Steven MAIJOOR
Chair, European Securities and Markets Authority
103 rue de Grenelle
75345 Paris

30 March 2015

Dear Sir,

As we build a capital markets union in Europe, we are taking strides towards creating jobs and growth through a stable, fair and competitive Single Market. In line with this objective, MiFID II already includes provisions to strengthen regulation and introduce meaningful competition in derivatives markets through non-discriminatory access to trading and clearing.[1]

As the implementing measures of the MiFID II package are being finalised, ICAP, LCH.Clearnet Group, London Stock Exchange Group (LSEG) and Nasdaq, reiterate our support for the open access provisions in the Regulation, and stress the need to ensure that Level II Regulatory Technical Standards (RTS) reflect fully the principles and spirit of text agreed by the co-legislators.

Why open access is important:
In an age characterised by transparency and consumer choice, we welcome the EU's determination to show global leadership in introducing this framework. We believe investors and market participants will embrace and reward European leadership in this area.

Access provisions, properly implemented, will stimulate choice in the execution and clearing of products where it does not currently exist, create deeper pools of liquidity, reduce costs and lead to better risk management in the financial system, through netting and cross-margining. It has great potential to deliver margin and collateral efficiency, and spur responsible innovation which will benefit the EU's economy.

A balanced framework and a model that works:
MiFID II includes proportionate safeguards such as transitional periods to ensure a smooth transition to an "open access" world for entities that need to adapt to this framework.

The concept of open access, however, is not new. For a number of years, we have been operating safe and robust infrastructures in a competitive and open access environment, notably in cash equities, fixed income, some exchange-traded and OTC derivative markets. And some closed infrastructure providers are slowly recognising the benefits of this model as well, taking steps towards open access in some parts of the world.

[1] MiFIR is clear on what these provisions intend to achieve, through Recital (40) which notes that: *"The removal of barriers and discriminatory practices is intended to increase competition for clearing and trading of financial instruments in order to lower investment and borrowing costs, eliminate inefficiencies and foster innovation in Union markets".*

Need for ESMA's RTS to be clear and objective:
Despite MiFID's well-balanced framework, we share the concern that the technical standards, as currently drafted, may limit the effectiveness of the access provisions. In our view, ESMA's draft rules should not be able to be interpreted with the purpose of frustrating the intention of the co-legislators or preventing a genuine request for access.

We support ESMA's approach whereby access can be denied only if it leads to undue risks that cannot be mitigated by infrastructures working together, and it is essential that ESMA avoids including grounds for denial that are spurious, duplicative or lack objectivity. ESMA should also ensure that the process to determine economically equivalent contracts for netting by a CCP leads to a harmonisation of standards in the EU, with the right balance in terms of the discretion of a CCP. It is important for CCPs to be consistent and transparent about how they determine contracts to be economically equivalent and which particular netting processes apply, so that the access provisions can be applied fairly. We also suggest that a rapid appeal process overseen by ESMA, to deal with disputes over access would be critical.

To conclude, we would like to recall that the majority of participants in the capital markets ecosystem have been unequivocal in their support for open access in MiFIR, including the world's largest asset managers, investors, sell-side participants and trade associations. It is in the interest of the economy of the European Union to ensure that the open access framework comes to fruition through clear, effective and well drafted rules.

Our suggestions in the Annex that follows explains how we believe this can be best achieved.

Yours sincerely

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CC:
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Finance Minister of Latvia

Lord Jonathan HILL
Commissioner for Financial Stability, Financial Markets and Capital Markets Union

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Commissioner for Competition

Annex A: Detailed submission

The signatories to this letter share the following views on ESMA's draft Regulatory Technical Standard (RTS 24) on access in respect of trading venues and central counterparties

Article	Comment
Conditions for trading venues and CCPs denying access (Articles 2-6)	We agree in general with ESMA's approach – an infrastructure should only be able to deny a request for access if it leads to significant undue risks that cannot be remedied by the parties in cooperation with each other. Our main concern is to ensure that the framework governing access rights is as objective as possible. It should not be possible for a CCP or trading venue to deny access based on criteria that can be arbitrarily decided upon by the CCP or trading venue itself. From a drafting perspective, this can be achieved through lists that are precise, mutually exclusive and exhaustive rather than open ended, clearly specifying the scenarios where a denial is justified. This is particularly relevant in the context of legal risks. We also have shared concerns around the issue of incompatibility of IT systems for connectivity. In our view, it is not reasonable to suggest that modern systems cannot be developed to conform to each other by the accessing parties within the timeframes for a new trading or clearing service to be offered, if infrastructures work in cooperation. There are several examples, within and outside the EU, to show that it is not operationally complex for a CCP to receive instructions from different venues (which in some occasions may even be in different regulatory regimes). Lastly, in our view, the concept of incompatibility of rules of the relevant infrastructure, identified by ESMA as an "other" factor which may lead to significant undue risks, is already covered by legal risks in RTS 24 Article 4(2) (a) and (b), whilst operational and risk grounds are covered in the Level I text which states that which explicitly states that *"A CCP may require that the trading venue comply with the operational and technical requirements established by the CCP including the risk management requirements".* Including this as a specific example is both unjustified and duplicative.
Denial of access by competent authorities (Article 7)	Our shared understanding is that ESMA is referring to a trading venue or CCP's "regulatory" obligations rather than "legal" obligations, which would be a very broad category that could include commercial obligations. It must also be clear that the decision to refuse access on reasons to do with not meeting regulatory obligations should only be made on the basis of an assessment by the Competent Authority, and not be based on the judgment of the infrastructure involved.
Non-discriminatory and transparent fees (Article 9-10)	All fees need to be evidenced, clear and non-discriminatory. We support ESMA's view that the same schedule of fees should apply to clearing members irrespective of the trading venue through which they execute. It is important that different fees for different trading venues/ CCPs/ Clearing Members are not used to frustrate the benefits of access.

Article	Comment
Non-discriminatory treatment of contracts and economic equivalence (Article 11-13)	ESMA's current approach risks defining economic equivalence too broadly at the outset, whilst subsequently leaving too much discretion to the CCP to restrict contract netting – and thus potentially frustrating the main objective of gaining access to the infrastructure. It is therefore important for CCPs to be consistent and transparent about how they determine contracts to be economically equivalent and which particular netting processes apply, so that the access provisions can be applied fairly.

For detailed comments on the proposed standards, please refer to our individual responses:
http://www.esma.europa.eu/consultation/Consultation-MiFID-IIMiFIR#responses