FINANCIAL MARKETS LAW COMMITTEE

ISSUES OF LEGAL UNCERTAINTY ARISING IN THE CONTEXT OF PROVISIONS ON NON-DISCRIMINATORY ACCESS TO CENTRAL COUNTERPARTIES AND TRADING VENUES

Response to Consultation Paper (2014/1570) by the European Securities and Markets Authority on MiFID II and MiFIR

May 2015

www.fmlc.org

FINANCIAL MARKETS LAW COMMITTEE

This paper has been prepared by the FMLC Secretariat.[1]

The FMLC is grateful to the following for their comments and contributions:[2]

Thomas Donegan	Shearman & Sterling LLP
Mark Kalderon	Freshfields Bruckhaus Deringer LLP
Simon Puleston Jones	FIA Europe

---

1 Joanna Perkins, FMLC Chief Executive, and Maria Chan, FMLC Legal Assistant.

2 Note that these individuals act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.

CONTENTS

1. EXECUTIVE SUMMARY AND INTRODUCTION

Executive summary

1.1. The role of the Financial Markets Law Committee (the "FMLC" or the "Committee") is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

1.2. The aim of this paper is to identify issues of legal uncertainty which arise in the context of the draft regulatory technical standards ("RTS") and implementing standards ("ITS") issued by the European Securities and Markets Authority ("ESMA") under a Consultation Paper (2014/1570) published on 19 December 2014 (the "Consultation Paper") which concerns the implementation of the Markets in Financial Instruments Directive (2014/65/EU) ("MiFID II") and Regulation on Markets in Financial Instruments and amending Regulation (EU) No 648/2012 ("MiFIR"). The focus of this paper is on Section 5.5 (Non-discriminatory Access to CCPs and Trading Venues).

1.3. The FMLC draws attention to issues of uncertainty arising from, in particular: (a) the interpretation of "economically equivalent"; (b) the non-discriminatory netting obligations applicable to central counterparties ("CCPs"); (c) potential conflicts of the non-discriminatory access to CCPs provisions with existing legislation Regulation (EU) No 648/2012 ("EMIR") and the obligations of the regulated markets under MiFID II and MiFIR; (d) the grounds for refusal of access by CCPs and trading venues for their respective non-discriminatory access provisions; and (e) the criteria for the approval of access by the relevant competent authorities.

Introduction

1.4. MiFID II and MiFIR entered into force on 2 July 2014, replacing the Markets in Financial Instruments Directive ("MiFID").[3] Amongst other things, MiFID II and MiFIR introduce provisions to reform market infrastructure access, specifically to prevent discriminatory practices in access rights to CCPs and trading venues and to remove various commercial barriers that could be used to prevent competition in the trading and clearing of financial instruments.

1.5. The draft RTS and ITS issued by ESMA under its Consultation Paper follow the legislative mandates under MiFID II and MiFIR and translate the MiFID II/MiFIR

[3] Directive 2004/39/EC.

requirements into practically applicable rules for market participants and national supervisors.

1.6. Article 35 of MiFIR requires CCPs to accept for clearing certain financial instruments from trading venues on a transparent and non-discriminatory basis, to the extent that those venues comply with the operational and technical requirements of the CCP. The granting of access rights involves an application process and access may be denied by the CCP or subsequently by the competent authority on a variety of grounds. The granting of access rights to trading venues also involves a similar procedure.

1.7. Article 35 of MiFIR also provides that a trading venue granted access to a CCP has the right to non-discriminatory treatment of contracts traded on that trading value, in particular with respect to collateral requirements, the netting of economically equivalent contracts and cross-margining with correlated contracts.

1.8. Under Article 35(6) ESMA is required to develop RTS specifying, *inter alia*: (a) the conditions under which an access request may be denied by a CCP; and (b) the conditions for non-discriminatory treatment for contracts accepted to be cleared.

1.9. Article 36 of MiFIR provides in similar terms for non-discriminatory access to trading venues by CCPs and for non-discriminatory treatment, in particular as regards fees.

1.10. Under Article 36(6) ESMA is required to develop RTS specifying, *inter alia*, the conditions under which access may be denied by a trading venue.

1.11. The FMLC has observed that certain provisions of the draft RTS implementing Articles 35 and 36 of MiFIR would benefit from further clarification, thereby providing greater legal certainty. The issues of legal uncertainty addressed in this paper relate to draft RTS 24 (Draft regulatory technical standards on access in respect of trading venues, central counterparties and benchmarks):

- the application of the concept of "economically equivalent" in the context of non-discriminatory access to central counterparties (Article 35 of MiFIR); and
- the grounds for refusing access, in light of the requirement for non-discriminatory access to central counterparties (Article 35 of MiFIR) and non-discriminatory access to trading venues (Article 36 of MiFIR).

1.12. These issues, if unresolved, could cause considerable uncertainty and material risks for the financial markets. The FMLC would recommend that these issues be addressed and clarified by the ESMA through its ongoing work on the RTS and ITS, or by providing further guidance.

2. ECONOMIC EQUIVALENCE AND NON-DISCRIMINATORY ACCESS TO CCPS

The meaning of "economically equivalent"

2.1. The concept "economically equivalent" applies in two distinct contexts in MiFID II and MiFIR: first, in relation to the setting of commodity derivatives position limits (Article 57 of MiFID II);[4] and, second, in connection with the application of non-discriminatory access provisions to a CCP (Article 35 of MiFIR).[5] Whilst its use in these two contexts is not consistent, such inconsistency may not result in legal uncertainty provided that the two respective definitions of "economic equivalence" are tailored appropriately according to the legislative intent of each provision in accordance with the Level 1 texts.

2.2. In the context of non-discriminatory access, a further distinction is made between "economically equivalent" and "correlated" contracts. The cross-margining requirement under the non-discriminatory access provisions (Article 35(1)(b)) applies to "correlated contracts" only.

2.3. Under Article 35(1) of MiFIR, a CCP in providing non-discriminatory access to a trading venue must

> ensure that a trading venue has the right to non-discriminatory treatment of contracts traded on that trading venue in terms of: (a) collateral requirements and netting of *economically equivalent contracts* … (b) cross-margining with *correlated* contracts cleared by the same CCP… (emphasis added.)

---

[4] Under Article 57 of MiFID II, a position limit is imposed on

> the size of a net position which a person can hold at all times in commodity derivatives traded on trading venues and *economically equivalent* OTC contracts (emphasis added).

[5] Article 7 of EMIR applies the same non-discriminatory access requirements in relation to OTC derivatives.

2.4. No definition of "economically equivalent" is provided in MiFIR. This suggests that the scope and characteristics of the concept could benefit from careful consideration at Level 2. In particular, the introduction in the draft RTS of further detail as to the practical application of the concept could be a useful step in giving substance to the concept and minimising the risk of legal uncertainty. The FMLC considers that it would also be helpful to differentiate the interpretation of "economically equivalent" from other terms, such as "correlated", which is also undefined.

Non-discriminatory treatment—netting

2.5. One aspect of non-discriminatory access to CCPs under Article 35 MiFIR is the requirement for the non-discriminatory treatment of cleared contracts by a CCP in respect of (i) collateral requirements of "economically equivalent contracts"; (ii) the netting of "economically equivalent contracts"; and (iii) cross-margining with respect to "correlated contracts". Article 35(6)(e) of MiFIR mandates ESMA to develop draft RTS to specify this requirement and these are set out in Title 3 of the draft RTS 24 accompanying the Consultation Paper.

2.6. ESMA's mandate in respect of this requirement is considered in paragraphs 66 to 83 of the Consultation Paper. By way of preface to further discussion, the FMLC wishes to draw attention to some of the difficulties which may be encountered when applying the concept of "economic equivalence" to the netting of contracts.

2.7. CCPs may undertake netting in a variety of circumstances. The first of these is close-out netting. On the occurrence of a default of a clearing member, all CCPs have default rules which provide for the termination and valuation of open contracts and the application of collateral against any losses. This involves netting of all contracts and generally does not give rise to any issues in light of the MiFIR requirements. A second category of netting might involve the offsetting of economically similar products within margin models to reduce collateral requirements, which is a matter of developing an appropriate risk model. The more difficult issue under MiFID II/MiFIR is a third category, ongoing contractual netting (also known as "position offset"). Most CCPs provide a service whereby, on an ongoing basis, a long trade and a short trade in the same instrument will be netted out against one another, such that each clearing member, for each account, only has a net position in a particular instrument.

2.8. For contractual netting purposes, the FMLC is of the view that a pre-requisite of economic equivalence must be that all corresponding legal terms in the relevant

contracts that are capable of giving rise to legal or basis risks (if such terms differ in any respects) must be legally identical. Where the relevant contractual terms are legally identical, the netting process is relatively straightforward as a contract and insolvency law issue and creates no legal risk to any parties (although there may be conflicts with the obligations of exchanges under MiFID II, as discussed below). On the other hand, where the relevant contractual terms differ to any degree and netting is mandated under MiFIR, unintended effects may transpire, particularly to the economics of the original trades. If such relevant contractual terms are not legally identical, a CCP and its participants will be exposed to basis risk and economic uncertainty, especially for those with back-to-back contracts with their customers.

2.9. For the purpose of non-discriminatory treatment provisions, it is helpful to recognise that the term "netting" encompasses different actions and the application of the relevant requirement may differ by degree depending on the exact context. In light of this, the FMLC notes with approval that the Consultation Paper distinguishes between position-offsetting, pre-default netting and close-out netting in paragraphs 75 and 76, with respect to a requirement to establish the validity of netting on the insolvency of a relevant trading venue. This risk (i.e. the insolvency of a trading venue) is, however, only one of a number of risks within the context of which the non-discriminatory netting requirement must be assessed.

2.10. In the context of non-discriminatory contractual netting, subjecting contracts other than those which are "economically equivalent" (in the sense of the relevant contractual terms being "legally identical") to contractual netting (i.e. opening a new position in one contract and extinguishing an equal and opposite position in another contract) would expose a CCP and its participants to basis risk and economic uncertainty. The same concerns do not, however, necessarily arise in respect of other kinds of netting treatment, collateral requirements or cross-margining.

2.11. It is important that the terminologies used in the RTS be assessed against all the relevant circumstances in order to avoid legal uncertainty and unintended consequences that may arise as a result of a "one-size-fit-all" definition or interpretation. While the issue of legal uncertainty for contractual netting is clear-cut, the determination of the exact meaning of the concept "economically equivalent" in other contexts may involve policy considerations which are outside the remit of the FMLC.

Contractual netting

2.12. A key legal principle underpinning the application of contractual netting, or position-offsetting, is that only economically equivalent contracts that are identical in their terms can be netted without creating a result which would be economically unacceptable: that the trade entered into is materially changed into something of a different economic effect. For example, all CCPs treat contracts with different expiry dates as non-nettable, because they do not have the same economic terms (in this instance, owing to their different tenor). Thus, in the case of physical commodity contracts, otherwise identical contracts terminating on Monday, Tuesday and Wednesday of the same week are treated as three separate, non-nettable, non-economically equivalent groups of contracts. These otherwise identical contracts give exposures to a different part of the curve and must, therefore, be recognised as different contracts. To the extent that a CCP clears non-identical products from a single trading venue, the netting treatment for these products would also be different; similarly, there is no reason why non-identical products should be or could be netted on the same basis for different trading venues.

2.13. ESMA has recognised, in footnote 47 on page 469 of the Consultation Paper, a comment concerning the need for contracts not only to be identical at the outset but to remain identical over the lifetime of the contract. In this respect, close-out netting is said to be difficult to achieve unless contracts are identical but pre-default netting and position-offsetting are said to be "possible in all cases" (at paragraph 75). In the view of the FMLC, however, the need for contracts to be identical throughout their lifetime—including in respect of characteristics such as the term and expiry date of the contract—is key to establishing economic equivalence in the context of contractual netting, or position off-setting, for the reasons set out above and below. This point does not appear to be recognised in the Consultation Paper.

2.14. Further, in the context of the requirement for non-discriminatory treatment of collateral requirements, the Consultation Paper appears expressly to contemplate that economically equivalent contracts can be "either identical or non-identical" (at paragraph 72, in parentheses). If this comment is intended to be of general application, it implies that the requirement for the netting of economically equivalent contracts may be intended to capture "non-identical" contracts which raises a concern that the distinctions between different kinds of netting, and the complexities of the risk assessment required in each case, may not have been fully recognised in drafting the Consultation Paper.

2.15. The schema for the netting of economically equivalent contracts set out in Articles 11 and 12 of RTS 24, which accompanies the Consultation Paper, is one under which a CCP must

> consider economically equivalent all contracts traded on the trading venue to which it has granted access, which are covered by the CCPs' initial authorisation …

2.16. Where contracts are, by this criterion, found to be economically equivalent, they must be subject to "the same netting processes" subject only to the further provisos that:

> (a) the applied netting process must be valid, binding and enforceable in compliance with Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems and the relevant applicable insolvency law (RTS 24, Article 12(1)); and
>
> (b) where the CCP considers that the legal risk or the basis risk related to a netting process applied to an economically equivalent contract traded on different trading venues is not sufficiently mitigated, the CCP may exclude such contracts from that netting process (RTS 24, Article 12(2)).

2.17. The difficulty with this schema for netting treatment is that it does not recognise the way in which the concept of economically equivalent contracts is—and should remain—operationally sensitive to the nature of the netting treatment being applied and to the various risks inherent in each case. Rather, the RTS attempt to impose a "one-size-fits-all" definition of economic equivalence and then to mitigate the consequences of this inflexible approach by permitting the CCP to exclude contracts on the basis of certain risks, namely: legal risk and basis risk. The uncertainties caused by this approach—including the failure comprehensively to account for the various types of risks which arise—are discussed further in the section immediately below.

2.18. The FMLC would respectfully request that ESMA consider differentiating the specific conditions that are necessary for each type of netting treatment in the draft RTS 24. A lack of a clear delimitation as to what "economically equivalent" means in relation to the different categories of netting treatment may create legal uncertainty regarding the

intended application and enforceability of the requirements under Article 12 of the draft RTS 24.

Risk assessment and netting

2.19. As set out above, "legal risk" and "basis risk" are included under Article 12(2) as the types of risk that a CCP should consider when assessing whether to exclude certain contracts from non-discriminatory treatment. In the view of the FMLC, this limited categorisation of the risks which may be taken into account by the CCP is insufficiently comprehensive to capture all relevant risks.

2.20. The FMLC would respectfully request that ESMA consider the desirability of including a wider range of risk factors to take into account other risks that may arise and which the CCP is obliged to assess and mitigate as part of its regulatory obligations under existing EU legislation (specifically, EMIR). For the purpose of international coordination, the risk factors set out in the Principles for Financial Market Infrastructures ("PFMI") issued by the Committee on Payment and Settlement Systems and the International Organisation of Securities Commissions may provide useful guidance.[6] For example, operational risk would be a relevant consideration as there may also be risks associated with netting that do not fall squarely within the proposed categories of "legal risk" (which is not further defined) or "basis risk" (defined in Article 12(4) of RTS 24).

Potential conflict between the obligation for cross-market contractual netting and obligations of regulated markets

2.21. Article 12(1) of the draft RTS 24 provides as follows:

> A CCP shall apply to economically equivalent contracts referred to in paragraph 1 of Article 11 the same netting processes, irrespective of where the contracts were executed, provided that the applied netting process is valid, binding and enforceable in compliance with Directive 98/26/EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems and the relevant applicable insolvency law.

---

[6] Principles for Financial Market Infrastructures report, dated 26 February 2015. The report can be accessed here<http://www.iosco.org/library/pubdocs/pdf/IOSCOPD377.pdf>.

2.22. The FMLC assumes that this provision introduces a requirement for cross-market netting, i.e. the netting of two contracts, irrespective of where they were executed, provided they are economically equivalent. (An alternative construction, however, would require only the application of the same *standards of netting treatment* to contracts irrespective of venue—permitting a restrictive approach to the netting of contracts, provided that the same restrictions are universally applied across all venues or markets—not necessarily the netting of economically equivalent contracts across markets.)

2.23. On this basis, the FMLC is concerned that there may be a potential for regulatory conflict between the requirement for cross-market netting in Article 12(1) of the RTS and the following obligations imposed on regulated markets under MiFID II:

- Under Article 47(1)(d) of MiFID II, regulated markets are required to:

  > have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders[.]

- Under Article 47(1)(e) of MiFID II, regulated markets are required to:

  > have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under its systems[.]

- Under Article 51(1) and (2) of MiFID II, regulated markets are required to:

  > (1) ... have clear and transparent rules regarding the admission of financial instruments to trading. Those rules shall ensure that any financial instruments admitted to trading on a regulated market are capable of being traded in a fair, orderly and efficient manner and, in the case of transferable securities, are freely negotiable. (2) In the case of derivatives, the rules referred to in paragraph 1 shall ensure in particular that the design of the derivative contract allows for its orderly pricing as well as for the existence of effective settlement conditions.

- Under Article 54(1) of MiFID II, regulated markets are required to:

> establish and maintain effective arrangements and procedures including the necessary resource for the regular monitoring of the compliance by their members or participants with their rules. Regulated markets shall monitor orders sent including cancellations and the transactions undertaken by their members or participants under their systems in order to identify infringements of those rules, disorderly trading conditions or conduct that may indicate behaviour that is prohibited under Regulation (EU) No 596/2014 or system disruptions in relation to a financial instrument.

- In addition, for commodity derivatives specifically, regulated markets are required under Article 57 of MiFID II to:

> apply position management controls. Those controls shall include at least, the powers for the trading venue to: (a) monitor the open interest positions of persons; (b) access information, including all relevant documentation, from persons about the size and purpose of a position or exposure entered into, information about beneficial or underlying owners, any concert arrangements, and any related assets or liabilities in the underlying market; (c) require a person to terminate or reduce a position, on a temporary or permanent basis as the specific case may require and to unilaterally take appropriate action to ensure the termination or reduction if the person does not comply; and (d) where appropriate, require a person to provide liquidity back into the market at an agreed price and volume on a temporary basis with the express intent of mitigating the effects of a large or dominant position.

2.24. The core issue that could impede compliance with such requirements arises out of a lack of a workable attribution mechanism—were cross-market netting to be introduced—of net positions to particular trading venues and of the ongoing obligations of the trading venues. Operational and legal difficulties could affect both identical and non-identical contracts.

2.25. Unlike equity instruments, the terms of derivatives (as defined in MiFID II, Annex I Section C paragraphs (4)-(10)), are defined contractually. For exchange-traded

derivatives, the terms of the contract are set by the regulated market which offers the product for trading. The terms of the derivative contract cover the conditions of admission to trading of a specific product, and the rules applying to its trading over the entire duration of the contract until expiry (which may stretch to several years or even decades). The exchange typically has obligations for the entire life of the financial instrument, including but not limited to the obligation to monitor and report open interest and to monitor settlement (including physical deliveries upon exercise/expiration of the financial instrument), pursuant to the provisions set out above. By extinguishing the contractual positions entered into on a particular trading venue, cross-market contractual netting by a CCP would interfere with the existing obligations of all regulated markets subject to such netting procedures to comply with the MiFID II requirements detailed above or obfuscate identification of positions for whose management they are responsible. It is possible to conceive mechanisms to "cure" this problem (e.g. reporting, cooperation and outsourcing agreements between trading venues or for the positions to be recorded separately on different trading venues regardless of the pooling of positions at the level of the CCP) but some of these are exceptionally complicated. Moreover, such arrangements are not currently mandatory under the Level 1 text and it is unclear whether trading venues would be compliant with their obligations under MiFID II even if such arrangements were to be established.

2.26. This same issue would affect commodity derivatives (to which position management requirements apply) more acutely and, in particular, physically-settled commodity derivatives. For such instruments, a regulated market is responsible for overseeing physical deliveries by virtue of its obligation to ensure the existence of orderly settlement conditions under Article 51(2). In terms of position management, contractual netting is achieved by the offsetting of opposite positions in the same product. With cross-market netting, as the positions would have been commingled across different trading venues, it is unclear which regulated market would have an obligation to carry out the monitoring function.

2.27. This area of uncertainty is not recognised or addressed in the RTS or in the Consultation Paper. The FMLC is concerned that, without further attention to this issue, the regulated markets for which a CCP already provides clearing services may not have a means of ensuring that a CCP offering cross-market contractual netting does not do so in a way that causes the trading venue to breach its own obligations under MiFID II. Further clarity is needed to ensure that there is no conflict between the MiFID II requirements for exchanges and clearing houses in this context.

3. GROUNDS FOR REFUSAL OF NON-DISCRIMINATORY ACCESS TO CCPS AND TRADING VENUES

Scope of the legislative mandate regarding grounds of refusal for CCPs and trading venues

3.1. Pursuant to Article 35(6)(a) of MiFIR, ESMA is required to develop draft RTS to define

> the specific conditions under which an access request may be denied by a CCP, including the anticipated volume of transactions, the number and type of users, arrangements for managing operational risk and complexity or other factors creating significant undue risks.

Pursuant to Article 36(6)(a) of MiFIR, ESMA is required to develop draft RTS to define

> the specific conditions under which an access request may be denied by a trading venue, including the anticipated volume of transactions, the number and type of users, arrangements for managing operational risk and complexity or other factors creating significant undue risks.

3.2. Despite the fact that the wording of the legislative mandates for access to CCPs and access to trading venues set out above is identical, "legal risk" is only listed as a ground for refusal of access for CCPs but not for trading venues. This is curious given that the risks arising from the simultaneous use of different trade acceptance models that are included in the draft RTS 24 for a CCP would equally be applicable to a trading venue. Additionally, the legal risk arising out of a trading venue's inability or insufficiency to fulfil position management and other obligations should also be taken into account if the issues of legal uncertainty discussed above remain unresolved.

3.3. Further, the legislative mandates under Articles 36(6)(a) and 37(6)(a) only require ESMA to "specify … specific conditions" including the relevant risk factors but have not gone so far as to require ESMA to specify a list of exhaustive risk factors and conditions on the assessment of the level of risk involved. The legislative mandate could be interpreted as providing a general ground of refusal for any "other factors creating significant undue risks", though ESMA is required to specify conditions that could constitute such factors. Articles 4(1) and 6 of the draft RTS 24, however, seem to

have taken the approach that an exhaustive list of such risk factors should be prescribed. Article 4(1) of the draft RTS 24, in particular, appears to narrow this by stipulating that

> [i]n addition to the circumstances identified in Articles 2 and 3 of this Regulation, a CCP may deny an access request, *only* when it cannot adopt arrangements to adequately manage any of the following risks arising from granting access such that there would be significant undue risk remaining (emphasis added).

3.4. Regarding the conditions for "legal risk" as a ground of refusal for access to CCPs, two specific legal risks are identified in Article 4(2) of the draft RTS 24:

> [a] CCP may refuse an access request based on legal risk as referred to in subparagraph (c) of the previous paragraph, where as a result of granting access the CCP: (a) would not be able to enforce its rules relating to close-out netting and default procedures; or (b) cannot manage the risks arising from the simultaneous use of different trade acceptance models.

The range of legal risks that could arise in reality, however, is potentially unlimited. Where legal risk is defined narrowly, there is a possibility that granting access could result in a CCP being unable to comply with existing laws. This may create legal uncertainty, if CCPs are obliged by this provision to break other laws. The FMLC would respectfully request ESMA to clarify if the list set out under Article 4(2) is expressed to be exhaustive.

3.5. The basis of such a restrictive approach is unclear from the Consultation Paper. While the use of an exhaustive list may enhance legal certainty in some circumstances, this might not be the optimal approach to accommodate the flexibility required in a risk assessment procedure. If an overly restrictive approach is taken, legal uncertainties arise as to whether a significant undue risk that should legitimately be taken into account may not formally constitute a ground of refusal and might lead to a lack of proper consideration as required under MiFIR and the draft RTS 24.

<u>Approach to risk assessment</u>

3.6. In the draft RTS 24, ESMA has proposed that the types of risk a CCP could take into account, when assessing whether to refuse access or not, must individually be significant and undue before a CCP or trading venue can deny an access request (e.g.

denial of access based on the anticipated volume of transactions or denial of access based on operational risk and complexity or denial of access based on other factors such as legal risk). This proposal would prevent a CCP from denying an access request where different types of risk cumulatively, or through interaction, amount to a significant and undue risk for the CCP. The FMLC is given to understand that, for example, it is conceivable that the anticipated volume of transactions, in combination with the operational risk and complexity, could amount to a significant and undue risk, though each separate risk may not on its own go above the risk threshold. The proposed approach to restrict risk assessment on the basis of separating out each risk as an independent factor contradicts Article 4(2) of EMIR that "a CCP shall take an integrated and comprehensive view of all relevant risks" and Principle 3 of PFMI requirements that CCPs take a holistic view of risk management in the sense that CCPs "should have a sound risk-management framework for comprehensively managing legal, credit, liquidity, operational, and other risks".[7] The FMLC would respectfully request that ESMA consider incorporating this consideration into the draft RTS 24.

4. CONCLUSION

4.1. MiFID II and MiFIR provide a robust framework for non-discriminatory access to CCPs and trading venues in the European Union. In light of ongoing and future work by ESMA on the RTS and ITS for MiFID II and MiFIR, the FMLC would welcome clarification or further guidance on the issues discussed in this paper.

4.2. These issues concern: (a) the interpretation of the meaning of "economically equivalent"; (b) the non-discriminatory netting obligations applicable to CCPs; (c) potential conflicts of the non-discriminatory access to CCPs provisions with existing legislation such as EMIR and the obligations of the regulated markets under MiFID II and MiFIR; (d) the grounds for refusal of access by CCPs and trading venues for their respective non-discriminatory access provisions; and (e) the criteria for the approval of access by the relevant competent authorities. This paper has endeavoured to address these issues, proposing solutions for ESMA's further consideration, where possible.

---

[7] *Ibid.*, p.32.

FINANCIAL MARKETS LAW COMMITTEE MEMBERS[8]

Lord Walker (Chairman)

David Greenwald (Deputy-Chairman)

Andrew Bagley, Goldman Sachs International

Charles Barter, Bridgepoint

Sir William Blair

Hubert de Vauplane, Kramer Levin Naftalis & Frankel LLP

Simon Dodds, Deutsche Bank AG

Michael Duncan, Allen & Overy LLP

Simon Firth, Linklaters LLP

Bradley J Gans, Citigroup

Kate Gibbons, Clifford Chance LLP

Richard Gray, HSBC Bank plc

Wim Hautekiet, Bank of New York Mellon SA/NV

Mark Kalderon, Freshfields Bruckhaus Deringer LLP

Sir Robin Knowles CBE

Sean Martin, Financial Conduct Authority

Jon May, Marshall Wace LLP

Sean McGovern, Lloyd's of London

Chris Newby, AIG

Stephen Parker, HM Treasury

Sanjev Warna-kula-suriya, Slaughter and May

Geoffrey Yeowart, Hogan Lovells International LLP

Joanna Perkins (Chief Executive)

---

[8] Note that Members act in a purely personal capacity. The names of the institutions that they ordinarily represent are given for information purposes only.