



Deutsche Börse Group

Deutsche Börse Group  
Response  
to  
Public Consultation

by Commission Services  
on the Review of the Markets in Financial Instruments  
Directive (MiFID)

Frankfurt / Main,  
2 February, 2011

## Introductory remarks

Deutsche Börse Group (DBG)<sup>1</sup> appreciates the opportunity to respond to Commission service's public consultation paper on the Review of the Markets in Financial Instruments Directive (MiFID).

DBG expressly welcomes the fact that the consultation has been started, providing the opportunity to articulate views on what we believe should be improved in the course of the Review. On the one hand, although this Review may be farther ahead on the heavy regulatory agenda of the EU, some critical issues have unfolded since MiFID became applicable and several of them would need immediate action. On the other hand, it would be most appreciated if areas where healthy competition is at work, such as data consolidation, would be left to market forces and no unnecessary monopolies would be introduced. We appreciate it is difficult to strike the right balance between these from the regulatory perspective, and we hope that our set of recommendations in the context of the MiFID Review will help the EU Commission in identifying aspects of MiFID and its implementing measures that need amendment in a justifiable way.

Being guided by the much stated MiFID objectives of competition under a level playing field, investor protection and market transparency, DBG takes the opportunity to highlight the following:

- As the consultation document stands, there seems to be a different regulatory treatment of cash equity Broker Crossing Networks (BCNs) and Organised Trading Facilities (OTFs) for non-equity financial instruments.
- As regards cash equity BCNs, DBG firmly rejects the idea to authorise BCNs as a sub-category of OTFs. We rather believe that MiFID is fully sufficient to describe BCNs already today. BCNs should be authorised and supervised as either Multilateral Trading Facilities (MTFs) or Systematic Internalisers (SIs) depending on the nature of their business model.
- As regards derivatives markets and the debate on organised trading of over-the-counter (OTC) derivatives, the ultimate goal should be that all market places/trading venues arranging or facilitating trades need to comply with MIFID market rules. Ideally, the existing MIFID trading venue categories should cover all market places. If that is not possible, the introduction of OTFs for certain derivatives market business models such as voice-arranged markets may be a sensible way forward, including firm and enforceable thresholds for conversion of OTFs into MTFs.
- On standardisation and organised trading of OTC derivatives, we note that standardisation is not the issue in OTC derivatives markets. It is the vested interests

---

<sup>1</sup> Deutsche Börse Group Interest Representative Register ID: 20884001341- 42

and the lack of willingness by market participants to take advantage of market infrastructures offering central clearing and organised trading. In the view of this, a clear roadmap for enforcing and implementing clear rules regarding more organised trading of OTC derivatives is necessary.

- The market structure aspects go hand in hand with the effort to improve transparency and resilience of financial markets in the view of the financial markets crisis. Therefore, from the trading and clearing perspective we appreciate an extension of pre- and post-trade transparency to non-equity markets in an asset specific manner, independent of whether executed on Regulated Markets (RMs), MTFs, OTFs or OTC.
- It is by no means necessarily the case that data consolidation either in equities or non-equities represents a problem as of today or in the future. Data consolidation will work once quality and reliability of OTC equity market data are improved.
- DBG strongly supports the Approved Publication Arrangement (APA) regime which will deliver – if being set-up correctly – OTC post-trade data of good quality and in a harmonised structure which will then be easy to consolidate.
- Several industry initiatives are underway to deliver a decentralised Tape of Record. Therefore, DBG strongly opposes the introduction of a Centralised Consolidated Tape due to various reasons outlined in more detail below.
- All data comes at cost and costs vary amongst suppliers due to their different set-ups, offerings, applied quality controls or infrastructures used. DBG does not see the necessity to define what constitutes a “reasonable” commercial term for market data fees as competitive forces provide this duty already. The definition of reasonable commercial terms, other than provided by market forces, is almost a philosophical task per se. As long as there is choice of market data from various data sources, data fees should be left to competitive market forces which is in line with the spirit of MiFID.
- In case the EU Commission considers that the consolidation of trade data should be done in a central hub, thereby accepting additional latency created by this decision, we like to raise the question if it might not be sensible to provide a Consolidated Tape with latency, or even at 15 minutes delayed which would anyway be free of data fees for public view.
- As regards pre-trade data consolidation, a mandatory consolidation, be it decentralised or be it centralised through a single entity, is neither necessary nor reasonable due to the different regulatory set-up in the EU compared to the US. Compared to RegNMS with its trade-through-rule and best execution defined by price only, MiFID allows best execution on a principle-based approach and thus does not require a complete consolidated view, but rather a customised one. Additional latency introduced by a centralised approach would furthermore hinder efficient trading.
- We wish to stress that for the European market the principle-based approach of MiFID is superior and should be maintained as it allows to take into account the particularities of the European market structure such as different tax regimes, settlement cycles, post-trade infrastructures, etc.

- Finally and as a general principle, we would appreciate to read a legislative amendment proposal for MiFID in due time that is coordinated with and takes account of the impact from other legislative initiatives underway such as Regulation on OTC derivatives, central counterparties and trade repositories (EMIR), Securities Law Directive (SLD) and Central Securities Depositories (CSD) legislation. We stand ready to provide our market expertise in identifying interdependencies and provide recommendations as to how to avoid overlaps while closing the loopholes.

The above is just a fraction of our major messages we wish to convene as a starting point for discussion. We elaborate on these and further questions raised in the EU Commission consultation paper on the MiFID Review in more detail below.

## Detailed Remarks

### 2 Developments in market structures

#### 2.1 *Defining admission to trading*

Question 1: What is your opinion on the suggested definition of admission to trading? Please explain the reasons for your views.

##### Question 1:

DBG generally welcomes the proposals of the EU Commission to amend the definition of “admission to trading” in order to include financial instruments beyond those admitted to trading on a RM.

Regarding equities as one sub-set of financial instruments, the EU Commission services might want to consider two exemptions due to the following reasons:

- Not all companies might be comfortable with the strict requirements that result from the listing on a RM. Some companies, especially small and medium-size enterprises (SMEs), might prefer the benefits of being listed on an MTF (see our answer to question 25).
- DBG has a special offering for German retail investors, allowing this client group to trade foreign equities on the German market. This helps investors to save explicit trading costs, since trading, clearing, settlement and custody of these shares is handled nearly in the same way as trading in German shares. The majority of these approx. 9,000 foreign shares is admitted to trading outside of a German / European regulated market (e.g. US equities). Often, these equities are included to trading without the explicit consent of the issuer. In order to preserve the benefits for local investors, these shares should continue to be exempt from the requirements that result from the amendment of the definition “admission to trading”.

Please also see answer to Question 35 below.

#### 2.2 *Organised trading facilities*

##### 2.2.1 *General requirements for all organised trading facilities*

Question 2: What is your opinion on the introduction of, and suggested requirements for, a broad category of organised trading facility to apply to all organised trading functionalities outside the current range of trading venues recognised by MiFID? Please explain the reasons for your views.

Question 3: What is your opinion on the proposed definition of an organised trading facility? What should be included and excluded?

Question 4: What is your opinion about creating a separate investment service for operating an organised trading facility? Do you consider that such an operator could passport the facility?

Question 5: What is your opinion about converting all alternative organised trading facilities to MTFs after reaching a specific threshold? How should this threshold be calculated, e.g. assessing the volume of trading per facility/venue compared with the global volume of trading per asset class/financial instrument? Should the activity outside regulated markets and MTFs be capped globally? Please explain the reasons for your views.

Question 2-5:

In order to provide a logical framework for the European financial market structure, MiFID defined a set of trading venues. These are RMs, MTFs and SIs, while the OTC market has also been described in Recital 53 of MiFID Level 1 directive. This logic has spurred intense competitiveness in European financial markets, while keeping the market structure clear-cut and comprehensive for end investors.

As a general principle for the MiFID Review, we believe that the financial market structure should be kept simple, as the interplay of fragmented markets already put high pressure for a level playing field and would result into a plethora of definition possibilities and resulting, inevitable, loopholes.

However, as the consultation document stands, there seems to be a differential regulatory treatment of cash equity BCNs and OTFs for non-equity financial instruments. Some examples:

- Although it is stated that cash equity BCNs should be a sub-category of OTFs, it is not envisaged that BCNs should fulfil strict pre- and post-trade transparency requirements as already applicable to RMs and MTFs, whereas non-equity OTFs are proposed to do so.
- Further to this, cash equity BCNs are not required to grant fair, non-discriminatory and open access to their respective liquidity pool, an issue which has been controversially discussed in the last two years since BCNs came into the spotlight. In contrast, non-equity OTFs are envisaged to be required to adopt and publish clear rules regarding access to the facility or system.

In conclusion, there seems to be a light touch treatment of cash equity BCNs vs. non-equity OTFs.

In the view of the inconsistency of EU Commission proposals described above, DBG has separate opinions as regards cash equity BCNs and non-equity OTFs.

- As regards cash equity BCNs, DBG firmly rejects the idea to authorise BCNs as a sub-category of OTFs. We rather believe that MiFID is fully sufficient to describe BCNs already today. BCNs should be authorised and supervised as either MTFs or SIs depending on the nature of their business model. Provided that the definitions of execution venues according to MiFID are enforced and more stringent application of Recital 53 is executed, BCNs can be defined along the lines of existing categories of execution venues according to MiFID. Concretely, regulators should confirm that OTC should be only for 1) large orders transacted between 2) wholesale counterparties on an 3) ad-hoc basis and 4) outside the investment firms' (IFs') systems for systematic internalisation. What is left is either systematic internalisation or multilateral order execution which already today should be treated as MTF if MiFID was enforced accordingly. DBG also rejects the idea of a cash equity BCN being converted into an MTF once a specific threshold is achieved. There are practical questions such as what would be the basis for calculation (country level volume, EU level volume), how difficult would it be to circumvent a threshold, etc. Market participants' vested interests have resulted into exploiting definition shortcomings. Thus, market participants should be called upon to provide for a level playing field, and adhere to the regulatory framework.
- As regards derivatives markets and the debate on organised trading of OTC derivatives, the ultimate goal should be that all market places/trading venues arranging or facilitating trades need to comply with MIFID market rules. Ideally, the three existing MIFID trading venue categories should cover all market places. If that is not possible, the introduction of OTFs for certain derivatives market business models such as voice-arranged markets may be a sensible way forward. Thresholds for conversion to a derivatives MTF should be introduced and it is important that these thresholds are clearly defined and enforced. The thresholds would ideally be defined per asset class and products within asset class based on its global volume. In contrast to EU Commission proposals on equities executed in BCNs where only aggregate reporting end of day is envisaged, the reporting requirements on non-equities are supposed to be much more granular. So calculation of thresholds for conversion of a non-equity OTF to an MTF should not represent as high an obstacle because the data would be available, but still the thresholds would need to be carefully calibrated.

### *2.2.2 Crossing systems*

Question 6: What is your opinion on the introduction of, and suggested requirements for, a new sub-regime for crossing networks? Please explain the reasons for your views.

Question 7: What is your opinion on the suggested clarification that if a crossing system is executing its own proprietary share orders against client orders in the system then it would prima facie be treated as being a systematic internaliser and that if more than one firm is

able to enter orders into a system it would be prima facie be treated as a MTF? Please explain the reasons for your views.

Question 6-7:

Please see our comments above.

*2.2.3 Trading of standardised OTC derivatives on exchanges or electronic trading platforms where appropriate*

Question 8: What is your opinion of the introduction of a requirement that all clearing eligible and sufficiently liquid derivatives should trade exclusively on regulated markets, MTFs, or organised trading facilities satisfying the conditions above? Please explain the reasons for your views.

Question 9: Are the above conditions for an organised trading facility appropriate? Please explain the reasons for your views.

Question 10: Which criteria could determine whether a derivative is sufficiently liquid to be required to be traded on such systems? Please explain the reasons for your views.

Question 11: Which market features could additionally be taken into account in order to achieve benefits in terms of better transparency, competition, market oversight, and price formation? Please be specific whether this could consider for instance, a high rate of concentration of dealers in a specific financial instruments, a clear need from buy-side institutions for further transparency, or on demonstrable obstacles to effective oversight in a derivative trading OTC, etc.

Question 12: Are there existing OTC derivatives that could be required to be traded on regulated markets, MTFs or organised trading facilities? If yes, please justify. Are there some OTC derivatives for which mandatory trading on a regulated market, MTF, or organised trading facility would be seriously damaging to investors or market participants? Please explain the reasons for your views.

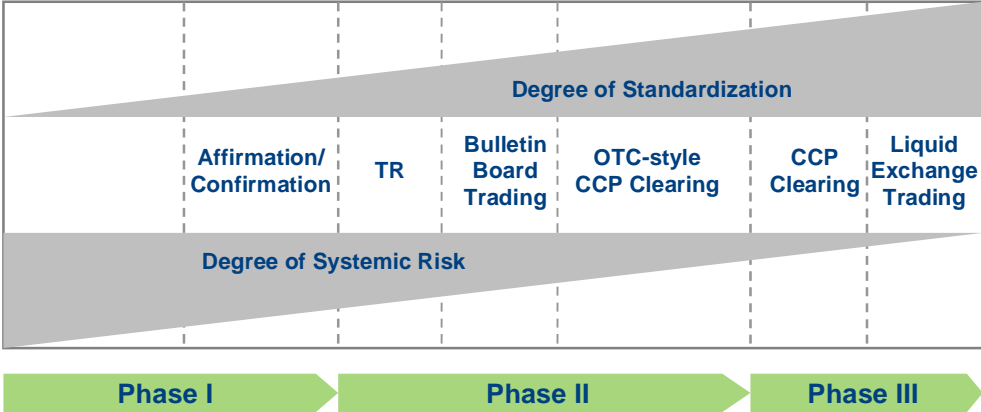
Question 8-12:

We welcome the EU Commission's reflection of the G20 recommendations in a European



setting, namely facilitating OTC derivatives into central market infrastructures. These infrastructures like exchange trading and central counterparty (CCP) clearing serve financial markets, the economy and the public as a whole. These robust and resilient central market infrastructures serving the public are at risk though, because the OTC derivatives market suffers from a lack in transparency. The market structure in OTC derivatives markets is under pressure, as no true competition is possible, due to the inflated use of OTC derivatives in an opaque fashion.

The logic chain for the G20 resulted into the goal to move OTC derivatives into the robust exchange environment, which safeguards the effective handling of resilient trading and clearing platforms. The subsequent graph displays the various phases derivatives trading and clearing might pass, given the degree of standardisation. Notably, with increasing standardisation, systemic risk should decrease.



Phase 1 reflects the state where derivatives should be so far developed to show at least the market maturity to be electronically captured, ideally affirmed/confirmed. In the second phase derivatives are more actively exchanged and develop into more organised traded and cleared markets. In the third phase, the derivatives markets liquidity pools usually are mature enough to be facilitated by central trading and clearing market infrastructures serving effective market processes and market stability. As a result, the higher the degree of standardisation the higher the likelihood that these products can be facilitated by central clearing and trading infrastructures and the lower the degree of systemic risk will be.

Our analysis of major OTC derivative asset classes concluded that those products, responsible for at least 95% of the OTC volume, do not require further product standardisation in order to be electronically eligible and therefore could be served at least by Trade Repositories and in most cases also by CCP clearing. In addition, many of those products could and also should be served by transparent, non-discretionary electronic trading venues, as these are actively traded. The definition of actively traded needs to be product and instrument specific, and is mainly a function of total volume and transaction frequency across all markets. Accordingly, clear, transparent and verifiable thresholds need to be defined. In addition, the topic of liquidity and clearing eligibility of products is also discussed

in the context of EMIR.

Frequently, there are two arguments used for trading OTC derivatives, namely the demand for bespoke products by customers and the need to trade large in scale transactions OTC, in order to reduce market impact. While we can see the arguments, we have come to the conclusion that the main reason for other products not moving to a more transparent environment is the vested interest of the involved parties. This has been pointed out also in many of the responses to the CESR consultation paper on 'Standardisation and Exchange Trading of OTC Derivatives', e.g. AIMA, Optiver and Eurex.

The biggest driver for the vested interest is the higher profit margin for the sell-side in OTC arranged products. At the same time, their counterpart, the buy-side, is too fragmented and too much dependent on the sell-side in order to change the way business is dealt with<sup>2</sup>. Furthermore, there are situations where both parties have a mutual interest in non-transparency, as they are concerned that a potential market impact can arise, before complex transactions have been completed. These concerns should be addressed by measures such as the large in scale waiver, already applied under MiFID for equities markets. Taking the lessons from the study by Gomber and Pierron (2010) regarding the OTC cash equities, it has been depicted that the large in scale argument for OTC transactions is dubious. It has been proven that actually 75% of the equity orders could have been filled at the best bid and offer of a public order book. Hence, we would raise similar doubts for this argument regarding OTC derivatives.

The sell-side interest for high-profit margins from non-standardised/ non-commoditised products is totally comprehensible as in general businesses seek often to increase their profits through bespoke products and services resulting from innovation. However, in derivatives and financial products in general, this interest needs to be balanced with the greater good of reducing systemic risk for the financial industry and the society overall. To elaborate further, the products targeted and described above, and defined according to our view to be in scope for electronic services and increased transparency, are no innovation anymore. These products already exist for a long time and are kept away from transparent markets as long as possible, for the economic considerations mentioned above.

In many cases, previously OTC bilateral arranged products developed over time into an electronic environment. Examples include Dividend Index Future trading at Eurex, electronic CDS and CDS index trading at Creditex or other Inter-Dealer Brokers, clearing of CDS and CDS indices by various clearing houses or the clearing of interest rate swaps by LCH.

We have outlined that the degree of standardisation per asset class is already a reality in most cases, but organised trading is not taking off due to vested interest. With regards to standardisation and exchange trading of OTC derivatives, CESR implies an industry led initiative. We fully agree on CESR's position that in case that those targets will not be met

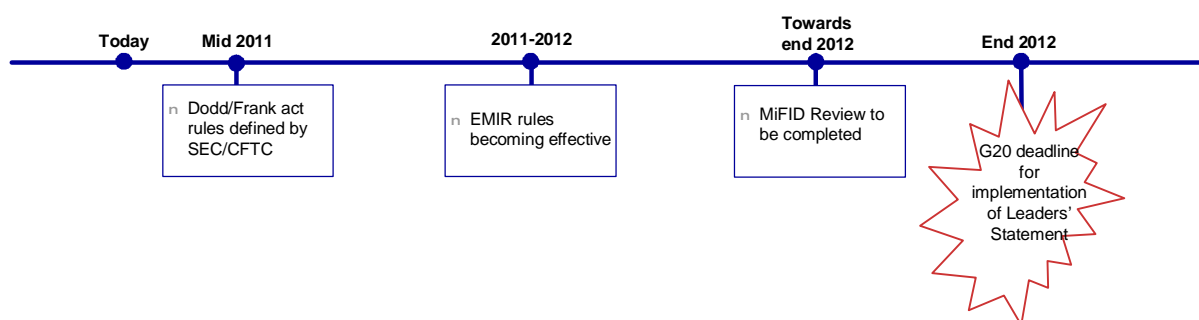
---

<sup>2</sup> Gomber, P. and Pierron, A.. (2010). 'MiFID - Spirit and Reality of a European Financial Markets Directive', Celent Research Report, p. 56-57.

through industry initiatives regulatory intervention is necessary. We believe ESMA should establish a clear roadmap for enforcing and implementing clear rules regarding more organised trading of OTC derivatives during 2011. The following steps are recommended:

- Define levels for the different elements of the electronic infrastructures as described in the graph above. For example:
  - X%<sup>3</sup> of total volume of an asset class/product type to be captured by affirmation/confirmation and warehoused in Trade Repositories, and/or electronically cleared, and/or electronically traded (cumulatively Phase 1 to 3).
  - Y% of total volume to be electronically cleared, and/or electronically traded (cumulatively Phase 2 and 3).
  - Z% of total volume to be electronically traded (Phase 3).
- Definition of technical standards in relation to requirements on organised trading venues, the benchmark being RMs and MTFs according to MiFID in the view of improving integrity and transparency of OTC derivatives markets.
- Consider waiver rules for large in scale trades like for cash equities, where specific thresholds are determined. It needs to be safeguarded that threshold levels reflect the right sizes, in order to strengthen lit markets.
- Enforce the publication of information necessary for the whole market to have well functioning and effective processes, e.g. enforce publication of credit auction results.

With the goal to fulfil the following timeline and align the different relevant rule sets.



### 2.3 Automated trading and related issues

Question 13: Is the definition of automated and high frequency trading provided above appropriate?

<sup>3</sup> For example, according to the 2010 ISDA Operations Benchmark Survey already 98% of the credit derivatives are electronically confirmed.

Question 14: What is your opinion of the suggestion that all high frequency traders over a specified minimum quantitative threshold would be required to be authorised?

Question 15: What is your opinion of the suggestions to require specific risk controls to be put in place by firms engaged in automated trading or by firms who allow their systems to be used by other traders?

Question 16: What is your opinion of the suggestion for risk controls (such as circuit breakers) to be put in place by trading venues?

Question 17: What is your opinion about co-location facilities needing to be offered on a non-discriminatory basis?

Question 18: Is it necessary that minimum tick sizes are prescribed? Please explain why.

Question 19: What is your opinion of the suggestion that high frequency traders might be required to provide liquidity on an ongoing basis where they actively trade in a financial instrument under similar conditions as apply to market makers? Under what conditions should this be required?

Question 20: What is your opinion about requiring orders to rest on the order book for a minimum period of time? How should the minimum period be prescribed? What is your opinion of the alternative, namely of introducing requirements to limit the ratio of orders to transactions executed by any given participant? What would be the impact on market efficiency of such a requirement?

Question 13:

DBG welcomes the proposed definition of automated and high frequency trading (HFT). HFT indeed is no strategy but the use of very sophisticated technology.

Question 14:

Exchanges and clearing houses already have strict admission criteria for trading and clearing members that ensure safe and sound conduct of business and orderly trading/clearing. DBG has strong capital requirements for all market participants in place (directly and via the

clearing house). We consider these requirements as very important independent of the authorisation status of the trading/clearing entity in question.

While we believe it should be on high frequency traders to respond to the question of authorisation, we nevertheless consider the approach of having certain quantitative threshold as not beneficial. Assuming the reason for doing so is to tackle alleged risks associated with HFT, rules based on (ex-post) thresholds cannot cope with future development properly as they will always lag behind.

Question 15:

DBG appreciates the idea of having organisational obligations and risk requirements in place.

Question 16:

DBG appreciates the idea that trading venues should have controls and procedures in place to mitigate the risks that are related to automated trading. We believe that operating a market implies the obligation to have systems and procedures in place to ensure orderly trading.

DBG operates the following risk control mechanisms for the most liquid asset classes:

- Volatility interruptions are built-in safeguard against rapid price movements. The concept of volatility interruption provides a safety mechanism to ensure that trading is suspended when a price range is breached. During the interruption, orders may be modified or deleted by market participants. Hereby, rapid price movements are already caught in advance and effectively prevented.
- Prevention of input errors by traders through a limit on the order entry on the trader level and by plausibility checks.
- Furthermore, DBG restricts or stops trading when the deposited securities exceed certain limits.

Most European exchanges have a long-lasting tradition of effective safety mechanisms. Some of these measures have been introduced just lately in the US, due to the Flash Crash of May 6, 2010, which we believe is an unlikely scenario in Europe given fundamental differences between the European and US equity market structure<sup>4</sup>. The result of the analysis of the US Flash Crash suggests that the functioning of the entire exchange trading in the US needs to be improved, as regulators have already admitted that the connections and the communication between the large number of trading platforms (Trade-Through-Rule) in addition to a very fragmented market (there are more than 30 trading platforms) had worsened the problem.

---

<sup>4</sup> <http://www.sec.gov/news/studies/2010/marketevents-report.pdf>

As regards stress testing, we believe that no prescription is needed, as the competitive pressure will ensure that trading venues conduct the necessary investments into infrastructure.

Question 17:

DBG supports non-discriminatory access to trading venues, co-location and proximity services by trading participants. This does include offering varieties of these services (e.g. differentiation by speed or service level) at different prices as long as all exchange members can purchase these services.

For the sake of clarity, there is a difference between co-location and proximity services. With co-location services the exchange member is able to locate its electronic trading machine in the same data centre like the exchange backend. With proximity services, the exchange member places its electronic trading machine in the data centre closest to the data centre with the exchange backend.

DBG has outsourced its co-location and proximity services offering to a third-party provider. The terms and conditions of the outsourcing agreement include the requirement that the third-party has to accept all trading participants for the co-location and proximity services under fair and non-discriminatory conditions.

Question 18:

DBG is against a prescription of tick sizes. Trading venues define in general minimum tick sizes in a way which maximises their turnover which usually means it creates maximum liquidity to the benefit of the overall market. Defining the tick sizes requires in depth market knowledge and regular interaction with market participants in order to strike a balance between the different interests to the benefit of the overall market. If tick sizes are too large, a further narrowing of spreads may be constrained by size of the minimum price tick. If tick sizes are too small (too granular), liquidity suffers as the value of time priority is reduced.

There is an agreement on tick sizes for the most liquid stocks by market participants on the standards published under the FESE Tick Size Regime.<sup>5</sup> In this industry-initiated working group banks, exchanges and MTFs already agreed on a regime which is working well.

Question 19:

DBG is against requiring high frequency traders to provide liquidity as market makers. It is not obvious why the mere implementation of a trading technology (as the EU Commission services correctly postulate) should automatically result in the application for market maker status. In addition, it is generally accepted that HFT comes in different trading styles,

---

<sup>5</sup> Available at <http://www.fese.be/en/?inc=cat&id=34>.

whereas not all of these styles implement liquidity provisioning strategies. Therefore, it seems difficult to impose market making obligations to the HFT community in general.

In this context, it is important to note the difference between traditional market making and contemporary liquidity provision as offered by HFT.

- For example in cash equity markets, traditional market makers often act on one market place and enter into obligations imposed by the respective market (max. spreads, min. volumes and quotation times), to obtain certain privileges in return (fee discounts, inter alia). In contrast, contemporary electronic liquidity providers often act on several markets. In certain cases they operate on a voluntary basis. These liquidity providers benefit from the privileges offered by competing trading venues. These venues attract HFTs and their liquidity via rebates (e.g. maker/taker schemes). Competitive pressure prohibits trading venues from imposing formal burdens (such as market maker obligations) to liquidity providers, as liquidity is key in attracting valuable client order flow to their platform.
- In derivatives markets such as for example at Eurex, the HFT firms are active in futures only, precisely those products where Eurex does not offer market making programs (unlike in options).

In the view of the above, it is difficult to justify definition of a market maker scheme for HFT firms in products which do not need market makers.

Eventually, it is important to note that this structure seems to be a direct result of the competition introduced by MiFID. An attempt to solve the issue of 'voluntary liquidity provision' by regulatory intervention in the form of generally imposing market maker obligations to liquidity providers seems to be a step back to the model of dealer markets (quote driven market), and away from the concept of the transparent public limit order book (order driven market) that was successfully introduced in the mid 90s throughout Europe, and which has ultimately led to efficiency, low trading cost and the democratisation of equity trading – which serves as a role model for other asset classes.

#### Question 20:

The DBG is against a time period prescribed for orders to rest in order books for a number of reasons:

- Introducing such a minimum order resting period will lead to wider spreads and less liquidity as those acting as market makers will be negatively affected. From a market maker perspective the risk associated with posting quotes is a function of the time it takes between new information requiring a price change and the time it takes to change/delete the limit of an order/quote. Accordingly, speed allows market makers to manage their risk better and therefore allows them to show narrower spreads and higher size.

- Each order entry is binding and immediately available for matching. A minimum resting time in the book would inhibit current market dynamics and impact trading models that facilitate and add liquidity to the market.
- Practical enforcement and implementation problems exist as well, e.g. what kind of metric covers sufficiently "trading actively". Another question is: If pulling out is problematic why to impose restrictions on HFT only? The general discussion is contradictory to the concept of an order-driven, continuously trading model.

The same arguments apply when the ratio of orders would be limited. It needs to be considered that market makers are not in a position to control their order ratio. Moreover, we would require different ratios for different products depending on their liquidity and the nature of the contract e.g. options with their wide range of strikes will always require an order/transaction ratio several times bigger than those for liquid futures. This creates further complexity.

The alternative of having certain "order ratios" transforms the problem and may result in discrimination by having ratios per participants. Order ratios per se do not convey information whether the behaviour represents a threat to orderly trading or not. Because of calculation problems (what is the time period e.g. daily, minute, second, etc.) and the issue of aggregating thresholds per participants, we do not think the proposed measures would serve the underlying intention to "stabilise und enhance orderly trading". In general, trading venues should have systems in place that can cope with a certain message load – if a particular excessive usage by an actor threatens orderly trading, venues should be enabled to take individual actions (e.g. economically or by refusing to accept new incoming orders).

#### *2.4 Systematic Internalisers*

Question 21: What is your opinion about clarifying the criteria for determining when a firm is a SI? If you are in favour of quantitative thresholds, how could these be articulated? Please explain the reasons for your views.

Question 22: What is your opinion about requiring SIs to publish two sided quotes and about establishing a minimum quote size? Please explain the reasons for your views.

Question 21:

We suggest to abolish the 'material commercial' criterion. The existence of the criteria available personnel and/or systems, and regular and continuous basis is in our view sufficient to define a SI, with the consequence that no further quantitative thresholds to define the SI business are necessary.



As regards the reference to non-discretionary rules we suggest this to be removed, as it might be used as a loophole to opt-out of the MiFID SI regime. The rules as they stand allow to opt-out of being a SI if the rules of execution are discretionary.

Question 22:

While we strongly believe that SIs should be required to publish two sided quotes, we have strong reservations to the proposal of maintaining a minimum quote size at such a low level as 10% of the standard market size (SMS). For instance, the current SMS for the top-tier German equities Siemens, E.ON, or Allianz is 15 000 EUR. The required quote size 10% SMS would result in two-sided quotes of 1500 EUR. The typical retail size is significantly larger, so the proposal makes SIs quotes not more meaningful, but less meaningful.

Instead, we suggest to quote 100% SMS, but allow to withdraw quotes in extreme situations and/or during special market conditions (auctions, etc.). This might be reflected in minimum time requirements (e.g. quote needs to be provided in only 90% of the trading day). In addition, the concept of a maximum spread needs to be introduced. Otherwise the requirement for a two sided quote for 100% SMS in 90% of time becomes irrelevant. This hinders SIs to provide stub quotes – which have proven to be problematic in the context of the market events of May 6, 2010 in the US.

*2.5 Further alignment and reinforcement of organisational and market surveillance requirements for MTFs and regulated markets as well as organised trading facilities*

Question 23: What is your opinion of the suggestions to further align organisational requirements for regulated markets and MTFs? Please explain the reasons for your views.

Question 24: What is your opinion of the suggestion to require regulated markets, MTFs and organised trading facilities trading the same financial instruments to cooperate in an immediate manner on market surveillance, including informing one another on trade disruptions, suspensions and conduct involving market abuse?

Question 23:

MiFID is already clear in saying that RMs and MTFs represent the same organised trading functionality, so no action is required.

Question 24:

As an operator of various markets we strongly agree on the need for exchanging information with other venues in order to ensure orderly trading and orderly market surveillance. We refer

to the good experience and expertise that is available due to the existence of the Intermarket Surveillance Group ([www.isgportal.org](http://www.isgportal.org)). In order to ensure efficiency of such “exchange of information” it is important that trading venue operators can share confidential information about trading participants and respective clients, so gateways have to be implemented in all jurisdictions that allow sharing all necessary information. Regulatory arbitrage with respect to information sharing is very likely to happen. As such ESMA and the respective competent authority should be entitled to sanction trading venues if they refuse to respond in a timely or material manner or if they fail to have procedures and sufficient resources in place to tackle that obligation.

#### *2.6 SME markets*

Question 25: What is your opinion of the suggestion to introduce a new definition of SME market and a tailored regime for SME markets under the framework of regulated markets and MTFs? What would be the potential benefits of creating such a regime?

Question 26: Do you consider that the criteria suggested for differentiating the SME markets (i.e. thresholds, market capitalisation) are adequate and sufficient?

#### Question 25 - 26:

DBG strongly recommends not changing the framework of regulated capital markets for SME only. The set up of different classes and regimes for SMEs within the RM would not facilitate their IPO debut; instead it would lead to a detraction of the quality characteristic of the RM. Therefore, we strongly suggest keeping a certain minimum standard of transparency that all issuers - irrespective of their size - need to fulfil. Apart from that, exchanges should keep the possibility to create premium segments to allow all those issuers who wish to show a higher transparency to be more visible for investors. Moreover, we want to point out that across Europe the emergence of junior markets already facilitated the capital raising activities of SMEs remarkably. If SMEs face difficulties in accessing capital markets, then this is due to the difficult business environment following the financial markets crisis and difficulty to find appropriate investors.

DBG supports competition in listing. It is issuers' choice in which segment he/she prefers for listing depending on the targeted investors (e.g in case of DBG offerings Entry Standard as a sub-segment of the open market vs. listing on the RM).

### 3 Pre- and post-trade transparency

#### 3.1 Equity markets

##### 3.1.1 Pre-trade transparency

Question 27: What is your opinion of the suggested changes to the framework directive to ensure that waivers are applied more consistently?

Question 28: What is your opinion about providing that actionable indications of interest would be treated as orders and required to be pre-trade transparent? Please explain the reasons for your views.

Question 29: What is your opinion about the treatment of order stubs? Should they not benefit from the large in scale waiver? Please explain the reasons for your views.

Question 30: What is your opinion about prohibiting embedding of fees in prices in the price reference waiver? What is your opinion about subjecting the use of the waiver to a minimum order size? If so, please explain why and how the size should be calculated.

Question 31: What is your opinion about keeping the large in scale waiver thresholds in their current format? Please explain the reasons for your views.

#### Question 27:

DBG supports the suggested changes. A consistent waiver application is paramount in order to ensure a level playing field, prevent regulatory arbitrage and thereby improve the transparency that is necessary in Europe's fragmented market environment.

The notification of ESMA by competent authorities seems reasonable. The competent authority has to publicly justify their reasons for allowing the use of waiver contrary to an ESMA opinion, but the waiver could still be in place. It needs to be ensured that it is not generating unfair advantages to firms in certain jurisdiction. It should also be ensured that ESMA can prevent further usage of the respective waiver.

#### Question 28:

DBG strongly supports this approach. Not making the actionable indication of interest public would create an informational advantage for direct participants. This would increase the

incentive for non-participants to join the opaque market environment, with trades further shifting from the lit to the dark.

Question 29:

DBG is in favour of displaying stubs.

The intention of the large-in-scale (LIS) waiver was to mitigate adverse effects for large orders. Thus, the LIS waiver should only cover large orders. The LIS thresholds are the starting point where orders are considered large. True large orders may be a multiple of the LIS thresholds. So, a truly large liquidity provider can place significant liquidity hidden into the book and trade against numerous smaller orders. Once the stub falls under the threshold, the trader should already have executed most of its volume. The remaining stub may be still sizeable in absolute terms, but should be small in relative terms compared to the original hidden order.

Question 30:

DBG is against embedding fees in prices.

DBG supports the idea to put the reference price waiver subject to a minimum order size.

Theoretically, such threshold should be between zero and the minimum thresholds for the LIS waiver. Orders that use the LIS waiver provide a large minimum size and in return they receive the right of “no pre-trade transparency” and a free choice of transaction price. The reference price waiver still provides the right of “no pre-trade transparency” but restricts the choice of transaction price to an external reference. Our customer feedback indicates that from a market perspective it is extremely important to be able to hide its orders (i.e. “no pre-trade transparency”), while the free choice of transaction price seems less relevant. We think that a large portion of all LIS orders are matched on the basis of an external reference price such as the midpoint of the primary market. This is simply due to the fact that there is a strong incentive of market participants to trade at unbiased reference prices such as the midpoint.

It is highly important to design the LIS waiver and the reference price waiver in ways that complement each other. Thus, the minimum thresholds for the reference waiver should be only slightly below the minimum thresholds of the LIS waiver (e.g. 80%). If the minimum size thresholds are significantly smaller, it allows market participants to circumvent the well intended LIS waiver by simply using a reference price. Since market participants would have executed the trade at the midpoint anyway, the LIS restriction becomes effectively irrelevant.

Question 31:

We agree with Commission's reasoning that decreasing the thresholds for LIS waiver would have undesired effects such as undermining transparency and encouraging trading outside of

lit markets and we recommend keeping the threshold as they currently are. A decrease in trade size is anyway a poor rationale for adjusting the LIS thresholds due to following reasons:

- Firstly, the trade size does not necessarily correspond with order size. The trade size decrease might be caused by the emergence of HFTs. We believe that HFTs use a lower order size due to their specific business model and they are involved in a significant number of trades. Thus, just by increasing of HFT market share, the average trade size decreases. No other market participant has to change its order size. We believe that for brokers that execute orders on behalf of their buy-side clients, the parent order size did most likely not change fundamentally. These large orders are supposed to profit from the LIS waiver. Thus, they should be analyzed more closely when reviewing the LIS thresholds.
- Secondly, lowering the LIS thresholds might lead to a “race to the bottom” for the average trade size in lit books. If LIS thresholds are reduced, large orders will migrate to the dark, and the displayed liquidity in the order book will further decrease. In turn, the necessity to use algos seeking hidden liquidity in lit order books increases. The end game is a continuous decrease of the LIS threshold.<sup>6</sup> Therefore, we propose to keep LIS thresholds unchanged.
- Thirdly, OTC trading is not considered for estimating the average daily turnover (ADT). Market participants widely agree that the OTC space is a significant part of the market. Thus, we believe that it should be considered when reviewing the LIS thresholds.

### *3.1.2 Post trade transparency*

Question 32: What is your opinion about the suggestions for reducing delays in the publication of trade data? Please explain the reasons for your views.
----------------------------------------------------------------------------------------------------------------------------------------------------------

Question 32:

DBG supports the approach of reducing delays in publication of trade data. Trades executed on RMs or MTFs are reported within milliseconds after a trade has been executed. SI and OTC data is sometimes published with a delay of up to 3 minutes. The original intention of this concept was to give the manual processor time to comply with the post-trade

---

<sup>6</sup> One conceivable scenario is depicted as follows: It seems to be in the nature of ‘hidden liquidity’-seeking algos to monitor the lit book and try to find hidden orders based on unexpected price improvements of aggressive orders. Unfortunately, those algos cannot forecast the amount of hidden liquidity that remains after an aggressive order obtained price improvement from a hidden order. Thus, those hidden liquidity algos will most likely use very small order sizes (e.g, 1-share-orders) to detect hidden orders. This is to limit the downside if the hidden order is already fully executed. This behaviour could start a vicious circle resulting the regulator to further lower the LIS thresholds – in the extreme case – down to zero. Obviously, this is not a desirable outcome.

transparency regime. However, with increasing automation of the OTC trading processes such a significant delay is not necessary anymore. Therefore, all trades conducted in automated systems should be published immediately in order to facilitate a more meaningful consolidation.

It is important to clarify that the expression on p.25 (real time) (a) "as close to instantaneously as is technically possible" should allow for deferred publication reduced in order to include manual processing. However further clarification needs to be provided regarding p. 25 (large transactions) (c). Should it be: b) Shorten the intra-day delay period from 3 hours to 2 hours; and/ or c) Raise the intra day transaction size thresholds.

### *3.2 Equity-like instruments*

Question 33: What is your opinion about extending transparency requirements to depositary receipts, exchange traded funds and certificates issued by companies? Are there any further products (e.g. UCITS) which could be considered? Please explain the reasons for your views.

Question 34: Can the transparency requirements be articulated along the same system of thresholds used for equities? If not, how could specific thresholds be defined? Can you provide some criteria for the definition of these thresholds for each of the categories of instruments mentioned above?

DBG welcomes the intention to extend transparency requirements to equity-like instruments.

Considering that the equity-like category is loosely defined and potentially includes very different financial instruments, DBG recommends that transparency requirements be tailored to the relevant financial instruments taking into account the market in which they are exchanged.

Furthermore, given that exchange traded commodities (ETCs) and exchange traded notes (ETNs) are typically traded in a trading environment similar to that of exchange traded funds (ETFs), an extension of the transparency regime for equity-like instruments to also include ETCs and ETNs should be considered.

### *3.3 Trade transparency regime for shares traded only on MTFs or organised trading facilities*

Question 35: What is your opinion about reinforcing and harmonising the trade transparency requirements for shares traded only on MTFs or organised trading facilities? Please explain the reasons for your views.

Question 36: What is your opinion about introducing a calibrated approach for SME markets? What should be the specific conditions attached to SME markets?

Question 35:

It is important to distinguish between instruments 'admitted' to an MTF and instruments 'included for trading' to an MTF. In the case of DBG, the situation unfolds as follows (see also answer to question 1 above):

- Instruments 'admitted to trading' on an MTF are usually SMEs with a listing in the entry market segment 'Open Market'. As of December 2011, the number of admitted instruments (equities) is 10,585. We welcome the application of transparency requirements to these instruments.
- Instruments 'included for trading' to an MTF include equities from around the world (see our answer to question 1). The majority of these approx. 9,000 foreign shares is admitted to trading outside the EEA, and often with home markets with trading hours not compatible with those of the European time zone (e.g. US equities). In addition, and in most cases, these equities are included to trading without the explicit consent of the issuer. Due to these peculiarities, and the price discovery being performed in the respective home market outside of the EEA, these instruments might not necessarily fall under the transparency requirements of MiFID.

Question 36:

We do not believe there is any urgent need for introducing special regulation on SMEs access to capital markets and we also do not consider this as a MiFID Review issue. If SMEs face difficulties in accessing capital markets, then this is due to the difficult business environment following the financial markets crisis and difficulty to find appropriate investors. It would therefore be appreciated if the EU Commission would engage into discussion with the SME industry to find out jointly the appropriate measures that would guide investors' interest into SMEs markets.

There are already tailored solutions for SMEs to access capital markets (e.g in case of DBG offerings Entry Standard as a sub-segment of the open market vs. listing on the RM). So it is upon SME to decide which level of transparency it wishes based on targeted group of investors in its shares.

### *3.4 Non equity markets*

Question 37: What is your opinion on the suggested modification to the MiFID framework directive in terms of scope of instruments and content of overarching transparency requirements? Please explain the reasons for your views.

Question 38: What is your opinion about the precise pre-trade information that regulated markets, MTFs and organised trading facilities as per section 2.2.3 above would have to publish on non-equity instruments traded on their system? Please be specific in terms of asset-class and nature of the trading system (e.g. order or quote driven).

Question 39: What is your opinion about applying requirements to investment firms executing trades OTC to ensure that their quotes are accessible to a large number of investors, reflect a price which is not too far from market value for comparable or identical instrument traded on organised venues, and are binding below a certain transaction size? Please indicate what transaction size would be appropriate for the various asset classes.

Question 40: In view of calibrating the exact post-trade transparency obligations for each asset class and type, what is your opinion of the suggested parameters, namely that the regime be transaction-based, and predicated on a set of thresholds by transaction size? Please explain the reasons for your views.

Question 41: What is your opinion about factoring in another measure besides transaction size to account for liquidity? What is your opinion about whether a specific additional factor (e.g. issuance size, frequency of trading) could be considered for determining when the regime or a threshold applies? Please justify.

Question 37:

We agree with the Commission that the OTC markets are generally less transparent than RMs and MTFs. As OTC markets in non-equities account for the majority of volumes traded, this lack of transparency results in information asymmetries, discriminating not only smaller market participants and private investors, but also the more sophisticated institutional investors as demonstrated by the financial markets crisis.

Further, pre- and post-trade transparency is essential for central clearing as it works today and as it is envisaged to work in the context of EMIR. Robust post-trade processes rely on availability of transparency, and as the market practice in clearing goes towards real-time risk management as offered by Eurex Clearing AG, real-time post-trade transparency is needed to perform real-time risk management. Pre-trade transparency and liquid markets in return are both necessary pre-requisites.

Therefore, from the trading and clearing perspective we appreciate an extension of pre- and post-trade transparency to non-equity markets in an asset specific manner, independent of whether executed on RMs, MTFs, OTFs or OTC.



Providing an asset specific view and starting with bond markets, RMs like Frankfurter Wertpapierbörse (FWB) and MTFs like Eurex Bonds provide pre- and post trade information for bonds, whereas only limited pre-trade information and almost no post-trade information is available for OTC markets. However, transparency is crucial for bonds markets to guarantee an efficient and fair price formation process and as a consequence resilient markets.

Therefore, we support the EU Commission's approach to adopt the principles of the existing MiFID transparency regime for shares to the bonds market. We also agree that it is necessary to consider the characteristics of different bond types by carefully calibrating the adequate transparency levels. Further, we welcome the extension of the transparency regime not only to corporate bonds but also to other bond types like sovereign bonds and covered bonds. Nevertheless, a possible bonds transparency regime should not be limited to bonds for which a prospectus has been published or which are admitted to trading on a RM or MTF. This approach would provide a disincentive for issuers to publish a prospectus (e.g. Directive 2003/71/EC does not require a prospectus for bonds issued under a certain framework) and to admit their bonds on a RM or MTF. Therefore also bonds for which no prospectus has been published should be considered for the transparency regime.

As a transparency regime for tailor-made bonds (with only a limited number of buyers) seems to be disproportionate, the number of investors buying a bond issue in the primary market could be a criterion to identify bonds (with no prospectus and no admission to a RM or MTF) which should be subject to the transparency regime. The number of addressed investors (other than qualified investors) as defined in the Prospectus Directive (Directive 2003/71/EC) for which an issuer is not obligated to publish a prospectus (100 persons) could serve as a benchmark.

As a large part of OTC trading in bonds takes place via telephone brokerage (50% in the inter-bank-market according to a Bearing Point study<sup>7</sup>) where the publication of pre-trade information seems to be difficult from a practical perspective, a pre- and post-trade transparency obligation for electronic markets only would not ensure a level playing field. Given the sheer size of the telephone brokerage in bond markets and as a general requirement we believe that the EU Commission's request for more derivatives trading on organised markets (EU Commission: Communication from the European Commission ensuring efficient, safe and sound derivatives markets (October 2009)) should be equally applicable to bond markets as well.

It is a practical question how to include telephone brokerage into the transparency regime in a meaningful way. We have provided a proposal for this to the CESR call for evidence on non-equities transparency in June last year<sup>8</sup>. We have proposed a stepwise approach:

---

<sup>7</sup> "The Electronic Bond Market - New Perspectives for Electronic Fixed Income Trading", 2007, page 10.

<sup>8</sup> [http://www.esma.europa.eu/index.php?page=response\\_details&c\\_id=164&r\\_id=5708](http://www.esma.europa.eu/index.php?page=response_details&c_id=164&r_id=5708)

1. As a first step, a post-trade transparency regime would be established where all market participants are required to report prices, volumes and time of execution. It is essential that the OTC market (i.e. telephone brokers) is required to report these data as well, since RMs and MTFs provide this level of transparency already.
2. As a second step and on the basis of information provided by the above post-trade transparency, those OTC market participants who trade pre-defined volumes in a sufficiently frequent way (i.e. daily) and whose trading activity would contribute to the price formation process could be identified. The identified IFs would then be required to post their quote obligation on an electronic platform accessible to the public and hence includable in the price formation process.
3. As a general requirement, more effort to achieve a higher degree of organised/electronic trading in bond markets is necessary.

This way we are confident that an appropriate pre- and post-trade transparency regime in bond markets across RMs, MTFs, OTFs and OTC markets would be achieved while taking into account distinctive features of this particular asset class.

As regards derivatives markets, we very much welcome the suggestions proposed by the EU Commission to extend pre- and post- trade transparency to derivatives. Explicitly we welcome that:

- The MiFID framework directive should be amended to require pre- and post-trade transparency for all trades in specific non-equity products, whether executed on RMs, MTFs, OTFs or OTC.
- The principles of the existing MiFID transparency regime for shares could be extended to various derivatives.
- Detailed requirements should be suitably tailored.
- The new transparency regime would be achieved through the setting up of new obligations for IFs, whether trading OTC or within OTFs, as well as for MTFs and RMs.
- The post-trade transparency regime would be transaction-based, rather than being based on aggregated data.
- The transparency regime would be properly calibrated to the class of financial instruments.
- The transparency regime would be predicated on a system of thresholds and delays, based on transaction size.
- The non equities transparency regime is also an important prerequisite for the functioning of the proposed OTF model, including its threshold concept.

Question 38:

Provided that electronic trading in non-equities is increased and telephone/voice-brokerage is covered by the transparency regime as well as proposed in the stepwise approach above, we think that the requirements for pre-trade information for continuous order-matching systems and for quote driven systems as defined in MiFID for equities may be applied for bonds and derivatives as well.

Specifically, with regards to derivatives pre-trade transparency towards the market, information may vary based on the market model used. In general, price and size (quantity) would be minimum information required. All information and pay off details need to be published that are necessary to value the product.

See also our comments to Q37.

Question 39:

DBG supports this approach.

Question 40:

We fully agree with the Commission's recommendations for a post-trade transparency regime for non-equities to be transaction-based and not aggregate which would ensure sufficient granularity and hence usefulness of transparency information. In relation to timing and content of post-trade information we support the EU Commission's approach for post trade information to be as prompt and precise as possible.

As regards calibration of the thresholds and delays the Commission should keep in mind that wholesale electronic trading platforms in Europe (such as MTS, Eurex Bonds, SENAF, etc.) use minimum ticket sizes that range from € 1 million to € 10 million depending on the bond type and type of trade. Therefore, the calibration of the transparency regime across organised trading venues and OTC should preserve this level of transparency to be reported in real-time.

With respect to derivatives post-trade transparency we would recommend disseminating information regarding price, size, and time, for all venues in scope.

See also our comments to Q37.

Question 41:

We believe that overall traded volume and the frequency of trading are the significant criteria for measuring liquidity in bonds markets. However, as the liquidity of bonds fluctuates over time (bonds are most liquid after the issuance of the bond and a short time before the

maturity of the bond), the issuance size could be an additional reasonable criterion for the calibration of transparency requirements.

As regards derivatives, liquidity is generally measured by total volume and transaction frequency.

For further details in relation to the questions 37 to 41 please refer also to our June 2010 response to the CESR call for evidence on non-equities transparency.

### *3.5 Over the counter trading*

Question 42: Could further identification and flagging of OTC trades be useful? Please explain the reasons.

DBG supports further identification and flagging of OTC trades. OTC data should be of more granular information rather than using the acronym OTC.

## 4 Data consolidation

DBG strongly welcomes the APA Regime. It perfectly fits into the existing regulatory framework, complements it and will improve data quality and consolidation. In combination with clear and pan-EU harmonised reporting requirements/rules for over the counter transactions and more detailed description within the regulation about the information which needs to be submitted to APAs and a reduction in trade reporting delays we trust that a meaningful "Tape of Record" can be achieved by the industry with existing resources.

Additionally, in order to improve data quality at the source (IFs) – a necessity which cannot be controlled by any APA - we suggest that competent authorities conduct regular compliance checks in order to raise the awareness for the importance of reporting correctly and in a timely manner.

Easy consolidation of post-trade data is further being fostered by the current Federation of European Securities Exchanges (FESE) initiatives which form a significant part of an overall Industry Initiative:

- FESE's work on harmonisation/standardisation of trade identifiers not only for OTC trades but as well for trades conducted on RMs and MTFs.
- FESE's work on providing post-trade data separately from pre-trade data for all RMs as soon as Q1 2011.
- Make available data free of data fees for public view after 15 minutes by all RMs within Q1 2011.

We would like to point out that DBG strongly opposes the introduction of a Centralised Consolidated Tape due to various reasons, outlined in more detail below.

#### *4.1 Improving the quality of raw data and ensuring it is provided in a consistent format*

Question 43: What is your opinion of the suggestions regarding reporting to be through approved publication arrangements (APAs)? Please explain the reasons for your views.

Question 44: What is your opinion of the criteria identified for an APA to be approved by competent authorities? Please explain the reasons for your views.

Question 45: What is your opinion of the suggestions for improving the quality and format of post trade reports? Please explain the reasons for your views.

Question 46: What is your opinion about applying these suggestions to non-equity markets? Please explain the reasons for your views.

Question 43:

DBG strongly supports the APA regime which will deliver – if being set-up correctly – OTC post-trade data of good quality and in a harmonised structure which will then be easy to consolidate. However, APAs will not be in the position to improve on timeliness of data availability. This has to be regulated by the EU Commission.

In general the APA regime could provide the following benefits:

- APAs would offer the means to trade report and act as a pre-consolidator for OTC post-trade data in order to provide additional quality assurance for OTC data and make data available in a structured and standardised way which can lead to correct data and thus to a more meaningful consolidation of post-trade data.
- APAs can store more detailed contributor data while publishing only the data which is requested to be made public. Thus, an APA would be in the position to provide a complete audit trail for each of its customers' OTC trades which has been reported via the APA. For example DBG is already in the position to provide clear audit trails for all trade reports submitted via its OTC trade report service per customer. This data could be made available to the competent authority and ESMA on request.

Currently, the shortcomings in the OTC post-trade transparency space result in a consolidated tape which has no practical value or use to anyone as reliable data (RMs and MTFs) are bundled together with unreliable and stale OTC data. OTC post-trade data is

unreliable – just to name a few reasons - due to a) mandatory data fields not being filled in accordingly, b) stale price data, c) data not being submitted in the necessary quality or d) data is made available on internet pages only and thus not being consolidated.

There are various reasons for the above mentioned shortcomings, but the APA regime will be able to solve most of them. For example in case a) mandatory data is not being published: this can be due either to the fact that the IF did not fill the required data field or it could be due to the fact that the Trade Reporting Facility did not implement this data field in its service. In order to solve this problem the APA could be requested to not only implement all data fields which are mandatory, but as well to reject any trade report submitted by an IF which does not contain all necessary data fields until the IF has fully completed the report.

The detailed requirements for an APA regime should ideally be developed in co-operation with the industry to set-up a standardised approach and in order to yield the expected benefits. DBG is accredited already by the FSA as a Trade Data Monitor and stands ready to provide further detailed guidance based on its experience and support and to be part of any potential working group on APAs.

#### Question 44:

DBG considers all mentioned conditions and specific criteria a) to c) to be valuable criteria for the application of APAs, although we have strong concerns that the implementing regulation should contain hard-coded requirements regarding a mandatory format (see as well answer to question 45). Regarding the criteria for APAs we would like to refer to the requirements as set out in CESR's "Technical Advice to the European Commission in the Context of the MiFID Review – Equity Markets", thereof "Annex I – Proposed Guidance for Approved Publication Arrangements" but not limited to.

With regard to a) we very much welcome EU Commission's proposal that any "Third Party" or "Proprietary Means" as defined within MiFID should be allowed to apply for the APA accreditation. We see a considerable value in the choice this will offer to market participants as it will enable existing connections (e.g. application interfaces to trading venues or trade repositories, etc.) to be extended to additional usage and service and thus to provide for economic solutions. As pointed out by the EU Commission, timely trade reporting is a crucial factor and should not be underestimated in order to provide for meaningful consolidation. Therefore, the ability of real-time data publication would be a very important criterion which would need to be fulfilled.

As pointed out before, really meaningful consolidation can only be achieved if the information value and quality of data (in its specific asset class) is not too different, otherwise the consolidated view is not really valuable and consolidation is very difficult as well as costly for the consolidator. Even 1 minute delay makes it difficult to display a consolidated view in a proper and easily digestible way for market participants. A stale price (be it one or three minutes delayed or even worse several trading days) will differ –

sometimes even substantially - from the real-time prices in a streaming data environment. Especially in fast markets this can be a problem and make a Consolidated Tape not the data source of choice for users. A potential solution to this dilemma would be that the all trade data would be made available at a level playing field, meaning RMs and MTFs data in line with OTC data after 1 respectively 3 minutes as then the data would be compatible.

With regard to b) APAs could potentially be approved by ESMA as well, as trade reporting should be a pan-EU solution. In case competent authorities would be in charge to approve APAs, it should be possible for APAs to offer their services on a pan-EU basis. In this case it would be of essence that all competent authorities require the same standardised criteria on a pan-EU level in order to provide for a level playing field and an EU harmonised approach.

As rightly pointed out by the EU Commission as well, the detailed definition of trade reporting requirements and clarification of which party of a trade has to submit a trade report is of essence. Without this definition OTC post-trade data will not become nearly reliable at all. Nevertheless, DBG regards it as important as well that in case of doubt regarding any trade reporting obligation, IFs would have one single point of contact in order to clarify questions which might arise, especially in the case of cross border trading. ESMA could be the right institution to govern a truly EU trade reporting regime.

With regard to c) we strongly support the EU Commission's intentions to improve the quality of OTC trade data as we consider it as the main obstacle to a meaningful consolidation. Regarding the format to become part of the regulation please refer to answer 45.

The use of several APAs by one IF should generally be allowed, especially in case non-equity asset classes will need to be reported as well. However, IFs should ideally make transparent which APA they use in order for their customers to identify their trade if necessary. Currently, only the publication channel (e.g. Boat, DBG, etc) is identified publicly within the trade reports, not the submitting IF. This makes it difficult for the buy side to identify their printed trades in case a sell side IF has reported it. In order to support the buy side for trade verification the following options would exist:

- a) the IF makes transparent which reporting channel(s) it uses (via ESMA MiFID database),
- b) APA make their customers transparent (via ESMA MiFID database),
- c) substitute acronym OTC by clear identifier of the trade reporting party, e.g. BIC code.

Furthermore, the mandatory APA regime should as well avoid data being "lost" in the internet and thus provide for a complete tape.

Question 45:

DBG offers a trade reporting service via its trading platform infrastructure which provides considerable synergies for market participants, as they can use already existing connections

and infrastructures. Thus, the respective format used for trade reporting is already compatible with the format the customer uses for trading and clearing. Regarding data dissemination to consolidators, the format is the same format used for all real-time market data dissemination to market data vendors by DBG.

Regarding format the regulation/implementation of a mandatory format to be used by all market participants would probably be appreciated by some market participants but would certainly put an undue burden to most market participants (be it IFs, RMs, or market data vendors) who would likely have to completely overhaul their existing and well functioning system infrastructures at major expenses.

Furthermore, such a move would likely result in a Big Bang situation in Europe with the according risks. Before even considering such an approach the EU Commission should in any case conduct a detailed cost analysis. Mandating a standard format and/or protocol by law would be problematic as requirements evolve over time and require a certain flexibility as regards formats.

Harmonisation of protocols without any hard-coding in a regulation, however, will be useful and allow for more efficient consolidation as well as the necessary flexibility required by all market participants, be it small or big ones. As pointed out above, FESE is part of an overall industry initiative which aims at improving data consolidation. In this respect FESE members have – amongst other actions – conducted substantial work in order to provide a standardised model for harmonised flagging of trading venues data in line with CESR's standardised flags for OTC trades which will further reduce consolidation efforts and at the same time leave sufficient flexibility to provide additional necessary flags for information. It is intended that all FESE members will implement the standard version alongside the more customised version in order to provide necessary choice to the market, as well as a smooth transition compared to a Big Bang solution, once FESE is being signalled by market participants and the Commission that this is the right way forward.

Taking into account that already today market data vendors are consolidating trade data and that the major reason why the consolidated views are of no use to the market is the bad quality of OTC trade data and the different timing of publication, we consider it of essence and much more important that these problems are solved accordingly.

Standardisation does not necessarily mean standardised format only. Standardisation is important with regard to pan-EU reporting requirements, e.g. how many days after a trade should a trade report be required to be cancelled, etc.

In more detail:

- Operating hours – DBG would suggest to standardise trade reporting hours within the EU (e.g. 7 a.m. to 8 p.m. CET, but could be different as well) in order to allow for a more harmonised approach within the EU. Furthermore, it should be clarified if week-ends and 24 hour trading would require real-time publication as well, which could provide for some problems regarding system availabilities and batch processings of the system infrastructures used. DBG would recommend that trades overnight and



over the week-end would have to be reported before the start or at the start of the new trading day.

- Holiday calendar – in case of APAs operating in different member states it should be possible that they offer their services due to the national holiday calendar as long as they clearly point out to their customers that their systems will not be available for trade reporting purposes at a particular national holiday. Potential customers could then decide, if the APA would provide the right service for them, or not. Background: some services on offer are incorporated into trading platforms, and can only technically be made available, when the trading platforms themselves are in operation. Whereas this usually guarantees a very efficient solution for the customer, it might not be possible to offer the trade reporting service outside the national holiday calendar on its own.
- Deferred publication – publication times of the deferred publication regime e.g. refer to “end of trading” of the most relevant market in terms of liquidity, whereas the most relevant market in terms of liquidity according to MiFID Art. 9 Implementing Regulation is a member state and not a trading venue. This makes the definition of “end of trading” extremely complicated, especially as within a member state various trading venues are operated with different operating hours. Again, it would be very helpful to have pan-EU definition of trade reporting windows with a clear start and a clear end-of-reporting available in order to streamline the overhead costs and reduce potential sources for mistakes and to achieve clear and standardised trade reporting results.

Question 46:

Reporting requirements may differ depending on the asset class, which obviously must be translated into the respective set-up of services by the APA. Although reporting requirements might differ slightly the APA regime will provide for the necessary framework as well for non-equity transparency.

In any case, we strongly recommend that no APA should be requested to cover all asset classes, though, however, due to competition it is likely that most APAs will offer services across all asset classes.

#### *4.2 Reducing the cost of post trade data for investors*

Question 47: What is your opinion of the suggestions for reducing the cost of trade data? Please explain the reasons for your views.

Question 48: In your view, how far data would need to be disaggregated? Please explain the reasons for your views.

Question 49: In your view, what would constitute a "reasonable" cost for the selling or dissemination of data? Please provide the rationale/criteria for such a cost.

Question 50: What is your opinion about applying any of these suggestions to non-equity markets? Please explain the reasons for your views.

Question 47:

DBG does not see the necessity to amend the framework directive in order to include the separation of post-trade data from pre-trade data as the industry itself has already solved this issue respectively.

After consulting with various market participants DBG understands that the current consolidated tapes are inflated in terms of market data fees compared to the value they provide. Their acceptance has been low and market participants have been frustrated as they could not derive value from the consolidated data currently available.

However, one of the major reasons for the non-acceptance of the provided solutions seems to be that meaningful consolidation (especially in real-time) is not possible without improved OTC data quality including timely publication as well. A "bundling" by consolidation of good and poor quality market data results in a consolidated tape with no practical value for anybody. Furthermore, incorporation of stale data (up to several days old) in a set of streaming data which displays current prices (made available within milliseconds after the trade took place) is confusing for market data users due to the fact that the stale price can differ substantially from current market conditions. It might be worthwhile mentioning that DBG offers MiFID OTC post-trade data in a completely separate product (as requested within the CESR Level 3 Guidelines) and in fact we see hardly any demand for such data to be consumed in real-time. Of course any data fee will be considered as being too expensive for such a consolidated view. Consolidated data which contains several days old data does not need to be consumed in real-time. In case such data is combined with highly valuable ultra low latency data from RMs, the overall consolidated view will not be meaningful and market participants stick to previously available solutions, excluding OTC data and consume the bundled data including OTC data in a 15 – 20 minutes delayed version available at no cost.

However, in order to support a Tape of Record of trade data all FESE members have already provided or are currently in the process to provide access to separated post-trade data at significantly lower cost until the end Q1 2011.<sup>9</sup> This move will facilitate a Tape of Record for the EU market at significantly lower costs. All FESE members will allow access to their data

---

<sup>9</sup> DBG already offers a "Post-Trade" product for its RM data at a significantly reduced price point (€ 15,-- wholesale / € 1,-- retail) complementing „MiFID OTC" product. Both data packages are made available separately from each other.

free for public view with a 15 minutes delay as well. Most exchanges had already supported this market data standard for a long time, now all FESE members have agreed to follow suit.

Regarding the current discussion about the cost of trade data it is worthwhile considering the following:

- All data comes at a cost, due to necessary resource allocation for the production, dissemination, implementation and administration. Costs vary amongst suppliers due to their different set-ups, offerings, applied quality controls or infrastructures used. Especially the production of highly reliable and high quality market data requires additional resources. Therefore usage of data should be targeted to the specific needs of market participants – there is no one-size-fits-all model where the benefits outweighs the cost.
- According to the Atradia Report<sup>10</sup> cost of market data is composed of technology components, vendor fees, administration costs and RMs fees. RMs' share of the total data costs spent by market participants accounts for 5-8% only.
- Data are made available at reasonable commercial terms already<sup>11</sup>.
- RMs already offer ample choice of various data products and corresponding price points in order to provide transparency to as many customers as possible at a level playing field and now have added a separate post-trade data product as well.
- Traders who need pre- and post-trade data usually have access to data for free from those markets they are registered with.
- All data are usually free for public view with a 15 minutes delay.
- An "EU Tape of Record", will most likely be able to provide real-time post-trade data at an approximately 60-65% reduced price point compared to current prices. This is substantially facilitated by FESE members who have committed to provide post-trade data separated from pre-trade data at significantly lower price points. The Tape of Record will be available free of data charges for public view after 15 minutes – which still provides significant value for its purpose (best execution verification, best execution analysis for policy adaptation).

Comparing the price to be paid for an EU Consolidated Tape with the US Consolidated Tape one should keep in mind the following:

- The Consolidated Tape in the US is the vehicle to enforce best execution at best price trade by trade within the US in combination with a trade through rule under RegNMS. RegNMS is a completely different regulatory system compared to MiFID.

---

<sup>10</sup> „The cost of access to pre- & post-trade order-book data in Europe“, A Research Study, Atradia, August 2010.

<sup>11</sup> See ESME Report on Post-Trade Data, 2009.

MiFID does not require such a set-up due to a different best execution regime which is more suitable to the EU and the different needs of the investors per se.

- Mandatory consumption of the tape data due to RegNMS provides for substantially increased revenues even at US\$ 70 per Consolidated Tape display.
- It is our understanding that data fees for the Consolidated Tapes (Tape A, Tape B and Tape C) have not changed for over 20 years. This seems to result as well in a lack of innovation (see comments on latency).
- Although not being the best choice for trading purposes (due to inherent latency) its consumption is required under Reg NMS.
- In the EU a mandatory consumption of a consolidated view – including data which would usually not be consumed in real-time if the investor would have a choice – would add as well additional costs for investors, which would be hard to be borne as well by smaller investors.

DBG would like as well to refer to a recent study of the SEC, “Equity Trading and the Allocation of Market Data Revenue”, May 27, 2009, by Cecilia Caglio and Stewart Mayhew, both staff of the U.S. Securities and Exchange Commission, Office of Economic Analysis, which states that market data fees form a substantial part of RMs income and should continue to do so. Market data are part of the competitive environment and the production of high quality data needs constant adaption to changing technological environments in order to prevent a race to the bottom in terms of quality and reliability.

#### Question 48:

As pointed out already before, FESE members as well as the LSE have already or will provide post-trade data separate from pre-trade data until Q1 2011. The availability of a post-trade only product will support a standardised consolidated “Tape of Record” whose data can be used for several purposes. RMs data will be the most valuable components in terms of data reliability and timeliness within such a Tape.

Disaggregation down to instrument level however, as suggested by CESR, would significantly increase the administrative burden on all market participants exponentially. Market data consumption is administered at IFs, market data vendors and as well at the exchange level, as it constitutes a reporting chain. Furthermore, market data vendors would need to be in the position to provide access to customized views per instrument only – a task which will significantly increase complexity and be prone to errors. We would suggest that the EU Commission consults with market data vendors in more detail before considering such a move.

As an example, DBG alone disseminates price data of more than 600.000 instruments to more than 150.000 users. Changing customised selections (e.g. different instruments each month by each customer) would need to be administered in terms of provision of access to

the selected instruments as well as the billing. Neither market data vendors, nor exchanges (and more than likely neither IFs) would be able to cope with such a set-up at reasonable administrative costs. It is more likely that the additional administration costs would significantly outweigh any potential savings which are expected to the further "disaggregation".

The provision of standard data packages thus is essential to keep administration costs at bay, especially as data fees are already moderate in absolute terms and a standardised post-trade tape will be made available as well.

Furthermore, DBG would like to point out that in case of disaggregation down to instrument level likely only the most liquid shares would be of significant interest. "Cherry-picking" on instrument level could thus lead to the situation that SMEs would not have their prices being displayed widely and find it more difficult to find investors.

#### Question 49:

DBG does not see the necessity and questions the sense to define what constitutes a "reasonable" commercial term for market data fees as competitive forces provide this duty already. The definition of reasonable commercial terms, other than provided by market forces, is almost a philosophical task per se.

With having choice to subscribe to market data from various data sources, data fees should be left to competitive market forces which is in line with the spirit of MiFID. Trading venues like RMs are exposed to full competition in all areas of their business and RMs have considerably lowered their transaction fees during the last years.

At the same time RMs have conducted major investments in new trading platforms and market data structure reacting to this industry evolution by an enhancement of their trading and market data services (e.g. delivery of market data with increasingly lower latency). In this context we would like to refer again to the paper by Cecilia Caglio and Stewart Mayhew, which states that market data fees form a substantial part of RMs income and should continue to do so. Market data are part of the competitive environment. In case data quality and value do not deliver up to the expectations of market participants the price of data will fall accordingly in order to reach a level at which demand exists.

The value of market data could be described as a function of quality in terms of inherent information (e.g. price forming) and reliability and of course timely data availability (real-time in milliseconds after trade compared to stale data). In this context the price of RMs equity market data has a significant intrinsic value that is reflected in the value they provide not only to investors but to various business models as well (e.g. MTFs or dark pools) which are directly based on the value provided by RMs data, including the considerable value to the functioning of the European equity markets.

Compared to OTC market data, RMs data are price setting, reliable and timely. Volumes are not inflated, data is published within milliseconds after the trade took place, the execution

venue is made public, etc. A race to the bottom in terms of market data quality, due to data fees becoming regulated, would certainly not be in the interest neither of the market participants nor of the EU Commission nor of individual investors.

After the market signalled interest in a post-trade tape of record, FESE members committed to provide separated post-trade data at significantly lower cost.

The most recent "trade price" is important information for a wide array of uses, unless data is of minor quality (or stale data):

- Market information for the next arriving order placers.
- Price determination in satellite markets (including various internalisers, dark pools, and derivatives).
- If it is a closing price, it is used for marking-to-market, for converting mutual fund cash inflows into shares (and redemptions into cash) and for valuations.

In combination with the already existing rich choice data products RMs already offer for all sorts of investors at various price points, we are convinced that any intervention regarding the reasonability of cost should not be considered.

Furthermore, the recent debate regarding cost was mainly focussed on RMs data fees completely leaving out of the equation that the total cost borne by a typical customer will show that, collectively, RMs data fees represent 8% to 15% of overall data costs<sup>12</sup> only compared to costs created by (vendors, communications) which does not seem out of proportion when comparing the value represented by the data vs. delivery.

Question 50:

The above outlined comments are the same in respect to non-equity markets instruments.

#### *4.3 A European Consolidated tape*

Question 51: What is your opinion of the suggestion for the introduction of a European Consolidated Tape for post-trade transparency? Please explain the reasons for your views, including the advantages and disadvantages you see in introducing a consolidated tape.

Question 52: If a post-trade consolidated tape was to be introduced which option (A, B or C) do you consider most appropriate regarding how a consolidated tape should be operated and who should operate it? Please explain the reasons for your view

---

<sup>12</sup> „The cost of access to pre- & post-trade order-book data in Europe“, A Research Study, Atradia, August 2010.

Question 53: If you prefer option A please outline which entity you believe would be best placed to operate the consolidated tape (e.g. public authority, new entity or an industry body).

Question 54: On Options A and B, what would be the conditions to make sure that such an entity would be commercially viable? In order to make operating a European consolidated tape commercially viable and thus attaining the regulatory goal of improving quality and supply of post-trade data, should market participants be obliged to acquire data from the European single entity as it is the case with the US regime?

Question 55: On Option B, which of the two sub-options discussed for revenue distribution for the data appears more appropriate and would ensure that the single entity described would be commercially viable?

Question 56: Are there any additional factors that need to be taken into account in deciding who should operate the consolidated tape (e.g. latency, expertise, independence, experience, competition)?

Question 57: Which timeframe do you envisage as appropriate for establishing a consolidated tape under each of the three options described?

Question 58: Do you have any views on a consolidated tape for pre-trade transparency data?

Question 59: What is your opinion about the introduction of a consolidated tape for non-equity trades? Please explain the reasons for your views.

Question 51:

DBG welcomes that the EU Commission does not envisage proposing the implementation of a consolidated tape for pre-trade data, as this would create significant latency for extremely latency sensitive data.

At the same time DBG would like to state that even implementing a mandatory consolidated post-trade tape via one central consolidator counters the original intentions of MiFID and its approach of principle based best execution compared to best execution as defined within Reg NMS in the US.

Furthermore, the central data consolidation is a model which is outdated as it is more than 30 years old, and since then technology has been developed and improved significantly.

Most market data vendors, who so far have consolidated data in a central place, have now adapted or are currently in the process to adapting to the new requirements introduced by high capacity technology. They started to consolidate data in a decentralised way in order to reduce latency introduced by routing data for processing to a central hub and then back to where the data is needed by customers.

In case the EU Commission considers that the consolidation of trade data should be done in a central hub, thereby accepting the additional latency created by this decision, we like to raise the question if it might not be sensible to provide a Consolidated Tape with latency, or even at 15 minutes delayed which would anyway be free of data fees for public view. Considering that OTC data will come in with 1-3 minutes late respectively or even more delayed in line with MiFID deferred publication periods, data could then be synchronised by the "plan" within the 15 minutes in order to provide a synchronised tape with trade data in chronological order. If the EU Commission, however, sees value in a real-time tape of post-trade data, Option C is definitely superior to both Option A and B.

In any case a Central Consolidator solution like in the US is not an economically sensible solution:

- Consolidated data are already made available via market data vendor terminals or via feeds by major market data vendors as well as third party providers.
- Introducing a Central Plan solution would introduce additional costs for all market participants. Instead of using existing lines and technical interfaces trading venues, IFs and market data vendors would have to connect to a Central Plan additionally, as the data provided by the plan would likely not substitute for decentralised available data. Unless data consumption would be regulated to be mandatory, we even doubt that there would be enough revenues generated in order to even operate self-financing. Thus, additional costs for market participants would arise by the introduction of mandatory consumption.
- Apart from introducing additional costs for all market participants a Central Consolidated Tape would represent as well a „single point of failure“.
- The reason why consolidated data so far has not been accepted by the market is due to the bundling of bad quality and unreliable OTC data with high quality RMs data. OTC trade data quality will now be addressed by the EU Commission, thus finally allowing for more reliable data. In combination with FESE members' provision of post-trade data being separated from pre-trade data, a post-trade Tape of Record (Consolidated Tape) can be efficiently provided by decentralised consolidation.

In this context it is worthwhile pointing out the recently announced new additional initiatives regarding EU tapes, those of Thomson Reuters as well as NYSE Euronext.



Question 52:

DBG considers Option C to be most appropriate and in line with MiFID's spirit of competition.

DBG would deem market data vendors to be well positioned to take on the role of data consolidators for a "Tape of Record". Most of them provide consolidated views and/or data feeds already as of today. With improved OTC data quality through the introduction of an APA regime, as well as clear and detailed pan-EU harmonised post-trade transparency requirements set by the EU Commission, a separate post-trade data product provided by each of the FESE members, a consolidated Tape of Record could be provided via infrastructures already available as of today.

This would not occur additional costs for market participants, like the introduction of a Centralized Tape, and furthermore it would be in line with recent technological developments which call for decentralised consolidation in order to be in line with low latency requirements which have been caused by technology developments over the recent years.

An accreditation might make sense in order to define some necessary pre-requisites, as well as the venues to be included in the tape but is probably not really necessary as we expect to see various solution providers in this space. Besides market data vendors like Bloomberg or ThomsonReuters, NYSE Euronext (the Administrator Network A, governed by the US Consolidated Tape Association which operates the Consolidated Tape System) has announced that it will launch a Consolidated Tape in Q3 2011 in Europe.

Having said this, we would like to point out as well that we consider Option A and B not to be commercially viable unless mandatory data consumption is being introduced. Option B would even introduce additional costs with every rotation.

Option C via competition would provide consolidated data at lowest cost for market participants while at the same time creating further innovative market data solutions in line with future technology improvements.

Question 53 - 54:

DBG is not in favour of Option A due to various reasons, as explained in more detail below.

Option A would create a monopoly, with access to sensible trade data. Therefore it would be essential that such a party would be neutral, e.g. like market data vendors or RMs.

As it would be a Centralised EU Plan, it would be recommendable that the operator is European as well. Having said this however, we are convinced that a substantial part of all market participants (including DBG) is not in favour of such a set-up, due to various reasons:

- A Central Plan would need massive funding and we doubt that it will be economically viable solution unless a mandatory consumption would be required by regulation. This would significantly increase costs for investors as most investors would still

require lowest latency data as well.

- A Central Plan would be redundant to already existing solutions.
- A Central Plan would additionally raise costs for contributing trading venues and APAs. However, APAs might not be required, as IFs could directly report to the monopoly as described in Option A.
- RMs could be in the position to provide such a service as well, like in the US. Again we doubt that this will be a commercial viable solution.
- A Central Plan would be a single point of failure.

Question 55:

As already pointed out earlier, DBG is not in favor of a Centralised Consolidated Tape, as it will be a significant investment and an additional cost burden to the industry. This additional burden is not necessary, as already today data consolidation is provided by market data vendors and independent software providers according to the requirements of the market. The real problems associated with the acceptance of a complete Consolidated Tape / Tape of Record (including OTC data) cannot be healed by a Central Consolidator but only through the submission of timely (at level playing field with all data sources, be it OTC or RMs, MTFs) and especially accurate and reliable OTC data.

DBG is convinced that a Central Consolidator cannot operate in a self-sustainable fashion unless a mandatory consumption like in the US (where it has been introduced in order to fulfill RegNMS requirements) is being introduced. This will add additional significant ongoing costs to the industry, besides significant set-up costs.

In case the EU Commission would decide to go forward with such a plan, DBG prefers that data is submitted to the Central Consolidator at commercial terms reflecting the significant intrinsic value due to the reasons outlined already before.

DBG strongly rejects the second alternative mentioned by the EU Commission, where trading venues and APAs would make their data available to the single entity for free, and then participate in the revenues generated a) due to the facts outlined above, and b) due to potential unintended consequences on the market microstructure within the EU.

Regarding the latter (b), we would like to point the EU Commission's focus again to the Caglio/Mayhew study (one of many in fact) which observes and interprets the effects an allocation formula used for allocating market data revenues has on the trading process per se. It provides evidence that market participants in the US developed mechanisms to exploit the respective formulas resulting in significantly changed trading behavior. It finds that revenue incentives set by such formulas have a decisive effect on trade execution patterns (e.g. tape shredding). They state as well that they have not studied the consequences such a behaviour might have on the execution quality for investors but that they would welcome further studies in this area. We would therefore urge the EU Commission that before taking

serious steps into the direction of setting up a single entity in order to consolidate data in combination with a revenue sharing model analogous to that in the US to consider:

- a) the significant differences between MiFID and RegNMS,
- b) the additional cost burdens for consolidating data at a Central Consolidator as well as in the currently existing set-ups,
- c) and especially the potential negative consequences this could have regarding market microstructure as well as best execution this could have.

Question 56:

DBG would deem it necessary that at least the following criteria would be met in case EU Commission would like to proceed with Option A or B:

- single entity should be of European origin as it would potentially have access to sensible data,
- it should be neutral, due to the same reason as described above,
- it should be able to operate in real-time in case the EU Commission would deem a real-time Tape of Record for post-trade data necessary, if a delayed tape would be considered this would not be necessary though,
- significant experience, expertise and reputation regarding data processing would of course be indispensable,
- market data fees should be left to competition,
- it should be self-sustainable in order to not require public or private funding.

Question 57:

Regarding Option C DBG is very positive that once all necessary prerequisites for a substantial improvement of OTC data have been finalised, existing consolidators will be able to improve already existing solutions in a meaningful way. DBG together with FESE is involved in the development of an industry led solution. Further improvements to already existing solutions (apart from OTC data which requires regulatory actions as described above), like a Tape of Record for post-trade data at lower costs and free of data fees for public view after 15 minutes will most likely be achieved end of Q1 2011 already. Further Consolidated Tape offerings, based as well on various FESE Member contributions, are scheduled for Q3 2011. We stand ready for further detailed discussions with the EU Commission regarding this matter.

Regarding the introduction of a Centralised Consolidator DBG does not want to speculate because this will be dependent on numerous unknown variables. However, we would like to point out that the set-up of a Consolidated Tape in the US took up to 8 years and still raises

questions on how to settle conflicts and adapt it to current standards of technical evolution. We assume that such a time frame should be considered for the EU as well, especially taking into account the immense necessary technical adaptations for the industry overall.

Question 58:

DBG is not in favour of a consolidated tape for pre-trade data, especially not via a Centralised Consolidator as this will raise overall market data costs, without providing any benefit and would introduce additional latency in a latency critical environment.

Best execution according to MiFID does not require mandatory consumption of all pre-trade data as not all liquidity pools which provide data are directly accessible. As long as data is made available market data vendors can consolidate it in a customised and flexible way, as market data vendors and front-end system providers already do. Traders usually use a front-end system like Fidessa's which offers consolidated views of all markets the customer trades and has access to liquidity. Usually, RMs trading members receive the market data for free in order to be able to trade.

In case EU Commission would consider a Central Consolidated pre-trade tape, the location of this consolidator would be a political question. Due to latency issues trading venues close to the consolidator would be in a favourable position compared to those further away.

Again, gaming for data revenues would likely play a significant role as well, with negative side effects for market microstructure.

Question 59:

No comment.

## 5 Measures specific to commodity derivative markets

### *5.1 Specific requirements for commodity derivative exchanges*

Question 60: What is your opinion about requiring organised trading venues which admit commodity derivatives to trading to make available to regulators (in detail) and the public (in aggregate) harmonised position information by type of regulated entity? Please explain the reasons for your views.

Question 61: What is your opinion about the categorisation of traders by type of regulated entity? Could the different categories of traders be defined in another way (e.g. by trading activity based on the definition of hedge accounting under international accounting standards, other)? Please explain the reasons for your views.

Question 62: What is your opinion about extending the disclosure of harmonised position information by type of regulated entity to all OTC commodity derivatives? Please explain the reasons for your views.

Question 63: What is your opinion about requiring organised commodity derivative trading venues to design contracts in a way that ensures convergence between futures and spot prices? What is your opinion about other possible requirements for such venues, including introducing limits to how much prices can vary in given timeframe? Please explain the reasons for your views.

Question 60-61:

A categorisation by regulated entity (exchange member) is in our opinion not efficient. It does not reveal the nature of the end-customer's business as exchange members are often acting as intermediaries (agency business).

We could envision a categorisation of end customers based on a comparable structure used by the CFTC (adapted to European market needs).

Question 62:

We support the extension of reporting obligations to the OTC market, in order to reach a comparable level of transparency among the entire derivatives markets and also a fair level playing field between exchange traded and OTC traded business in order to avoid regulatory arbitrage.

Question 63:

The convergence between derivatives and spot market prices is ensured by either physical delivery or cash settlement against the spot market index on maturity of the contract. In this context organised trading venues are a reliable source to provide the according market price transparency in both cash and derivatives markets.

We do not support introducing limits to price movements in a given time frame, as this significantly limits the hedging possibilities of commercial users. This will lead to a decoupling of the derivatives and cash/physical market.

#### *5.2 MiFID exemptions for commodity firms*

Question 64: What is your opinion on the three suggested modifications to the exemptions? Please explain the reasons for your views.

No comment.

*5.3 Definition of other derivative financial instrument*

Question 65: What is your opinion about removing the criterion of whether the contract is cleared by a CCP or subject to margining from the definition of other derivative financial instrument in the framework directive and implementing regulation? Please explain the reasons for your views.

No comment.

*5.4 Emission allowances*

Question 66: What is your opinion on whether to classify emission allowances as financial instruments? Please explain the reasons for your views.

Question 66:

Emission allowances have aspects of both administrative grants or licences and of private property, and different conclusions as to their legal classification have been reached in a number of Member States. This obviously raises concerns in cross-border transactions or custody chains. Emission allowances are generally not considered as financial instruments for the purpose of MiFID. It is worth noting that derivatives on emission allowances are within the scope of MiFID. The reality of carbon trading is that emission allowances are traded as financial instruments on and off exchange, e.g. emission allowance distribution in the context of EU auctioning. The integrity of the European carbon market would benefit from a legislative recognition of the fact that emission allowances are handled as financial instruments and that carbon market participants can expect their holding to be afforded the same level of organisational safeguards and investor protection on their emission allowances transactions and holding as they enjoy on their emission derivatives. Further to these benefits, classifying emission allowances as financial instruments would lead to avoiding issues like tax fraud (tax carousel) and VAT differences between Member States. Also the uncertainty of regulation of emission allowances still leads to missed opportunities in the EU ETS as potential traders, especially from the US, are not sure if they are legally enabled to trade emissions allowances. Finally, as a financial instrument emissions allowances would be regulated under the financial directive for collaterals, which would enable clearing houses to offer using emission rights as collateral.

## 6 Transaction reporting

### *6.1 Scope*

Question 67: What is your opinion on the extension of the transaction reporting regime to transactions in all financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

Question 68: What is your opinion on the extension of the transaction reporting regime to transactions in all financial instruments the value of which correlates with the value of financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

Question 69: What is your opinion on the extension of the transaction reporting regime to transactions in depositary receipts that are related to financial instruments that are admitted to trading or traded on the above platforms and systems? Please explain the reasons for your views.

Question 70: What is your opinion on the extension of the transaction reporting regime to transactions in all commodity derivatives? Please explain the reasons for your views.

Question 71: Do you consider that the extension of transaction reporting to all correlated instruments and to all commodity derivatives captures all relevant OTC trading? Please explain the reasons for your views.

Question 72: What is your opinion of an obligation for regulated markets, MTFs and other alternative trading venues to report the transactions of non-authorized members or participants under MiFID? Please explain the reasons for your views.

Question 73: What is your opinion on the introduction of an obligation to store order data? Please explain the reasons for your views.

Question 74: What is your opinion on requiring greater harmonisation of the storage of order data? Please explain the reasons for your views.

Question 67 - 70:

DBG welcomes the extension to the financial instruments described. This increases stability and integrity of financial markets.

Question 71:

No comment.

Question 72:

We expect that it would be welcomed by our trading members which are not authorised as investment firms if we offer to report for them transactions to the supervisors in a cost efficient way.

Question 73:

DBG supports the obligation to store order data.

Question 74:

DBG sees no need for a greater harmonisation of the storage of order data. The data is available and can be prepared on demand. A harmonisation would be costly and it should be considered that a request is not very frequent.

#### *6.2 Content of reporting*

Question 75: What is your opinion on the suggested specification of what constitutes a transaction for reporting purposes? Please explain the reasons for your views.

Question 76: How do you consider that the use of client identifiers may best be further harmonised? Please explain the reasons for your views.

Question 77: What is your opinion on the introduction of an obligation to transmit required details of orders when not subject to a reporting obligation? Please explain the reasons for your views.

Question 78: What is your opinion on the introduction of a separate trader ID? Please explain the reasons for your views.



Question 79: What is your opinion on introducing implementing acts on a common European transaction reporting format and content? Please explain the reasons for your views.

Question 75:

DBG supports the suggested specification.

Question 76-79:

No comment.

### *6.3 Reporting channels*

Question 80: What is your opinion on the possibility of transaction reporting directly to a reporting mechanism at EU level? Please explain the reasons for your views.

Question 81: What is your opinion on clarifying that third parties reporting on behalf of investment firms need to be approved by the supervisor as an Approved Reporting Mechanism? Please explain the reasons for your views.

Question 82: What is your opinion on waiving the MiFID reporting obligation on an investment firm which has already reported an OTC contract to a trade repository or competent authority under EMIR? Please explain the reasons for your views.

Question 83: What is your opinion on requiring trade repositories under EMIR to be approved as an ARM under MiFID? Please explain the reasons for your views.

Question 80:

No comment.

Question 81:

DBG supports introduction of an "Approved Reporting Mechanism" (ARM) for transaction reporting purposes. This ensures quality and stability of the reported data.

Question 82:

To avoid duplicate reporting DBG welcomes the proposal on waiving the MiFID reporting obligation for an IF which has already reported an OTC contract to a trade repository or

competent authority under EMIR. However, companies subject to reporting requirements which prefer to report via the established channels according to article 25 MiFID ought to be left this option.

Question 83:

Ideally the approval as ARM is granted based on the application requirements set for becoming a trade repository under EMIR. A separate and from a requirement perspective different application lacks efficiency. Should a separate application and approval process remain necessary, we believe that any endorsement of such a requirement for trade repositories should be linked to a requirement for IFs to include transaction reporting in these market infrastructures. The reason for this is that we believe it will be a natural trend for trade repositories to serve both position and transaction reporting obligations for instruments requiring position reporting under EMIR.

7 Investor protection and provision of investment services

*7.1 Scope of the Directive*

*7.1.1 Optional exemptions for some investment service providers*

Question 84: What is your opinion about limiting the optional exemptions under Article 3 of MiFID? What is your opinion about obliging Member States to apply to the exempted entities requirements analogous to the MiFID conduct of business rules for the provision of investment advice and fit and proper criteria? Please explain the reasons for your views.

No comment.

*7.1.2 Application of MiFID to structured deposits*

Question 85: What is your opinion on extending MiFID to cover the sale of structured deposits by credit institutions? Do you consider that other categories of products could be covered? Please explain the reasons for your views.

No comment.

*7.1.3 Direct sales by investment firms and credit institutions*

Question 86: What is your opinion about applying MiFID rules to credit institutions and investment firms when, in the issuance phase, they sell financial instruments they issue, even when advice is not provided? What is your opinion on whether, to this end, the definition of the service of execution of orders would include direct sales of financial instruments by banks and investment firms? Please explain the reasons for your views.

Question 86:

We welcome the proposed approach. We believe that the definition 'Execution Service' should apply to all trading forms including all following duties such as best execution or information search for advisory purposes. Otherwise, the legal consequence becomes immaterial.

*7.2 Conduct of business obligations*

*7.2.1 "Execution only" services*

Question 87: What is your opinion of the suggested modifications of certain categories of instruments (notably shares, money market instruments, bonds and securitised debt), in the context of so-called "execution only" services? Please explain the reasons for your views.

Question 88: What is your opinion about the exclusion of the provision of "execution-only" services when the ancillary service of granting credits or loans to the client (Annex I, section B (2) of MiFID) is also provided? Please explain the reasons for your views.

Question 89: Do you consider that all or some UCITS could be excluded from the list of non-complex financial instruments? In the case of a partial exclusion of certain UCITS, what criteria could be adopted to identify more complex UCITS within the overall population of UCITS? Please explain the reasons for your views.

Question 90: Do you consider that, in the light of the intrinsic complexity of investment services, the "execution-only" regime should be abolished? Please explain the reasons for your views.

Question 87:

We welcome the described attempts. In addition we would further recommend to refine the 'execution only' application on product type modifications, as proposed in Option A, but also include the type of trading venue the products are traded on. Accordingly, 'execution only' should be granted for certain products only, when the execution occurs on transparent and orderly RMs or MTFs.

Question 89:

We believe that the UCITS Directive ensures a high level of transparency by requiring

prospectuses to include all information necessary for investors to be able to make an informed judgement of the investment, and, in particular, of the risks attached thereto. This is also apparent by the requirement that prospectuses shall include, independent of the instruments invested in a clear and easily understandable explanation of the fund's risk profile.

In addition, investment companies are required to publish key investor information documents that shall include appropriate information about the essential characteristics of the UCITS concerned with the objective to enable investors to understand the nature and the risks of the investment product and, consequently, to take investment decisions on an informed basis.

Therefore, we believe that investors are very well-positioned to take self-directed, educated investment decisions in UCITS instruments and hence there is no need to exclude all or some UCITS from the list of non-complex financial products. If some portfolio management techniques are considered complex, adequate transparency requirements could, for example, be established via a corresponding amendment of the UCITS Directive itself.

Question 90:

We do not conceive abolishment of the "execution only" service as the right way forward as it would patronise well-informed, self-directed investors. Clients - including retail clients - who engage in equity or bonds trading usually are familiar with the specificities of the respective asset class.

#### *7.2.2 Investment advice*

Question 91: What is your opinion of the suggestion that intermediaries providing investment advice should: 1) inform the client, prior to the provision of the service, about the basis on which advice is provided; 2) in the case of advice based on a fair analysis of the market, consider a sufficiently large number of financial instruments from different providers? Please explain the reasons for your views.

Question 92: What is your opinion about obliging intermediaries to provide advice to specify in writing to the client the underlying reasons for the advice provided, including the explanation on how the advice meets the client's profile? Please explain the reasons for your views.

Question 93: What is your opinion about obliging intermediaries to inform the clients about any relevant modifications in the situation of the financial instruments pertaining to them? Please explain the reasons for your views.

Question 94: What is your opinion about introducing an obligation for intermediaries providing advice to keep the situation of clients and financial instruments under review in order to confirm the continued suitability of the investments? Do you consider this obligation be limited to longer term investments? Do you consider this could be applied to all situations where advice has been provided or could the intermediary maintain the possibility not to offer this additional service? Please explain the reasons for your views.

We welcome the described attempts.

### *7.2.3. Informing clients on complex products*

Question 95: What is your opinion about obliging intermediaries to provide clients, prior to the transaction, with a risk/gain and valuation profile of the instrument in different market conditions? Please explain the reasons for your views.

Question 96: What is your opinion about obliging intermediaries also to provide clients with independent quarterly valuations of such complex products? In that case, what criteria should be adopted to ensure the independence and the integrity of the valuations?

Question 97: What is your opinion about obliging intermediaries also to provide clients with quarterly reporting on the evolution of the underlying assets of structured finance products? Please explain the reasons for your views.

Question 98: What is your opinion about introducing an obligation to inform clients about any material modification in the situation of the financial instruments held by firms on their behalf? Please explain the reasons for your views

Question 99: What is your opinion about applying the information and reporting requirements concerning complex products and material modifications in the situation of financial instruments also to the relationship with eligible counterparties? Please explain the reasons for your views.

Question 100: What is your opinion of, in the case of products adopting ethical or socially oriented investment criteria, obliging investment firms to inform clients thereof?

We would recommend daily reporting for retail investors. At least a valuation on a daily basis should be possible. For professional clients we do understand that sometimes very complex

structures are necessary with very long maturities, however, weekly, or at least monthly reports should be available as with regards to valuation.

However, additional information requirements for IFs may increase their cost base and could possibly translate in higher transaction costs for investors. A way forward to improve the information situation for the investor may be that the issuer of a financial instrument is obliged to create such profiles within the Key Investor Information (KII) document which can then be provided by the intermediary.

#### *7.2.4 Inducements*

Question 101: What is your opinion of the removal of the possibility to provide a summary disclosure concerning inducements? Please explain the reasons for your views.

Question 102: Do you consider that additional ex-post disclosure of inducements could be required when ex-ante disclosure has been limited to information methods of calculating inducements? Please explain the reasons for your views.

Question 103: What is your opinion about banning inducements in the case of portfolio management and in the case of advice provided on an independent basis due to the specific nature of these services? Alternatively, what is your opinion about banning them in the case of all investment services? Please explain the reasons for your views.

No comment.

#### *7.2.5 Provision of services to non-retail clients and classification of clients*

Question 104: What is your opinion about retaining the current client classification regime in its general approach involving three categories of clients (eligible counterparties, professional and retail clients)? Please explain the reasons for your views.

Question 105: What are your suggestions for modification in the following areas:

- a) Introduce, for eligible counterparties, the high level principle to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading when informing the client;
- b) Introduce some limitations in the eligible counterparties regime. Limitations may refer to entities covered (such as non-financial undertakings and/or certain financial institutions) or financial instruments traded (such as asset backed securities and non-standard OTC derivatives); and/or
- c) Clarify the list of eligible counterparties and professional clients per se in order

to exclude local public authorities/municipalities? Please explain the reasons for your views.

Question 106: Do you consider that the current presumption covering the professional clients' knowledge and experience, for the purpose of the appropriateness and suitability test, could be retained? Please explain the reasons for your views.

We welcome the described attempts.

#### *7.2.6 Liability of firms providing services*

Question 107: What is your opinion on introducing a principle of civil liability applicable to investment firms? Please explain the reasons for your views.

Question 108: What is your opinion of the following list of areas to be covered: information and reporting to clients, suitability and appropriateness test, best execution, client order handling? Please explain the reasons for your views.

No comment.

#### *7.2.7 Execution quality and best execution*

Question 109: What is your opinion about requesting execution venues to publish data on execution quality concerning financial instruments they trade? What kind of information would be useful for firms executing client orders in order to facilitate compliance with best execution obligations? Please explain the reasons for your views.

Question 110: What is your opinion of the requirements concerning the content of execution policies and usability of information given to clients should be strengthened? Please explain the reasons for your views.

Question 109:

Although it is fair to require the production of data on execution quality, it must be noted that the availability and quality of pre- and post-trade data is essential to assess the quality of execution of various execution venues. While pre- and post-trade transparency of RMs and MTFs is of high quality, availability and quality of OTC transparency is still rather weak.

Publishing execution quality data of OTC (internalisation, BCN) might blur the picture (usually, the IF offers price improvement to its client, compared to the public markets).

Therefore, best execution reports must provide a clear distinction between the publicly accessible markets and markets that are available to the clients of an IF.

The usage of pre- and post-trade data provided by execution venues usually includes efforts on the customer side, like storing and aggregating the data in order to come up with respective best execution analytics. For the verification of consistent best execution of orders only a few market operators provide special best execution reports containing major key figures. The lack of data makes it hard to compare execution quality.

Establishing comparable reports of all available execution venues – on and off-exchange – with comparable and concretely defined key figures would be an efficient step to facilitate verification and back-testing of best execution principles.

Since Deutsche Börse AG established in 2007 Best Execution Reports with proven key figures, these may be used as a blueprint. They contain key figures with regard to liquidity: spreads and other implicit cost figures as well as qualitative key figures. These figures can be translated easily into best execution criteria.

Question 110:

In general, best execution policies should be monitored more closely in order to determine whether they are really MiFID-compliant. Phrasings like "Order execution on a domestic exchange" in countries with several exchanges make it impossible for investors to determine on which venue his order will be executed. Moreover, there are strong reasons to believe that the interest of the investor is not always the most important factor during the process of drafting and reviewing best execution policies. As well, criteria and criteria weightings for best execution policies could be defined more precisely to reduce room for interpretation.

#### *7.2.8 Dealing on own account and execution of client orders*

Question 111: What is your opinion on modifying the exemption regime in order to clarify that firms dealing on own account with clients are fully subject to MiFID requirements? Please explain the reasons for your views.

Question 112: What is your opinion on treating matched principal trades both as execution of client orders and as dealing on own account? Do you agree that this should not affect the treatment of such trading under the Capital Adequacy Directive? How should such trading be treated for the purposes of the systematic internaliser regime? Please explain the reasons for your views.

Question 111:

We generally welcome the proposal as this ensures that all firms executing client orders are now captured under MiFID.



Question 112:

We welcome the proposal of treating matched principle trades both as execution of client orders and as dealing on own account. We also agree that this should not affect the treatment of such trading under the Capital Adequacy Directive.

*7.3 Authorisation and organisational requirements*

*7.3.1 Fit and proper criteria*

Question 113: What is your opinion on possible MiFID modifications leading to the further strengthening of the fit and proper criteria, the role of directors and the role of supervisors? Please explain the reasons for your view.

No comment.

*7.3.2 Compliance, risk management and internal audit functions*

Question 114: What is your opinion on possible MiFID modifications leading to the reinforcing of the requirements attached to the compliance, the risk management and the internal audit function? Please explain the reasons for your view.

No comment.

*7.3.3 Organisational requirements for the launch of products, operations and services*

Question 115: Do you consider that organisational requirements in the implementing directive could be further detailed in order to specifically cover and address the launch of new products, operations and services? Please explain the reasons for your views.

Question 116: Do you consider that this would imply modifying the general organisational requirements, the duties of the compliance function, the management of risks, the role of board members, the reporting to senior management and possibly to supervisors?

No comment.

*7.3.4 Specific organisational requirements for the provision of the service of portfolio management*

Question 117: Do you consider that specific organisational requirements could address the provision of the service of portfolio management? Please explain the reasons for your views.

No comment.

*7.3.5 Conflicts of interest and sales process*

Question 118: Do you consider that implementing measures are required for a more uniform application of the principles on conflicts of interest?

No comment.

*7.3.6 Segregation of client assets*

Question 119: What is your opinion of the prohibition of title transfer collateral arrangements involving retail clients' assets? Please explain the reasons for your views.

Question 120: What is your opinion about Member States be granted the option to extend the prohibition above to the relationship between investment firms and their non retail clients? Please explain the reasons for your views.

Question 121: Do you consider that specific requirements could be introduced to protect retail clients in the case of securities financing transaction involving their financial instruments? Please explain the reasons for your views.

Question 122: Do you consider that information requirements concerning the use of client financial instruments could be extended to any category of clients?

Question 123: What is your opinion about the need to specify due diligence obligations in the choice of entities for the deposit of client funds?

Question 119:

Title transfer collateral arrangements should be allowed in each case. Such collateral arrangements should be allowed when dealing with retail clients as well as with professional clients.

Background of the described ownership disputes in single Member States were not title transfer collateral arrangements as such, but poor operational standards of the involved firms and a lack of sufficient legal documentation. These mistakes caused problems not only in connection with title transfer collateral arrangements, but in other business areas as well.

Traditional and developed legal means of security provision should not be prohibited in

general. The described ownership disputes can be prevented more efficiently by enhanced operational standards. Retail clients could be informed and protected by way of mandatory specific written warnings.

To allow a fair competition within Europe Member States should not be granted options to incorporate different rules. Otherwise a regulatory arbitrage would be possible as many firms offer their products in more than one Member State. In addition there is the concern that an option would further contribute to non-standardised procedures per jurisdiction.

In important business areas pledge constructs are the only alternative to title transfer collateral arrangements. National pledging laws across Europe are not harmonised. Therefore a pledge construct is difficult to be used for across Europe business solution. Title transfer collateral arrangements seem to be currently the only stable way of protected systems to offer European standard solutions.

Question 120:

Member States should not be granted the option to incorporate different rules. For explanation see explanation to question 119.

Question 122:

Information requirements could be extended to any category of clients. Such information would increase the transparency and give clients all necessary information to make reasonable decisions. In comparison with prohibitions information requirements are the preferred way forward.

Question 123:

Members of Eurex Clearing AG hold their deposits of collateral (securities, cash or other) in depository entities at recognized collateral locations (CSDs, central banks, payment banks). Eurex Clearing appreciates due diligence obligations applicable to collateral depository entities, e.g. (International) Central Security Depositories or Global Custodians, to generally ensure security and quality, especially in terms of client asset protection, and in the context of T2S.

### *7.3.7 Underwriting and placing*

<p>Question 124: Do you consider that some aspects of the provision of underwriting and placing could be specified in the implementing legislation? Do you consider that the areas mentioned above (conflicts of interest, general organisational requirements, requirements concerning the allotment process) are the appropriate ones? Please explain the reasons for your views.</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

No comment.

---

8 Further convergence of the regulatory framework and of supervisory practices

*8.1 Options and discretions*

*8.1.1 Tied agents*

Question 125: What is your opinion of Member States retaining the option not to allow the use of tied agents?

Question 126: What is your opinion in relation to the prohibition for tied agents to handle clients' assets?

Question 127: What is your opinion of the suggested clarifications and improvements of the requirements concerning the provision of services in other Member States through tied agents?

Question 128: Do you consider that the tied agents regime require any major regulatory modifications? Please explain the reasons for your views.

No comment.

*8.1.2 Telephone and electronic recording*

Question 129: Do you consider that a common regulatory framework for telephone and electronic recording, which should comply with EU data protection legal provisions, could be introduced at EU level? Please explain the reasons for your views.

Question 130: If it is introduced do you consider that it could cover at least the services of reception and transmission of orders, execution of orders and dealing on own account? Please explain the reasons for your views.

Question 131: Do you consider that the obligation could apply to all forms of telephone conversation and electronic communications? Please explain the reasons for your views.

Question 132: Do you consider that the relevant records could be kept at least for 3 years? Please explain the reasons for your views.

No comment.

*8.1.3 Additional requirements on investment firms in exceptional cases*

Question 133: What is your opinion on the abolition of Article 4 of the MiFID Implementing Directive and the introduction of an on-going obligation for Member States to communicate to the Commission any addition or modification in national provisions in the field covered by MiFID? Please explain the reasons for your views.

No comment.

*8.2. Supervisory powers and sanctions*

*8.2.2. Sanctions (definition, amounts, publication)*

Question 134: Do you consider that appropriate administrative measures should have at least the effect of putting an end to a breach of the provisions of the national measures implementing MiFID and/or eliminating its effect? How the deterrent effect of administrative fines and periodic penalty payments can be enhanced? Please explain the reasons for your views.

Question 135: What is your opinion on the deterrent effects of effective, proportionate and dissuasive criminal sanctions for the most serious infringements? Please explain the reasons for your views.

Question 136: What are the benefits of the possible introduction of whistleblowing programs? Please explain the reasons for your views.

Question 137: Do you think that the competent authorities should be obliged to disclose to the public every measure or sanction that would be imposed for infringement of the provisions adopted in the implementation of MiFID? Please explain the reasons for your views.

No comment.

*8.3 Access of third country firms to EU markets*

Question 138: In your opinion, is it necessary to introduce a third country regime in MiFID based on the principle of exemptive relief for equivalent jurisdictions? What is your opinion on the suggested equivalence mechanism?

Question 139: In your opinion, which conditions and parameters in terms of applicable regulation in a third country should inform the assessment of equivalence? Please be specific.

Question 140: What is your opinion concerning the access to investment firms and market operators only for non-retail business?

Question 141:

Question 138:

We support the idea of introducing a third country regime in MiFID based on the principle of exemptive relief for equivalent jurisdictions as this would provide for regulatory certainty and avoid loopholes for regulatory arbitrage. We also think that such a regime should be closely aligned with principles of third country access to EU capital markets in the context of EMIR.

## 9 Reinforcement of supervisory powers in key areas

### *9.1 Ban on specific activities, products or practices*

Question 142: What is your opinion on the possibility to ban products, practices or operations that raise significant investor protection concerns, generate market disorder or create serious systemic risk? Please explain the reasons for your views.

Question 143: For example, could trading in OTC derivatives which competent authorities determine should be cleared on systemic risk grounds, but which no CCP offers to clear, be banned pending a CCP offering clearing in the instrument? Please explain the reasons for your views.

Question 144: Are there other specific products which could face greater regulatory scrutiny? Please explain the reasons for your views.

We presume banning products, practices or operations that raise significant investor protection concerns or create serious systemic risk might be necessary. Especially in the light of the last crises, the example of Collateralised Debt Obligations (CDOs)–tranches has exactly shown the need for such a provision as those products generated systemic risk. By heavily

relying on assumptions, correlation and other parameters were modelled in a way that they would justify the market prices rather than the risk associated with those products. The consequence was the creation of a bubble, with tremendous effects on the global economy. The risks associated with the whole construction was dense and obscure for the broad market.

As proposed in the MiFID review consultation paper, a ban should be carefully taken into consideration. Potentially, introducing measures to increase transparency would support the market and would not suspend the trading in the product.

Question 143:

Once OTC derivatives reach a certain volume threshold (and therefore also with a potential to systematically impact the entire market), and no CCP is willing to accept the risk of those products, that would be a clear indication for a regulator to investigate and potentially ban or restrain such a product. Accordingly, we welcome the proposal.

#### *9.2 Stronger oversight of positions in derivatives, including commodity derivatives*

Question 145: If regulators are given harmonised and effective powers to intervene during the life of any derivative contract in the MiFID framework directive do you consider that they could be given the powers to adopt hard position limits for some or all types of derivative contracts whether they are traded on exchange or OTC? Please explain the reasons for your views.

Question 146: What is your opinion of using position limits as an efficient tool for some or all types of derivative contracts in view of any or all of the following objectives: (i) to combat market manipulation; (ii) to reduce systemic risk; (iii) to prevent disorderly markets and developments detrimental to investors; (iv) to safeguard the stability and delivery and settlement arrangements of physical commodity markets. Please explain the reasons for your views.

Question 147: Are there some types of derivatives or market conditions which are more prone to market manipulation and/or disorderly markets? If yes, please justify and provide evidence to support your argument.

Question 148: How could the above position limits be applied by regulators:

- a) To certain categories of market participants (e.g. some or all types of financial participants or investment vehicles)?

- b) To some types of activities (e.g. hedging versus non-hedging)?
- c) To the aggregate open interest/notional amount of a market?

No comment.

Final Remarks

We appreciate the opportunity to have provided our views to this very important consultation and we stand at your disposal for further discussions.

Dr. Stefan Mai	Sabina Salkic
Head of Section Market Policy and European Public Affairs	Market Policy and European Public Affairs
Deutsche Börse AG	Deutsche Börse AG
<a href="mailto:Stefan.Mai@deutsche-boerse.com">Stefan.Mai@deutsche-boerse.com</a>	<a href="mailto:Sabina.Salkic@deutsche-boerse.com">Sabina.Salkic@deutsche-boerse.com</a>
+ + 49 (0) 69- 211 - 157 49	