSE Euronext voluntarily undertakes transaction reporting** of the market side of the transaction for both EU and non-EU financial institutions trading on its markets to the relevant competent authority. However, it is completely impractical to require trading venues to report **both** the market and customer facing transactions of non-EU financial institutions due to the obvious difficulty in obtaining the necessary information on the customer facing transaction. Instead, the Commission should **oblige non-EU financial institutions** trading on EU markets to disclose the customer side of the transaction to the relevant competent authorities in a similar way to what is required of EU financial institutions.

Finally, the Commission has proposed improving the **identification of the clients** on whose behalf the investment firm has executed the transaction and the persons responsible for its execution. NYSE Euronext considers that the provisions for better identification of clients – inclusion of trader and algorithm IDs on transactions – would add considerable complexity and costs to transaction reporting without bringing any tangible benefits in terms of investigation capacity. This is because regulators can already get this information *ex-post* when investigating fraudulent practices by requesting it from the brokers. Therefore, the advantages of including trader and algorithm IDs in transaction reports might not be significantly higher than those of the current investigation methods used by regulators.

Summary:

- NYSE Euronext considers that transaction reporting should **only apply to products** that need to be monitored on a transaction-by-transaction basis in order to prevent or identify abuses such as insider dealing.
- Furthermore, we consider it impractical for trading venues to be required to undertake customer side transaction reporting **for non-EU financial institutions** trading on European markets. We suggest this is replaced with a requirement on the non-EU firms themselves

to report the customer side of their transactions to the relevant competent authorities in Europe.

- NYSE Euronext also suggests a review of the necessity of improving **client identification** given that regulators are already able to get this information on an ex-post basis when investigating fraudulent practices.

SECTION V: SANCTIONS REGIME: Regulated Markets' role as frontline regulators

NYSE Euronext considers that clarification is needed on how the proposed new sanctions regime foreseen under MiFID and MAR will be applied to the operators of trading venues, Regulated Markets in particular, and to Central Counterparties. The key provisions that concern us are:

- **MiFID Article 75** establishing powers of public censure and potential fines of up to 10% of the annual turnover of the Regulated Market's corporate group in instances (*inter alia*) where it has failed to put in place arrangements, systems, rules and procedures in respect of the provisions in MiFID Article 50 and Article 51.

We would welcome clarification on the imposition of an obligation of means as opposed to an obligation of ends. While there should be an **obligation of means** on trading venues (for example, the obligation of having effective monitoring systems in place), it is unrealistic to subject trading venues to an **obligation of ends** (for example, the guarantee that no market abuse will take place). As currently drafted this distinction is not clear to us, particularly in respect of:

- **MiFID Article 51(3)** and the reference to RMs having in place effective systems, procedures and arrangements to ensure that algorithmic trading systems **cannot create or contribute** to disorderly trading conditions. In our view, while RMs can be required to maintain the systems, they cannot be placed in a position of guaranteeing that there will be no disorderly trading.

The **magnitude of the potential fine is extremely high** and amounts to standard remedies imposed on guilty parties in antitrust cases. Moreover, the logic underpinning this proposal seems paradoxical in that it applies the same fine to market operators - who have responsibilities for regulating the use of their facilities by market participants - as to those responsible for the market abuse.

NYSE Euronext does not believe that the proposals **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 fulfil a number of duties which are not imposed on operators of other types of trading venues; therefore 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)(e)) and public censure (MiFID Article 75(2)(a)) powers not be applied to them.

Summary:

- NYSE Euronext would **welcome a clarification of the obligations** to be imposed on trading venues: while there should be an obligation of means, it is unrealistic to subject trading venues to an obligation of ends, for example guaranteeing that no market abuse or disorderly trading will take place.
- We also consider that the respective responsibilities of RMs and the competent authorities have to be clearly maintained and accordingly recommends that RMs 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)(e)) and public censure (MiFID Article 75(2)(a)) powers not be applied to them.

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NYSE Euronext

**NYSE Euronext
MiFID II / MiFIR**

**Summary of
Recommendations**

February 2012

NYSE Euronext MiFID II / MiFIR Summary of Recommendations

This document outlines the views of NYSE Euronext with regards to the review of the Market in Financial Instruments Directive (MiFID) and the Commission proposals on MiFID II and MiFIR.

This summary paper includes an overview of the main policy recommendations NYSE Euronext would like to suggest, while the accompanying full position paper outlines our positions in more detail.

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<i>b) Organised Trading Facility (OTF)</i>
2. <u>Market Structure – Transparency as the key to efficient, well-functioning markets</u>
<i>b) Consolidated Data: Improving post-trade transparency</i>
<i>c) Non-equities: Extension of transparency requirements</i>
3. <u>Market Structure: Conflicts of Interest</u>
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SECTION IV: TRANSACTION REPORTING: Extension of scope & application to non-EU financial institutions
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Introduction

In the debates on the MiFID II / MiFIR proposals it is important that all financial market participants recognize that markets are not the sole concern of the exchanges or of the banks, but rather that their health is vital to European citizens who invest their savings and pensions in the markets. Ultimately, legislation must protect the interests of all market users, right down to the end investor and this objective should be a cornerstone of the review process.

MiFID **successfully introduced competition** into equity trading in Europe: users have more choice, costs have fallen and, most importantly for economic growth, possibilities for investment have been significantly augmented. New entrants now account for over 1/3 of lit equity trading and Europe's largest share-trading platform is a 'new entrant' Multilateral Trading Facility (MTF).

However, at the same time, MiFID led to **greater complexity of the trading landscape through fragmentation**, a migration of trading away from full price transparency and the emergence of an unlevel playing field, as new entrants have been able to avoid the more onerous rules that Regulated Markets (RMs) have to follow. In addition, the cost savings from this increased competition have not flowed equally to all market participants and have not always been passed on to the end investors, retail or wholesale.

These are the challenges facing the EU legislator in the adoption of a revised MiFID framework. NYSE Euronext, as a leading global operator of financial markets and a provider of innovative trading technologies, supports the European Commission's objectives in the MiFID Review, particularly those **structural reforms** necessary for the establishment of a safer, sounder, more transparent and responsible financial system working for the economy and society as a whole. These reforms fall within the scope of the objectives set by the **G20 Summit in Pittsburg (September 2009)** to tackle the less regulated and more opaque parts of the financial system and NYSE Euronext concurs with the Commission that significant changes are required in MiFID concerning the organization, transparency and oversight of a range of market segments, particularly those in the cash equities OTC space.

NYSE Euronext EU Regulatory Policy Channel

Further information on our MiFID positions can be accessed through our [EU Regulatory Policy Channel](#)¹. This website includes:

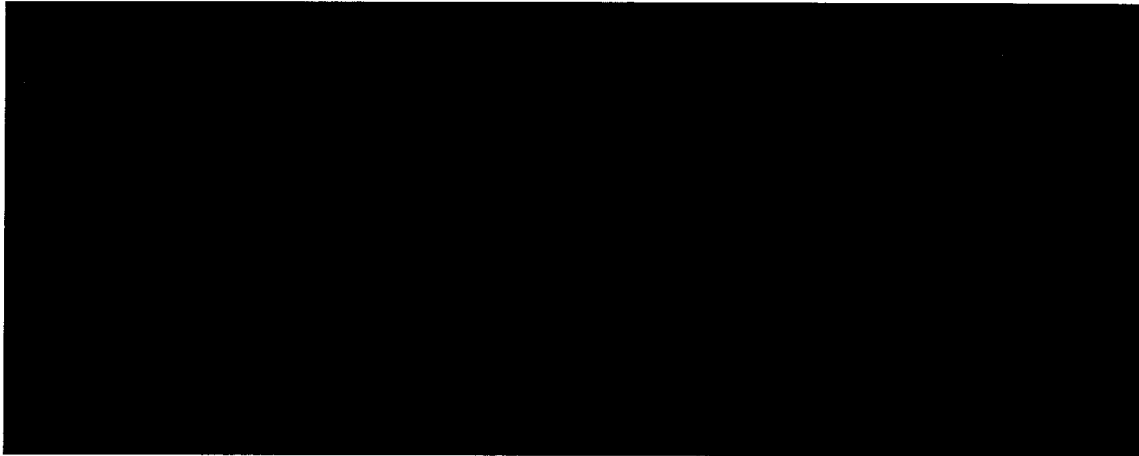
- An **animation** explaining the background to MiFID and the evolution in the trading landscape over the last decade;
- **Videos** on some of the key themes running through the MiFID proposals;
- Links to further **written background materials** on MiFID.

¹ <http://corporate.nyx.com/en/who-we-are/advocacy/eupolicy>

Summary of Main Recommendations

SECTION I: MARKET STRUCTURE

1. Market Structure – OTC Cash Equities Definition & OTF



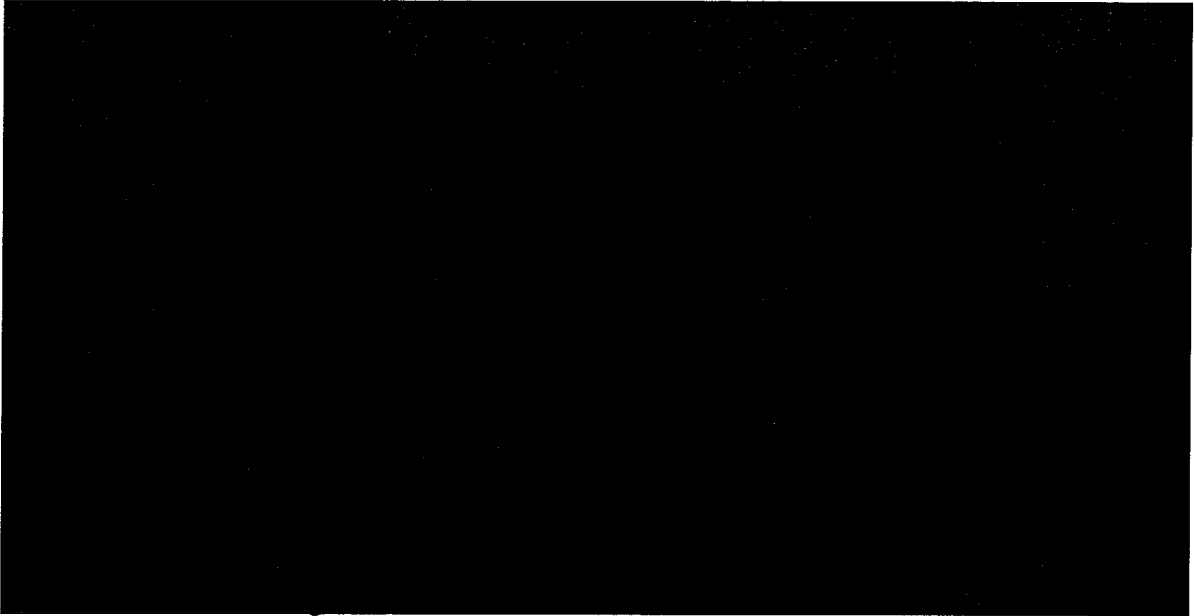
b) Organised Trading Facility

- In principle, NYSE Euronext has nothing against the creation of this new category, but considers that its success is dependent upon a **strict and legally binding definition of OTC cash equities** being introduced in the main body of the text.
- If the legislator follows the **rationale of a multilateral OTF** as proposed by the Commission, it will be critical to ensure a true level playing field between the OTF and other multilateral trading venues, notably in maintaining the proposal's prohibition of trading on own account by the OTF operator, while removing its ability to perform discretionary execution. This will ensure the new category is a properly multilateral venue.
- If the legislator wishes to attribute **bilateral characteristics to the new category** to allow it to perform client trade facilitation (for example, through the inclusion of own account flows alongside the proposed discretion), then the OTF should be placed within the bilateral space and appropriately regulated through controls on price and size to protect price formation on lit markets.



2. Market Structure – Transparency as the key to efficient, well-functioning markets

Transparency is not only crucial for efficient price formation, but also for investor protection in that it enables investors to compare prices and allows execution quality to be upheld across competing execution venues.



b) Consolidated Data: Improving post-trade transparency

- NYSE Euronext broadly supports the direction being taken in the development of consolidated tape providers (CTPs) (with the one caveat that it should be clarified that the scope is limited to transferable securities), approved publication arrangements (APAs) and approved reporting mechanisms (ARMs): the key objective should be to **improve the quality of trade report data arising from market fragmentation**, particularly in the OTC space.
- A set of **dear and specific guidelines on trade reporting** should be developed for both APAs and the reporting parties to ensure the accuracy of trade reports and avoid duplicative reporting.



3. Market Structure: Conflicts of Interest

- While new entrants have brought considerable benefits there is no longer any need to preserve the proportionality principle which was adopted in MIFID 1 to favour the emergence of new entrants. MTFs should bear the exact same regulatory requirements in their role as secondary markets as RMs do.

- There is also a need **for greater disclosure on best execution** given the combination of roles performed by user-shareholders of trading platforms.
- NYSE Euronext suggests that platform user-shareholders should be obliged to **disclose on a monthly basis** detailed best execution reports, including details on maker rebates earned by the intermediary in executing the client order. The Commission has only proposed disclosure on an annual basis of the top five execution venues to which platforms route orders.
- In addition, trading venues should disclose public high-level details on their shareholder base (we suggest a requirement for **user-shareholders of a trading venue to disclose shareholdings** above 20% to investors) as well as **aggregate, periodical statistics on market abuse cases** investigated and the number / type of sanctions taken.
- Finally from a **corporate governance** perspective, the combination of an executive directorship in an organised trading venue with an executive directorship in an investment firm should be prohibited given the potential conflicts of interests it may give rise to, notably any combination of roles across entities routing client orders and execution venues.

4. Market Structure: Algorithmic and High Frequency Trading

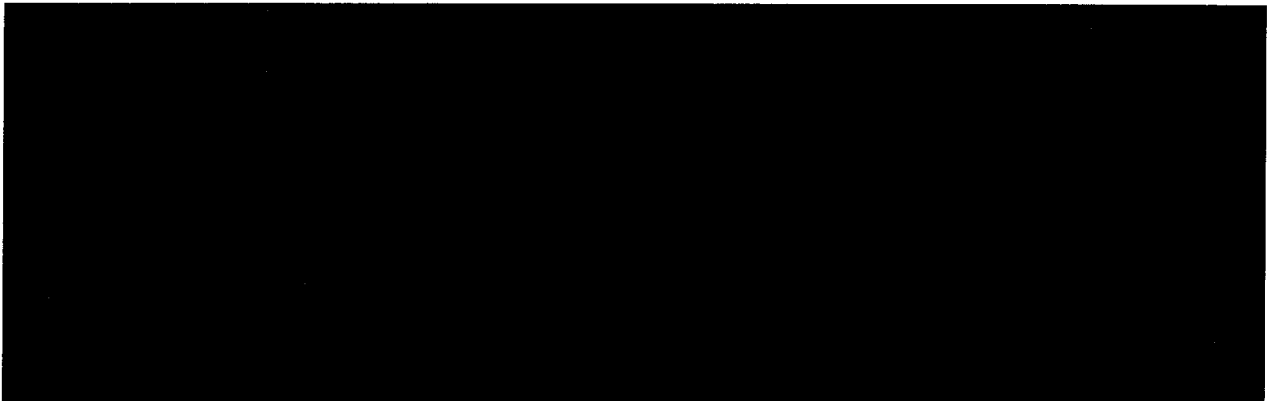
- Given the significant danger it would generate in obliging participants to be present in the market on a continuous basis whether they are willing to bear the risk or not, NYSE Euronext strongly suggests deletion of the requirement in MiFID Article 17(3) for algorithmic trading strategies to be in **continuous operation posting permanent quotes on an intraday basis, regardless of prevailing market conditions**.
- Instead, NYSE Euronext considers that trading venues should be allowed to use the full range of tools they have at their disposal to ensure **systems resilience**, avoiding a prescriptive one-size-fits-all approach and tailoring arrangements to particular markets and financial instruments, in order to ensure fair and orderly market functioning.
- It will also be important to maintain the **respective responsibilities of trading venues and competent authorities**. Competent authorities should have the responsibility of ensuring the appropriate controls are in place and that the **requirements** are applied consistently across all trading venues and jurisdictions where the same product is available for trading.

5. Market Structure: SME Growth Markets

- The fundamental challenge surrounding SME access to finance and the facilitation of viable public listing markets is ensuring that **SMEs want to list (supply)** and that **investors want to invest (demand)**. 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**.
- The provision in MiFID Article 35(7) allowing the shares of companies listed on SME Growth Markets to be traded on other SME Growth Markets without the consent of the issuer will lead to a **fragmentation in the liquidity of SME stock**. Coupled with a lack of market research and consolidated market data, this will produce price discrepancies across the venues on which the SME stock is traded and result in a loss of **investor confidence** in the price formation process. This will be compounded by the strong 'home bias' of investors in SMEs, where the proximity of the investor to the issuer is key
- Accordingly, NYSE Euronext proposes that the trading of SME stock on other SME Growth Markets should only occur with the **explicit consent of the SME issuer**.

SECTION II: Commodity Derivatives: Transparency and Position Limits

- NYSE Euronext supports the Commission's policy objectives and 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.
- It is essential to retain flexibility in the arrangements that are applied due to the diversity of market structures and physical commodities. This can be achieved through provisions allowing for "**alternative arrangements with equivalent effect**" to position limits.
- Moreover, NYSE Euronext believes that the position limits need to be expressed in terms of **open contracts** that a participant holds rather than the number of contracts traded, as it is the former that is relevant in terms of ensuring orderly pricing and settlement and deterring market abuse. The Commission has proposed **limits to be placed on the number of contracts** a person can enter over a specified period of time.
- The responsibility for **setting limits** should be the primary responsibility of the market operators, with appropriate oversight by the competent authorities. More clarity in the proposed application of reserve powers at the European level is required.
- The **weekly report setting out aggregate positions** held by different categories of market users does not require position reporting by member firms to be done in real time. This would pose significant practical problems and is, in any case, not required for a weekly position report.



SECTION IV: Transaction Reporting: Extension of scope & application to non-EU financial institutions

- NYSE Euronext considers that transaction reporting should **only apply to products** that need to be monitored on a transaction-by-transaction basis in order to prevent or identify abuses such as insider dealing.
- Furthermore, we consider it impractical for trading venues to be required to undertake customer side transaction reporting **for non-EU financial institutions** trading on European markets. We suggest this is replaced with a requirement on the non-EU firms themselves to report the customer side of their transactions to the relevant competent authorities in Europe.
- NYSE Euronext also suggests a review of the necessity of improving **client identification** given that regulators are already able to get this information on an ex-post basis when investigating fraudulent practices.

SECTION V: Sanctions regime: Regulated Markets' role as frontline regulators

- NYSE Euronext would **welcome a clarification of the obligations** to be imposed on trading venues: while there should be an obligation of means, it is unrealistic to subject trading venues to an obligation of ends, for example guaranteeing that no market abuse or disorderly trading will take place.
- We also consider that the respective responsibilities of RMs and the competent authorities have to be clearly maintained and accordingly recommends that RMs 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)(e)) and public censure (MiFID Article 75(2)(a)) powers not be applied to them.

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[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: donderdag 23 februari 2012 13:58
Aan: [REDACTED]@afm.NL'
CC: [REDACTED]
Onderwerp: Meeting on MiFID II (MiFIR)

All,

Just sending you a confirmation of our meeting next Friday, March 2nd at [REDACTED] in Amsterdam. The plan is to start around 10:00 and end around 12:00. Since a number of people are travelling by train and/or plane, chances are some will be delayed. For those of you who have time, we will have a lunch available around 12:00.

From the ministry of finance [REDACTED] and [REDACTED] are joining. From AFM, I believe [REDACTED] [REDACTED] is that still correct?) From NYX: [REDACTED] (Government Affairs Brussels), [REDACTED] (Cash, Paris), [REDACTED] (Derivatives, London) and myself will be attending.

See you then.

[REDACTED]

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[Redacted]

Van: [Redacted]@nyx.com]
Verzonden: dinsdag 6 maart 2012 13:00
Aan: [Redacted]@afm.nl)
CC: [Redacted]
Onderwerp: FW: MiFID Docs
Bijlagen: [Redacted]

All,

As we discussed last Friday we promised to send you additional information on a number of topics.

Attached are three documents:

- [Redacted]
- [Redacted]
- [Redacted]

Hope this information will be of use to you.
Please let us know if you have further questions or would like to receive more information on these or related topics.

Regards,
[Redacted]

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[Redacted]

Van: [Redacted]@nyx.com]
Verzonden: vrijdag 9 maart 2012 16:03
Aan: [Redacted]@afm.nl)
Onderwerp: RE: MiFID Docs
Bijlagen: MiFID Report by Gomber Pierron (Oct 2010).pdf.html

Heren,

Zoals beloofd, stuur ik jullie hierbij tevens het rapport waar wij in ons MIFID paper naar verwijzen (Pagina 5 position paper).
Daarnaast zijn nog 2 andere papers in voorbereiding: over SME financing en clearing. Zodra deze gereed zijn, stuur ik ze ook toe.

Alvast een goed weekend.

[Redacted]

[Redacted]

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[Redacted]

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[REDACTED]

Van: [REDACTED]
Verzonden: maandag 16 april 2012 12:14
Aan: [REDACTED]
CC: [REDACTED]
Onderwerp: RE: Ministry and AFM
Bijlagen: PDF Scan 2012-04-11 - 09.42.05.pdf.html

Beste [REDACTED]

Bijgaand tref je aan een motie van de PvdA/CDA zoals deze vorige week in de Tweede Kamer (TK) tijdens het VAO voedselprijzen is ingediend. Over deze motie wordt morgen gestemd: naar verwachting zal deze motie op brede(re) steun in de TK kunnen rekenen. Zie hierna de vierde alinea van de motie waarin is neergelegd op welke onderdelen de EU-regeling – m.b.t. grondstofderivaten - niet onder zou moeten doen voor de VS regelgeving. Als jij m.b.t. die onderwerpen enige nadere info over Dodd-Frank hebt dan stel ik dat zeer op prijs:

“verzoekt de regering om zich in Europees verband in te zetten voor versterking van *de* Markets in Financial Instruments Directive (MIFID) en Regulation (MIFIR), zodat deze op de gebieden van (1) transparantievereisten, (2) sterk en onafhankelijk toezicht door de relevante Europese instituties, en (3) ex-ante positielimieten niet onder doen voor de reeds bestaande Amerikaanse vereisten zoals vastgelegd in de Dodd-Frank Wall Street Reform and Consumer Protection Act”.

Verder wil ik je reeds bij voorbaat danken voor de informatie m.b.t. de “alternative arrangements”.

Met vriendelijke groet,

Van: [REDACTED]@nyx.com]
Verzonden: maandag 16 april 2012 9:59
Aan: [REDACTED]
Onderwerp: RE: Ministry and AFM

Prima, ik ben tot 12:30 bereikbaar en tussen 14:30 en 16:00 op [REDACTED]

From: [REDACTED]@minfin.nl]
Sent: maandag 16 april 2012 9:48
To: [REDACTED]
Subject: RE: Ministry and AFM

Wat mij betreft niet nodig, het zijn geen vragen waar ik ter plekke een gedetailleerd inhoudelijk antwoord op moet/wil hebben.

Van: [REDACTED]@nyx.com]
Verzonden: maandag 16 april 2012 9:43
Aan: [REDACTED]
Onderwerp: RE: Ministry and AFM

Zeker, heeft het zin om mijn collega uit London mee te laten bellen die de expert is op het gebied van derivaten?

From: [REDACTED]@minfin.nl]
Sent: maandag 16 april 2012 9:42
To: [REDACTED]
Subject: RE: Ministry and AFM

Beste [REDACTED]

Heb je op korte termijn even tijd om via de telefoon enkele MiFID gerelateerde onderwerpen, m.n. op het terrein van de (grondstof)derivaten, kort te bespreken. Reeds bij voorbaat dank. (Op welk nummer kan ik je bereiken?)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

Van: [REDACTED]
Verzonden: woensdag 18 april 2012 10:36
Aan: [REDACTED]
Onderwerp: RE: Ministry and AFM

Prima. Dank voor deze stavaza.
Groet,
[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: woensdag 18 april 2012 10:29
Aan: [REDACTED]
Onderwerp: RE: Ministry and AFM

Beste [REDACTED]

Even een kort bericht om je te laten weten dat mijn collega's in London bezig zijn met het opstellen van een stukje tekst dat de problematiek op eenvoudige wijze verwoordt. Zoals ik al vermoedde hebben wij onze commodity position limits nog niet geïntroduceerd. We zijn op dit moment bezig met het verwerken van de respons op onze marktconsultatie.

Desalniettemin zou het mogelijk moeten zijn om een voorbeeld uit te werken. Ik hoop je een van de komende dagen iets toe te sturen.

Groet,
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: woensdag 16 mei 2012 10:24
Aan: [REDACTED]
CC: [REDACTED]
Onderwerp: MiFID - Presidency respons
Bijlagen: [REDACTED] NYSE Euronext Briefing on
OTF.PDF.html; NYSE Euronext - Multilateral Trading - Avoiding Loopholes.pdf.html;
[REDACTED]

Beste [REDACTED]

Dank voor je tijd deze ochtend. Ik ga met Brussel aan de slag om te kijken of ik je meer specifieke tekst kan aanleveren ten behoeve van jullie respons op de Presidency consultatie. Ik kopieer [REDACTED] voor het gemak in.

Ter informatie stuur ik je ook de meest recente stukken die wij hebben opgesteld met betrekking tot:

- [REDACTED]
- OTF
- Multilateral vs. bilateral trading
- OTC trading

Als er vragen zijn, beantwoorden we die graag. Ik neem hopelijk later deze week nog contact op.

Groet, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

www.nyx.com

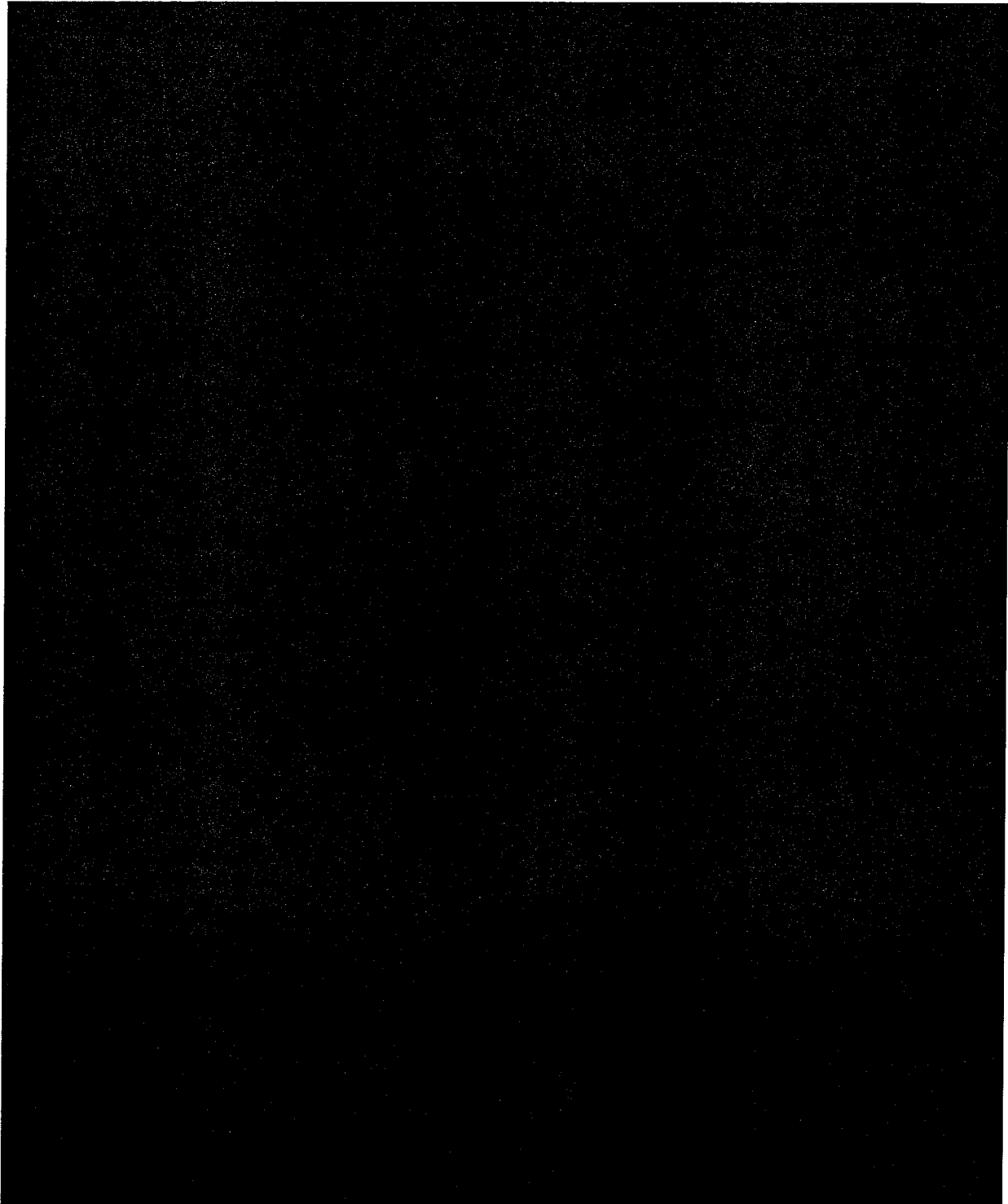
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NYSE Euronext Briefing: Defining Multilateral Trading – Avoiding Loopholes

Many of the issues identified in the MiFID Review could be resolved through a **proper distinction between multilateral and bilateral trading**. As the operator of multilateral, transparent regulated markets in Europe, NYSE Euronext considers that the criteria underpinning multilateral trading should be applied to all trading venues categorized as multilateral by the European Commission: these being Regulated Markets, MTFs and OTFs (should the latter be introduced – we have significant reservations on their creation).



2. OTF Dealing on Own Account: Capturing Riskless Principal Trading

Summary:

- There are **potential loopholes** in MiFID allowing for the prohibition of dealing on own account by the OTF operator to be circumvented which we recommend dosing.
- These are: a limited inclusion of riskless principal trading within the prohibition (only referenced in MiFID Recital 14) and an insufficient reference to dealing on own account by entities from the same group as the OTF and building linkages between OTFs and SIs.

While NYSE Euronext holds significant reservations on the creation of the OTF, we fully support the Commission's decision to **prohibit proprietary trading for multilateral OTFs**. This is essential for investor protection if OTFs are to be multilateral trading venues, that is to say matching third parties buying and selling interests. The provision of own account flow by the operator of a multilateral OTF would give rise to important conflicts of interests, since the interests of own account traders and multilateral venue operators are intrinsically contradictory. Traders on own account are primarily interested in the execution price, since their revenue directly derives from the execution price they get. On the contrary, the operator of a truly multilateral trading venue, that is to say, a venue which only enables the matching of third parties trading interests, has absolutely no direct interests in the execution price, since its revenue is not derived from it. Its only interest resides in ensuring fair and orderly trading, and in the objective setting of the execution price, which must reflect the meeting of buying and selling interests. The neutrality of the venue operator in this respect is crucial to protecting the interests of the final investor.

In addition, the Commission has made it clear that riskless principle trading should also fall within this prohibition. **However, the concept of riskless principal trading is only currently mentioned in Recital 14 of MiFID II and is not included in the body text of the Directive. For the sake of consistency and to ensure loopholes are dosed, the prohibition of riskless principal trading should be clearly established in Article 4 of MiFID II, along with the prohibition of proprietary trading.** The lack of a legally binding prohibition of riskless principal trading would constitute a significant loophole in the legislation which could be used by brokers and investment banks to develop own account trading, leaving regulators unable to have a say in the process.

Furthermore, the **MiFID Article 20 organizational rules on the OTF** should be clarified in paragraph one to ensure that dealing on own account from entities which are part of the same legal entity as the OTF operator and building linkages between OTFs and SIs also fall within the prohibition.

a) Background on Riskless Principal Trading

In theory, riskless principal trading corresponds to a situation where an intermediary, upon receiving a buy or sell order from a client, executes this order using his own account on several trading venues and / or over-the-counter. This may result in the order being executed partially on different venues and as a result the intermediary would then register these transactions on its own account and create a reverse operation at a single price to balance out the position on its own account in order to deliver a single global execution to its client. The goal is to offer the client a single execution price, even though execution prices obtained on different venues likely differed. If the intermediary follows the sequence above, and if the execution price reported to the client is the average price obtained on the different venues, then this operation is effectively riskless for the intermediary.

However, according to our analysis, **riskless principal trading often does not follow the sequence detailed above**. Instead, the Intermediary first executes orders on his own account and then tries to unwind its positions on the market, which in fact **implies a transfer of risk and should *de facto* be considered as proprietary trading**. In most cases, the intermediary reports to its client a different execution price than the average price it was able to obtain on the different platforms, which from a client's perspective is a **serious breach of transparency and best execution**.

Taking into account the risks associated with this practice, the **prohibition of riskless principal trading should therefore be included in the legally binding definition of proprietary trading** in order to close the loophole and avoid banks using it to bypass the legislation and trade on own account in spite of the prohibition. Because these transactions are extremely opaque, it is hardly possible to distinguish between trading on own account involving risk and the associated profits on the one side, and riskless principal trading where the intermediary acts on behalf of its client for an agreed and transparent fee. The resulting confusion between own account and client trades and the difficulty of identifying a transaction as one or the other *a posteriori* irrevocably undermines the ability of regulators to control this type of operations.

3. Non-discretionary order matching processes

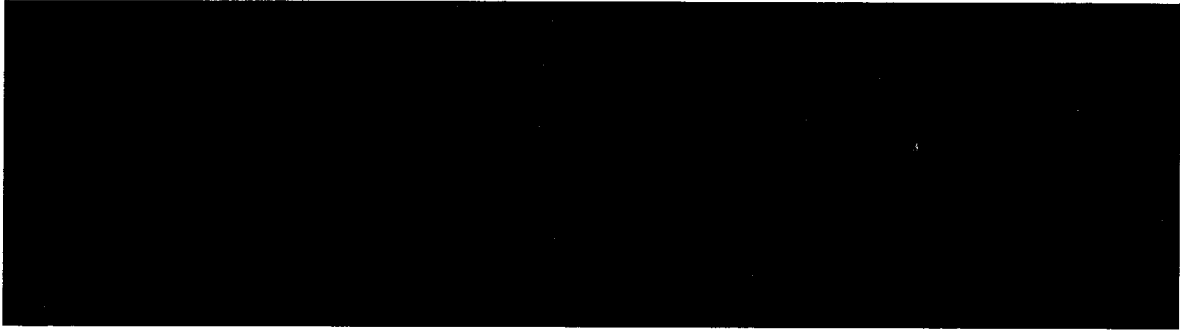
Summary:

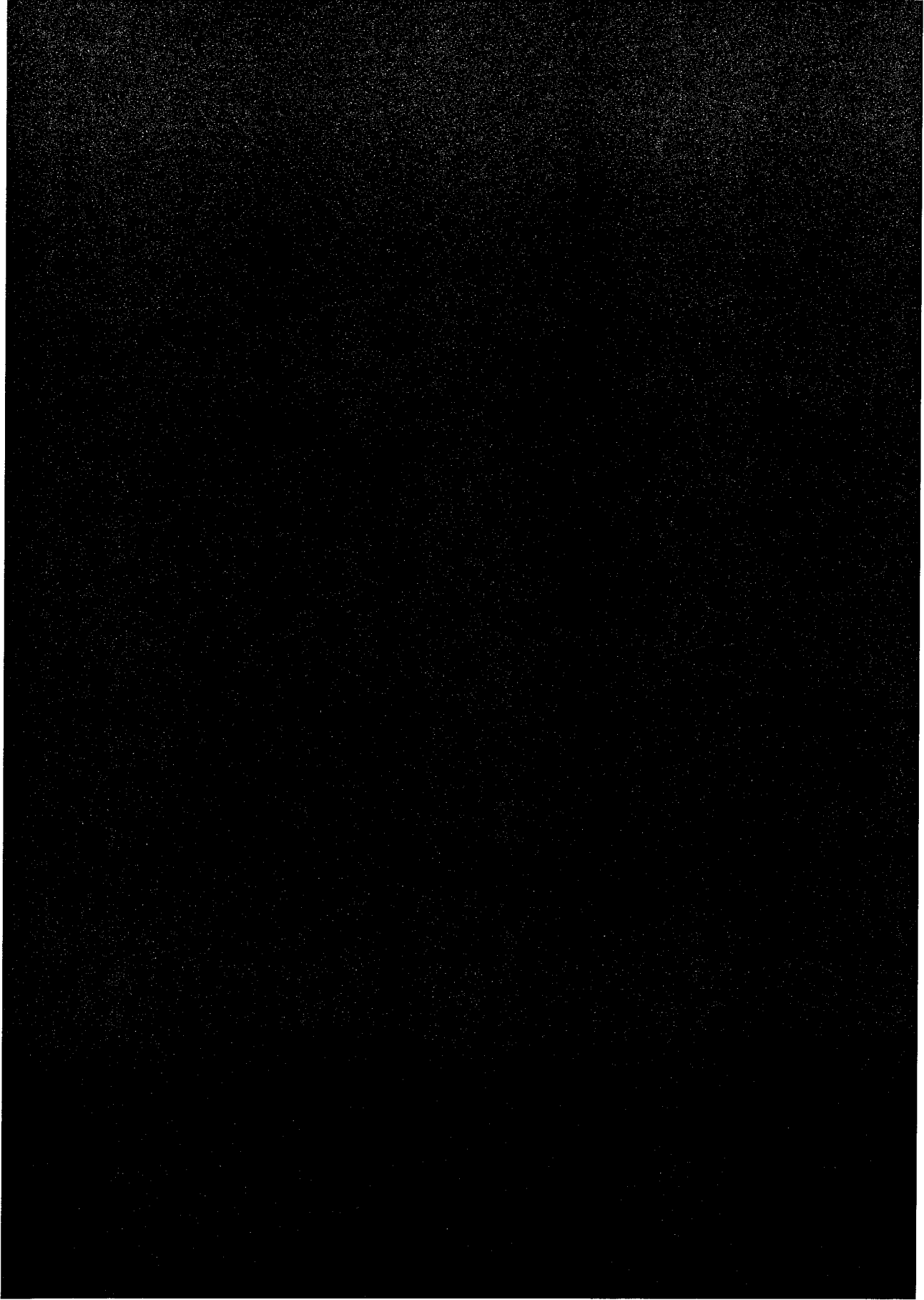
- While supporting moves to delete the OTF category, we consider that if a **multilateral OTF** as proposed by the Commission were introduced it would be critical to **remove its ability to perform discretionary execution**. This is because discretionary execution is inconsistent with the application of pre-trade transparency requirements to OTFs: displayed prices would be non-binding, meaning investors would not necessarily receive the prices advertised. Transparency applied to discretionary quotes would not promote price formation and would be the equivalent of dark trading, thus contributing to an undermining of the overall price formation process.

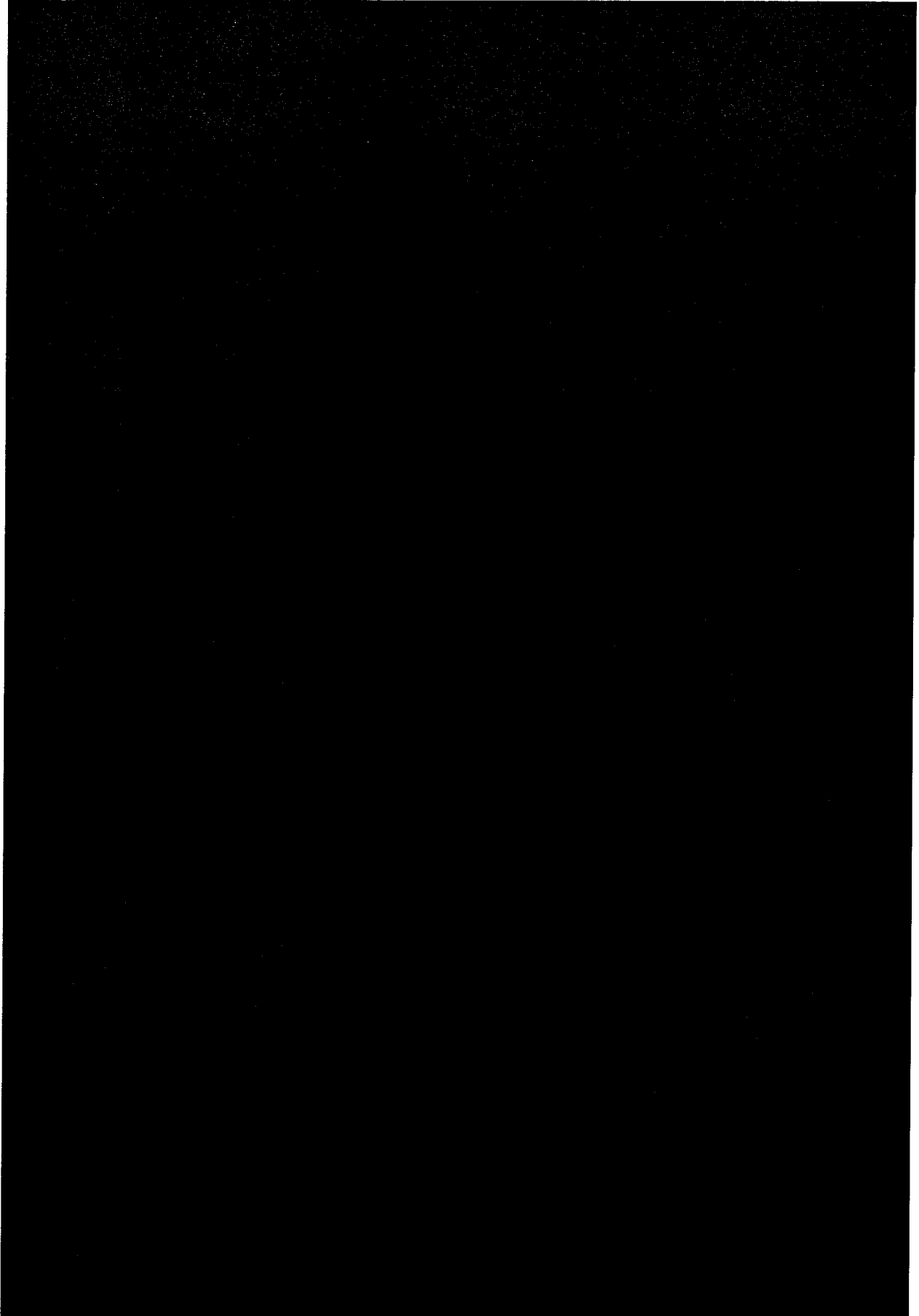
NYSE Euronext considers that the attribution of discretion to a *multilateral* OTF raises two important issues, namely investor protection and price formation. In terms of **investor protection**, the ability of a multilateral and pre-trade transparent trading venue to execute (that is to say to match) orders on a discretionary basis raises doubts as to the level of protection the platform offers investors. This is because investors would not necessarily receive an execution price identical to the one displayed on the order book of the venue. In order to mitigate this risk, the Commission has suggested subjecting OTFs to the same **best execution requirements** as those borne by investment firms toward their clients. While, in theory, such a measure appears to adequately address the risks faced by the execution of investors' orders on a multilateral, pre-trade transparent and discretionary venue, the practical implementation of the best execution requirements could prove problematic. This is due to the concept of best execution being broad and more than just about the price: this means that it remains open to interpretation, a fact which leaves scope for investment firms and, as proposed by the Commission, multilateral OTFs to apply it according to their own interests, and not necessarily in the best interests of their clients.

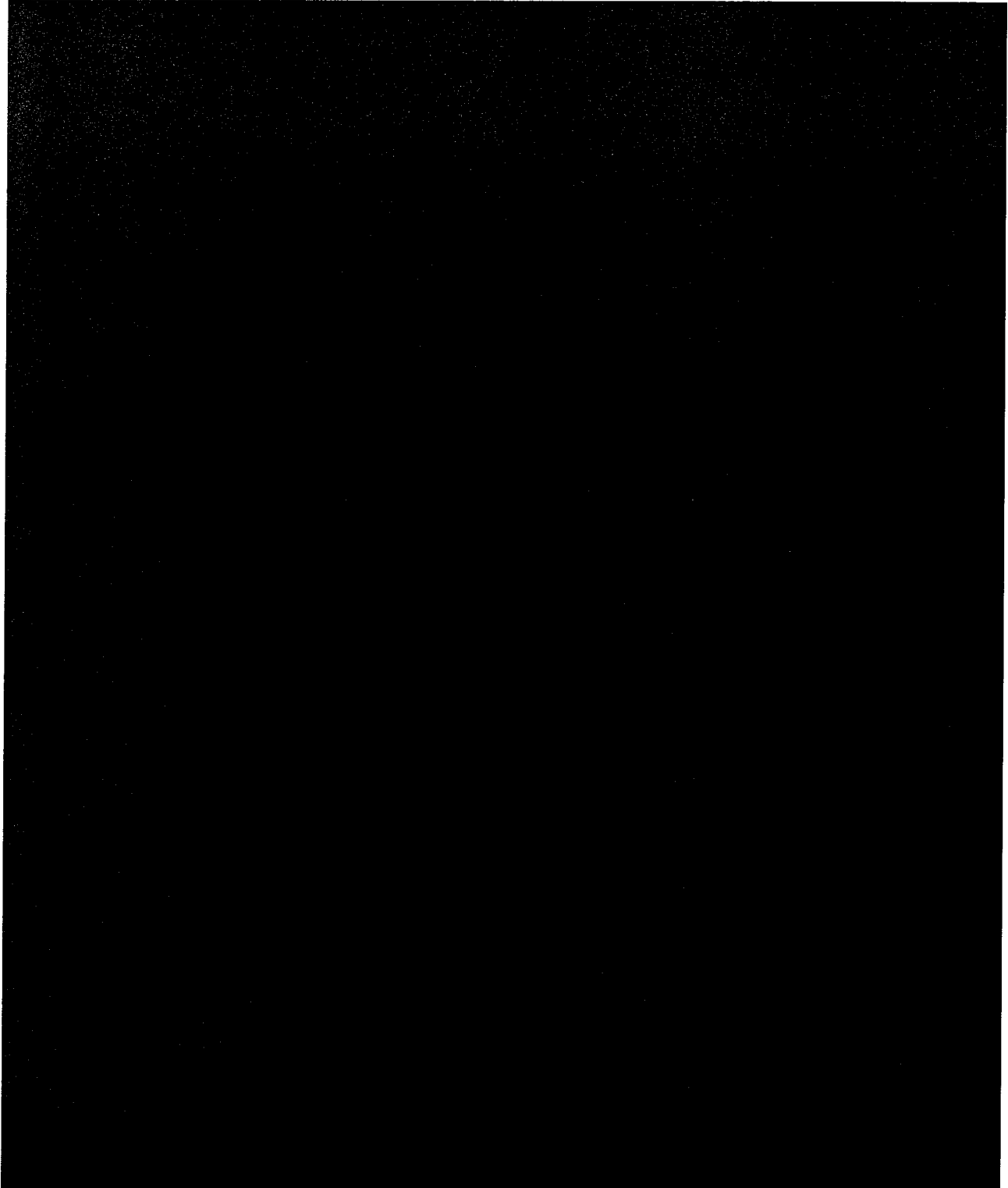
In addition, applying best execution requirements to multilateral OTFs would not, in any case, mitigate the risks that arise for the **overall efficiency of the price formation process** as a result of the discretionary execution of orders on a multilateral and pre-trade transparent trading venue. If OTFs are to be multilateral venues, contributing to price formation, it is not coherent for the operators to have discretion over prices or order handling, since the prices displayed would not be subject to objective rules and could thus be arbitrary. Non-discretionary execution is the only way of ensuring that the price at which a transaction is executed corresponds to the one displayed at the time of its execution in the order book. As 'multilateral' venues, OTFs will publish pre-trade data under the same transparency regime as RMs and MTFs. However, if an OTF enjoys discretion over how orders are matched, then the pre-trade quotes from the OTF will effectively be **non-binding** as the orders will not necessarily be executed at the displayed prices and will not contribute to price formation. For pre-trade transparency to be meaningful it must be based on binding quotes, which cannot be the case with a discretionary platform.

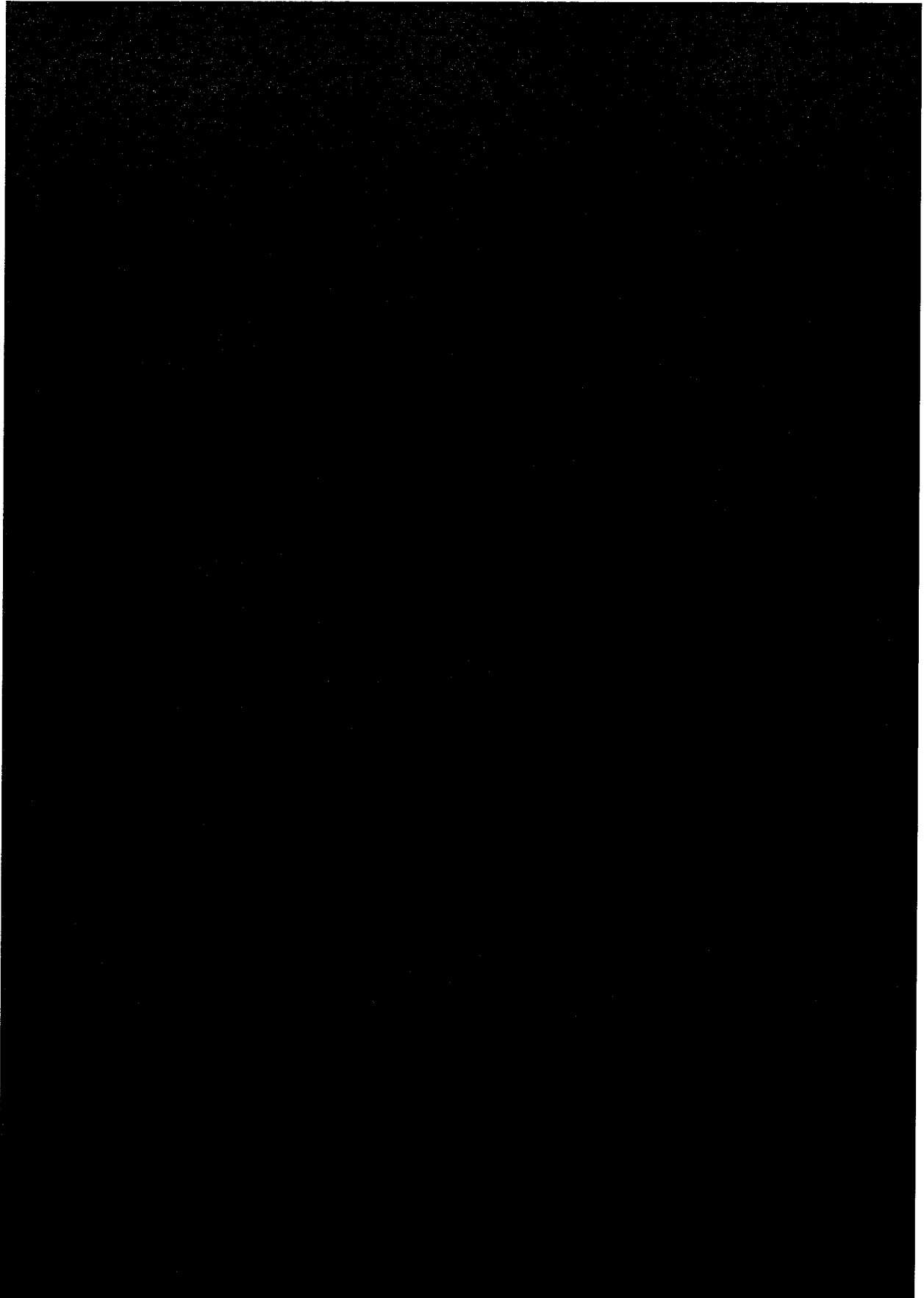


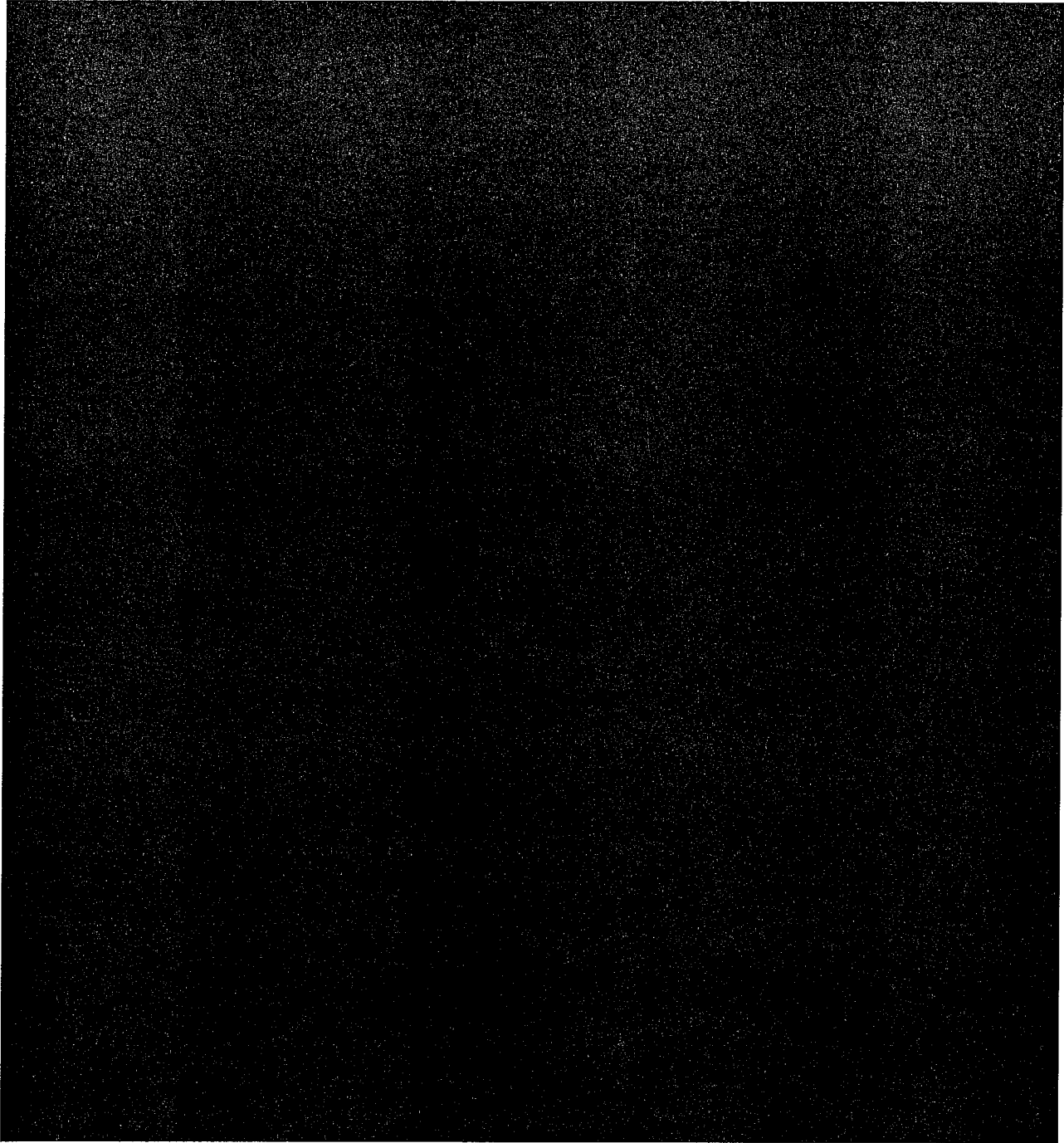








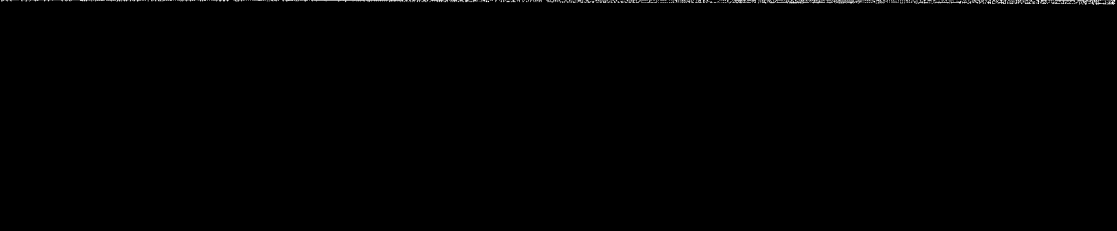




NYSE Euronext Briefing: Organised Trading Facility (OTF)

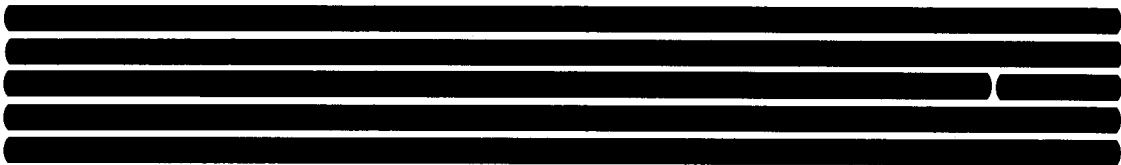
Summary


- In the MiFID review, the main priority in respect of market structure should be the introduction of a **strict and legally binding definition of OTC** for cash equities trading in the main body of the text and a strengthening of the existing categories to **close loopholes** which allowed OTC trading to develop under MiFID I.
- Given the serious implications the proposed OTF has for **investor protection**, the **efficiency of the price formation process** and – in relation to the G20 derivatives trading mandate – the **effectiveness of clearing arrangements**, NYSE Euronext is unable to support the category as currently proposed and consequently recommends its deletion or substantial modification.
- If the policy objective is to create a **multilateral OTF** then the new category should be subject to truly multilateral requirements (notably non-discretionary execution and a complete prohibition on dealing own account) to ensure a level playing field between the OTF and other multilateral trading venues.
- If the legislator wishes to attribute **bilateral characteristics to the new category** to allow it to perform client trade facilitation, for example, then the requirements should properly reflect this. We outline some suggestions in this briefing paper.



The Commission has proposed the creation of a new trading venue, the ‘**Organised Trading Facility**’ (‘OTF’). This has been proposed to address two different issues: first, to bring platforms which are not currently regulated as trading venues within the scope of the legislative framework in the cash equities space and second, to help meet the G20 trading mandate in the derivatives markets.

NYSE Euronext fully supports the policy objective of extending regulatory and supervisory oversight to hitherto unregulated platforms but has serious concerns over the way the Commission has constructed the proposed OTF. While the OTF will have the same functional multilateral role as a Regulated Market or MTF – bringing together third party buying and selling interests – **it will not be governed in a truly multilateral way.**



 This paper lays out some of these options beginning with an analysis of the differences between multilateral and bilateral trading which we consider are fundamental to addressing these issues.

In addition, before considering the creation of any new category, the initial main priority should be the introduction of a **legally enforceable definition of OTC for cash trading**, together with a **strengthening of the existing venues to close loopholes**, in order to prevent new types of trading

venues gravitating towards the unregulated OTC space as has been the experience in MiFID 1. These points are covered in our separate papers on *Defining Cash OTC Trading* and *Multilateral Trading – Avoiding Loopholes*.

1. Properly distinguishing between multilateral and bilateral trading

All trading categories under the MiFID framework must reflect a clear distinction between **multilateral and bilateral trading**. The two are fundamentally different in nature and should be subject to different sets of obligations concerning the matching of orders, access to the system, transparency and reporting.

- i) **Multilateral:** multilateral venues play a fundamental role in price formation, by ensuring the equal treatment of all participants and by offering a high level of transparency, both of which are central to investor confidence in the fairness and efficiency of financial markets. Their key characteristic is one of **neutrality**, both in respect of:
- The absence of any **discretion** for the venue operator to intervene in the order matching process, including via trading on own account (acting as a buyer to a client sell-order and as a seller to a client buy-order), and;
 - The provision of **non-discriminatory access** to their matching systems, meaning that there are transparent and non-exclusive rules governing access which are applicable to all participants. This guarantees that all trading participants are treated equally, avoiding conflicts of interest and ensuring a well-balanced market and efficient price formation.
- ii) **Bilateral:** in contrast, in a bilateral trading system, the operator controls access to the platform on a discriminatory basis, can exercise discretion over how the orders are matched and determines how firms interact with both each others and the operator's own account flows. Such discretion in the treatment of client orders is a normal part of the intermediation process and should be subject to an appropriate set of rules.

The Commission has proposed positioning the OTF category as a 'multilateral' venue with full pre- and post-trade transparency and no own account flows (like RMs and MTFs), but with the operator having discretion over the order matching process and an ability to restrict access to the platform (unlike RMs and MTFs, which must organise trading in an objective and non-discriminatory manner).

NYSE Euronext has the **following concerns** with this construct.

a) OTF exercising discretion over the order matching process

NYSE Euronext considers that the attribution of discretion to a *multilateral* OTF raises two important issues, namely investor protection and price formation. In terms of **investor protection**, the ability of a multilateral and pre-trade transparent trading venue to execute (that is to say to match) orders on a discretionary basis raises doubts as to the level of protection the platform offers investors. This is because investors would not necessarily receive an execution price identical to the one displayed on the order book of the venue. In order to mitigate this risk, the Commission has suggested subjecting OTFs to the same **best execution requirements** as those borne by investment firms toward their clients. While, in theory, such a measure appears to adequately address the risks faced by the execution of investors' orders on a multilateral, pre-trade transparent and discretionary venue, the practical implementation of the best execution requirements could prove problematic. This is due to the concept of best execution being broad and more than just about the price: this

means that it remains open to interpretation, a fact which leaves scope for investment firms and, as proposed by the Commission, multilateral OTFs to apply it according to their own interests, and not necessarily in the best interests of their clients.

In addition, applying best execution requirements to multilateral OTFs would not, in any case, mitigate the risks that arise for the **overall efficiency of the price formation process** as a result of the discretionary execution of orders on a multilateral and pre-trade transparent trading venue. If OTFs are to be multilateral venues, contributing to price formation, it is not coherent for the operators to have discretion over prices or order handling, since the prices displayed would not be subject to objective rules and could thus be arbitrary. Non-discretionary execution is the only way of ensuring that the price at which a transaction is executed corresponds to the one displayed at the time of its execution in the order book. As 'multilateral' venues, OTFs will publish pre-trade data under the same transparency regime as RMs and MTFs. However, if an OTF enjoys discretion over how orders are matched, then the pre-trade quotes from the OTF will effectively be **non-binding** as the orders will not necessarily be executed at the displayed prices and will not contribute to price formation. For pre-trade transparency to be meaningful it must be based on binding quotes, which cannot be the case with a discretionary platform.

b) Prohibition on dealing on own account

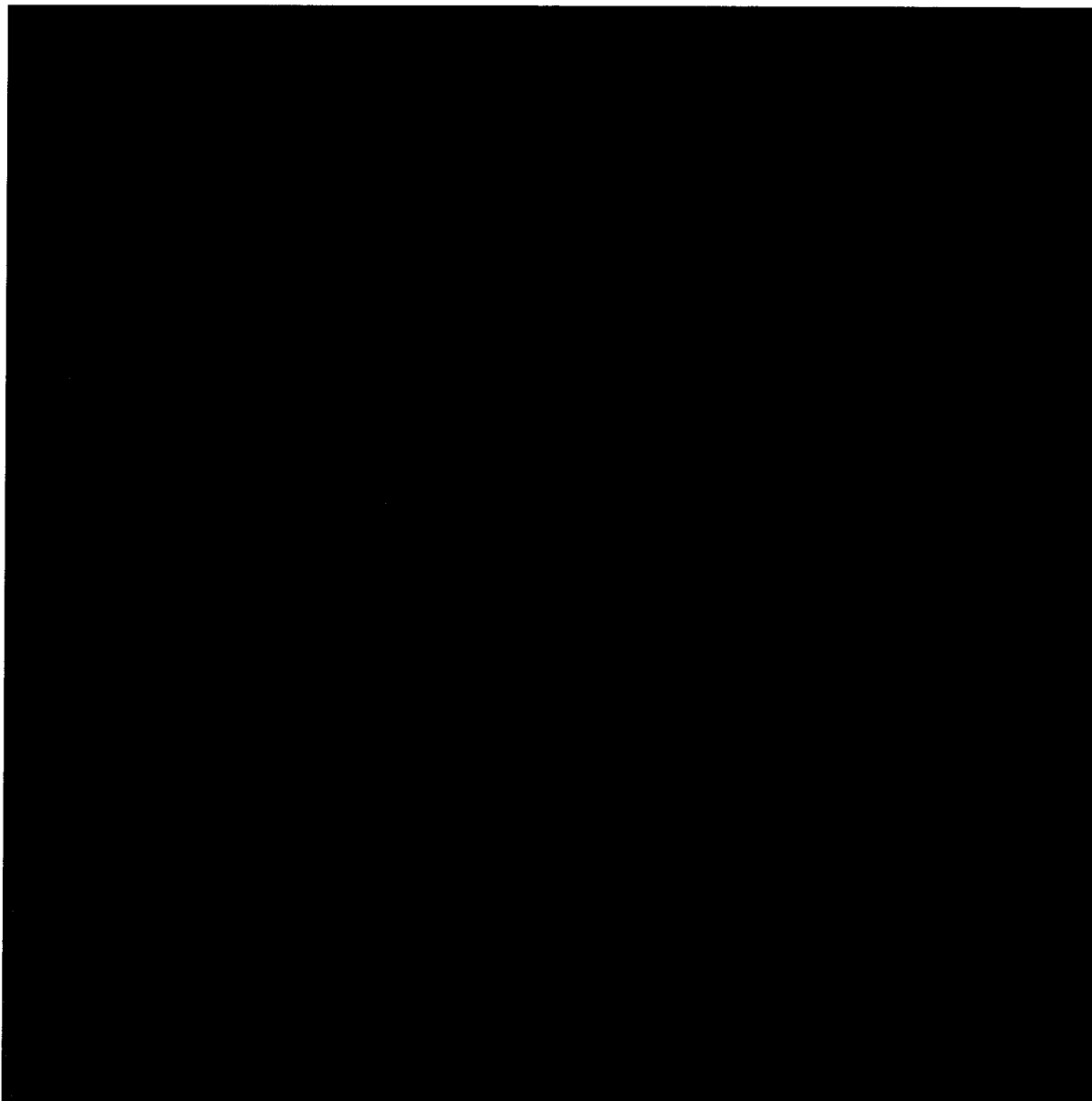
If the OTF is to be multilateral as proposed by the Commission, then NYSE Euronext fully supports the proposal to prohibit **OTF operators from dealing on own account** on the OTFs they operate. This is essential for investor protection if OTFs are to be multilateral trading venues, that is to say matching third parties buying and selling interests. The provision of own account flow by the operator of a multilateral OTF would give rise to important conflicts of interests, since the interests of own account traders and multilateral venue operators are intrinsically contradictory. Traders on own account are primarily interested in the execution price, since their revenue directly derives from the execution price they get. On the contrary, the operator of a truly multilateral trading venue, that is to say, a venue which only enables the matching of third parties trading interests, has absolutely no direct interest in the execution price, since its revenue is not derived from it. Its only interest resides in ensuring fair and orderly trading, and in the objective setting of the execution price, which must reflect the meeting of buying and selling interests. The neutrality of the venue operator in this respect is crucial to protecting the interests of the final investor.

Moreover, while we strongly support the prohibition of own account flows we believe it is also crucial to remove any scope for its circumvention. Specifically this concerns **riskless principal trading**: the Commission has made it clear that riskless principal trading should also fall within this prohibition. However, the concept of riskless principal trading is only currently mentioned in Recital 14 of MiFID II and is not included in the body text of the Directive. For the sake of consistency and to ensure loopholes are closed, the prohibition of riskless principal trading should be clearly established in Article 4 of MiFID II, along with the prohibition of proprietary trading. The lack of a legally binding prohibition of riskless principal trading would constitute a significant loophole in the legislation which could be used by brokers and investment banks to develop own account trading, leaving regulators unable to have a say in the process. Furthermore, the **MiFID Article 20 organizational rules on the OTF** should be clarified in paragraph one to ensure that dealing on own account by entities which are affiliated to the OTF operator (e.g. parent companies, subsidiaries and other affiliated companies) and building linkages between OTFs and SIs also fall within the prohibition.

2. Policy Recommendations

As outlined above, NYSE Euronext considers that as currently proposed the OTF can not be supported given the serious implications its creation would have for investor protection, price formation and clearing arrangements in respect of derivatives trading. We therefore consider that **the most optimal solution would be the deletion of the OTF combined with a definition of OTC cash equities trading and a strengthening of the existing categories.**

However, we have also considered options for a modified OTF to reflect a more bilateral nature, reflecting the views of the Commission and certain stakeholders.



b) A bilateral cash equities OTF: limits on price and size

Notwithstanding the above comments, we note that one of the main stated objectives of the OTF category - providing a regulatory home for **broker crossing networks (BCNs)** – may well be impractical within the Commission’s proposed structures. This is because without the ability to introduce proprietary flow into a multilateral OTF, the value proposition of a BCN to its buy-side customers is likely to be severely diminished, undermining the ability of BCNs to function within their current business models.

If, during the review process, the European Parliament and Council were to look at permitting **own account flow to mingle with client-client flows** in a single platform, thereby accommodating the business models of BCNs, we believe that this framework should be regulated as a **bilateral entity**, where the intermediary can fulfil their role of facilitating order execution. Such an entity should be **non-price forming** (and therefore able to benefit from a pre-trade waiver) with **safeguards** to (i) preserve the role of lit, price-forming markets and (ii) to protect the interests of the investor. We believe that this could be achieved by:

- (i) Imposing a **minimum size on transactions** that can be executed in an own account, dark and bilateral OTF. This would ensure that all small orders, which do not create price impact, contribute to price formation on lit markets.
- (ii) Controlling the discretion on the price at which orders are executed on the OTF. By **limiting the discretion to mid-point only**, we will ensure that price formation does not occur away from public price-forming markets and ensure that the interests of investors are protected.

[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: dinsdag 18 september 2012 17:28
Aan: [REDACTED]
CC: [REDACTED]
Onderwerp: Re: Bezoek en MiFID

From: [REDACTED]@minfin.nl]
Sent: Tuesday, September 18, 2012 04:18 PM
To: [REDACTED]@minfin.nl>
Cc: [REDACTED]@minfin.nl>
Subject: RE: Bezoek en MiFID

Beste [REDACTED]

Goed dat we al hebben kennismemaakt [REDACTED] Ik mail je nog voorstellen voor data hiervoor. Wellicht dat één of twee collega's van mij meekomen, maar ik neem aan dat dit geen bezwaar is.

[REDACTED] is helaas niet in de gelegenheid om je nog over de concept MIFID voorstellen terug te bellen. Als je het commentaar per email kan sturen aan mijn collega [REDACTED] (coördinator voor MIFID) en mij dan kunnen wij dat intern bespreken.

Met vriendelijke groet,
[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: dinsdag 18 september 2012 15:11
Aan: [REDACTED]
Onderwerp: Bezoek en MiFID

Beste [REDACTED] en [REDACTED]

Veel dank voor Julie bezoek vanmorgen.

[REDACTED]

[REDACTED]

[REDACTED] heb jij vanmiddag nog tien minuten tijd om de MiFID tekst door te nemen? Wij hebben een aantal suggesties die ik je morgenochtend per mail en wat uitgebreider kan sturen en die ik nu eventueel alvast mondeling kan bespreken.
Schikt dat je?

Groet,
[REDACTED]

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[REDACTED]

Van: [REDACTED]
Verzonden: donderdag 27 september 2012 9:16
Aan: [REDACTED]
CC: [REDACTED]
Onderwerp: RE: Fw:

Prima, tot vanmiddag.

Met vriendelijke groet,

[REDACTED]

[REDACTED]

[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: woensdag 26 september 2012 20:30
Aan: [REDACTED]
CC: [REDACTED]
Onderwerp: Re: Fw:

Hi [REDACTED]

Excuses voor het late bericht. Ik ben morgen om 14.00 uur bereikbaar op [REDACTED]
Dan bespreken we ook even het US verhaal.

From: [REDACTED]@minfin.nl]
Sent: Tuesday, September 25, 2012 04:51 PM
To: [REDACTED]
Cc: [REDACTED]@minfin.nl>
Subject: RE: Fw:

Beste [REDACTED]

In vervolg op jouw verzoek ten aanzien van het verloop van de bijeenkomst met de attaches over MiFID, zouden [REDACTED] en ik donderdag 27 september a.s. even kort kunnen bellen. Schikt het dat wij jou dan rond 14 uur bellen?

Ten aanzien van de bijeenkomst op 10 oktober a.s.: een collega van mij vroeg zich af of jullie hoofd hoofd US Government Affairs ook zal spreken over marktmisbruikregels en/of regels met betrekking tot grondstofderivaten?

Groet,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Van: [REDACTED]@nyx.com]

Verzonden: vrijdag 21 september 2012 13:48

Aan: [REDACTED]

CC: [REDACTED]

Onderwerp: RE: Fw:

Dank [REDACTED] ik ga dit uitzetten en kom er op terug.

Daarnaast heb ik nog twee andere vragen:

Ons hoofd US Government Affairs is op 10 oktober as. in Amsterdam. Hij geeft, zoals wij een tijd geleden hadden beloofd, aan een aantal AFM mensen (en evt. ook DNB indien geïnteresseerd) een update over US regelgeving en ontwikkelingen. Als jullie of anderen van jullie afdeling daarin zijn geïnteresseerd, zijn jullie ook van harte welkom. Ik heb nog geen tijdstip afgesproken, daar kom ik nog op terug. Zou dit interessant zijn voor jullie?

Andere vraag: ik was benieuwd hoe de Raadswerkgroep was gegaan. Zou ik vandaag of maandag een van jullie daar over kunnen bellen?

Alvast dank.

Groet, [REDACTED]

From: [REDACTED]@minfin.nl]

Sent: vrijdag 21 september 2012 13:43

To: [REDACTED]

Cc: [REDACTED]

Subject: RE: Fw:

Beste [REDACTED]

[REDACTED] ik komen zoals besproken graag een ochtend of middag langs. Dat zou wat ons betreft kunnen op:

Donderdag 4 oktober vanaf 13:30 uur

Vrijdag 5 oktober

Donderdag 11 oktober ochtend

Ik hoor graag wat jullie uitkomt.

Groet,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Van: [REDACTED]@nyx.com]

Verzonden: donderdag 20 september 2012 16:44

Aan: [REDACTED]

Onderwerp: RE: Fw:

Dank [REDACTED]

Ik heb het gister via mijn blackberry gestuurd en dat heeft zijn effect gehad op de lay-out zie ik nu. Excuses daarvoor.

Ik kan met voorstellen dat het wat laat binnenkwam bij jullie en dat het daardoor wat minder van nut was maar helaas kon het niet eerder.

Geef jij nog een paar data door voor [REDACTED]

From: [REDACTED]@minfin.nl]

Sent: donderdag 20 september 2012 13:21

To: [REDACTED]

Subject: RE: Fw:

Beste [REDACTED]

Hartelijk dank hiervoor. Wij zullen hiermee aan de slag gaan.

Groet,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

From: [Redacted]
Sent: Wednesday, September 19, 2012 05:31 PM
To: [Redacted]
Subject:

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[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: maandag 8 april 2013 9:37
Aan: [REDACTED]
Onderwerp: MPT en listed derivatives

Beste [REDACTED] en [REDACTED]

Hieronder stuur ik jullie onze zorgen met betrekking tot de MPT regels die linken aan de trading mandate. Onze zorg is dat de trading mandate de derivaten die reeds op regulated markets worden verhandeld niet zal noemen als gevolg waarvan het (onvoorziene?) effect kan ontstaan dat MPT wel kan worden toegestaan voor deze derivaten. Dat lijkt ons niet de bedoeling. Hebben jullie enig idee of onze zorgen terecht zijn?

Alvast dank voor jullie bericht.

[REDACTED]

MPT and listed derivatives

We note the apparent policy intent of the Presidency to limit the use of MPT to non-equities and, within this asset class, to introduce a prohibition on the use of MPT by an OTF operator for derivatives which are subject to the derivatives trading mandate (MiFID, Article 20). Our evaluation of this measure is that the policy intent is to restrict the use of MPT to non-standardised and infrequently traded derivatives (i.e. ostensibly the ones falling outside the trading mandate).

However, we are very concerned that this provision opens up a significant loophole for MPT to be employed in the multilateral trading of completely standardised derivatives. Specifically, we see an opportunity for an OTF to create derivatives contracts which are designed to mimic existing ones listed on a Regulated Market (i.e. "lookalike contracts") and claim that MPT can be deployed by the OTF operator since the derivative in question would not have been subject to the EMIR and MiFIR clearing and trading mandates for OTC derivatives.

This would appear to be a rather perverse outcome.

The proponents of MPT argue in favour of its use by an OTF operator for a number of diverse reasons, a central one being that it is needed for client facilitation. If that premise were to be accepted (and we are extremely sceptical on the technical basis of such a claim) it would seem to suggest that MPT only has a rationale in respect of the trading of non-standardised and infrequently traded derivatives. In contrast, ending up with a situation in which an OTF could employ MPT in the trading of a contract replicating an ETD which has consistently traded on a multilateral and transparent basis without the need for any MPT would appear nonsensical.

In terms of alternatives, we see two main options:

- Complete deletion of the MPT provisions for the OTF across all asset classes (on the basis of its fundamental incompatibility with multilateral trading and the fact that a differentiated approach within the same asset class opens up the potential for a range of unintended consequences) – our preferred option, or;
 - Ensure that the OTF operator can only deploy MPT for non-cleared financial instruments (preferred secondary alternative); or
 - In contrast to using a negative definition to limit the use of MPT in respect of derivatives, introduce a positive definition of where exactly MPT can be allowed, i.e. in respect of non-standardised and infrequently traded derivatives (back-up alternative).

Our detailed assessment is laid out below

Assessment of Irish Presidency proposals in respect of matched principal trading (MPT)

- Proposals in MIFID Article 20 to allow MPT in respect of OTF trading in bonds, structured finance products, emission allowances and 'certain derivatives'.
- In respect of derivatives, the text introduces a prohibition on an OTF using MPT in respect of orders in derivatives which have been declared subject to the trading obligation in MiFIR Article 26.
- [REDACTED]
- Under these proposals, an OTF could create a derivative which is economically equivalent to an exchange traded derivative and claim that it can employ MPT since the derivative in question would be subject neither to the clearing nor trading mandates.

[REDACTED]

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30 YEARS OF THE AEX-INDEX*

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[REDACTED]

Van: [REDACTED]@nyx.com]
Verzonden: donderdag 2 mei 2013 17:32
Aan: [REDACTED]
Onderwerp: CWG MiFID

Dag [REDACTED]

Ik heb vernomen dat de CWG is gecancelled. Betekent dit dat de Ieren het overlaten voor het volgende semester of wordt er toch nog een poging gewaagd ergens in de nabije toekomst?

Groet, [REDACTED]

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