



European Securities and  
Markets Authority

# Reply form for the ESMA MiFID II/MiFIR Discussion Paper





European Securities and  
Markets Authority

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Date: 22 May 2014



## Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA MiFID II/MiFIR Discussion Paper, published on the ESMA website ([here](#)).

### **Instructions**

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

- i. use this form and send your responses in Word format;
- ii. do not remove the tags of type <ESMA\_QUESTION\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

- if they respond to the question stated;
- contain a clear rationale, including on any related costs and benefits; and
- describe any alternatives that ESMA should consider

Given the breadth of issues covered, ESMA expects and encourages respondents to specially answer those questions relevant to their business, interest and experience.

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Responses must reach us by **1 August 2014**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input/Consultations’.

### **Publication of responses**

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.**

Note also that a confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

### **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Disclaimer’.



## 1. Overview

## 2. Investor protection

### 2.1. Authorisation of investment firms

**Q1: Do you agree that the existing work/standards set out in points Error! Reference source not found. and Error! Reference source not found. Error! Reference source not found. provide a valid basis on which to develop implementing measures in respect of the authorisation of investment firms?**

<ESMA\_QUESTION\_1>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_1>

**Q2: What areas of these existing standards do you consider require adjustment, and in what way should they be adjusted?**

<ESMA\_QUESTION\_2>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_2>

**Q3: Do you consider that the list of information set out in point Error! Reference source not found. should be provided to Home State NCAs? If not, what other information should ESMA consider?**

<ESMA\_QUESTION\_3>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_3>

**Q4: Are there any other elements which may help to assess whether the main activities of an applicant investment firm is not in the territory where the application is made?**

<ESMA\_QUESTION\_4>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_4>

**Q5: How much would one-off costs incurred during the authorisation process increase, compared to current practices, in order to meet the requirements suggested in this section?**

<ESMA\_QUESTION\_5>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_5>

**Q6: Are there any particular items of information suggested above that would take significant time or cost to produce and if so, do you have alternative suggestions that would reduce the time/cost for firms yet provide the same assurance to NCAs?**

<ESMA\_QUESTION\_6>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_6>



## **2.2. Freedom to provide investment services and activities / Establishment of a branch**

**Q7: Do you agree that development of technical standards required under Articles 34 and 35 of MiFID II should be based on the existing standards and forms contained in the CESR Protocol on MiFID Notifications (CESR/07-317c)? If not, what are the specific areas in the existing CESR standards requiring review and adjustment?**

<ESMA\_QUESTION\_7>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_7>

## **2.3. Best execution - publication of data related to the quality of execution by trading venues for each financial instrument traded**

**Q8: Do you agree data should be provided by all the execution venues as set out in footnote 24? If not, please state why not.**

<ESMA\_QUESTION\_8>  
Deutsche Börse Group only partially agrees with ESMA's suggestions within footnote 24. We agree with ESMA that regulated markets, MTFs, systematic internalisers within the EU and within third countries should provide for the requested information. Market makers acting under the rules of a regulated market, however, should not fall under the execution quality reporting obligation. Regulated markets publish execution quality reporting for all market making conducted under their exchange rules.  
<ESMA\_QUESTION\_8>

**Q9: If you think that the different types of venues should not publish exactly the same data, please specify how the data should be adapted in each case, and the reasons for each adjustment.**

<ESMA\_QUESTION\_9>  
Deutsche Börse Group believes that where the same form of trading is executed, all types of venues should publish the same data. However we are concerned about the comparability of data and believe it is important to therefore set standards in this regard e.g. order book trading cannot be directly compared with non-automated negotiated deals, which we believe should not be included in terms of speed of execution or likelihood of execution as they are manual trades. Therefore, metrics should be applied according to market models, as well according to asset class specifics.

For the purposes of standardisation and comparability, it is appropriate for different venues to produce broadly the same information. It should be noted however that the specific relevant data will differ according to the type of instrument and type of trading. Given the relatively limited value of this data for non-equity products, and the wide range of types of products and trading types, we do not believe that it is appropriate at this stage to aim for a centralised and standardised data and report definition across all trading venues and instruments.

<ESMA\_QUESTION\_9>



**Q10: Should the data publication obligation apply to every financial instrument traded on the execution venue? Alternatively, should there be a minimum threshold of activity and, if so, how should it be defined (for example, frequency of trades, number of trades, turnover etc.)?**

<ESMA\_QUESTION\_10>

Deutsche Börse Group believes that data publication obligations should apply to all instruments traded on the execution venue. In addition, Deutsche Börse Group believes that publication should be effected on an instrument by instrument basis.

There should be a minimum threshold, which should be based on the proportion of trading activity represented by the instrument on the trading venue. For example, a trading venue should report data for each instrument representing greater than 0.5 - 1% of trading activity.

<ESMA\_QUESTION\_10>

**Q11: How often should all execution data be published by trading venues? Is the minimum requirement specified in MiFID II sufficient, or should this frequency be increased? Is it reasonable or beneficial to require publication on a monthly basis and is it possible to reliably estimate the marginal cost of increased frequency?**

<ESMA\_QUESTION\_11>

Deutsche Börse Group believes that annual, or at most quarterly, reporting is sufficient, since it is unlikely that the data will vary substantially over time.

<ESMA\_QUESTION\_11>

**Q12: Please provide an estimate of the cost of the necessary IT development for the production and the publication of such reporting.**

<ESMA\_QUESTION\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_12>

**Q13: Do you agree that trading venues should publish the data relating to the quality of execution with regard to a uniform reference period, with a minimum of specific reporting details and in a compatible format of data based on a homogeneous calculation method? If not, please state why.**

<ESMA\_QUESTION\_13>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_13>

**Q14: Is the volume of orders received and executed a good indicator for investment firms to compare execution venues? Would the VBBO in a single stock published at the same time also be a good indicator by facilitating the creation of a periodic European price benchmark? Are there other indicators to be considered?**

<ESMA\_QUESTION\_14>

Deutsche Börse Group considers that both alternatives taken as single measures are just an indication. In microstructures that offer continuous matching in a central limit order book a volume-weighted spread liquidity measure should be employed that measures the order-size-dependent liquidity costs of a round-trip (standard volumes). This should be combined (validated) with the volume of orders executed at these conditions, respective averages could be calculated.

<ESMA\_QUESTION\_14>

**Q15: The venue execution quality reporting obligation is intended to apply to all MiFID instruments. Is this feasible and what differences in approach will be required for different instrument types?**

<ESMA\_QUESTION\_15>

Yes, in Deutsche Börse Group's view the impact will be higher when different instruments are traded with different market microstructures.

<ESMA\_QUESTION\_15>

**Q16: Do you consider that this requirement will generate any additional cost? If yes, could you specify in which areas and provide an estimation of these costs?**

<ESMA\_QUESTION\_16>

Yes, Deutsche Börse Group considers that this requirement will generate additional costs reflecting different microstructures.

<ESMA\_QUESTION\_16>

**Q17: If available liquidity and execution quality are a function of order size, is it appropriate to split trades into ranges so that they are comparable? How should they be defined (for example, as a percentage of the average trading size of the financial instrument on the execution venue; fixed ranges by volume or value; or in another manner)?**

<ESMA\_QUESTION\_17>

Deutsche Börse Group considers that they should be defined as fixed ranges as multiple of the standard order size and of course limit order, marketable limit orders and market orders.

<ESMA\_QUESTION\_17>

**Q18: Do you agree that a benchmark price is needed to evaluate execution quality? Would a depth-weighted benchmark that relates in size to the executed order be appropriate or, if not, could you provide alternative suggestions together with justification?**

<ESMA\_QUESTION\_18>

Usually, an investment firm executes an order across those venues defined within their execution policies. Depending on the order instructions of their customers, how best execution needs to be established varies. Not always is the price (including respective external and internal costs) the main focus of the customer. Therefore, reflecting the execution quality is required according to customer agreements. Deutsche Börse Group considers that the above suggestion seems not to be sufficient in this light.

<ESMA\_QUESTION\_18>

**Q19: What kind of cost should be reported (e.g. regulatory levies, taxes, mandatory clearing fees) and how should this data be presented to enable recipients to assess the total consideration of transactions?**

<ESMA\_QUESTION\_19>

Deutsche Börse Group considers that EU best execution requirements apply to a mix of:

- Price,
- overall cost,
- speed of execution and
- likelihood of execution

Best price would also always contain explicit costs, like execution and settlement fees. Furthermore, it contains implicit costs due to the spread quoted. So price quality does not need an external benchmark, but can be calculated according to implicit and explicit costs taking into account that the price is rather volatile (as indicated in ESMA's considerations as regards a VBBO) and varies a lot, whereas quality of quotes (average spread) as well as explicit costs are usually more stable indications.

- execution costs



- explicit costs,
- implicit costs and
- total costs

Explicit costs are already made available within price lists, implicit costs metrics could be provided by the trading venue.

<ESMA\_QUESTION\_19>

**Q20: What would be the most appropriate way to measure the likelihood of execution in order to get useful data? Would it be a good indicator for likelihood of execution to measure the percentage of orders not executed at the end of the applicable trading period (for example the end of each trading day)? Should the modification of an order be taken into consideration?**

<ESMA\_QUESTION\_20>

Deutsche Börse Group considers the following details as relevant when considering the likelihood of execution:

- availability of quotes
- average order size,
- liquidity measure,
- full execution quota,
- number of executions and
- average executed order value

<ESMA\_QUESTION\_20>

**Q21: What would be the most appropriate way to measure the speed of execution in order to get useful data?**

<ESMA\_QUESTION\_21>

Deutsche Börse Group believes that the most important way to measure the speed of execution would be time stamp of entering order into the venues' system minus time stamp of execution.

<ESMA\_QUESTION\_21>

**Q22: Are there other criteria (qualitative or quantitative) that are particularly relevant (e.g. market structures providing for a guarantee of settlement of the trades vs OTC deals; robustness of the market infrastructure due to the existence of circuit breakers)?**

<ESMA\_QUESTION\_22>

In Deutsche Börse Group's view, other criteria would be: type of offer (indicative/firm), mistrade probability (cancellation of execution), degree of counterparty risk, circuit breakers, time frame since last execution on this venue.

<ESMA\_QUESTION\_22>

**Q23: Is data on orders cancelled useful and if so, on what time basis should it be computed (e.g. within a single trading day)?**

<ESMA\_QUESTION\_23>

No, Deutsche Börse Group considers it not useful. We believe that data on orders cancelled could be misleading as orders can be cancelled for a wide range of reasons and it is not necessarily an indication of poor execution quality on a venue.

<ESMA\_QUESTION\_23>

**Q24: Are there any adjustments that need to be made to the above execution quality metrics to accommodate different market microstructures?**





<ESMA\_QUESTION\_24>

Yes, Deutsche Börse Group considers that adjustments need to be made depending on the asset classes and venues in consideration.

<ESMA\_QUESTION\_24>

**Q25: What additional measures are required to define or capture the above data and relevant additional information (e.g. depth weighted spreads, book depths, or others) How should the data be presented: on an average basis such as daily, weekly or monthly for each financial instrument (or on more than one basis)? Do you think that the metrics captured in the Annex to this chapter are relevant to European markets trading in the full range of MiFID instruments? What alternative could you propose?**

<ESMA\_QUESTION\_25>

In Deutsche Börse Group's view, additional measures should be depth/volume weighted spreads. It should be presented on a monthly basis.

We also refer to the response on question 14 which is included hereafter. Deutsche Börse Group considers that both alternatives taken as single measures are just an indication. In microstructures that offer continuous matching in a central limit order book a volume-weighted spread liquidity measure should be employed that measures the order-size-dependent liquidity costs of a roundtrip (standard volumes). This should be combined (validated) with the volume of orders executed at these conditions, respective averages could be calculated.

<ESMA\_QUESTION\_25>

**Q26: Please provide an estimate of the costs of production and publication of all of the above data and, the IT developments required? How could these costs be minimised?**

<ESMA\_QUESTION\_26>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_26>

**Q27: Would increasing the frequency of venue execution quality data generate additional costs for you? Would these costs arise as a result of an increase of the frequency of the review, or because this review will require additional training for your staff in order to be able to analyse and take into account these data? Please provide an estimate of these costs.**

<ESMA\_QUESTION\_27>

Deutsche Börse Group assumes that a more frequent data request would increase costs of course. Training should not be the issue, rather the time consumed for preparing, executing and submitting the data requests would need to be considered.

<ESMA\_QUESTION\_27>

**Q28: Do you agree that investment firms should take the publication of the data envisaged in this Discussion Paper into consideration, in order to determine whether they represent a "material change"?**

<ESMA\_QUESTION\_28>

Deutsche Börse Group agrees that investment firms should take the publication of the data envisaged in the Discussion Paper into consideration when defining and revising their best execution policies.

<ESMA\_QUESTION\_28>

## **2.4. Best execution - publication of data by investment firms**



**Q29: Do you agree that in order to allow clients to evaluate the quality of a firm's execution, any proposed standards should oblige the firm to give an appropriate picture of the venues and the different ways they execute an order?**

<ESMA\_QUESTION\_29>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_29>

**Q30: Do you agree that when systematic internalisers, market makers, OTC negotiation or dealing on own account represent one of the five most important ways for the firm to execute clients' orders, they should be incorporated in the reporting obligations under Article 27(6) of MiFID II?**

<ESMA\_QUESTION\_30>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_30>

**Q31: Do you think that the data provided should be different in cases when the firm directly executes the orders to when the firm transmits the orders to a third-party for execution? If yes, please indicate what the differences should be, and explain why.**

<ESMA\_QUESTION\_31>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_31>

**Q32: Do you consider that information on both directed and non-directed orders is useful? Should the data be aggregated so that both types of order are shown together or separated? Should there be a similar approach to disclosure of information on market orders versus limit orders? Do you think that another categorisation of client orders could be useful?**

<ESMA\_QUESTION\_32>  
Yes, Deutsche Börse Group considers that information on both directed and non-directed orders is useful. No data should be separated. The approach to disclosure of information on market orders versus limit orders should be similar. There is no need for another categorisation of client orders.  
<ESMA\_QUESTION\_32>

**Q33: Do you think that the reporting data should separate retail clients from other types of clients? Do you think that this data should be publicly disclosed or only provided to the NCA (e.g. when requested to assess whether there is unfair discrimination between retail clients and other categories)? Is there a more useful way to categorise clients for these purposes?**

<ESMA\_QUESTION\_33>  
No, in Deutsche Börse Group's view reporting data should not separate retail clients from other types of clients. Data should be separated only by volume and execution venue/form.  
<ESMA\_QUESTION\_33>

**Q34: Do you agree that the investment firms should publish the data relating to their execution of orders with regard to a uniform reference period, with a minimum of specific reporting details and in a compatible format of data based on a homogeneous calculation method? If not, please state why.**

<ESMA\_QUESTION\_34>  
Yes, Deutsche Börse Group agrees.  
<ESMA\_QUESTION\_34>



**Q35: What would be an acceptable delay for publication to provide the clients with useful data?**

<ESMA\_QUESTION\_35>

Deutsche Börse Group considers three days an acceptable delay.

<ESMA\_QUESTION\_35>

**Q36: What format should the report take? Should there be any difference depending on the nature of the execution venues (MTF, OTF, Regulated Market, systematic internalisers, own account) and, if so, could you specify the precise data required for each type?**

<ESMA\_QUESTION\_36>

No, in Deutsche Börse Group's view there should be no difference depending on the nature of the execution venues.

<ESMA\_QUESTION\_36>

**Q37: Do you agree that it is proportionate to require investment firms to publish on an annual basis a summary based on their internal execution quality monitoring of their top five execution venues in terms of trading volumes, subject to certain minimum standards?**

<ESMA\_QUESTION\_37>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_37>

**Q38: Do you have views on how 'directed orders' covered by client specific instructions should be captured in the information on execution quality? Is it possible to disaggregate reporting for directed orders from those for which there are no specific instructions and, if so, what the most relevant criteria would be for this exercise?**

<ESMA\_QUESTION\_38>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_38>

**Q39: Minimum standards to ensure that the summary of the firm's internal execution quality monitoring of their top five execution venues (in terms of trading volumes) is comprehensive and contains sufficient analysis or context to allow it to be understood by market participants shall include the factors set out at paragraph 29. Do you agree with this analysis or are there any other relevant factors that should be considered as minimum standards for reporting?**

<ESMA\_QUESTION\_39>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_39>

**Q40: Can you recommend an alternative approach to the provision of information on execution quality obtained by investment firms, which is consistent with Article 27(6) of MiFID II and with ESMA's overall objective to ensure proportionate implementation?**

<ESMA\_QUESTION\_40>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_40>

**Q41: Do you agree that ESMA should try to limit the number of definitions of classes of instruments and provide a classification that can be used for the different reports established by MiFID and MiFIR?**

<ESMA\_QUESTION\_41>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_41>

**Q42: If this approach is not viable how should these classes be defined? What elements should be taken into consideration for that classification? Please explain the rationale of your classification. Is there a need to delay the publication of the reporting for particular class of financial instruments? If the schedule has to be defined, what timeframe would be the most relevant?**

<ESMA\_QUESTION\_42>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_42>

**Q43: Is any additional data required (for instance, on number of trades or total value of orders routed)?**

<ESMA\_QUESTION\_43>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_43>

**Q44: What information on conflicts of interest would be appropriate (inducements, capital links, payment for order flow, etc.)?**

<ESMA\_QUESTION\_44>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_44>



### 3. Transparency

#### 3.1. Pre-trade transparency - Equities

**Q45: What in your view would be the minimum content of information that would make an indication of interest actionable? Please provide arguments with your answer.**

<ESMA\_QUESTION\_45>

Deutsche Börse Group agrees with ESMA that an actionable IOI is a message that contains a binding expression to trade from one counterparty to another that initially sought indications of interest to trade. The minimum content of information that makes an indication of interest actionable should be ISIN, buy or sell and number of shares.

<ESMA\_QUESTION\_45>

**Q46: Do you agree with ESMA's opinion that Table 1 of Annex II of Regulation 1287/2006 is still valid for shares traded on regulated markets and MTFs? Please provide reasons for your answer.**

<ESMA\_QUESTION\_46>

Yes, Deutsche Börse Group still agrees with this table.

<ESMA\_QUESTION\_46>

**Q47: Do you agree with ESMA's view that Table 1 of Annex II of Regulation 1287/2006 is appropriate for equity-like instruments traded on regulated markets and MTFs? Are there other trading systems ESMA should take into account for these instruments? Please provide reasons for your answer.**

<ESMA\_QUESTION\_47>

Deutsche Börse Group agrees with ESMA's view that the existing table is also appropriate for equity-like instruments traded on regulated markets and MTFs.

<ESMA\_QUESTION\_47>

**Q48: Do you agree with ESMA's view that ADT remains a valid measure for determining when an order is large in scale compared to normal market size? If not, what other measure would you suggest as a substitute or complement to the ADT? Please provide reasons for your answer.**

<ESMA\_QUESTION\_48>

Deutsche Börse Group believes ADT still remains a valid measure for determining when an order is large in scale compared to normal market size and thereby should not be changed, because it has proved to work in the past, is correlated with liquidity and easy to calculate.

<ESMA\_QUESTION\_48>

**Q49: Do you agree that ADT should be used as an indicator also for the MiFIR equity-like products (depository receipts, ETFs and certificates)? Please provide reasons for your answers.**

<ESMA\_QUESTION\_49>

While Deutsche Börse Group supports ESMA's view that ADT remains a valid measure for determining large in scale orders for shares, we believe that ETFs may warrant a different approach. Since ETFs benefit from multiple layers of liquidity due to their inherent creation/redemption mechanism, ADT as an indicator may not accurately reflect their true level of liquidity and may therefore result in large-in-scale thresh-

olds being set at levels too low. The creation/redemption mechanism enables market makers to access the primary market to create new fund shares whenever required by market demand. Correspondingly, the liquidity of an ETF in terms of bid offer spreads and order book depth is to a large extent determined by the liquidity of its underlying market. Hence, two ETFs tracking the same underlying market may show similar levels of liquidity despite significant differences in their ADT. In such cases, the difference in ADT between both products may not be related to their liquidity, but to individual product characteristics such as replication methodology, tracking performance or costs. As a consequence, ESMA could consider using an alternative liquidity proxy for ETFs that is more closely aligned with the liquidity of their underlying market. Alternatively, if ADT is preferred for the sake of simplicity, LIS thresholds for ETFs should be set at significantly higher levels compared to shares to account for the additional layer of liquidity available to ETFs. Please see also our answer to question 54 below.

<ESMA\_QUESTION\_49>

**Q50: Do you think there is merit in creating a new ADT class of 0 to €100,000 with an adequate new large in scale threshold and a new ADT class of €100,000 to €500,000? At what level should the thresholds be set? Please provide reasons for your answer.**

<ESMA\_QUESTION\_50>

Deutsche Börse Group supports ESMA's proposal, i.e. introducing a new ADT class of 100,000 EUR with a new large in scale threshold and a new ADT class of 100,000 to 500,000 EUR respectively in order to facilitate supporting liquidity and transparency for SMEs.

<ESMA\_QUESTION\_50>

**Q51: Do you think there is merit in creating new ADT classes of €1 to €5m and €5 to €25m? At what level should the thresholds be set? Please provide reasons for your answer.**

<ESMA\_QUESTION\_51>

Deutsche Börse Group agrees with ESMA's proposal of introducing new ADT classes of 1 million EUR to 5 million EUR and 5 million EUR to 25 million EUR. The suggested thresholds of 200,000 EUR and 300,000 EUR are fine, they should not be decreased.

<ESMA\_QUESTION\_51>

**Q52: Do you think there is merit in creating a new ADT class for 'super-liquid' shares with an ADT in excess of €100m and a new class of €50m to €100m? At what level should the thresholds be set?**

<ESMA\_QUESTION\_52>

Deutsche Börse Group supports ESMA's proposal of introducing new ADT classes for super-liquid shares and a new class of 50 million EUR to 100 million EUR. The suggested thresholds of 650,000 EUR and 500,000 EUR respectively support and improve the quality of the price discovery process as the order book becomes more liquid. Ultimately it will reduce implicit transaction costs that are beneficial for all trading participants. We therefore agree with the suggested thresholds. They should not be lower.

<ESMA\_QUESTION\_52>

**Q53: What comments do you have in respect of the new large in scale transparency thresholds for shares proposed by ESMA?**

<ESMA\_QUESTION\_53>

As outlined in questions 50 to 52 Deutsche Börse Group supports ESMA's proposal of adding new ADT classes for super-liquid shares and also to facilitate liquidity in SMEs by adding lower ADT classes. The suggested thresholds for existing and new classes are calibrated adequately and should not be lowered.

<ESMA\_QUESTION\_53>

**Q54: Do you agree with the ADT ranges selected? Do you agree with the large in scale thresholds set for each ADT class? Which is your preferred option? Would you calibrate the ADT classes and related large in scale thresholds differently? Please provide reasons for your answers, including describing your own role in the market (e.g. market-maker, issuer etc).**

<ESMA\_QUESTION\_54>

For the same reasons as stated in our answer to question 49, Deutsche Börse Group is of the opinion that ADT as an indicator may not accurately reflect the true liquidity of an ETF. However, if ESMA would like to implement an ADT-based approach for the sake of simplicity, we would recommend defining LIS (large-in-scale)-thresholds for ETFs at levels significantly higher than those proposed under Scenario A and B. Higher LIS-thresholds would be more representative of ETFs as financial instruments that track an underlying market and therefore benefit from an external price source for valuation in addition to their limit order book. Furthermore, market makers in ETFs are able to access additional liquidity through the creation/redemption mechanism inherent to ETFs. As a consequence, ETFs are less prone to an adverse market impact of large orders than equities. Taking these points into consideration while at the same time aiming at a further reduction of complexity, we would even recommend that ESMA considers deviating from the ADT class-based LIS-threshold model employed for equities by applying a single LIS-threshold to ETFs in general. Based on our experience as operator of Xetra, Europe's largest trading platform for ETFs, we would consider a single LIS-threshold of 5,000,000 EUR an appropriate measure to ensure the desired degree of pre-trade transparency on the one hand while still protecting large orders from an adverse market impact on the other, irrespective of an ETF's ADT.

<ESMA\_QUESTION\_54>

**Q55: Which is your preferred scenario? Would you calibrate the ADT classes differently? Please provide reasons for your answers.**

<ESMA\_QUESTION\_55>

Deutsche Börse Group prefers scenario 2 as it the less complex approach.

<ESMA\_QUESTION\_55>

**Q56: Do you agree that the same ADT classes should be used for both pre-trade and post-trade transparency? Please provide reasons for your answers.**

<ESMA\_QUESTION\_56>

Yes, Deutsche Börse Group agrees for reason of simplification.

<ESMA\_QUESTION\_56>

**Q57: How would you calibrate the large in scale thresholds for each ADT class for pre- and post-trade transparency? Please provide reasons for your answers.**

<ESMA\_QUESTION\_57>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_57>

**Q58: Do you agree with ESMA's view that the large in scale thresholds (i.e. the minimum size of orders qualifying as large in scale and the ADT classes) should be subject to a review no earlier than two years after MiFIR and Level 2 apply in practice?**

<ESMA\_QUESTION\_58>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_58>

**Q59: How frequently do you think the calculation per financial instrument should be performed to determine within which large in scale class it falls? Which combination of frequency and period would you recommend?**



<ESMA\_QUESTION\_59>

Deutsche Börse Group agrees with ESMA that an annual calculation for the calculation per financial instrument makes sense to determine within which ADT class it falls. Any shorter period of time is not useful as results may be subject to spurious change in liquidity due to seasonality.

<ESMA\_QUESTION\_59>

**Q60: Do you agree with ESMA's opinion that stubs should become transparent once they are a certain percentage below the large in scale thresholds? If yes, at what percentage would you set the transparency threshold for large in scale stubs? Please provide reasons to support your answer.**

<ESMA\_QUESTION\_60>

Deutsche Börse Group believes that transparency regime should apply to the stub once its size drops below the large in scale threshold, but does not agree with the fact that only a certain percentage below the large-in-scale thresholds should be displayed. In our opinion all stubs should be displayed because displaying stub orders positively contributes to the price discovery process. Ultimately more displayed liquidity will reduce implicit transaction cost (i.e. spreads will narrow) and thereby benefiting investors. Besides if stub orders remain protected or at least a percentage of them, this could be a way to misuse the large-in-scale waiver by adding volume to an order in order to reach the large-in-scale threshold.

<ESMA\_QUESTION\_60>

**Q61: Do you agree with ESMA's view that the most relevant market in terms of liquidity should be the trading venue with the highest turnover in the relevant financial instrument? Do you agree with an annual review of the most relevant market in terms of liquidity? Please give reasons for your answer.**

<ESMA\_QUESTION\_61>

Deutsche Börse Group does not agree that the most relevant market in terms of liquidity should be restricted to the trading venue with the highest turnover in the relevant financial instrument. The proposed criteria is not a precise measure of the overall level of liquidity of a market as turnover does not take into account the actual level of price formation that takes place on a venue. Therefore, this approach should take into account further criteria such as spreads, market depth and number of trades.

<ESMA\_QUESTION\_61>

**Q62: Do you agree with ESMA's view on the different ways the member or participant of a trading venue can execute a negotiated trade? Please give reasons for your answer.**

<ESMA\_QUESTION\_62>

Deutsche Börse Group thinks that when executed under the rules of a trading venue, then only members should be allowed to trade against each other, otherwise (e.g. directly trading against clients) the rules cannot be enforced!

<ESMA\_QUESTION\_62>

**Q63: Do you agree that the proposed list of transactions are subject to conditions other than the current market price and do not contribute to the price formation process? Do you think that there are other transactions which are subject to conditions other than the current market price that should be added to the list? Please provide reasons for your answer.**

<ESMA\_QUESTION\_63>

Yes, Deutsche Börse Group agrees. No other transactions should be added to the list.

### **Deutsche Börse Group's view on the Double Volume Cap process**

The discussion paper mentions at this point also the double volume cap mechanism, however Deutsche Börse Group noted that there was no question. Therefore we would like to provide our view on the double volume cap process here:



1. Art. 5 (4) MiFIR requires ESMA to publish within 5 working days of the end of each calendar month an aggregated total volume traded on EU trading venues within the last 12 months (statistical data), per instrument. Art. 5 (9) MiFIR requires ESMA to develop the method by which it collates, calculates and publishes the statistical transaction data in question in order to provide an:
  - a) accurate measurement of the total volume of EU trading per financial instrument, and the
  - b) percentages of trading that use those waivers across the EU (8% CAP) as well as per trading venue (4% CAP).
2. Accordingly, Art. 5 (7) MiFIR requires trading venues to enable the identification of all trades which have taken place on its venue under the reference price waiver (assumingly by applying the respective trade flag) and ensure that it does not exceed the permitted percentage of trading allowed under those waivers referenced to the statistical data published by ESMA once per month.
3. Consequently, Art. 5 (2) MiFIR requires, once trading in a financial instrument has exceeded the limits of 4% per trading venue, respectively 8% in total based on the data published by ESMA, the relevant Competent Authorities shall suspend the use of these waivers for a period of six months.

#### Data required for ESMA and trading venues

To meet the data collection requirements of Art. 5 MiFIR ESMA has several options to obtain the necessary data:

- a) Sourcing trading venue's data from a CTP or market data vendors like Thomson Reuters, Bloomberg, or others in real-time, or more conveniently, directly asking market data vendors for monthly aggregated data per instrument (which would be resource saving for ESMA), or
- b) Requiring trading venues directly to deliver the monthly aggregated volume data per instrument data to ESMA in a pre-defined format (again resource-saving for ESMA).

To achieve a convenient solution which meets the requirements of Art. 5 MiFIR Deutsche Börse Group recommends the following data gathering process:

Trading venues should submit relevant data to Competent Authorities (or ESMA) within two working days at the end of each calendar month in an aggregated form defined by ESMA according to Art. 5 (7) MiFIR.

Already today, trading venues deliver statistical data to Competent Authorities for the calculation and publication of the standard market sizes per instrument within the EU (standard market sizes as defined within MiFID I, and displayed on the ESMA webpage). The above approach therefore represents a practicable solution that neatly fits into already existing practices.

<ESMA\_QUESTION\_63>

**Q64: Do you agree that these are the two main groups of order management facilities ESMA should focus on or are there others?**

<ESMA\_QUESTION\_64>

Deutsche Börse Group agrees that the iceberg order is the major group of order management facilities ESMA shall focus on. Stop orders shall be excluded as they are not in the order book until the triggering event, hence they are inactive orders until then.

<ESMA\_QUESTION\_64>



**Q65: Do you agree with ESMA’s general assessment on how to design future implementing measures for the order management facility waiver? Please provide reasons for your answer.**

<ESMA\_QUESTION\_65>

Yes Deutsche Börse Group agrees to ESMA’s reasoning outlined in paragraph 98.

<ESMA\_QUESTION\_65>

**Q66: Are there other factors that need to be taken into consideration for equity-like instruments? Please provide reasons for your answer.**

<ESMA\_QUESTION\_66>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_66>

**Q67: Do you agree that the minimum size for a stop order should be set at the minimum tradable quantity of shares in the relevant trading venue? Please provide reasons for your answer.**

<ESMA\_QUESTION\_67>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_67>

**Q68: Are there additional factors that need to be taken into consideration for equity-like instruments?**

<ESMA\_QUESTION\_68>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_68>

**Q69: Which minimum overall sizes for iceberg orders are currently employed in the markets you use and how are those minimum sizes determined?**

<ESMA\_QUESTION\_69>

For trading in equities and equity like instruments such as ETFs and ETPs on our Xetra market the following sizes apply:

- Minimum peak size: 100 units
- Minimum overall volume: 1000 units
- Condition: The peak size has to be at least 5 % of the overall volume.

The parameters were developed under prevailing market conditions in 2008. Back then, an extensive analysis of our peer group parameters showed that we have to align our iceberg parameters with the European market, which at that time had considerably lower parameters than our market, in order to stay competitive.

<ESMA\_QUESTION\_69>

**Q70: Which minimum sizes and which methods for determining them should be prescribed via implementing measures? To what level of detail should such an implementing measure go and what should be left to the discretion of the individual market to attain an appropriate level of harmonisation?**

<ESMA\_QUESTION\_70>

Deutsche Börse Group is of the opinion that minimum sizes shall be applicable to all European trading venues, which shall be a multiple of the Standard Market Size but below the LIS (large-in-scale).

<ESMA\_QUESTION\_70>



**Q71: Which methods for determining the individual peak sizes of iceberg orders are currently employed in European markets?**

<ESMA\_QUESTION\_71>

Deutsche Börse Group determined the minimum peak size as 1/10 of the minimum overall volume and at least 5% of the overall volume.

<ESMA\_QUESTION\_71>

**Q72: Which methods for determining peaks should be prescribed by implementing measures, for example, should these be purely abstract criteria or a measure expressed in percentages against the overall size of the iceberg order? To what level of details should such an implementing measure go and what should be left to the discretion of the individual market to attain an appropriate level of harmonisation?**

<ESMA\_QUESTION\_72>

In Deutsche Börse Group's view, ESMA shall introduce minimum sizes but the determination, i.e. if absolute values and/or percentage amounts shall be in the responsibility of the individual venue.

<ESMA\_QUESTION\_72>

**Q73: Are there additional factors that need to be taken into consideration for equity-like instruments?**

<ESMA\_QUESTION\_73>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_73>

### **3.2. Post-trade transparency - Equities**

**Q74: Do you agree that the content of the information currently required under existing MiFID is still valid for shares and applicable to equity-like instruments? Please provide reasons for your answer.**

<ESMA\_QUESTION\_74>

Yes, Deutsche Börse Group believes it is still applicable for shares and ETFs.

<ESMA\_QUESTION\_74>

**Q75: Do you think that any new field(s) should be considered? If yes, which other information should be disclosed?**

<ESMA\_QUESTION\_75>

Yes, Deutsche Börse Group believes that selected new fields as described by ESMA should be considered. In addition to this information, we would recommend including those harmonised trade flags specifying the way a trade was carried out:

1. if the transaction, even though it was carried out on a regulated platform, was executed with no pre-trade transparency and under which pre-trade transparency waiver (i.e. the trade flags proposed by ESMA in Table 7 – also please see our response to question 77 below);
2. when the transaction was executed on an OTC basis, specify which transaction category it belongs, i.e. 'non-addressable liquidity' or a transaction 'determined by factors other than the current market valuation of the financial instrument'.

<ESMA\_QUESTION\_75>



**Q76: Do you think that the current post-trade regime should be retained or that the identity of the systematic internaliser is relevant information which should be published? Please provide reasons for your response, distinguishing between liquid shares and illiquid shares.**

<ESMA\_QUESTION\_76>

Deutsche Börse Group supports the publication of the systematic internaliser (SI) indicators in order to enhance transparency and in order to allow SI customers to clearly identify the execution of their trade order in a consolidated post-trade tape.

<ESMA\_QUESTION\_76>

**Q77: Do you agree with the proposed list of identifiers? Please provide reasons for your answer.**

<ESMA\_QUESTION\_77>

Deutsche Börse Group generally agrees with ESMA but we would like to suggest that the list of trade flag identifiers identified by ESMA (and elaborating from the CESR trade flags) is recommended to follow MMT without making compulsory the entire set of MMT flags under all circumstances. This would ensure the use of an existing and efficient industry standard for those flags which are necessary under regulation (which is usually spanning several years in a fixed format) and the need of keeping a standard up to actual market requirements (on a shorter timeline).

The new proposals submitted by ESMA are add-on to the original CESR/10-882 recommendations. In essence they are not conflicting with the original CESR/10-882 recommendations. The additional new tags ['L', 'R', 'NTV', 'NTI', 'NTC'] suggested by ESMA (see point 3.2/page 80 of ESMA Discussion Paper) are all linked to orders executed under one of the 4 pre-trade transparency waiver regimes (Large in Scale, Reference Price, Negotiated Trade, Order Management Facility).

**Potential issues with data hierarchy and duplicative nature of certain flags ['R', 'NTV', 'NTI', 'NTC' flags]**

The scope of other new flags suggested by ESMA lies outside of lit book operations. There are potential issues of operational nature.

- We understand that the reference price waiver applies mainly to dark trading venues. ESMA suggests a new tag 'R', while CESR recommended a tag 'D' in CESR/10-882. There is duplication and potentially some confusion. 'D' flag is already available in MMT v2.0 Transaction Category field (see MMT data hierarchy level 3/ Transaction Type).
- 'NTV', 'NTC' and 'NTI' are designed to make off book trade reporting more transparent. There is an operational issue with these 3 codes as CESR/10-882 always applied 1 digit code values. MMT data model currently relies accordingly on 1 digit code values for each MMT field. Enlarging the existing MMT 'Negotiated Transaction Indicator' field (see MMT data hierarchy level 3/transaction Type) to new values is not an issue as long as code values remain 1 digit long. Enlarging MMT field to 3 positions means all industry players having already implemented MMT logic should modify the structure of their feeds/display products. This cost/benefits ratio would be negative.
- Some of the properties 'NTV', 'NTC' and 'NTI' already can be covered by existing MMT flags. The MMT project should be consulted in order to determine suitable modelling from an MMT point of view.

<ESMA\_QUESTION\_77>

**Q78: Do you think that specific flags for equity-like instruments should be envisaged? Please justify your answer.**

<ESMA\_QUESTION\_78>

Deutsche Börse Group would agree that specific flags for equity-like instruments could be envisaged but we would suggest that this follows the MMT rationale in order to compare market models across Europe.



Furthermore, in this context Deutsche Börse Group would like to draw ESMA's attention to the potentially different categorizations of instruments into the class 'equity-like'. After the introduction of MiFID I it quickly became obvious that the terminology of 'shares' was ambiguous, leading to problems as regards OTC post-trade transparency. In fact, in order to apply the new transparency standards of MiFID II across Europe in a harmonized way, there should be an unambiguous definition of the securities categorized as equity-like.

<ESMA\_QUESTION\_78>

**Q79: Do you support the proposal to introduce a flag for trades that benefit from the large in scale deferral? Please provide reasons for your response.**

<ESMA\_QUESTION\_79>

Yes, Deutsche Börse Group supports the proposal to introduce a flag for trades that benefit from the large in scale deferral, because as pointed out by ESMA it would facilitate identification of such trades.

<ESMA\_QUESTION\_79>

**Q80: What is your view on requiring post-trade reports to identify the market mechanism, the trading mode and the publication mode in addition to the flags for the different types of transactions proposed in the table above? Please provide reasons for your answer.**

<ESMA\_QUESTION\_80>

Deutsche Börse Group suggests to only code the really necessary flags into regulation. MMT is a new standard based on a flexible model, evolving with market needs which might require more flexibility initially. Therefore, the pre-defined set of flags should become regulated. Market participants would always be able to freely implement more than required by regulation.

<ESMA\_QUESTION\_80>

**Q81: For which transactions captured by Article 20(1) would you consider specifying additional flags as foreseen by Article 20(3)(b) as useful?**

<ESMA\_QUESTION\_81>

Deutsche Börse Group generally agrees with ESMA but we would like to suggest that the list of trade flag identifiers identified by ESMA (and elaborating from the CESR trade flags) is recommended to follow MMT without making compulsory the entire set of MMT flags under all circumstances. This would ensure the use of an existing and efficient industry standard for those flags which are necessary under regulation (which is usually spanning several years in a fixed format) and the need of keeping a standard up to actual market requirements (on a shorter timeline).

The new proposals submitted by ESMA are add-on to the original CESR/10-882 recommendations. In essence they are not conflicting with the original CESR/10-882 recommendations. The additional new tags ['L', 'R', 'NTV', 'NTI', 'NTC'] suggested by ESMA (see point 3.2/page 80 of ESMA Discussion Paper) are all linked to orders executed under one of the 4 pre-trade transparency waiver regimes (Large in Scale, Reference Price, Negotiated Trade, Order Management Facility).

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3/transaction Type) to new values is not an issue as long as code values remain 1 digit long. Enlarging MMT field to 3 positions means all industry players having already implemented MMT logic should modify the structure of their feeds/display products. This cost/benefits ratio would be negative.

- Some of the properties 'NTV', 'NTC' and 'NTI' already can be covered by existing MMT flags. The MMT project should be consulted in order to determine suitable modelling from an MMT point of view.

<ESMA\_QUESTION\_81>

**Q82: Do you agree with the definition of “normal trading hours” given above?**

<ESMA\_QUESTION\_82>

No, Deutsche Börse Group believes for OTC, normal trading hours should be considered as the hours applicable to the market where the concerned instrument is primarily admitted to. We suggest applying the primary market rather than the most relevant market in terms of liquidity as the first one is overall more consistent and causes less uncertainty while the latter one might change over time. Besides in general the primary market is the most liquid market for a financial instrument.

<ESMA\_QUESTION\_82>

**Q83: Do you agree with the proposed shortening of the maximum permissible delay to 1 minute? Do you see any reason to have a different maximum permissible deferral of publication for any equity-like instrument? Please provide reasons for your answer**

<ESMA\_QUESTION\_83>

In general, Deutsche Börse Group agrees to a reduction of delay time. But we would suggest to not determine a defined timespan. This will most likely be exploited by brokers setting the reporting's to exact that time. We have seen these developments with MiFID I, where the '3-minutes-delay' was intentionally exploited by brokers by setting artificial, internal delays into their IT infrastructure. The original intention of the delay was, however, to give brokers sufficient time to manually enter the tickets into their internal processing systems. Therefore, we suggest replacing the '1 minute' with the term 'as soon as technically possible', which would outlaw the intentional implementation of delays into the broker's IT systems.

<ESMA\_QUESTION\_83>

**Q84: Should the deferred publication regime be subject to the condition that the transaction is between an investment firm dealing on own account and a client of the firm? Please provide reasons for your answer.**

<ESMA\_QUESTION\_84>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_84>

**Q85: Which of the two options do you prefer in relation to the deferral periods for large in scale transactions (or do you prefer another option that has not been proposed)? Please provide reasons for your answer**

<ESMA\_QUESTION\_85>

Deutsche Börse Group prefers to extend the number of ADT classes (from 5 to 8) and to reduce timing for publication, but recommend to change EOD to publication until a) end of trading day if trade occurs prior to 15:00 or b) prior to the opening of trading on the next trading day if trade occurs after 15:00 (and not until noon on the next trading day).

<ESMA\_QUESTION\_85>

**Q86: Do you see merit in adding more ADT classes and adjusting the large in scale thresholds as proposed? Please provide alternatives if you disagree with ESMA's proposal**

<ESMA\_QUESTION\_86>



Yes, Deutsche Börse Group agrees to adding more ADT classes and adjusting the large in scale thresholds as proposed. This would only be consistent with our answers given with respect to questions 50 to 53 on the pre-trade transparency regime.

<ESMA\_QUESTION\_86>

**Q87: Do you consider the thresholds proposed as appropriate for SME shares?**

<ESMA\_QUESTION\_87>

Yes, Deutsche Börse Group believes the thresholds proposed are appropriate for SME shares.

<ESMA\_QUESTION\_87>

**Q88: How frequently should the large in scale table be reviewed? Please provide reasons for your answer**

<ESMA\_QUESTION\_88>

In Deutsche Börse Group's view the large in scale thresholds should be subject to a review no earlier than two years after MiFIR and Level 2 apply in practice. Please also refer to Deutsche Börse Group's response to question 58.

<ESMA\_QUESTION\_88>

**Q89: Do you have concerns regarding deferred publication occurring at the end of the trading day, during the closing auction period?**

<ESMA\_QUESTION\_89>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_89>

**Q90: Do you agree with ESMA's preliminary view of applying the same ADT classes to the pre-trade and post-trade transparency regimes for ETFs? Please provide reasons for your answer.**

<ESMA\_QUESTION\_90>

For the same reasons as stated in our answers to question 49 and question 54, Deutsche Börse Group is of the opinion that ADT as an indicator may not accurately reflect the true liquidity of an ETF. While we fully support ESMA's view to set higher thresholds for the purpose of post-trade transparency than proposed for pre-trade transparency, we would recommend that ESMA reconsiders applying ADT class-based thresholds to the post-trade transparency regime for ETFs. As outlined in our answer to question 54, we believe that ETFs are in general less prone to an adverse market impact of large orders than equities. Hence, it is our view that a post-trade transparency regime for ETFs would not necessitate a relatively complex ADT class-based threshold model as proposed for equities. We would rather opt for a less complex model by proposing deferred publication thresholds and delays based on single threshold levels applicable to all ETFs. Following this line of thought, we would consider deferred publication thresholds of 10,000,000 EUR and 50,000,000 EUR as appropriate to ensure adequate post-trade transparency for ETFs in general. To be more precise, we would propose to require imminent publication of all transactions with a size below 10,000,000 EUR, permit a 60 minutes delay for transactions with a size between 10,000,000 EUR and 50,000,000 EUR and permit an EOD publication for transactions with a size of 50,000,000 EUR and above. From our perspective, these levels would be in line with ESMA's objective to provide meaningful post-trade transparency for ETFs by accounting for the instrument's specific market characteristics and, at the same time, reducing complexity for market participants.

<ESMA\_QUESTION\_90>

### **3.3. Systematic Internaliser Regime - Equities**



**Q91: Do you support maintaining the existing definition of quotes reflecting prevailing market conditions? Please provide reasons for your answer.**

<ESMA\_QUESTION\_91>

Yes, Deutsche Börse Group agrees with ESMA's proposal. Deutsche Börse Group is of the opinion that SIs should not be able to provide price improvement, as this would create a loophole to undermine MiFID's strict transparency requirements. In terms of keeping a level playing field, this would mean that trading venues could create order types that allow price improvement – this is not possible due to strict MiFID requirements towards pre-trade transparency.

<ESMA\_QUESTION\_91>

**Q92: Do you support maintaining the existing table for the calculation of the standard market size? If not, which of the above options do you believe provides the best trade-off between maintaining a sufficient level of transparency and ensuring that obligations for systematic internalisers remain reasonable and proportionate? Please provide reasons for your answer.**

<ESMA\_QUESTION\_92>

Deutsche Börse Group supports Option B which suggests grouping the two smallest classes into a single class for shares with an AVT between zero and 20,000 EUR and setting a SMS of 10,000 EUR for the benefit of transparency, but suggest keeping the SMS at a level of 15,000 EUR. Option A which suggests lowering the standard market size for the smallest class from 7,500 EUR to 5,000 EUR would have an effect on the level of transparency provided by SI's quotes. It would ultimately reduce transparency, encourage dark trading and thereby conflict with the idea of MiFID II. The fact that we have seen lower trade sizes over the last year's is a result of market structure that was introduced by MiFID I and to some extent as well by a change in trading patterns since the beginning of the financial crisis but does not justify any reductions in thresholds.

<ESMA\_QUESTION\_92>

**Q93: Do you agree with the proposal to set the standard market size for depositary receipts at the same level as for shares? Please provide reasons for your answer.**

<ESMA\_QUESTION\_93>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_93>

**Q94: What are your views regarding how financial instruments should be grouped into classes and/or how the standard market size for each class should be established for certificates and exchange traded funds?**

<ESMA\_QUESTION\_94>

Since the average value of transactions in ETFs is significantly higher than the corresponding figure for shares, Deutsche Börse Group would recommend establishing classes with higher absolute values for ETFs. For example, the lowest class could include ETFs with an AVT <50,000 compared to an AVT <10,000 for shares.

<ESMA\_QUESTION\_94>

### **3.4. Trading obligation for shares (Article 23, MiFIR)**



**Q95: Do you consider that the determination of what is non-systematic, ad-hoc, irregular and infrequent should be defined within the same parameters applicable for the systematic internaliser definition? In the case of the exemption to the trading obligation for shares, should the frequency concept be more restrictive taking into consideration the other factors, i.e. ‘ad-hoc’ and ‘irregular’?**

<ESMA\_QUESTION\_95>

Deutsche Börse Group agrees with ESMA that non-systematic, ad-hoc, irregular and infrequent should be defined in order to avoid opening of new loopholes. We agree that it makes sense that the definition should be aligned with parameters applicable for SI definition. As pointed out in our responses on the questions 122 and 124 in the Consultation Paper we believe the thresholds are too high and should be lowered. In addition we agree that they should become overall more restrictive in order to take the additional two factors - ‘ad-hoc’ and ‘irregular’ into account. Therefore we believe that for frequent and systematic the range of 0.25% to 0.5% of number of transactions should be lowered to 0.10%. This level equals the Q2/2014 market shares of smaller trading venues like Posit, Equiduct and Blockmatch in many DAX instruments. The range between 15% and 25% of the total turnover in that financial instrument executed by the investment firm on own account or on behalf of clients should be lowered to 5%. In addition we would like to draw ESMA’s attention to a further aspect. Level 1 states that an investment firm that operates an internal matching system which executes client orders in shares, depositary receipts, ETFs, certificates and other similar financial instruments on a multilateral basis must ensure it is authorised as an MTF under Directive 2014/65/EU and comply with all relevant provisions pertaining to such authorisations. However ‘internal matching system’ has not been defined in Level 1 and ESMA has no task to do so. In order to avoid misunderstandings we strongly recommend ESMA to do so in order to ensure a level-playing field.

<ESMA\_QUESTION\_95>

**Q96: Do you agree with the list of examples of trades that do not contribute to the price discovery process? In case of an exhaustive list would you add any other type of transaction? Would you exclude any of them? Please, provide reasons for your response.**

<ESMA\_QUESTION\_96>

Deutsche Börse Group recommends that when defining non-addressable liquidity trades and trades that are determined by factors others than the current valuation of the share ESMA defines an exhaustive list as otherwise this might allow for loopholes. For example the following in nature non-technical trades such as cross trades or agency trades, riskless principal or matched principal trades and principal trades where the intermediary matches a client order against its proprietary capital should fall under the Trading Obligation! We agree with the list that ESMA has proposed and do not recommend to add anything. Further, although this seems to be not ESMA's task we recommend that only RMs and MTFs in a third country should be accepted as a third-country trading venue, otherwise MiFID will include loopholes.

<ESMA\_QUESTION\_96>

**Q97: Do you consider it appropriate to include benchmark and/or portfolio trades in the list of those transactions determined by factors other than the current valuation of the share? If not, please provide an explanation with your response.**

<ESMA\_QUESTION\_97>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_97>

### **3.5. Introduction to the non-equity section and scope of non-equity financial instruments**

**Q98: Do you agree with the proposed description of structured finance products? If not, please provide arguments and suggestions for an alternative.**

<ESMA\_QUESTION\_98>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_98>

**Q99: For the purposes of transparency, should structured finance products be identified in order to distinguish them from other non-equity transferable securities? If so, how should this be done?**

<ESMA\_QUESTION\_99>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_99>

**Q100: Do you agree with the proposed explanation for the various types of transferable securities that should be treated as derivatives for pre-trade and post trade transparency? If not, please provide arguments and suggestions for an alternative.**

<ESMA\_QUESTION\_100>  
With respect to derivatives:

***No, Deutsche Börse Group does not agree. Considering the scope of ‘non-equities’, the asset classes covered within this group are manifold. There are transferable securities such as bonds, structured finance products, and securitized derivatives but derivatives contracts, too, which are not transferable securities. Although the specifics of each of these groups are entirely different, derivatives contracts in addition have a nature that does not resemble any other class. It is therefore proposed not to consider exchange traded derivatives (ETD) in the same product class as securitized derivatives.***

Listed futures and options, as ETDs, are standardized contracts, which are created when the parties agree to the contract, unlike securities that have been issued and considered transferable securities. In ETDs liquidity is focussed at pre-defined standard expiry points. For one underlying, there are for example call and put options, which investors can combine to express a wide range of trading and hedging strategies. Also, numerous market makers and a multitude of liquidity providers provide quotation services and ensure liquidity.

Securitized derivatives instruments are issued and not created when the contract has been agreed. Instead, securitized products are often only quoted by the issuer, feature far lower than the levels of quoted, tradable and traded liquidity, and trading interest is spread out across thousands of products for one single underlying, as tailored payoff structures are created by virtue of listing a single product per strategy. It is not uncommon to see specific securitized derivatives products listed by multiple issuers, leading to further inherent differences to ETDs.

As such, derivatives contracts like in exchange traded derivatives need to be addressed specifically, and should not be categorized in the same group as any other asset class.

Furthermore, it needs to be differentiated if the contracts and instruments are analysed for transparency purposes, or the purpose of the trading obligation. Under the trading obligation, the goal is to cater OTC derivatives with multilateral trading, given that they have been determined under the clearing obligation. The OTC derivatives determined under the clearing obligation will probably have a high degree of liquidity, since a CCP will be approved to clear those. The trading obligation could capture all clearing eligible products, since the trading venues can be very flexible in their set-up, those instruments would not be forced onto electronic order-books and these could be catered also with voice-brokered systems. Furthermore, in this regard, competent authorities should also look at the potential progress when the market will become more transparent, and thus, it is recommended to also take future developments into account, when defining the instruments that should fall under the trading obligation. The classes determined by EMIR can be used as a basis, in order to classify OTC derivatives.



Regarding transparency levels, we would like to point out that OTC derivatives differ greatly in nature to exchange traded derivatives and that exchange traded derivatives already have a very high level of transparency today. Setting the same rules for all non-equities, or OTC derivatives and exchange traded derivatives would be detrimental, since the standards with exchange traded derivatives are higher and any attempt to assemble instruments would dilute the result and would negatively impact current high transparency levels in exchange traded derivatives. It cannot be the goal of the regulators to impair the high transparency levels in exchange traded derivatives provided today already, with the consequence that in future the transparency levels will be lower.

<ESMA\_QUESTION\_100>

**Q101: Do you agree with ESMA’s proposal that for transparency purposes market operators and investment firms operating a trading venue should assume responsibility for determining to which MiFIR category the non-equity financial instruments which they intend to introduce on their trading venue belong and for providing their competent authorities and the market with this information before trading begins?**

<ESMA\_QUESTION\_101>

With respect to bonds:

No. Deutsche Börse Group agrees that trading venues should be responsible for ensuring appropriate compliance with the new pre-trade and post-trade transparency requirements. But the issuer should have the responsibility for determining to which MiFIR category the non-equity financial instrument belongs to. Otherwise instruments may be assigned to different categories by different venues.

With respect to derivatives:

Yes, Deutsche Börse Group agrees. Market operators should determine the categories and notify as outlined. Also, point 46 should be taken into account for derivatives contracts. It does not seem to cover exchange traded derivatives, which we would promote.

<ESMA\_QUESTION\_101>

**Q102: Do you agree with the definitions listed and proposed by ESMA? If not, please provide alternatives.**

<ESMA\_QUESTION\_102>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_102>

### **3.6. Liquid market definition for non-equity financial instruments**

**Q103: Do you agree with the proposed approach? If you do not agree please provide reasons for your answers. Could you provide for an alternative approach?**

<ESMA\_QUESTION\_103>

With respect to bonds:

Deutsche Börse Group agrees with the proposed approach and ESMA's preference for Option 3.

With respect to derivatives:

No, Deutsche Börse Group does not agree. As explained in our response on question 100, there is a difference when determining liquidity for the purposes of trading obligation or transparency. In order to achieve the goals under G20 to cater substantial part of the OTC derivatives markets with multilateral clearing and trading, the trading obligation needs to take into consideration the analyses made under EMIR and needs to take forward looking elements into account. There should be elements including a perspective on the development of a market, when it is catered by multilateral trading and thus exposed to the benefits.

When defining a liquid market the transparency regime for exchange traded derivatives needs to be addressed as well. However, as explained in our response on question 100, the derivatives contracts on regulated markets are entirely different in nature and should not be defined in a way that could impair the high standard of transparency they already provide today. Thus, it is questionable, whether the liquid market definition can be used for both, the trading obligation and the transparency analyses.

The approach described does not cater to product specific factors that drive the liquidity in exchange traded derivatives (ETDs) regarding trade sizes. For example, in equity and index products, contract multipliers such as shares per option or the value per index point for index derivatives lead to product specific liquidity levels that cannot be grasped with the proposed average frequency and trade size definitions. Within one asset class, the proposal should allow for at least three liquidity groups, to classify products' liquidity by virtue of their notional value per traded contract unit of the ETD.

For fixed income futures, the duration differences between short and long term instruments lead to higher trade sizes for short duration products, while overall liquidity of short-term futures is lower than in long-term futures.

The approach should also be extended by a consideration of the expiry ranges available for an ETD, as liquidity thresholds formulated from averages of all expiries will discriminate towards longer expiries as these are typically less liquid.

A general differentiation of futures and options in one asset class is required to capture the liquidity concentration in (front-month) driven futures versus the trading interest that is spread out across calls, puts, expiries and strikes prices in options.

In general, the timeframe needs to be long enough (quarterly, annual), since some products, which do not trade on a daily basis are liquid, if Market Makers are permanently quoting within a predefined timeframe and thus enable trading in general.

The liquidity definition via spreads is a further aspect that needs to be closer analysed. The timeframe of assessment should be annual, to smooth out quarterly roll activities or seasonal trading factors such as summer months or the dividend season. The spread criterion cannot capture product specific differences in contract size and notional value. A static view of available order book liquidity is only a rudimentary indicator of liquidity as flow mainly trades upon incoming order flow placed mid-market or at best bid/offer. The market reaction to flow is a substantial liquidity contribution. For example, when considering one of our exchange traded derivatives products, in EURO STOXX 50 options, a fraction of 5% order book volume is traded against quotes, whereas the remainder is traded in the fashion of the market reacting to (mid-) market order flow.

In order to improve the liquidity test for a broader range of derivatives, one could imagine, for example, equipping the definition with some more levels of sophistication. One could propose a third approach that would combine both flexibility and comprehensiveness. Specifically, a staggered approach which would allow the application of all the Level 1 criteria on a sequential basis, step 1 would assess whether there is trading activity by applying, sequentially, the frequency test followed by size. If the product fits either criterion, then it is deemed liquid. If not, step 2 would assess whether there is a liquid provider for the contract in question. If yes, the product is liquid, if not, step 3 needs to evaluate existence of a tight spread, even in the absence of liquidity providers.

The purpose of the liquidity test is also to bring transparency to derivatives instruments that have not contributed to transparency so far. From the moment two counterparties agree on a price, then the existence of a potential trade is the key element to decide whether or not the rest of the market should see its price and be able to participate in the trade and see the transaction itself once executed even if it did not participate in the trade. In certain cases there may not be traded prices; however, this does not necessarily mean that the product is not liquid.

***Market operators of exchange traded derivatives on the other hand, should continue to set liquidity thresholds and large size limits on a product by product basis to be able to consider the above mentioned additional criteria and to allow for a level of discretion required to successfully launch products and further develop their liquidity. In particular, feedback from a cross section of major market users is called upon in determining these limits, as well as the required trading and market models to establish further new and existing asset classes in ETDs.***

***If the levels are set, without taking more than the liquid market criteria set out, the computed levels and thresholds for waivers and deferrals will be skewed and will be widely applicable, which will harm all markets. Exchange traded derivatives have been designed by regulated markets to provide the degree of standardisation that allows for efficient trading and hedging. As regulated markets in Germany, such product related discussions are performed in work committees where market participants are involved and are additionally discussed with the respective competent authorities. It is crucial for exchange traded derivatives to continue to provide high levels of transparency, and to take into account the expertise regulated markets have, as well as their competent authorities. Setting the thresholds at a wrong level can have a very substantial negative effect on some of the most transparent markets.***

***Therefore, Deutsche Börse Group would like to introduce the idea that for transparency purposes, the liquid market criteria provided shall form a starting point, but within level 1 the aspects regarding transparency could be extended to capture the trading venue information and to let competent authorities and trading venues define the appropriate degree of aggregation for the products on the markets and the appropriate level that has been historically defined by the experts on the markets (trading venue) and the contributors to liquidity (market participants), as well as the competent authority of the trading venue. As such a framework of cooperation between NCAs and regulated markets can be envisaged to provide ESMA with expertise, in order to set appropriate levels and not to negatively impact and damage these highly transparent markets.***

***In the following, we will provide answers to the specific question, but we urge ESMA to take a holistic approach and framework into consideration, in order not to dilute the currently high transparency levels of exchange traded derivatives.***

<ESMA\_QUESTION\_103>

**Q104: Do you agree with the proposed approach? If you do not agree please provide reasons. Could you provide an alternative approach?**

<ESMA\_QUESTION\_104>

With respect to bonds:

Deutsche Börse Group agrees. However, total turnover may be defined more specific. Is total turnover the traded nominal, the traded nominal multiplied by price/100 (market value) or traded nominal multiplied by price/100 plus accrued interest (settlement amount)? We recommend using the traded nominal (face value) as the basis for the calculation of the total turnover.

With respect to commodity derivatives:

Deutsche Börse Group has a preference for option 2. AVT does not work for grid bound commodities like power and gas.

One remark regarding the definition of turnover/notional amount as mentioned in No 4 of Annex 3.6.1.: for energy related products like electricity and gas a constant delivery period is the underlying of the contract. A year contract amounts to 8760 MW but is still only one contract/lot, a month contract amounts to 720 MW, a day future amounts to 24 MW which are still one contract as well. This example is relevant for base load contracts; peak load and off-peak contracts differ from base load contracts even if there is the same delivery period as the daily delivery amount differs. In order to be able to compare liquidity between



different loads and different maturities of the same product the amount of lots per transaction should be considered as turnover.

<ESMA\_QUESTION\_104>

**Q105: Do you agree with the proposed approach? If you do not agree please provide reasons. Could you provide an alternative approach?**

<ESMA\_QUESTION\_105>

With respect to bonds:

Deutsche Börse Group agrees that option 1 is a valid criterion and can easily be operated. However, option 2 should also be considered as a bond should be defined as liquid where market makers (e.g. on basis of contracts on trading venues) provide liquidity. Additionally SI's providing liquidity with marketable spreads (e.g. spreads < than spread threshold) should be considered. Both options could be combined using 'or'.

With respect to derivatives:

As described above in question 103, Deutsche Börse Group proposes to pursue a more holistic approach and framework, taking into consideration the interplay of the various elements. When looking at the element of market participants exclusively, option 2 is a suitable means to determine the average size of a financial instrument for mature products.

However, a combination of options 1 and 2 is preferable, as for newly listed products, the number of Market Makers can make a product 'liquid' in the sense of tradable, even if the overall number of participants is low.

An alternative approach for the wider group of derivatives has been provided above in Q103, where a staggered approach of the various criteria is proposed.

To apply the same threshold for all classes of financial instruments might not be expedient, and we would like to highlight the difference in the nature of exchange traded derivatives to transferable securities or even OTC derivatives.

With respect to commodity derivatives:

As regards commodity derivatives, Option 1 is easy to handle but for counting a trading participant the last trade should be within a certain period in the past (last quarter, last half year or whatsoever).

<ESMA\_QUESTION\_105>

**Q106: Do you agree with the proposed approach? If you do not agree please provide reasons. Could you provide an alternative approach?**

<ESMA\_QUESTION\_106>

With respect to bonds:

Deutsche Börse Group agrees. However, 'dark' trading (e.g. SI's) should also be considered if data is available in regards to ii, iii, and iv of figure 27 of paragraph 3.6. of the Discussion Paper.

With respect to derivatives:

Yes, in principle Deutsche Börse Group agrees. Please note however that especially in already liquid and highly transparent exchange traded derivatives markets the proposal is not comprehensive enough as:

- a) end of day spreads are not representative as almost no trading takes place anymore at that time
- b) the metric must include volumes, as 1 lot prices only will not be meaningful.

Alternatively, mid trading day spreads and the spreads employing the top 10 bid and top 10 offers including volumes, and average over a month should be used in case of exchange traded derivatives that are highly liquid, in order to set appropriate levels of liquidity from a market operator perspective. However, for less liquid products different levels are chosen, such that, if averaged quoted spread volume is for example, only 1% of average traded volume, spread criteria should be disregarded as not representative.

In derivatives, spreads will differ quite a lot depending on the underlying market, maturity, etc. Even though it may work to define spread levels for delta-one products (i.e. futures, front month contract most active), it will be very challenging to do the same for options and derive a meaningful spread indicator. The variety over in-, at-and out of - the-money options will be tremendous.

Clearly, for derivatives the staggered approach of all criteria could be the enhanced approach, but for exchange traded derivatives, the involvement of the trading venue, its market participants and its competent authority seems to be the more appropriate way to define the overall point of liquidity to identify large in scale. For the trading obligation the focus is mainly on OTC derivatives, the classes determined under EMIR can be considered under this approach but should include a forward looking element as well.

With respect to commodity derivatives:

With respect to commodity derivatives, in general end of day data are quite valuable as they are used for clearing purposes and as reference prices. Therefore the approach seems to be quite efficient.

<ESMA\_QUESTION\_106>

**Q107: Should different thresholds be applied for different (classes of) financial instruments? Please provide proposals and reasons.**

<ESMA\_QUESTION\_107>

With respect to bonds:

Deutsche Börse Group considers that no different thresholds should apply for different classes. The exception would be average size of spreads, as spreads differ between different classes of bonds (for example government bonds of AAA states and high yield corporate bonds).

With respect to derivatives:

Yes, in Deutsche Börse Group's view different thresholds should apply since spread depends on the underlying market, product category (futures/options), expiry in question and the number of market makers. Thus, we favour a more granular approach.

<ESMA\_QUESTION\_107>

**Q108: Do you have any proposals for appropriate spread thresholds? Please provide figures and reasons.**

<ESMA\_QUESTION\_108>

With respect to bonds:

In Deutsche Börse Group's view an approach might be to define thresholds for the quotation (bid/ask) time, volume and the time weighted average spread over a period. This approach is applied by several DMO's (e.g. Netherlands, Belgium, Denmark and Finland) to measure primary dealer activities to support a liquid secondary market.

With respect to derivatives:

Deutsche Börse Group considers that if taken into consideration, spreads should be defined per product.

<ESMA\_QUESTION\_108>

**Q109: How could the data necessary for computing the average spreads be obtained?**

<ESMA\_QUESTION\_109>

With respect to bonds:

In Deutsche Börse Group's view transparent trading venues' pre-trade information is published by several data vendors like Bloomberg or Reuters. However, not only the pre-trade information of trading venues is published via Bloomberg. Also quotes/IOIs of liquidity providers like banks are published. Bloomberg continuously aggregates the quotes of the trading venues and the liquidity providers to a Bloomberg best bid/best ask. This information is available also historically in Bloomberg data bases and can be used to obtain the necessary data to calculate the average spread.

With respect to derivatives:

As pointed out in the answer to Q106, in Deutsche Börse Group's view the data amount to analyse would be substantial for regulators. An alternative is provided with Q 100 and 103, which suggests to have regulated markets define appropriate levels for exchange traded derivatives and discuss those with market participants and ultimately align with their competent authority to ensure realisation of the regulatory intention. Since regulated markets already provide a high level of transparency, the information could be captured with the help of the trading venue and its competent authority. Otherwise the criterion will not be meaningful.

***For this purpose a framework can be envisaged, of regulated markets, national competent authorities providing their expertise to ESMA, to ensure high transparency levels in exchange traded derivatives and to counteract any potential damage from wrong calibration.***

<ESMA\_QUESTION\_109>

**Q110: Do you agree with the proposed approach? If you do not agree please provide reasons for your answer. Could you provide an alternative approach?**

<ESMA\_QUESTION\_110>

With respect to bonds:

Deutsche Börse Group thinks that the average frequency, the average transaction size and the average size of spreads measure historic liquidity. In contrast the number of market makers is a forward looking criterion, as market making e.g. on trading venues regularly takes place over the whole life cycle of a bond.

Therefore we recommend using option 2 combining the criteria's with 'or' using the following logic:

A bonds or a class of bonds is liquid if

- average frequency and the average transaction size or
- the number of participants or
- the average size of spreads

exceeds/falls below the threshold for a liquid market.

With respect to derivatives:

Deutsche Börse Group considers Option 2 to be superior, with lowest priority given to simply just looking at spreads as they are not a reliable indicator of liquidity, especially if no volume information is attached. As spreads are challenging to define for derivatives, the spread criteria should be disregarded so that only a combination of the other three criteria is considered effectively. As an alternative, a staggered approach of the criteria has been described in question 103, where each criterion is tested individually.

<ESMA\_QUESTION\_110>

**Q111: Overall, could you think of an alternative approach on how to assess whether a market is liquid bearing in mind the various elements of the liquid market definition in MiFIR?**

<ESMA\_QUESTION\_111>

With respect to bonds:

Deutsche Börse Group thinks that criteria like issuer of a bond and outstanding issue amount are also a valid measure for liquidity.

With respect to derivatives:

In Deutsche Börse Group's view, amending responses on questions 106 and 110 is considered sufficient to refine the proposed methodology; therefore, the respective responses are provided hereunder again.

Deutsche Börse Group's response on question 106: Yes, in principle Deutsche Börse Group agrees. Please note however that especially in already liquid and highly transparent exchange traded derivatives markets the proposal is not comprehensive enough as:

- a) end of day spreads are not representative as almost no trading takes place anymore at that time
- b) the metric must include volumes, as 1 lot prices only will not be meaningful.



Alternatively, mid trading day spreads and the spreads employing the top 10 bid and top 10 offers including volumes, and average over a month should be used in case of exchange traded derivatives that are highly liquid, in order to set appropriate levels of liquidity from a market operator perspective. However, for less liquid products different levels are chosen, such that, if averaged quoted spread volume is for example, only 1% of average traded volume, spread criteria should be disregarded as not representative.

In derivatives, spreads will differ quite a lot depending on the underlying market, maturity, etc. Even though it may work to define spread levels for delta-one products (i.e. futures, front month contract most active), it will be very challenging to do the same for options and derive a meaningful spread indicator. The variety over in-, at-and out of - the-money options will be tremendous.

Clearly, for derivatives the staggered approach of all criteria could be the enhanced approach, but for exchange traded derivatives, the involvement of the trading venue, its market participants and its competent authority seems to be the more appropriate way to define the overall point of liquidity to identify large in scale. For the trading obligation the focus is mainly on OTC derivatives, the classes determined under EMIR can be considered under this approach but should include a forward looking element as well.

Deutsche Börse Group's response on question 110: Deutsche Börse Group considers Option 2 to be superior, with lowest priority given to spreads as they are not a reliable indicator of liquidity, especially if no volume information is attached. As spreads are challenging to define for derivatives, the spread criteria should be disregarded so that only a combination of the other three criteria is considered effectively. As an alternative, a staggered approach of the criteria has been described in Q103, where each criterion is tested individually.

Finally, Deutsche Börse Group emphasizes again, that taking into consideration the expertise of trading venues and their competent authorities might become crucial in setting appropriate levels for exchange traded derivatives, since these markets already provide transparency and a wrongly performed calibration will have a severe negative impact on the market. It is therefore recommended to take a holistic approach into consideration, where trading venues of exchange traded derivatives set the appropriate levels according to the nature of their markets. Then discuss those levels with market participants and ultimately align with the regulators in order to suffice the regulatory goal of ensuring appropriate transparency levels.

It is proposed to establish a framework of cooperation between regulated markets and national competent authorities, to provide expertise to ESMA in order not to damage exchange traded derivatives transparency.

<ESMA\_QUESTION\_111>

**Q112: Which is your preferred scenario or which combination of thresholds would you propose for defining a liquid market for bonds or for a sub-category of bonds (sovereign, corporate, covered, convertible, etc.)? Please provide reasons for your answer.**

<ESMA\_QUESTION\_112>

With respect to bonds:

When defining the thresholds for a liquid market, in Deutsche Börse Group's view it is important to keep in mind that for bonds which are defined as liquid there will be additional possibilities to avoid pre-trade transparency and to defer the publication of trades. Hence Deutsche Börse Group thinks that the definition of the thresholds for a liquid market should not be too narrow as this would water down the aimed increase in transparency. Therefore we prefer Scenario 1 and 2 as they define a broader range of instruments and trades as liquid.

<ESMA\_QUESTION\_112>

**Q113: Should the concept of liquid market be applied to financial instruments (IBIA) or to classes of financial instruments (COFIA)? Would be appropriate to apply IBIA for certain asset classes and COFIA to other asset classes? Please provide reasons for your answers**

<ESMA\_QUESTION\_113>

With respect to bonds:



Deutsche Börse Group prefers the concept of COFIA as all new issues are considered within their respective class.

With respect to derivatives:

In Deutsche Börse Group's view, ideally for exchange traded derivatives the IBIA approach would be chosen. However, it is recommended to take into account the trading venue/regulated market information as a parameter. The trading venue/regulated market could then set the appropriate levels according to the nature of the trading venue's parameters and mix. The levels proposed by the trading venue could be discussed with market participants and ultimately be aligned with the respective competent authority. Given the nature of exchange traded derivatives, trying to aggregate information and define thresholds without taking into consideration information from the respective trading venues should be seen as critical.

If a degree of aggregation becomes absolutely necessary, again the expertise of the trading venue could be leveraged.

In order to ensure that trading venues and market participants adhere to the regulatory goal, each trading venue would need to align with its competent authority, which could provide the particular level to ESMA, in order not to damage markets that today already provide the highest degree of transparency. Any wrongly calibrated level could lead to a shift towards more off book trading and less order book trading.

Therefore, it is proposed to establish a framework of cooperation between regulated markets and national competent authorities, to provide expertise to ESMA in order not to damage exchange traded derivatives transparency.

<ESMA\_QUESTION\_113>

**Q114: Do you have any (alternative) proposals how to take the 'range of market conditions and the life-cycle' of (classes of) financial instruments into account - other than the periodic reviews described in the sections periodic review of the liquidity threshold and periodic assessment of the liquidity of the instrument class, above?**

<ESMA\_QUESTION\_114>

No. In Deutsche Börse Group's view periodic reviews on an annual basis are advisable.

<ESMA\_QUESTION\_114>

**Q115: Do you have any proposals on how to form homogenous and relevant classes of financial instruments? Which specifics do you consider relevant for that purpose? Please distinguish between bonds, SFPs and (different types of) derivatives and across qualitative criteria (please refer to Annex 3.6.1).**

<ESMA\_QUESTION\_115>

With respect to bonds:

Deutsche Börse Group agrees with the general product types Sovereign bonds (EU, non-EU), Municipal bonds, Corporate bonds, Covered bonds and convertible bonds. However, we recommend including a criterion in column 4 which reflects the quality of the issuer. The different denomination currencies of bonds should also be reflected in column 4 as bonds denominated in illiquid currencies are different to bonds denominated e.g. in EUR or USD. Additionally we recommend using nominal traded as metric, as nominal traded is mainly used in the industry to describe the traded amount in a specific bond.

With respect to derivatives:

In Deutsche Börse Group's view, as described above under questions 100 and 103, exchange traded derivatives shall be addressed in a dedicated fashion and shall not be grouped with other asset classes. Also aggregating exchange traded derivatives themselves is not meaningful. While technically it would be necessary to analyse on an instrument basis, the intention to aggregate has been understood. When the information would further attach the trading venue to it, trading venues could contribute meaningful levels of aggregation and provide levels for their instruments, given the nature of derivative contracts and

the characteristics of the venue. The trading venues could provide the necessary information by discussing the levels with the market participants and afterwards with their competent authority.

In order not to harm any market, it is a necessity to look at each derivative contract and its trading venue separately. Although for example some instruments might be similar, the nature of liquidity is different on each trading venue. Setting transparency levels centrally for all markets will result in some markets being forced to adhere to “average” thresholds that might not be compatible with their particular characteristics, especially if they are on either end of the liquidity scale, i.e. either highly liquid or highly illiquid. This approach would essentially be harming certain trading venues while benefiting others and would therefore be rather detrimental on market quality. Level 1 is very broad, and thus the specific characteristics of derivatives contracts are not addressed. On level 2, this aspect should not be neglected when determining levels.

As recommended, when taking the information per trading venue, derivatives should be grouped according to the expertise of the trading venue in alignment with the competent authority.

Just to provide some insight into the difficulty of addressing liquidity correctly in exchange traded derivatives and the reason why we would promote the idea of having trading venues/ regulated markets define appropriate levels and groups of instruments specifically for their venue in association with their competent authorities.

Fixed income or equity index futures could be handled in a more intuitive way, whereas, options should be handled individually as their liquidity is heterogeneous, i.e. back month expiries of a liquid contract might have low liquidity levels.

Alternatively, for equity derivatives we suggest distinguishing between certain product types. Following that step, a distinction between single name large, mid and small cap products would be necessary.

Most exchange traded derivatives already have a specifically calibrated differentiation of levels. If ESMA would consider differentiating the information per product and per trading venue, then trading venues and their competent authority could provide ESMA with the aggregation and levels that are adequate for their instruments.

It is proposed to establish a framework of cooperation between regulated markets and national competent authorities, to provide expertise to ESMA in order not to damage exchange traded derivatives transparency.

<ESMA\_QUESTION\_115>

**Q116: Do you think that, in the context of the liquidity thresholds to be calculated under MiFID II, the classification in Annex 3.6.1 is relevant? Which product types or sub-product types would you be inclined to create or merge? Please provide reasons for your answers**

<ESMA\_QUESTION\_116>

With respect to bonds:

Deutsche Börse Group considers that no creation or merge is necessary. Generally, Deutsche Börse Group thinks that the classification should be not too complex. However, we recommend deleting the criterion ‘class of bonds (sovereign vs. non-sovereign)’ in the column ‘other potential liquidity sub-category’ as the class of bond is already addressed in the column ‘product type’. Additionally, we recommend inserting a criterion ‘issuer class’.

With respect to derivatives:

As mentioned in the above answers, in Deutsche Börse Group’s view exchange traded derivatives have a specific nature. In order to set appropriate levels applicable for each trading venue, the trading venue itself needs to be taken into consideration as an additional parameter. The level 1 text does not stipulate one single level to be defined for all trading venues. One should imply that the level needs to be appropriate for the trading venue, when the nature of exchange traded derivatives is seriously taken into account.

The degree of aggregation and appropriate levels can be best calibrated by the trading venue and discussed with the competent authority overseeing the exchange traded derivatives markets. A degree of aggregation and associated levels can thus be formed to apply to the trading venue, and all market participants would have an overview on the levels per trading venue and the level of aggregation most meaningful.

The degree of aggregation and associated levels are discussed in working committees with the trading venues' market participants but are also discussed with the competent authority. As such, the cooperation with the competent authority could be more formalized, to ensure the levels are adequate for the trading venue, the product and the characteristics of the trading venue in the specific products, and in order to safeguard the regulatory intention to cater to transparency, although regulated markets already provide to this principle already today.

<ESMA\_QUESTION\_116>

**Q117: Do you agree with the proposed approach? If not, please provide rationales and alternatives.**

<ESMA\_QUESTION\_117>

With respect to bonds:

Yes, Deutsche Börse Group agrees with the proposed approach.

With respect to derivatives:

Yes, in Deutsche Börse Group's view the proposal can be agreed with in general. However, to clarify again, the difficulties with exchange traded derivatives, specifically with regards to fixed income futures, where the quarterly roll typically leads to a short-dated increase in volumes followed by a significant drop, the minimum period should be at least 90 trading days in order to reduce the risk of false signalling.

Furthermore, the spread criteria, as mentioned before is considered to be fundamentally flawed, if not strengthened by representative executable volumes.

We would recommend to ESMA to take a holistic approach into consideration that addresses the nature of exchange traded derivatives and the nature of products on each trading venue. It is proposed to establish a framework of cooperation between regulated markets and national competent authorities, to provide expertise to ESMA in order not to damage exchange traded derivatives transparency.

<ESMA\_QUESTION\_117>

**Q118: Do you agree with the proposed thresholds? If not, please provide rationales and alternatives.**

<ESMA\_QUESTION\_118>

With respect to bonds:

Deutsche Börse Group thinks that the thresholds are too high as the ADT of bonds fluctuates during a year.

Monthly change in ADT of respective bond type on Frankfurt Stock Exchange (Börse Frankfurt) for the last 12 month (normal market conditions):

Month	Corporate Bonds of Financial Issuers	Corporate Bonds of Industrial Issuers	German Sovereigns	Non-German Sovereigns
June 2013				
July 2013	11,70%	1,14%	28,42%	48,25%
August 2013	18,51%	18,80%	104,02%	-8,14%
September 2013	-8,60%	-14,87%	-21,96%	-12,04%
October 2013	13,32%	-7,56%	-25,50%	0,13%



November 2013	-18,73%	-10,98%	6,84%	-34,99%
December 2013	-10,33%	0,60%	49,22%	12,70%
January 2014	4,00%	-5,33%	0,36%	-22,15%
February 2014	1,31%	5,61%	-42,94%	17,66%
March 2014	14,29%	5,84%	6,04%	11,18%
April 2014	3,31%	8,27%	11,93%	-10,16%
May 2014	-16,19%	-2,95%	2,99%	0,18%

Therefore we recommend decreasing the threshold for liquid and illiquid bonds to 50%.

With respect to derivatives:

Deutsche Börse Group would recommend to ESMA to take a holistic approach into consideration that addresses the nature of exchange traded derivatives and the nature of products on each trading venue. An approach that addresses the nature of derivatives contracts has been proposed above already. First, the venue needs to calibrate appropriate sizes, second the market participants need to be able to provide feedback and the trading venue should align with the competent authority, in order to align with the regulators overall goal.

Deutsche Börse Group would urge ESMA though to at least consider reducing the thresholds to 50% for liquid and 25% for illiquid products, if the nature of exchange traded derivatives is disregarded. As previously mentioned, the observation period should be increased to at least 90 trading days to avoid frequent changes to the transparency regime.

<ESMA\_QUESTION\_118>

### 3.7. Pre-trade transparency requirements for non-equity instruments

**Q119: Do you agree with the description of request-for-quote system? If not, how would you describe a request-for-quote system? Please give reasons to support your answer.**

<ESMA\_QUESTION\_119>

With respect to bonds:

Yes, Deutsche Börse Group generally agrees with the description.

With respect to derivatives:

In Deutsche Börse Group's view, the definition leaves open questions regarding private versus public quotes and requests for quotes, which has implications for price providers in terms of potentially trading a multiple of the quoted size with a potentially wider range of counterparties. It is our understanding that the requirement to potentially offer a wider audience the same prices as for a quote to a single client increases the risk for market makers and will widen bid offer spreads quoted on request.

The definition should be extended by a potential interaction between the requesting party and the price provider, i.e. can the requester make an offer or enter an order mid-market?

<ESMA\_QUESTION\_119>

**Q120: Do you agree with the inclusion of request-for-stream systems in the definition of request-for-quote system? Please give reasons to support your answer.**

<ESMA\_QUESTION\_120>

Yes, Deutsche Börse Group agrees with the inclusion of request for stream systems.

With respect to derivatives:

In Deutsche Börse Group's view the definition of a request for stream system is unclear under point 12 and lacks a distinction to standard exchange supported market making programs in which members receive



fee incentives for streaming prices on a continuous basis for a defined percentage of the day. The unusual system of request for streaming basically entails the same level of permanent quotation. If considered part of the request for quote system definition, please add it to the respective wording under 11.

<ESMA\_QUESTION\_120>

**Q121: Do you think that – apart from request-for-stream systems – other functionalities should be included in the definition of request-for-quote system? If yes, please provide a description of this functionality and give reasons to support your answer.**

<ESMA\_QUESTION\_121>

In Deutsche Börse Group's view, public and private user defined pre trade communication systems using voice brokerage or chat functions of information vendors that on their side do not offer trade capture characterized pre trade communication and should be included in the request-for-quote definition.

<ESMA\_QUESTION\_121>

**Q122: Do you agree with the description of voice trading system? If not, how would you describe a voice trading system?**

<ESMA\_QUESTION\_122>

Deutsche Börse Group agrees to the definition of voice trading.

<ESMA\_QUESTION\_122>

**Q123: Do you agree with the proposed table setting out different types of trading systems for non-equity instruments?**

<ESMA\_QUESTION\_123>

With respect to bonds:

Deutsche Börse Group recommends covering trading systems, where the prices or quotes are shown to a selected number of participants and the trading takes place by negotiation via chat. Additionally we recommend including bulletin boards as a type of trading system).

With respect to derivatives:

Deutsche Börse Group believes that order book depth of up to 3 is sufficient for options in a 'Continuous auction order book trading system'.

Please add a reference that the 'Quote-driven trading system' can be a standalone market model, and / or an integral part of liquidity provision in a 'Continuous auction order book trading system'. Likewise, the same applies to periodic auctions and RFQ systems. In Eurex options, for example, there is an opening auction, market makers stream quotes in a continuous order book trading system, in which intraday auctions or other end of day or closing auctions, for example could be introduced.

However, the uniform definition of a 'trading system not covered by the first five rows' as a hybrid system if two or more criteria are met does not sufficiently differentiate between the qualitative differences of various constellations of the individual types of trading systems.

<ESMA\_QUESTION\_123>

**Q124: Do you think that the information to be made public for each type of trading system provides adequate transparency for each trading system?**

<ESMA\_QUESTION\_124>

With respect to bonds:

Yes, Deutsche Börse Group agrees.

With respect to derivatives:

In Deutsche Börse Group's view the wide potential for structural variation of a 'Trading system not covered by the first five rows' requires a differentiated treatment, especially in relation to transparency regimes.

For auction systems, publishing the executable quantity at the respective potential opening price may provide information to gauge order sizes at given price levels.

For voice trading systems, the added value of pre trade disclosure is highly questionable, especially if price validations and corridors are given by the trading system that ensures market standards of executed prices (timely fashion, daily high-lows). The price, spread and size quoted to one client impacts the risk position of the market maker if traded. That specific price is not likely to be available for infinite size, which makes the information value questionable for uninvolved price takers.

<ESMA\_QUESTION\_124>

**Q125: Besides the trading systems mentioned above, are there additional trading models that need to be considered for pre-trade transparency requirements in the non-equity market space?**

<ESMA\_QUESTION\_125>

With respect to bonds:

Deutsche Börse Group recommends covering trading systems, where the prices or quotes are shown to a selected number of participants and the trading takes place by negotiation via chat. Additionally we recommend including bulletin boards as a type of trading system).

With respect to derivatives:

No, Deutsche Börse Group thinks that no additional trading models need to be considered.

<ESMA\_QUESTION\_125>

**Q126: If you think that additional trading systems should be considered, what information do you think should be made public for each additional type of trading model?**

<ESMA\_QUESTION\_126>

With respect to bonds:

For hybrid trading systems where quotes/IOIs and/or prices are shown to selected participants and the matching takes place via chat, Deutsche Börse Group recommends to make public the quotes (limit and volume)/IOIs and prices. For bulletin boards we recommend to make public the bid and offers and attaching volumes from any member or participant which, if accepted would lead to a transaction.

<ESMA\_QUESTION\_126>

**Q127: Based on your experience, what are the different types of voice trading systems in the market currently? What specific characteristics do these systems have?**

<ESMA\_QUESTION\_127>

With respect to derivatives:

Deutsche Börse Group is of the opinion that the most common form of voice trading is phone market trading in derivatives, in which dealers ask for prices in a multilateral fashion by including the broadest possible range of price providers in the negotiation process. Allocations are given based on best price principle, pro-rata allocation to price providers and their respective trade size thresholds under which they operate with a broker, as well the technical feasibility of splitting a trade amongst equally priced providers, in consideration of minimum block trade sizes. Please note that there is no clear distinction in terms of voice emulation and the usage of message and chat systems, with or without trade capturing and / or clearing. A broker may publish a recent trade via Bloomberg chat, and then call clients who enquire prices, and a trade is negotiated.

<ESMA\_QUESTION\_127>

**Q128: How do these voice trading systems currently make information public or known to interested parties at the pre-trade stage?**

<ESMA\_QUESTION\_128>

With respect to derivatives:



In Deutsche Börse Group's view, there are various ways. Taking the example of Eurex off-book block trading business, pre-trade information is not visible, but every market participant knows that the perimeters are between the daily low and high. Transactions in exchange traded derivatives which were negotiated via phone or any other voice enhanced measure must be finalized and confirmed with Eurex within 30 minutes. These large sizes block transactions are therefore published within 30 minutes of being agreed on via voice trading systems. Equity options are the only exception, for which very large trades, a multiple of the large size defined by the exchange, i.e. Eurex, are subject to deferred publication. These sizes were set in such a fashion so that only about 5% of large trades are eligible for deferred publication and published later in the post trading period, however, on the day of the trade.

<ESMA\_QUESTION\_128>

**Q129: Do you agree with ESMA's approach in relation to the content, method and timing of pre-trade information being made available to the wider public?**

<ESMA\_QUESTION\_129>

With respect to bonds:

Yes, Deutsche Börse Group agrees with ESMA's approach.

With respect to derivatives:

In Deutsche Börse Group's view, this intention has been questioned for voice trading systems regarding derivatives in the sections above. Mostly such voice brokered markets trade in large sizes or complex strategies on phones (voice based trading) and would thus qualify for pre trade transparency waivers.

<ESMA\_QUESTION\_129>

**Q130: Do you agree with the above mentioned approach with regard to indicative pre-trade bid and offer prices which are close to the price of the trading interests? Please give reasons to support your answer**

<ESMA\_QUESTION\_130>

With respect to bonds:

Deutsche Börse Group agrees. However, the publication of the best bid offer could also be a good approach.

With respect to derivatives:

For exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels on transactions. Regarding deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

In regards to pre-trade information for off-book transactions at a regulated market, price validation corridors and daily high-low ranges for block trades are equivalent to indicative prices and hence should satisfy pre trade transparency for voice brokerage trades in Eurex products above the given block size or the size specific to the instrument. Otherwise, respective tools must be scoped and built so that brokers can fulfil pre trade ruling with a communications board. However, the set-up used today already provides to a high degree to pre-trade transparency, even though the size traded are large. In that regard, the daily high and low of the regulated market entails the same level of market information as an indicative bid and offer.

In general though, the value of indicative pricing is too limited. Indicative prices entail no risk to the price provider as they are not tradable. For 1 lot, or for indicative prices i.e. 0 lots, any price is possible without a price provider suffering a mentionable loss.

<ESMA\_QUESTION\_130>





**Q131: If you do not agree with the approach described above please provide an alternative**

<ESMA\_QUESTION\_131>

With respect to derivatives:

For exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives. For pre trade transparency levels and post trade transparency levels on transactions. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

Regarding pre-trade transparency, off book orders and resulting transactions are offered by Eurex. The daily high and low entails the same level of market information as an indicative bid and offer.

The definition of the ‘closeness’ of indicative prices must be defined based on the respective liquidity and instrument type for various asset classes to ensure a high level of information value.

***It is proposed to establish a framework of cooperation between regulated markets and national competent authorities, to provide expertise to ESMA in order not to damage exchange traded derivatives transparency.***

<ESMA\_QUESTION\_131>

### **3.8. Post-trade transparency requirements for non-equity instruments**

**Q132: Do you agree with the proposed content of post-trade public information? If not, please provide arguments and suggestions for an alternative.**

<ESMA\_QUESTION\_132>

With respect to bonds:

Deutsche Börse Group generally agrees, but price notation should be specified. Several price notations are common in non-equity markets like yield, discount margin, percent, clean/dirty etc. Additionally, the currency might be considered.

With respect to derivatives:

Yes, Deutsche Börse Group agrees that content of post-trade public information is nearly identical to the high levels of transparency of exchange traded derivatives markets published today already and is considered sufficient.

It needs to be clarified though, as for pre trade transparency, for exchange traded derivatives, a holistic approach needs to be envisaged.

***It is proposed to establish a framework of cooperation between regulated markets and national competent authorities, to provide expertise to ESMA in order not to damage exchange traded derivatives transparency.***

Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels on transactions. In regards to deferred publication, in post trade infor-

mation, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.  
<ESMA\_QUESTION\_132>

**Q133: Do you think that the current post-trade regime for shares on the systematic internaliser's identity should be extended to non-equity instruments or that the systematic internaliser's identity is relevant information which should be published without exception?**

<ESMA\_QUESTION\_133>

With respect to bonds:

To support transparency, Deutsche Börse Group thinks SI's identity should be relevant information.

With respect to derivatives:

In principle, Deutsche Börse Group would like to clarify the role of Systematic Internaliser regarding derivatives. According to the G20 goals, a substantial part of the market shall be captured by multilateral trading and clearing in the future. Under EMIR, OTC derivatives that are clearing eligible under EMIR need to be multilaterally cleared, i.e. through a CCP. However, this is only the one side of the coin. In order to suffice the G20 goal of increasing multilateral trading, the OTC derivatives captured under EMIR as being clearing eligible, need to be checked for eligibility for multilateral trading under MiFIR. The trading obligation shall define which of the OTC derivatives need to be traded in a multilateral fashion on trading venues, in order to increase multilateral trading. The products that do not fall under the trading obligation, and do not need to be traded multilaterally, could thus still be traded bilaterally, either at a Systematic Internaliser or completely OTC. In addition, it needs to be highlighted that exchange traded derivatives are already traded multilaterally, and should not be within the scope of Systematic Internalisers.

Leaving the identification of the Systematic Internaliser to the investment firms' discretion is not viable, nor the cited timeframes for aggregate publication.

Regarding point 15, will the name of the investment firm be explicitly mentioned? If yes, then the proposal could be agreed with. If no, we see reason to differentiate between Systematic Internaliser and exchange venue transactions in reporting. The information value of trades is significant to the market, regardless of a trades' nature as internalized or not. Regarding point 16, Deutsche Börse Group fully agrees.

***We would like to clarify our understanding that the derivatives trading obligation and extension of transparency requirements applies both to OTC derivatives meeting the clearing and trading tests in EMIR and MiFIR respectively, as well as to all exchange traded derivatives (ETDs) since these products already fulfilled the G20 requirements before regulatory initiatives have developed. MiFIR Article 9(1c) allows competent authorities to waive pre-trade transparency obligations for 'derivatives which are not subject to the trading obligation and other financial instruments for which there is not a liquid market'. As a consequence, the trading obligation needs to apply both to OTC derivatives and ETDs to avoid transparency waivers being sought for these contracts simply on wrong interpretation grounds that they have not fulfilled a trading obligation. This would be a perverse outcome and completely at odds with the political ambitions of the G20 and the MIFID Review in respect of OTC derivatives.***

<ESMA\_QUESTION\_133>

**Q134: Is there any other information that would be relevant to the market for the above mentioned asset classes?**

<ESMA\_QUESTION\_134>

With respect to bonds:

Deutsche Börse Group thinks that the currency as well as the type of price notation might be relevant.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives (ETDs), Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is includ-

ed as an information parameter and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency level on transactions. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

The cited content of the post-trade public information is sufficient.

<ESMA\_QUESTION\_134>

**Q135: Do you agree with the proposed table of identifiers for transactions executed on non-equity instruments? Please provide reasons for your answer.**

<ESMA\_QUESTION\_135>

With respect to bonds:

Generally, Deutsche Börse Group agrees.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for pre trade transparency levels, and post trade transparency levels on transactions. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication accounts for equity options only.

Flags that are not meaningful in the context of exchange traded derivatives are twofold:

- Agency cross trade flag: All cross requests are published for Eurex ETDs real-time. Explicitly flagging these trades is redundant, as members and vendors can recreate. Flagging poses a risk for quantities of cross that are not matched by the identical buyer/seller that initiated the cross, .i.e. broken crosses should not be reported as cross trades.
- Technical trade flag: No merit can be seen in a differentiation for ETDs. Rather, it is a redundant indicator in the ETD context for futures legs of options volatility strategy trades in which options are transacted as combined trade with futures. These are sufficiently marketed as combination trades.

<ESMA\_QUESTION\_135>

**Q136: Do you support the use of flags to identify trades which have benefitted from the use of deferrals? Should separate flags be used for each type of deferral (e.g. large in scale deferral, size specific to the instrument deferral)? Please provide reasons for your answer.**

<ESMA\_QUESTION\_136>

With respect to bonds:

Deutsche Börse Group thinks the deferred trades should contain information which kind of deferral is used. This would help (ESMA) analysing which type of deferral is used and how often it is used.

With respect to derivatives:

Order book and off-book trades are reported and flagged as such. Deutsche Börse Group sees no merit in an explicit labelling, as market participants assess the impact of trades to their risk based on individually tailored size and price criteria.



As has been defined already in previous questions, for exchange traded derivatives, a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels on transactions. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

<ESMA\_QUESTION\_136>

**Q137: Do you think a flag related to coupon payments (ex/cum) should be introduced? If yes, please describe the cases where such flags would be warranted and which information should be captured.**

<ESMA\_QUESTION\_137>

With respect to bonds:

No, Deutsche Börse Group does not think so.

With respect to derivatives:

No, Deutsche Börse Group does not think so as it is not applicable to exchange traded derivatives.

<ESMA\_QUESTION\_137>

**Q138: Do you think that give-up/give-in trades (identified with a flag) should be included in post-trade reports or not made public? Please provide reasons for your answers.**

<ESMA\_QUESTION\_138>

With respect to bonds:

No, Deutsche Börse Group does not think so.

With respect to derivatives:

There are core information elements necessary for the market. These have been captured by level 1.

In Deutsche Börse Group's view, the give-up/give-in trade flag is unnecessary and provides no additional information regarding the price and size impact of a trade to the market. The beneficiary owner and initiator of a trade can freely choose between give up and non give up linked executions. Exchange members with multiple member IDs may use give ups to transfer ownership between legal entities, but this gives no indication if a trade was arranged by a broker and given up, or for example, traded directly with a clients' prime broker. The information value is negligible, if an investment firm utilizes his prime broker for execution, or transacts with another exchange member who then gives up the trade.

<ESMA\_QUESTION\_138>

**Q139: Do you agree that securities financing transactions should be exempted from the post-trade transparency regime?**

<ESMA\_QUESTION\_139>

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<ESMA\_QUESTION\_139>

**Q140: Do you agree that for the initial application of the new transparency regime the information should be made public within five minutes after the relevant non-equity transaction? Please provide reasons for your answer.**

<ESMA\_QUESTION\_140>

With respect to bonds:

Yes, Deutsche Börse Group agrees.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

All order book trades in exchange traded derivatives ideally should be reported immediately, regardless of size. The proposed 5 minutes maybe adequate for bonds, but we would consider a narrower timeframe for order book trades.

For off-book exchange traded derivatives transactions it will not be feasible for members/ market participants to conduct block trades within 5 minutes due to operation handling, staffing, the frequency in which trades are transacted, operational handling, client interaction, and the inability to control a trade counterparty reaction time in processing a trade. The last argument is yet more severe in the case of multilateral trades, which are processed after all parties involved in the trade have approved a trade. 15 minutes to enter a trade, a further 15 minutes to verify/approve a block trade is the desired operating model. Thus, a publication of latest 30 min is prevalent.

Provided that narrow scope of exchange traded derivatives, it needs to be ensured that deferred publication shall only capture a selected group of instruments i.e. equity options only. The deferred publication is latest end of day, and only for transactions that have a multiple of the size in the pre-trade transparency of orders. It is important to only allow 5% of the pre- trade large size orders to be deferred till end of day, and ideally only in equity options, where market practice allows so. As will be clarified below as well, market participants on trading venues of exchange traded derivatives expect timely information in futures markets and market participants usually object in working and advisory committees to defer publication.

<ESMA\_QUESTION\_140>

**Q141: Do you agree with the proposed text or would you propose an alternative option? Please provide reasons for your answer.**

<ESMA\_QUESTION\_141>

With respect to bonds:

Deutsche Börse Group agrees with the proposed text.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

Solely relying on numerical and empirical evaluations leaves no room for product or asset class specific deviations from disclosing trades or setting thresholds. Whilst the arguments in 45 and 48 are valid, not knowing of trades is considered to be a greater impediment than the inability to unwind risk from un-



published trades. Qualitative factors linked to the asset classes trading conventions and price and size transparency requirements are not reflected in pure numeric classification. Market operators should be able to make a discretionary decision against deferred publication.

***It is proposed to establish a framework of cooperation between regulated markets and national competent authorities, to provide expertise to ESMA in order not to damage exchange traded derivatives transparency.***

<ESMA\_QUESTION\_141>

**Q142: Do you agree that the intra-day deferral periods should range between 60 minutes and 120 minutes?**

<ESMA\_QUESTION\_142>

With respect to bonds:

Yes, Deutsche Börse Group agrees.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

In principle though, 30 minutes deferred reporting is sufficient, 15 minutes to enter a trade, a further 15 minutes for the counterparties confirmation.

Transactions of multiples the pre trade sizes should not be published prior to the market's close, but latest end of day, however.

<ESMA\_QUESTION\_142>

**Q143: Do you agree that the maximum deferral period, reserved for the largest transactions, should not exceed end of day or, for transactions executed after 15.00, the opening of the following trading day? If not, could you provide alternative proposals? Please provide reasons for your answer.**

<ESMA\_QUESTION\_143>

With respect to bonds:

Yes, Deutsche Börse Group agrees.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.



In principle though, 30 minutes deferred reporting is sufficient, 15 minutes to enter a trade, a further 15 minutes for the counterparties confirmation. Transactions of multiples the pre trade sizes should not be published prior to the market's close, but latest end of day, however.

<ESMA\_QUESTION\_143>

**Q144: Do you consider there are reasons for applying different deferral periods to different asset classes, e.g. fixing specific deferral periods for sovereign bonds? Please provide arguments to support your answer.**

<ESMA\_QUESTION\_144>

With respect to bonds:

No, Deutsche Börse Group thinks every class should be treated equally.

With respect to derivatives:

Asset classes have unique characteristics and require finessed reporting limits and deferral periods. The flow of information depends on the market structure of a product in the sense of order book focus, level of intermediation by bank dealers and brokers, and the market size and volume of OTC surrogates.

Currently, Eurex offers deferred publication (non-disclose of block trades) for equity options only. The thresholds were suggested and aligned with major market users in advisory committees and were set at volume threshold levels that ensure that 95% of block trades are reported timely. Advisory committees in index and fixed income derivatives did not recommend non-disclosure, as we call deferred publication, for the products, citing size independent disclosure of trades an imperative.

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

<ESMA\_QUESTION\_144>

**Q145: Do you support the proposal that the deferral for non-equity instruments which do not have a liquid market should be until the end of day + 1? Please provide reasons for your answer.**

<ESMA\_QUESTION\_145>

With respect to bonds:

No, Deutsche Börse Group thinks EOD (after 15:00h t+1 start of trading) should be sufficient. Hedging of the position will immediately be done after the trade was executed. Every market participant will hedge the trade on the same day as a possible overnight risk would be too high even for trades executed after 15:00h.

With respect to derivatives:

No, in Deutsche Börse Group's view trades should be reported intra-day and latest after the close regardless of their size or liquidity classification to ensure a level playing field for stakeholders in the underlying asset and adequate post trade reporting standards (point 50).

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for

exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

<ESMA\_QUESTION\_145>

**Q146: Do you think that one universal deferral period is appropriate for all non-equity instruments which do not have a liquid market or that the deferrals should be set at a more granular level, depending on asset class and even sub asset class. Please provide reasons for your answer.**

<ESMA\_QUESTION\_146>

With respect to bonds:

To keep it as simple and transparent as possible, Deutsche Börse Group supports a universal deferral period.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

If the limitation in scope and the increased level of transaction threshold vis-à-vis the order threshold in pre-trade transparency levels cannot be provided, one reporting deferral for all illiquid non-equities could be sufficient. Liquid products require a differentiation by asset class and sub asset class. These mass levels though are counterproductive for the transparency levels of regulated markets today. Therefore, we would like to emphasise to take a more sophisticated approach towards exchange traded derivatives, and it is advisable to include the expertise of regulated markets.

<ESMA\_QUESTION\_146>

**Q147: Do you agree with the proposal that during the deferred period for non-equity instruments which do not have a liquid market, the volume of the transaction should be omitted but all the other details of individual transactions must be published? Please provide reasons for your answer.**

<ESMA\_QUESTION\_147>

With respect to bonds:

Deutsche Börse Group agrees that volume is the only information that should be omitted. The price without attached volume is not enough to support price discovery, however, the price without the attached volume is at least an orientation point for the price determination of the bond.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency





shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

We do not suggest showing the trade price intra-day for deferred transactions in illiquid instruments, as the existence of a trade represents a price moving event in itself. Due to the wide quote spreads for these instruments, showing the price intra-day gives away the market direction of the trade in question. For example, if a market maker sees a trade at the price of 20, and had the mid-point of his own pricing at 17.5 prior to the trade, it is likely that a buyer paid up the price of 20. Hence, a market maker will adjust my theoretical price upwards, and charge more for subsequent buyers. This evaluation stems from the understanding that deferred publication is only used for a few instruments and also on levels that form multiples of the pre trade levels, so that the majority of instruments is reported timely.

<ESMA\_QUESTION\_147>

**Q148: Do you agree that publication in an aggregated form with respect to sovereign debt should be authorised for an indefinite period only in limited circumstances? Please give reasons for your answers. If you disagree, what alternative approaches would you propose?**

<ESMA\_QUESTION\_148>

Deutsche Börse Group agrees.

<ESMA\_QUESTION\_148>

**Q149: In your view, which criteria and/or conditions would it be appropriate to specify as indicating there is a need to authorise extended/indefinite deferrals for sovereign debt??**

<ESMA\_QUESTION\_149>

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<ESMA\_QUESTION\_149>

**Q150: In your view, could those transactions determined by other factors than the valuation of the instrument be authorised for deferred publication to the end of day? Please provide reasons for your answer.**

<ESMA\_QUESTION\_150>

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

However, operators should have the flexibility to offer deferred publication for Flex trades in exchange traded derivatives regardless of the transaction size, due to the nature of how strategies are traded.

<ESMA\_QUESTION\_150>

### **3.9. The transparency regime of non-equity large in scale orders and transactions**

**Q151: Do you agree with the proposed option? Which option would be more suitable for the calibration of the large in scale requirements within an asset class?**

<ESMA\_QUESTION\_151>

With respect to bonds:

Deutsche Börse Group prefers Option 2, as Option 1 is in our view too complex to operate. Option 2 fits in the COFIA approach as the individual classes of bonds already reflect the liquidity profiles of the bonds represented in the respective class of bond.

With respect to derivatives:

See also Q141 and Q144. As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

Futures and options on the same underlying will feature different liquidity levels resulting in different sized thresholds, i.e. order book focused futures will feature a high number of trades and small trade sizes, whilst options are more heavily traded via phone negotiation with greater sizes and lower trade frequencies. Based on the description ESMA provides, the impact would be tremendous. The comingling of the liquidity definitions of futures and options could result in undesired thresholds for the LIS definitions. A too low LIS threshold for options would result in lower transparency, as significantly more trades would be subject to deferred reporting, depending on the idea that same levels shall prevail for pre and post trade waivers/deferrals. On the flipside, high block trade sizes are maintained in futures to ensure high order book liquidity levels. Lowering these would result in less direct matching and potential greater levels of pre-negotiated trading. This evaluation stems from the understanding that deferred publication is only used for a few instruments and also on levels that form multiples of the pre trade levels. If forced under this notion, a model similar to model 1 is preferable with an annual evaluation. It should be amended by the points mentioned before though.

***Therefore, it is proposed to establish a framework of cooperation between regulated markets and national competent authorities, to provide expertise to ESMA in order not to damage exchange traded derivatives transparency.***

<ESMA\_QUESTION\_151>

**Q152: Do you consider there are reasons for opting for different options for different asset classes? Please provide arguments.**

<ESMA\_QUESTION\_152>

With respect to bonds:

No, Deutsche Börse Group believes one asset class should have one threshold.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives (ETDs), Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transpar-



ency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

ETDs may differ significantly towards other instruments in scope. Although we propose a different approach in general, if model 1 is chosen, it should be amended.

<ESMA\_QUESTION\_152>

**Q153: Do you agree that the choice between the two options should be consistent with the approach adopted for the assessment of liquidity? If not, please provide arguments.**

<ESMA\_QUESTION\_153>

With respect to bonds:

Yes, Deutsche Börse Group agrees.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

In this context, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_153>

**Q154: Do you agree with the proposed approach? If no, which indicator would you consider more appropriate for the determination of large in scale thresholds for orders and transactions?**

<ESMA\_QUESTION\_154>

With respect to bonds:

Deutsche Börse Group prefers Option 1 as option 1 is in line with the approach chosen by ESMA to identify bonds for which there is a liquid market.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

Specifically on the question, option 1 would be preferable over option 2. However, we suggest taking the exchange/operator information on large sizes of each venue. For deferred publication purposes, a multiple thereof shall be used.

For example at Eurex, only equity options can enjoy deferred publication, called non-disclosure, but also only on levels of multiples of large sizes of pre-trade transparency levels.

<ESMA\_QUESTION\_154>

**Q155: Do you agree that the proxy used for the determining the large in scale thresholds should be the same as the one used to assess the average size of transactions in the context of the definition of liquid markets? Please provide arguments.**

<ESMA\_QUESTION\_155>

With respect to bonds:

Yes, Deutsche Börse Group agrees. To be consistent, if ADT is used to measure the liquidity of a market, the same logic and calculation should be applied to measure the average size of transactions.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall also be allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives.

Regarding the question as such, using the trade volume data and distributions based on each transaction would be superior to average volume or trade size figures. LIS thresholds cannot be efficiently determined with the average sizes, as only the largest trades require deferred publication for efficient risk management of these positions by involved investors. Classifying all trades above the product/asset class average as LIS would lower transparency and liquidity levels that currently already exist. This should not be the intention of regulators to create a situation where transparency before legislation has been higher than after legislation.

<ESMA\_QUESTION\_155>

**Q156: In your view, which option would be more suitable for the determination of the large in scale thresholds? Please provide arguments.**

<ESMA\_QUESTION\_156>

With respect to bonds:

Deutsche Börse Group thinks Option 2 is the best approach to identify the large in scale thresholds. To be consistent this approach should also be used when defining the threshold for the liquid market criterion.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

Using the trade volume data and distributions based on each transaction is superior to average volume or trade size figures. LIS thresholds cannot be efficiently determined with the average sizes, as only the largest trades require deferred publication for efficient risk management of these positions by involved investors. Classifying all trades above the product/asset class average as LIS would lower transparency and liquidity levels.

<ESMA\_QUESTION\_156>

**Q157: Alternatively which method would you suggest for setting the large in scale thresholds?**

<ESMA\_QUESTION\_157>

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

Using the trade volume data and distributions based on each transaction is superior to average volume or trade size figures. LIS thresholds cannot be efficiently determined with the average sizes, as only the largest trades require deferred publication for efficient risk management of these positions by involved investors. Classifying all trades above the product/asset class average as LIS would lower transparency and liquidity levels and thus impact transparent markets in a way that in future, exchange traded derivatives markets will suffer from less transparency, due to wrong calibration.

<ESMA\_QUESTION\_157>

**Q158: In your view, should large in scale thresholds for orders differ from the large in scale thresholds for transactions? If yes, which thresholds should be higher: pre-trade or post-trade? Please provide reasons to support your answer.**

<ESMA\_QUESTION\_158>

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

Thus, a differentiation between pre-and post-trade thresholds is required. The large in scale thresholds for transactions should be higher as they imply deferred reporting. For orders, pre-trade transparency negatively impacts the price building process by disclosing the size of an order. This should be addressed with respective waivers. For trades, not disclosing the details within a reasonable time frame creates a competitive disadvantage to those parties not involved in the trade. This should only apply to the largest of all transactions.

***Therefore, it is proposed to establish a framework of cooperation between regulated markets and national competent authorities, to provide expertise to ESMA in order not to damage exchange traded derivatives transparency.***

<ESMA\_QUESTION\_158>

**Q159: Do you agree that the large in scale thresholds should be computed only on the basis of transactions carried out on trading venues following the implementation of MiFID II? Please, provide reasons for the answer.**

<ESMA\_QUESTION\_159>

With respect to bonds:



Deutsche Börse Group thinks that the large in scale thresholds should be computed on all relevant transactions. The large in scale threshold may only be applied to trading venues regarding pre-trade transparency. However, as the large in scale threshold also applies to SI transactions and OTC transactions regarding post-trade transparency, transactions of SIs and OTC transactions should also be considered when calculating the large in scale thresholds. We see no reason why SI and OTC transaction should not be included in the calculation of the large in scale threshold.

With respect to derivatives:

Deutsche Börse Group agrees.

<ESMA\_QUESTION\_159>

**Q160: Do you think that the condition for deferred publication of large in scale transactions currently applying to shares (transaction is between an investment firm that deals on own account and a client of the investment firm) is applicable to non-equity instruments? Please provide reasons for your answer.**

<ESMA\_QUESTION\_160>

With respect to bonds:

Deutsche Börse Group agrees to the approach by ESMA, as there is no reason for a deferred publication of a trade when no participant is exposed to risk or needs to hedge the transactions when providing liquidity (e.g. when to buy-side participant trade a bond). Proprietary transaction of banks should also be published without a deferral.

With respect to derivatives:

Deutsche Börse Group considers that distinction as it stands under MIFID offer preferential treatment for investment firms over intermediaries such as inter dealer brokers. The pricing impact and likewise the amount of capital put at stake in LIS transactions is identical regardless whether a trade is arranged and traded by brokers in exchange traded derivatives (ETDs), and then given up to the beneficial owners of a transaction, or the transaction is directly arranged between a bank dealing desk and their client.

<ESMA\_QUESTION\_160>

**Q161: Do you agree that the large in scale regime should be reviewed no earlier than two years after application of MiFIR in practice?**

<ESMA\_QUESTION\_161>

With respect to bonds:

Deutsche Börse Group agrees.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels, and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

Parameters and classifications should be reviewed in the frequency of the data timeframes they are based on, i.e. ideally annual data, then the parameters should be reviewed once a year; the regime itself could be reviewed every 2 years.

<ESMA\_QUESTION\_161>

### 3.10. Size specific to the instrument

**Q162: Do you agree with the above description of the applicability of the size specific to the instrument? If not please provide reasons for your answer.**

<ESMA\_QUESTION\_162>

With respect to bonds:

Deutsche Börse Group agrees.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels, and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

The size specific to the instrument is equally sensitive and also needs to be set accordingly, as described above.

<ESMA\_QUESTION\_162>

**Q163: Do you agree with the proposal that the size specific to the instrument should be set as a percentage of the large in scale size? Please provide reasons for you answer.**

<ESMA\_QUESTION\_163>

With respect to bonds:

Deutsche Börse Group agrees. However, the percentage should be different for pre- and post-trade transparency requirements.

When defining the percentage for pre-trade transparency the following items should be considered:

- The pre-trade transparency waiver for RFQ and voice trading models only applies to liquid bonds where hedging a transaction is straight forward as the traded bond is liquid and derivatives provide for additional hedging possibilities.
- Liquidity providers publishing IOIs in RFQ and voice trading models are already protected by the trading model itself as they can adapt their published quote when requested for a quote or they can even not provide a quote if requested for a quote. Market makers providing liquidity in a central limit order book or in an auction model with firm quotes are not protected by this waiver. This is a serious disadvantage for trading venues using these trading models.
- RFQ and voice trading models dominate the trading in bonds (McKinsey-Greenwich Associates 2013 survey of institutional investors and Celent 2013 European Fixed Income Market Sizing). Hence the pre-trade transparency waiver for RFQ and voice trading model has a major impact to transparency. A too low threshold would water down the aimed increase in pre-trade transparency.

Therefore we recommend that the large in scale threshold and the size specific to the financial instrument should be identical regarding the pre-trade transparency requirements.

With respect to derivatives:

The size specific to the instrument should be defined as a percentage of the large in scale size, as it entails the requirement to make public a quote provided to a client on request. The dealer's risk increases when the quote is made available to other clients. A trade in a size greater than 10 times the average quote size of

an option represents undue risk. The requirement to make such a quote public, and to offer it to a wide range of market participants has additional implications and requires a lower size ratio to cater to the risk that the dealer may end up trading of the size quotes to the original client, i.e. undue risk arises for a trade size that is 3 times the average quote size of an option, if the dealer trades the initial position, and is required to offer this quote to the general public, and further 3 clients want to trade on this price.

In general, for exchange traded derivatives, a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

<ESMA\_QUESTION\_163>

**Q164: In your view, what methodologies would be most appropriate for measuring the undue risk in order to set the size specific threshold?**

<ESMA\_QUESTION\_164>

With respect to derivatives:

In exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

The size related to the average trade size is suitable, as well as the size quoted on the inside market of liquid instruments. Undue risk arises when multiples thereof are quoted and traded.

In instruments with lower liquidity, trades in sizes greater than 10% of the average daily notional volume. In options the options delta should also be considered in addition to liquidity aspects, as a high delta requires delta hedging in the underlying instrument that entails additional risk. For example, 500 contracts in liquid index options may not entail undue risk when the options are quoted in 200-300 contracts on the inside market, however, when quoting a 0.50 delta option, trading 250 futures may pose additional execution risk dependent on the average liquidity of the underlying asset.

<ESMA\_QUESTION\_164>

**Q165: Would you suggest any other practical ways in which ESMA could take into account whether, at such sizes, liquidity providers would be able to hedge their risks?**

<ESMA\_QUESTION\_165>

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<ESMA\_QUESTION\_165>

**Q166: Do you agree with ESMA's description of how the size specific to the instrument waiver would interact with the large in scale waiver? Please provide reasons for your answer.**

<ESMA\_QUESTION\_166>

With respect to bonds:

Deutsche Börse Group agrees.





With respect to derivatives:

Deutsche Börse Group agrees with caveats; please see following answer we also provided to Q163.

The size specific to the instrument should be defined as a percentage of the large in scale size, as it entails the requirement to make public a quote provided to a client on request. The dealer's risk increases when the quote is made available to other clients. A trade in a size greater than 10 times the average quote size of an option represents undue risk. The requirement to make such a quote public, and to offer it to a wide range of market participants has additional implications and requires a lower size ratio to cater to the risk that the dealer may end up trading of the size quotes to the original client, i.e. undue risk arises for a trade size that is 3 times the average quote size of an option, if the dealer trades the initial position, and is required to offer this quote to the general public, and further 3 clients want to trade on this price.

In general, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels, and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

<ESMA\_QUESTION\_166>

**Q167: Do you agree with ESMA's description of how the size specific to the instrument deferrals would interact with the large in scale deferrals? In particular, do you agree that the deferral periods for the size specific to the instrument and the large in scale should differ and have any specific proposals on how the deferral periods should be calibrated? Please provide reasons for your answer.**

<ESMA\_QUESTION\_167>

With respect to bonds:

Deutsche Börse Group agrees to the description of the interaction of the size specific to the instrument and large in scale. We also agree to the approach that the size specific to the instrument should have shorter periods of deferrals than large in scale, e.g. half the time than for large in scale.

With respect to derivatives:

As has been defined already in previous questions, for exchange traded derivatives, Deutsche Börse Group considers that a holistic approach needs to be envisaged. Ideally, the trading venue is included as an information parameter, and the expertise of the trading venue is captured. The appropriate level is usually defined by the regulated market/ trading venue, discussed with market participants and the competent authority. This framework shall be also allowed in the future in order to calibrate meaningful levels for exchange traded derivatives and eliminate any impact on the already high levels of transparency in exchange traded derivatives, for both pre trade transparency levels, and post trade transparency levels. In regards to deferred publication, in post trade information, multiples of the size for pre trade transparency shall be used, and only for a limited scope of instrument types in exchange traded derivatives. Usually, deferred publication is in equity options only.

Challenges in setting the reporting deferrals are discussed and outlined under question 142. To repeat, deferred publication shall be minimized to a narrow scope of products only, usually equity options. The deferred publication levels shall be multiples of the pre-trade defined levels of orders.

<ESMA\_QUESTION\_167>

### 3.11. The Trading Obligation for Derivatives

**Q168: Do you agree that there should be consistent categories of derivatives contracts throughout MiFIR/EMIR?**

<ESMA\_QUESTION\_168>

Deutsche Börse Group is of the opinion that a consistent approach is necessary when defining ‘categories’ of derivative contracts. An inconsistent approach would lead to legal uncertainty for financial and non-financial counterparties under the clearing obligation and the trading obligation for OTC derivatives. A naming categorisation needs to be reasonably adapted for exchange traded derivatives. A norm for naming does not mean though that exchange traded derivatives can be set on equal liquidity measures like OTC derivatives under the clearing and trading obligation.

*We would like to clarify our understanding that the derivatives trading obligation and extension of transparency requirements applies both to OTC derivatives meeting the clearing and trading tests in EMIR and MiFIR respectively, as well as to all exchange traded derivatives (ETDs) since these products already fulfilled the G20 requirements before regulatory initiatives have developed. MiFIR Article 9(1c) allows competent authorities to waive pre-trade transparency obligations for ‘derivatives which are not subject to the trading obligation and other financial instruments for which there is not a liquid market’. As a consequence, the trading obligation needs to apply both to OTC derivatives and ETDs to avoid transparency waivers being sought for these contracts simply on wrong interpretation grounds that they have not fulfilled a trading obligation. This would be a perverse outcome and completely at odds with the political ambitions of the G20 and the MIFID Review in respect of OTC derivatives.*

<ESMA\_QUESTION\_168>

**Q169: Do you agree with this approach to the treatment of third countries?**

<ESMA\_QUESTION\_169>

Deutsche Börse Group agrees with the proposed approach. A consistent alignment with the treatment of products under the clearing obligation stipulated by EMIR is necessary.

<ESMA\_QUESTION\_169>

**Q170: Do you agree with the proposed criteria based anti-avoidance procedure?**

<ESMA\_QUESTION\_170>

Deutsche Börse Group is concerned that avoidance could materialize, when ESMA would neglect forward looking criteria. When the scope of analysis is only backward focused, then markets will never be liquid enough under the current set-up. Only if the new inflow of multilaterally traded markets is taken into consideration, the market’s potential can be estimated and actually cater to the G20 goals and be multilaterally cleared and traded. An avoidance can result not willingly, but because the measures do not allow for potential future developments under a different trading in a multilateral fashion.

<ESMA\_QUESTION\_170>

**Q171: Do you think it would be reasonable for ESMA to consult venues with regard to which classes of derivatives contracts are traded on venue? Do you think venues would be well placed to undertake this task?**

<ESMA\_QUESTION\_171>

Deutsche Börse Group agrees that it is necessary to consult a trading venue with respect to the capability to process larger volumes in either contracts already offered for trading or in case new products should be eligible for the trading obligation. The clearing obligation under EMIR targets OTC derivatives with sufficient standardization and liquidity, as outlined in the started consultation on interest rate swaps derivatives and credit default swaps. Hence bi-laterally agreed transaction can be cleared via a CCP authorized



under EMIR and registered in ESMA's public register. Imposing the trading obligation should consider that this choice for clearing via several CCPs can be maintained for OTC derivatives.

<ESMA\_QUESTION\_171>

**Q172: The discussion in section 3.6 on the liquid market for non-equity instruments around 'average frequency', 'average size', 'number and type of active market participants' and average size of spreads is also relevant to this chapter and we would welcome respondent's views on any differences in how the trading obligation procedure should approach the following:**

<ESMA\_QUESTION\_172>

As a general observation Deutsche Börse Group would like to point out that a clear alignment with the categories, definitions and parameter used when defining 'liquidity' for evaluating the clearing obligation is necessary. The focus lies with OTC derivatives in that regard, which have been extensively analysed under EMIR.

- i. Whether 'average frequency' should be understood to refer to the number of trades over a given time period, the number of days on which trading occurred over that time period or both.
- ii. The extent to which the given time period will need to vary by asset class.
- iii. Whether the 'average size' should be based on the notional and the number of trades in the given period, the notional and the number of trading days, or some other measure.
- iv. The most appropriate data for calculating 'spreads'.

<ESMA\_QUESTION\_172>

**Q173: Do you have a view on how ESMA should approach data gathering about a product's life cycle, and how a dynamic calibration across that life cycle might work? How frequently should ESMA revisit its assumptions? What factors might lead the reduction of the liquidity of a contract currently traded on venue? Are you able to share with ESMA any analysis related to product lifecycles?**

<ESMA\_QUESTION\_173>

Deutsche Börse Group considers that for contracts related to the clearing obligation the parameters as used for that purpose should be aligned.

<ESMA\_QUESTION\_173>

**Q174: Do you have any suggestions on how ESMA should consider the anticipated effects of the trading obligation on end users and on future market behaviour?**

<ESMA\_QUESTION\_174>

Deutsche Börse Group refers to its answer to question 171 repeated below.

Deutsche Börse Group agrees that it is necessary to consult a trading venue with respect to the capability to process larger volumes in either contracts already offered for trading or in case new products should be eligible for the trading obligation. The clearing obligation under EMIR targets OTC derivatives with sufficient standardization and liquidity, as outlined in the started consultation on interest rate swaps derivatives and credit default swaps. Hence bi-laterally agreed transaction can be cleared via a CCP authorized under EMIR and registered in ESMA's public register. Imposing the trading obligation should consider that this choice for clearing via several CCPs can be maintained.

Regulated market derivatives are not in scope under the EMIR clearing obligation.

<ESMA\_QUESTION\_174>

**Q175: Do you have any other comments on our overall approach?**

<ESMA\_QUESTION\_175>

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<ESMA\_QUESTION\_175>

### **3.12. Transparency Requirements for the Members of ESCB**

**Q176: Do you agree that the above identifies the types of operations that can be undertaken by a member of the ESCB for the purpose of monetary, foreign exchange and financial stability policy and that are within the MiFID scope? Please give reasons to support your answer.**

<ESMA\_QUESTION\_176>

From Deutsche Börse Group's perspective, it needs to be made clear that electronic order books of regulated markets are already anonymous. In transaction reporting, the counterparty is made transparent towards the competent authority, but counterparty information is not included in trade reporting towards the market, only instrument related information, price and size.

Trading in a public order book means the trading information/ interest such as price and size in the instrument of the trading venue is made public to all trading participants of the venue. Therefore, exceptions to the transparency requirements for transactions conducted by members of the ESCB can only apply to OTC transactions. Any transaction conducted through a trading venues' order book will have to adhere to the same transparency requirements as all other transactions. Either the trading interest can be shared in a public order book, in which case the rules of the market prevail, or else there are good reasons for conducting such transactions OTC.

<ESMA\_QUESTION\_176>

**Q177: What is your view about the types of transactions for which the member of the ESCB would be able to provide prior notification that the transaction is exempt?**

<ESMA\_QUESTION\_177>

Deutsche Börse Group refers to its response to question 176.

It is not recommended to change order books and their mechanism in such a way that they would turn into OTC platforms as a consequence of the adaptations to cover and disguise single trading interests and the ones interacting with the particular trading interest.

<ESMA\_QUESTION\_177>

### **3.13. Article 22, MiFIR: Providing information for the purposes of transparency and other calculations**

**Q178: Do you have any comments on the content of requests as outlined above?**

<ESMA\_QUESTION\_178>

#### **Data inquiries for equity and equity-like data**

Deutsche Börse Group is slightly concerned how the NCAs/ ESMA is supposed to obtain free float data, unless it is only required at the time of listing at a trading venue. Free float data on an ongoing basis is not made available to RMs, APAs, or CTPs. Neither trading venues, nor APAs nor CTPs would be in the position to provide such data, as it is simply not being reported to them. In fact, there is no source which provides for overall free-float data for all equity instruments on an ongoing basis within the EU. We would assume that Issuers might be aware about their free float, but again it is questionable, if that would be the case across all instruments. We therefore assume that the application of free float data only happens once at the time of issuance of an instrument.

#### **Data inquiries for non - equity data**



Deutsche Börse Group is concerned how ESMA will be able to achieve necessary information as regards certain non-equity data via trading venues, APAs and CTPs. Whereas asset classes predominantly traded on exchanges are already very transparent, and data is being made available to regulators already as of today, it seems questionable if the NCA or ESMA initially will have access to sufficient non-equity non-exchange traded data, other than exchange traded derivatives data. Here it seems that Level 1 missed to include IF's into Art 22.

### **Inquiries by NCAs**

Generally, Deutsche Börse Group would like to suggest that the NCA / ESMA streamline their inquiries to trading venues in order to contain costs at both ends. Data is already made available as of today to NCAs and all requests might be aligned going forward. Content need to be further specified upfront according to the new additional needs. In general as parameters may vary across products and product classes there should be specified a 'pre-set' subset of parameters for respective data to be collected – flexible enough to make it easily comparable across products and markets, yet simple enough to process for market participants and NCAs to process on a regular basis.

<ESMA\_QUESTION\_178>

### **Q179: Do you have proposals on how NCAs could collect specific information on the number and type of market participants in a product?**

<ESMA\_QUESTION\_179>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_179>

### **Q180: Do you consider the frequency of data requests proposed as appropriate?**

<ESMA\_QUESTION\_180>

Yes, Deutsche Börse Group appreciates ESMA's mindful suggestion and agrees that the frequency of data requests in relation to equity is appropriate.

We would like to point out however that non-equity data should not be considered similar within itself. In fact exchange traded derivatives significantly differ from cash bonds and thus recalculations might be necessary less frequently compared to bonds. Therefore, we would like to urge ESMA to clearly differentiate between fixed income, i.e. bonds, cash instruments usually traded off exchange and exchange traded derivatives. Whereas fixed income/ bonds are supposed to be updated in a higher frequency, we do not see this need in case of exchange traded derivatives like futures and/or options. As an example of an exchange traded derivative, the Bund Future, being a fixed income derivative, is highly liquid. Structured products like certificates should as well not be in need on a much more frequent update. In the case of certificates we speak about approx. 1.4 mn instruments across the EU. The cost/benefit analysis might not be sensible.

<ESMA\_QUESTION\_180>

### **Q181: How often should data be requested in respect of newly issued instruments in order to classify them correctly based on their actual liquidity?**

<ESMA\_QUESTION\_181>

Deutsche Börse Group suggests that for equity and equity-like instruments the update should be continued for once per year going forward. Even in this case, free float data would only be available once – at the time of issuance.

We would deem the same frequency as being the right one as well in the case of exchange traded derivatives. As regards the other asset classes, a cost-benefit consideration should be applied.

<ESMA\_QUESTION\_181>

**Q182: What is your view of ESMA’s initial assessment of the format of data requests and do you have any proposals for making requests cost-efficient and useful for all parties involved?**

<ESMA\_QUESTION\_182>

Deutsche Börse Group agrees with ESMA to not integrate the format into technical standards in order to keep them sufficiently adaptable. However, any adaptations should be well considered in advance and moreover, the requests must include clear reasoning and purpose in order for the relevant data to be submitted to the regulator.

Deutsche Börse Group proposes that in order to make the requests cost-efficient and useful for all parties involved they should be based on existing industry standards as much as possible. In fact XML or CSV are already formats which are used in the field of static data.

<ESMA\_QUESTION\_182>

**Q183: Do you consider a maximum period of two weeks appropriate for responding to data requests?**

<ESMA\_QUESTION\_183>

Deutsche Börse Group believes that a maximum period depends on the level of complexity and scale of the data that has been requested. Generally, a two week period might be a bit too short especially, in case of holiday seasons. Ideally, we would suggest a maximum period of 4 weeks, unless there are reasonable reasons for requiring a shorter period. Generally, it would be good to have upfront scheduled times for data submissions to the regulator in order for planning. The maximum period discussed ideally should only refer to ad hoc requirements. We agree that once the implementation has been concluded, shorter time frames might become feasible. However, Deutsche Börse Group is open for further constructive discussions how to set up an efficient process for the industry.

<ESMA\_QUESTION\_183>

**Q184: Do you consider a storage time for relevant data of two years appropriate?**

<ESMA\_QUESTION\_184>

Deutsche Börse Group agrees with ESMA in this respect.

<ESMA\_QUESTION\_184>

## 4. Microstructural issues

### 4.1. Microstructural issues: common elements for Articles 17, 48 and 49 MiFID II

**Q185: Is there any element that has not been considered and/or needs to be further clarified in the ESMA Guidelines that should be addressed in the RTS relating to Articles 17, 48 and 49 of MiFID II?**

<ESMA\_QUESTION\_185>

No, Deutsche Börse Group believes the key elements have been addressed.

<ESMA\_QUESTION\_185>

**Q186: Do you agree with the definition of ‘trading systems’ for trading venues?**

<ESMA\_QUESTION\_186>

From Deutsche Börse Group’s point of view this is a complete functional definition for a trading system that we support.

<ESMA\_QUESTION\_186>

**Q187: Do you agree that the requirements under Articles 48 and 49 of MiFID II are only relevant for continuous auction order book systems and quote-driven trading systems and not for the other systems mentioned above?**

<ESMA\_QUESTION\_187>

With respect to equities and equity-like instruments:

Deutsche Börse Group believes those should be applicable for all trading systems.

With respect to derivatives:

While request for quote systems and voice trading should be kept out of scope, periodic auction trading systems should be considered to be part of the regulation, especially in the context of algorithmic trading. Essentially it is of relevance how the order is perceived on the venue side.

<ESMA\_QUESTION\_187>

**Q188: Which hybrid systems, if any, should be considered within the scope of Articles 48 and 49, and why?**

<ESMA\_QUESTION\_188>

With respect to equities and equity-like instruments:

Deutsche Börse Group believes all hybrid systems should be considered within the scope of Articles 17, 48 and 49. On the one hand, all electronic trading systems should be subject to the rules of algorithmic trading and systems reliance in order to further support the stability of markets. On the other hand, common tick sizes should also be obeyed by all trading platforms (and even bilateral transactions (SI and OTC)) in order to protect a level playing field.

<ESMA\_QUESTION\_188>

**Q189: Do you agree with the definition of “trading system” for investment firms?**

<ESMA\_QUESTION\_189>

With respect to derivatives:

DBG considers that while most of the description is appropriate, not all the components listed in this definition should be perceived as part of a trading system. Widening the definition to that extent would result in investment firms having to test all technical network components (switches, etc.) as well as components such as news feeds. Not only would this be an unnecessary effort, it would also impose significant additional costs on investment firms.

<ESMA\_QUESTION\_189>

**Q190: Do you agree with the definition of ‘real time’ in relation to market monitoring of algorithmic trading activity by investment firms?**

<ESMA\_QUESTION\_190>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_190>

**Q191: Is the requirement that real time monitoring should take place with a delay of maximum 5 seconds appropriate for the risks inherent to algorithmic trading and from an operational perspective? Should the time frame be longer or shorter? Please state your reasons.**

<ESMA\_QUESTION\_191>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_191>

**Q192: Do you agree with the definition of ‘t+1’ in relation to market monitoring of algorithmic trading activity by investment firms?**

<ESMA\_QUESTION\_192>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_192>

**Q193: Do you agree with the parameters to be considered to define situations of ‘severe market stress’ and ‘disorderly trading conditions’?**

<ESMA\_QUESTION\_193>

With respect to equities and equity-like instruments:

Deutsche Börse Group believes only the third criterion ‘significant short term increase in the number of messages’ may be considered as the first two criteria ‘significant short-term changes in terms of market volume’ and ‘significant short-term changes in terms of price (volatility)’ may lead to more traffic, but not cause disorderly trading conditions.

With respect to derivatives:

Severe market stress cannot be defined equally across trading venues. Due to different technical infrastructures some conditions might compromise the performance of one trading venue while not compromising the performance of another trading venue under the same circumstances.

Significant short-term changes in terms of market volume and/or significant short-term increase in the number of messages could be an indicator of disorderly trading conditions.

A significant short-term change of price (volatility) is not necessarily an indicator. A possible scenario is where, due to a large external trigger (dividend increase of a stock, better unemployment rate, etc.), the market prices make a huge move. But because that is a normal market reaction fair, orderly and transparent execution are still secured.

<ESMA\_QUESTION\_193>

**Q194: Do you agree with the above approach?**

<ESMA\_QUESTION\_194>

With respect to equities and equity-like instruments:



Yes, Deutsche Börse Group does agree in general. Regarding point 37.ii. e., please note that the trading venue might not know the exact amount of HFT activity (if the definition is based on Option 1, as trading venues do not always know whether the HFT criteria are fulfilled (such as if the trading decision is automated or not, or if the trading is for own account or not, which we recommend to include, see our response in the Consultation Paper, Q168). In terms of frequency ESMA does not define how frequently such a self-assessment should be done. We do not recommend doing it more than once every three years unless there is a justified reason to do so.

Regarding point 37.ii.a., please note that a trading venue has no insight about the algorithms/strategies operating on that venue, except for the ‘algo flag’, as identified by the investment firm. Thus, trading venues will most likely use precisely this information in order to identify the number of algorithms/strategies. It will not be possible for a trading venue to guarantee the correctness or validity.  
<ESMA\_QUESTION\_194>

**Q195: Is there any element that should be added to/removed from the periodic self-assessment?**

<ESMA\_QUESTION\_195>

With respect to equities and equity-like instruments:

A trading venue does not operate trading strategies, and thus has only limited insights in all the possible and heterogeneous trading strategies used by market participants. Behind this background, a trading venue might not fully realize how its fee structure might affect market participants’ trading strategies (37.i.c). Deutsche Börse Group covers many markets and exchanges and cannot determine the number of algorithms/strategies operating in the venues (37.ii.a). Same holds for 37.ii.e (percentage of HFT activity) as outlined in answer to question 194. In today’s trading, nearly all members are remote (37.ii.i), therefore this point may not seem absolutely necessary. Therefore we recommend removing it from the periodic self-assessment.

<ESMA\_QUESTION\_195>

**Q196: Would the MiFID II organisational requirements for investment firms undertaking algorithmic trading fit all the types of investment firms you are aware of? Please elaborate.**

<ESMA\_QUESTION\_196>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_196>

**Q197: Do you agree with the approach described above regarding the application of the proportionality principle by investment firms? Please elaborate.**

<ESMA\_QUESTION\_197>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_197>

**Q198: Are there any additional elements that for the purpose of clarity should be added to/removed from the non-exhaustive list contained in the RTS? Please elaborate.**

<ESMA\_QUESTION\_198>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_198>

## **4.2. Organisational requirements for investment firms (Article 17 MiFID II)**

**Q199: Do you agree with a restricted deployment of algorithms in a live environment? Please elaborate**



<ESMA\_QUESTION\_199>

Deutsche Börse Group believes that no restriction is required; deployment of algorithms is the prerogative of the trading participant.

<ESMA\_QUESTION\_199>

**Q200: Do you agree with the parameters outlined for initial restriction? Please elaborate.**

<ESMA\_QUESTION\_200>

While the environments described in this chapter do make sense, Deutsche Börse Group would like to note that testing requirements generally depend upon the design of the specific algorithm and should be calibrated to reflect the inherent characteristics of each individual algorithm. We therefore recommend allowing the trading participant to decide on the specifics of the tests that an algorithm runs through. E.g. a small modification does not require significant testing while a completely new algorithm does. In short testing is the responsibility of the trading participant.

<ESMA\_QUESTION\_200>

**Q201: Do you agree with the proposed testing scenarios outlined above? Would you propose any alternative or additional testing scenarios? Please elaborate.**

<ESMA\_QUESTION\_201>

Deutsche Börse Group thinks that trading participants need a certain degree of flexibility in deciding when and how to conduct testing. Considering that the investment firm itself is in the best position to decide which elements need to be tested for a certain system or algorithm, there should be no predefined conformance testing. Alternatives to conformance testing shall be permitted.

<ESMA\_QUESTION\_201>

**Q202: Do you agree with ESMA's approach regarding the conditions under which investment firms should make use of non-live trading venue testing environments? Please elaborate.**

<ESMA\_QUESTION\_202>

Deutsche Börse Group is of the opinion that the trading participant should always have the possibility for non-live trading in a test environment provided by the trading venue.

<ESMA\_QUESTION\_202>

**Q203: Do you consider that ESMA should specify more in detail what should be the minimum functionality or the types of testing that should be carried out in non-live trading venue testing environments, and if so, which?**

<ESMA\_QUESTION\_203>

No, Deutsche Börse Group does not think so as long as the non-live test environment provides the same functionality as the production environment so that a proper testing under real conditions can take place.

<ESMA\_QUESTION\_203>

**Q204: Do you consider that the requirements around change management are appropriately laid down, especially with regard to testing? Please elaborate.**

<ESMA\_QUESTION\_204>

Deutsche Börse Group considers that the requirements outlined look reasonable.

<ESMA\_QUESTION\_204>

**Q205: Do you agree with the proposed monitoring and review approach? Is a twice yearly review, as a minimum, appropriate?**

<ESMA\_QUESTION\_205>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_205>



**Q206: To what extent do you agree with the usage of drop copies in the context of monitoring? Which sources of drop copies would be most important?**

<ESMA\_QUESTION\_206>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_206>

**Q207: Do you agree with the proposed approach?**

<ESMA\_QUESTION\_207>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_207>

**Q208: Is the proposed list of pre trade controls adequate? Are there any you would add to or remove from the list?**

<ESMA\_QUESTION\_208>  
Deutsche Börse Group thinks that the proposed list sounds reasonable.  
<ESMA\_QUESTION\_208>

**Q209: To what extent do you consider it appropriate to request having all the pre-trade controls in place? In which cases would it not be appropriate? Please elaborate.**

<ESMA\_QUESTION\_209>

With respect to derivatives:

In Deutsche Börse Group's view it should be possible to overwrite price collars by manual confirmation at least in options markets (fast price movements due to leverage) and highly volatile markets. Ideally, ii,iii) 'maximum order value' and 'maximum order volume' should be combined in one check, otherwise the maintenance of updating these limits is very high. To the point of v) as far as 'maximum long/short overall strategy position' are concerned, the limits should not be set by the number of contracts. At least for derivatives the delta should be used. The preferred method would be limits by value-at-risk.

<ESMA\_QUESTION\_209>

**Q210: Do you agree with the record keeping approach outlined above?**

<ESMA\_QUESTION\_210>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_210>

**Q211: In particular, what are your views regarding the storage of the parameters used to calibrate the trading algorithms and the market data messages on which the algorithm's decision is based?**

<ESMA\_QUESTION\_211>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_211>

**Q212: Do you consider that the requirements regarding the scope, capabilities, and flexibility of the monitoring system are appropriate?**

<ESMA\_QUESTION\_212>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_212>

**Q213: Trade reconciliation – should a more prescriptive deadline be set for reconciling trade and account information?**



<ESMA\_QUESTION\_213>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_213>

**Q214: Periodic reviews – would a minimum requirement of undertaking reviews on a half-yearly basis seem reasonable for investment firms engaged in algorithmic trading activity, and if not, what would be an appropriate minimum interval for undertaking such reviews? Should a more prescriptive rule be set as to when more frequent reviews need be taken?**

<ESMA\_QUESTION\_214>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_214>

**Q215: Are there any elements that have not been considered and / or need to be further clarified here?**

<ESMA\_QUESTION\_215>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_215>

**Q216: What is your opinion of the elements that the DEA provider should take into account when performing the due diligence assessment? In your opinion, should any elements be added or removed? If so, which?**

<ESMA\_QUESTION\_216>  
Deutsche Börse Group believes that it may make sense to require the trading participant to document failed tests within his premises in order to have documentation on failed algorithms for future reference.  
<ESMA\_QUESTION\_216>

**Q217: Do you agree that for assessing the adequacy of the systems and controls of a prospective DEA user, the DEA provider should use the systems and controls requirements applied by trading venues for members as a benchmark?**

<ESMA\_QUESTION\_217>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_217>

**Q218: Do you agree that a long term prior relationship (in other areas of service than DEA) between the investment firm and a client facilitates the due diligence process for providing DEA and, thus, additional precautions and diligence are needed when allowing a new client (to whom the investment firm has never provided any other services previously) to use DEA? If yes, to what extent does a long term relationship between the investment firm and a client facilitate the due diligence process of the DEA provider? Please elaborate.**

<ESMA\_QUESTION\_218>  
Deutsche Börse Group thinks that no differences should be made dependent on the relationship between the DEA and the investment firm. All users should be treated equally.  
<ESMA\_QUESTION\_218>

**Q219: Do you agree with the above approach? Please elaborate.**

<ESMA\_QUESTION\_219>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_219>

**Q220: Do you agree with the above approach, specifically with regard to the granular identification of DEA user order flow as separate from the firm's other order flow? Please elaborate.**

<ESMA\_QUESTION\_220>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_220>

**Q221: Are there any criteria other than those listed above against which clearing firms should be assessing their potential clients?**

<ESMA\_QUESTION\_221>  
Deutsche Börse Group believes the criteria outlined in the Discussion Paper seem to be comprehensive and sufficient. However, for an effective application and enforcement the criteria should be publicly available and clearing firms should have transparent processes in place to ensure that the application of the criteria is met on an ongoing basis.  
<ESMA\_QUESTION\_221>

**Q222: Should clearing firms disclose their criteria (some or all of them) in order to help potential clients to assess their ability to become clients of clearing firms (either publicly or on request from prospective clients)?**

<ESMA\_QUESTION\_222>  
Deutsche Börse Group agrees that criteria should be transparent and disclosed at least to clients as well as to CCPs in order to assess stipulated requirements and potential associated risks.  
<ESMA\_QUESTION\_222>

**Q223: How often should clearing firms review their clients' ongoing performance against these criteria?**

<ESMA\_QUESTION\_223>  
With respect to derivatives:  
In Deutsche Börse Group' view, the frequency is dependent on the specific criteria and may range between real-time and annually, but should in no case be less than annually. Further it is important that processes applied to assess the ongoing performance against these criteria are transparent and auditable by a third party.  
<ESMA\_QUESTION\_223>

**Q224: Should clearing firms have any arrangement(s) other than position limits and margins to limit their risk exposure to clients (counterparty, liquidity, operational and any other risks)? For example, should clearing firms stress-test clients' positions that could pose material risk to the clearing firms, test their own ability to meet initial margin and variation margin requirements, test their own ability to liquidate their clients' positions in an orderly manner and estimate the cost of the liquidation, test their own credit lines?**

<ESMA\_QUESTION\_224>  
Deutsche Börse Group believes that in order to support safe and robust markets clearing firms must have arrangements in place to measure credit and liquidity risks reliably and efficiently. When assessing these risks they must also consider services offered to clients. The method should be appropriate for the respective business. With regards to potential straight through processing requirements setting of binding position limits for clients is a valuable tool to limit credit and liquidity risk and should be mandatory. However, clearing firms should be allowed to use additional methods for measuring credit and liquidity risk.  
<ESMA\_QUESTION\_224>

**Q225: How regularly should clearing firms monitor their clients' compliance with such limits and margin requirements (e.g. intra-day, overnight) and any other tests, as applicable?**

<ESMA\_QUESTION\_225>

With respect to derivatives:

Deutsche Börse Group is of the view that in order to ensure effective enforcement of limits and margin requirements intra-day monitoring is deemed to be necessary. Otherwise it would not be possible to act promptly in case of a breach of limits or in case of requirements not being fulfilled. An unwanted execution trades and submission of these trades to clearing would pose a risk to CCPs and the complete market.

<ESMA\_QUESTION\_225>

**Q226: Should clearing firms have a real-time view on their clients' positions?**

<ESMA\_QUESTION\_226>

With respect to derivatives:

To ensure intra-day monitoring of limits and margin requirements clearing firms need to have real-time information of their clients' positions.

<ESMA\_QUESTION\_226>

**Q227: How should clearing firms manage their risks in relation to orders from managers on behalf of multiple clients for execution as a block and post-trade allocation to individual accounts for clearing?**

<ESMA\_QUESTION\_227>

With respect to derivatives:

The clearing firm should be able to monitor asset managers' overall risk limits which could be broken down to each single fund which belonging to the asset manager to monitor the risk pre allocation.

<ESMA\_QUESTION\_227>

**Q228: Which type(s) of automated systems would enable clearing members to monitor their risks (including clients' compliance with limits)? Which criteria should apply to any such automated systems (e.g. should they enable clearing firms to screen clients' orders for compliance with the relevant limits etc.)?**

<ESMA\_QUESTION\_228>

With respect to derivatives:

Deutsche Börse Group is of the view that in order to monitor clients' compliance with set risk limits, clearing members should maintain client positions in a real time risk management system, similar to the proprietary trading risk monitoring. Any breach in limits should trigger a change to the order limits.

<ESMA\_QUESTION\_228>

### **4.3. Organisational requirements for trading venues (Article 48 MiFID II)**

**Q229: Do you agree with requiring trading venues to perform due diligence on all types of entities willing to become members/participants of a trading venue which permits algorithmic trading through its systems?**

<ESMA\_QUESTION\_229>

Deutsche Börse Group disagrees. The list of proposed requirements would require a significant investment of resources to achieve and are, in some cases, not quantifiably measurable. Deutsche Börse Group believes that much of the aforementioned minimum requirements should remain at the discretion of the trading venues for assessment prior to granting and maintaining membership. That notwithstanding, the

European community would benefit from a dialogue facilitated by a committee or council of exchanges to review and discuss best practices in regard to these measures (e.g. FESE and the like).

For derivatives, for Eurex the admission criteria apply to all entities interested to become members. Trader exams are a pre-requisite, without registered traders a member cannot be permitted to trading. Every certified trader receives a unique trader ID. The exchange market supervision sets up the trader (along with his Trader ID) and supervises the market functionally. Various roles in the interaction with the exchange are possible, from head trader to trader, as well as back office personnel and compliance and risk roles. In simulation a testing environment is provided where all functionalities can be tested by the member. After the set-up, the Audit Group is regularly ensuring that all rules are applied by the members. While the market supervision is overseeing the market functionally, the Trading Surveillance Office oversees the market on grounds of orderly functioning, market abuse and the adherence of exchange rules by the trader/member.

<ESMA\_QUESTION\_229>

**Q230: Do you agree with the list of minimum requirements that in all cases trading venues should assess prior to granting and while maintaining membership? Should the requirements for entities not authorised as credit institutions or not registered as investment firms be more stringent than for those who are qualified as such?**

<ESMA\_QUESTION\_230>

While Deutsche Börse Group generally agrees with the provisions which are suggested, we recommend that the implementation of these measures be left to the discretion of the trading venues.

- i. Pre-trade and post-trade controls are in place in all Deutsche Börse markets.
- ii. Staff selection policy is the prerogative of the member/participant; however, Deutsche Börse recommends that trading venues ensure personal reliability of the persons who are nominated business representatives of the member/participant. These measures are in place for Deutsche Börse markets.
- iii. Organizational structure and risk management practices of members/participants are monitored by Deutsche Börse.
- iv. Technical and functional testing is required by Deutsche Börse; however, due to the varied requirements of each trading venue, we recommend that the method by which members/participants conclude their testing be left to the discretion of the trading venue. Alternatives to conformance testing shall be allowed. Please see also answer to question 243.
- v. Testing of algorithms for potential disorder is the task of the participant. Burden of proof to ensure algorithms are stable and do not contribute to a disruptive market lies with the user of the algorithm. It is the responsibility of the trading venue to set the guidelines for participation in the respective market, and the responsibility of the member/participant to ensure they meet these requirements, to include the stability of any algorithms used. Please see also answer to question 243.
- vi. A 'kill button' is already in place for Deutsche Börse markets. We support the enforcement of the availability of such a function for all market operators/trading venues.
- vii. Business continuity and disaster recovery procedures of the member/participant are the responsibility of the member/participant. In this regard, the role of the member/participant will determine their criticality to the market in general, and in the case of market critical participants the requirement for business continuity and disaster recovery procedures should be required and enforced. Deutsche Börse markets have such contingency plans in place for its trading venues and, furthermore, facilitate the participation by members/participants in such plans. In cases where the member/participant is deemed by the trading venue to play a critical role, the member/participant should be required – at the discretion of the trading venue – to provide such evidence of a plan for business continuity as well as a disaster recovery procedure.
- viii. Outsourcing policies should ensure that sensitive information of the member/participant is safeguarded, as well as the identification of market participants – on an individual level as necessary – to ensure a properly functioning market. These requirements should be at the discretion of the trading venue to enforce.



The requirements for entities not authorized as credit institutions or not registered as investment firms should be more stringent to the degree required to ensure a stable trading environment.

<ESMA\_QUESTION\_230>

**Q231: If you agree that non-investment firms and non-credit institutions should be subject to more stringent requirements to become member or participants, which type of additional information should they provide to trading venues?**

<ESMA\_QUESTION\_231>

In accordance with the current procedures for membership to exchanges within Deutsche Börse Group, all members/participants – by virtue of the relationship to Eurex Clearing, which is a credit institutions – are required to fulfil the requirements of the anti-money laundering law (for example, members/participants fall under the know-your-customer requirements).

Specific requirements for the non-investment firms and non-credit institutions include the requirements to conduct proprietary trading only (no agency trading), demonstrate proof of 50k EUR in reserve capital, and declaration of beneficial ownership.

<ESMA\_QUESTION\_231>

**Q232: Do you agree with the list of parameters to be monitored in real time by trading venues? Would you add/delete/redefine any of them? In particular, are there any trading models permitting algorithmic trading through their systems for which that list would be inadequate? Please elaborate.**

<ESMA\_QUESTION\_232>

In Deutsche Börse Group's view most of the criteria already form part of many trading venues' system capacity and performance monitoring practices. It is important to focus the testing on the core components of the trading system. A criterion that is not used for performance and capacity monitoring and provides no value in monitoring is the calculation of the median lifetime of the orders modified or cancelled in the trading venue for a specific period (criterion 13.i.). A potential introduction of such a criterion does not support the trading venue in any way to monitor performance and capacity of their system. It is unclear how a meaningful conclusion shall be derived from a potential result and be useful to the trading venue or any other party. As for 13.iii, the performance and orderly function of the venue's trading system is an intrinsic value itself. Therefore, it is unnecessary and will only complicate the process if other departments need to be involved.

<ESMA\_QUESTION\_232>

**Q233: Regarding the periodic review of the systems, is there any element that has not been considered and/or needs to be further clarified in the ESMA Guidelines that should be included?**

<ESMA\_QUESTION\_233>

Deutsche Börse Group believes that periodic reviews of the systems including stress tests are important for each system and should be performed at least once a year. The requirements for a stress test should be defined from each trading venue according to the needs of the system and its architecture. The calculation of the median lifetime of orders seems not to be a criterion which is relevant for each trading system. Therefore the criteria should not be defined with this granularity, as they might not be applicable to all levels of trading.

<ESMA\_QUESTION\_233>

**Q234: Do you agree with the above approach?**

<ESMA\_QUESTION\_234>

Deutsche Börse Group believes that trading venues should be able to accommodate twice the historical peak of messages and in addition to that we recommend adding the principle of 'no transaction lost' in a meaningful way for both, the trading venue and the members. This is because even if a trading system has





enough capacity to handle a high amount of order flow, it might still not be able to execute orders in an adequate amount of time, resulting in ‘stale’ orders and thus impose risk on the member.

<ESMA\_QUESTION\_234>

**Q235: Do you think ESMA should determine minimum standards in terms of latency or is it preferable to consider as a benchmark of performance the principle “no order lost, no transaction lost”?**

<ESMA\_QUESTION\_235>

Deutsche Börse Group believes ESMA should not determine minimum standards in terms of latency. The principle ‘no order lost, no transaction lost’ seems to be sufficient.

<ESMA\_QUESTION\_235>

**Q236: Do you agree with requiring trading venues to be able to accommodate at least twice the historical peak of messages?**

<ESMA\_QUESTION\_236>

DBG believes that trading venues should be able to accommodate twice the historical peak of messages and in addition to that we recommend adding the principle of ‘no transaction lost’ in a meaningful way for both, the trading venue and the members.

This is because even if a trading system has enough capacity to handle a high amount of order flow, it might still not be able to execute orders in an adequate amount of time, resulting in “stale” orders and thus impose risk on the member.

To exemplify this statement, the disadvantage for the member could be that due to outdated orders in the queue something will be matched that is already outdated, although the capacity of the trading venue has not been impaired.

The members are at a disadvantage, when their orders are matched on the basis of too old information, because they were hanging in the queue. Economic impact for the member will lead to legal disputes. It is safer for the member to know that no orders based on outdated information are processed and the capacity is safeguarded before reaching the matcher.

As result, the ‘no transaction lost’ principle is truly reasonable for trading venues and members.

<ESMA\_QUESTION\_236>

**Q237: Do you agree with the list of abilities that trading venues should have to ensure the resilience of the market?**

<ESMA\_QUESTION\_237>

While most of the criteria on disorderly trading can be supported, Deutsche Börse Group would like to raise awareness that requiring trading venues to cancel or amend orders in case of the order book being corrupted by erroneous orders (point 31.vi.b) will expose the venue to severe legal risk, as it will be forced to make a decision on what would be defined as an erroneous order. We therefore recommend removing this requirement. Erroneous orders should always be handled according to the publicly documented mistrade rules and procedures.

Furthermore, the trading venue should not be forced to publish anything more than the general arrangements in respect to the different safety mechanisms. Publishing sensitive information would lead to increased risk as it would enable participants to avoid such measures. Thus, we recommend ESMA reconsider their proposals on point 32.v.a. and 34.vi.

<ESMA\_QUESTION\_237>

**Q238: Do you agree with the publication of the general framework by the trading venues? Where would it be necessary to have more/less granularity?**

<ESMA\_QUESTION\_238>

Please see question 237 above. Deutsche Börse Group believes publishing the general framework can be supported. However, parameters cannot be published (as outlined in point 29), as this could harm the orderly functioning of markets, put the trading venues under legal risks and make the market suffer from decreased market quality and impaired market integrity.

<ESMA\_QUESTION\_238>

**Q239: Which in your opinion is the degree of discretion that trading venues should have when deciding to cancel, vary or correct orders and transactions?**

<ESMA\_QUESTION\_239>

Deutsche Börse Group believes that any trading venue needs to have rules in place for fair-and-orderly trading, volatility management, mistrade applications, corporate action handling, listing rules, etc. The decision to cancel, vary or correct orders and transactions has to reflect these rules. Thus, when deciding to cancel, vary or correct orders and transactions the respective exchange management board is bound by the official exchange rules (mistrade rules). The cancellation, correction or adjustments of orders or transactions are corrective measures.

<ESMA\_QUESTION\_239>

**Q240: Do you agree with the above principles for halting or constraining trading?**

<ESMA\_QUESTION\_240>

In general, Deutsche Börse Group agrees. However, the trading venue should have more degrees of freedom to assess their trading halt rules and functionality. Point 34 ii) is too specific and might therefore not cover all existing approaches. E. g. a trading venue might use an assessment without taking into account volatility characteristics of similar financial instruments.

<ESMA\_QUESTION\_240>

**Q241: Do you agree that trading venues should make the operating mode of their trading halts public?**

<ESMA\_QUESTION\_241>

With regards to trading halts this can be supported; however in constrained trading/volatility interruptions Deutsche Börse Group would like to warn against publishing sensitive parameters that can give rise to market manipulation. See also our answers to questions 237 and 238.

<ESMA\_QUESTION\_241>

**Q242: Should trading venues also make the actual thresholds in place public? In your view, would this publication offer market participants the necessary predictability and certainty, or would it entail risks? Please elaborate.**

<ESMA\_QUESTION\_242>

As has been warned already in previous answers, publishing sensitive volatility interruption information can be detrimental. Deutsche Börse Group recommends not forcing to publish thresholds as this could lead to:

- (1) higher price volatility due to the certainty which price band is in between the threshold,
- (2) worse order execution for small investors and market orders especially for instrument with ongoing or intermediate low liquidity
- (3) wider thresholds due to (1) and therefore more volatility and lower price continuity in low liquid situations or for low liquid financial instruments in general.

<ESMA\_QUESTION\_242>

**Q243: Do you agree with the proposal above?**

<ESMA\_QUESTION\_243>

Deutsche Börse Group thinks testing is an ideal preventative measure prior to connecting to integrated systems. Testing should be highly encouraged and, where possible, enforced to the extent which can be

measured. The ESMA proposal for testing requirements lacks clarity regarding where the burden of proof lies for preparedness (e.g. sufficiency of testing) before connecting to the live environment of trading venues. As a matter of principle, the participant wishing to connect should be responsible to provide proof that their systems have been sufficiently tested before the trading venue should grant access to the live trading environment. As each participant brings a different strategy which they possess the greatest knowledge thereof, it is the participant which knows best how to test their system and determine the results thereof. An exchange may not be aware of an innovative new strategy which brings disorder to the market, and worse how to identify and prevent it. This further supports that the participant should be responsible for the testing of their own system(s) and subsequently providing proof of the extent to which it has been tested. Having said this, we would like to highlight the need for alternatives to conformance testing.

Regarding the minimum characteristics of a trading venue's testing environment:

- i. Easy access – how does ESMA define 'easy'? This broad term, if not properly defined, may lead to interpretations which are costly for trading venues when pushed by the most active members/participants. This trading venue supports the notion that testing should indeed take place prior to connection to the live environment of a trading venue, and that each trading venue should provide a test environment at reasonable terms as determined by the trading venue.
- ii. Available instruments – agreed. Instruments for testing should reflect, as closely as possible, the scenarios which exist in the live environment. We recommend making a small amendment to the wording in point 39.ii: 'the list of instruments products available for testing should cover subsets of products from all asset classes available in the live environment to allow for comprehensive testing.'
- iii. Self-certifying test front end – This may lead to security concerns if mandated. This approach would be beneficial and should be encouraged; however, not required.
- iv. Timing of availability – agreed. This is generally already in place.
- v. Knowledgeable staff – agreed. This is also in place.

Trading venue report of participant test results – should be at the discretion of the trading venue. Should a trading venue provide a report of conformance test results, it would imply that there are predictable scenarios which it wishes to prevent/ensure. While there are predictable scenarios for which testing can and should be accomplished, it should remain the prerogative of the trading venue to determine whether and which tests are to be required. Furthermore, to restate the aforementioned burden of proof recommendation, although a trading venue will strive to prevent and avoid market disruptions it may not be able to predict, and therefore report on, unexpected or new scenarios which may disrupt or abuse the market. In the event of a market disruption caused by a participant's system, the ensuing investigation should evaluate not only safeguards of the trading venue but also, the extent to which the participant knew about the potential for disruption and their efforts to successfully testing for such a situation. Additionally, as a matter of security the trading venue should not report, or reveal, methods by which a participant may effectively disrupt the market or trading system.

<ESMA\_QUESTION\_243>

**Q244: Should trading venues have the ability to impose the process, content and timing of conformance tests? If yes, should they charge for this service separately?**

<ESMA\_QUESTION\_244>

Deutsche Börse Group considers that there should be no dictated conformance tests. The responsibility of testing algorithms should lie with the member, monitored by the exchange. Testing environments need to be flexible and adjustable to the respective member's needs. A rigid, predefined order of testing would be counter-productive (see also question 229). Deutsche Börse Group thinks trading venues should charge a reasonable fee which reflects the costs to provide such an environment.

<ESMA\_QUESTION\_244>

**Q245: Should alternative means of conformance testing be permitted?**

<ESMA\_QUESTION\_245>

Yes, Deutsche Börse Group believes alternative testing should definitely be permitted.



<ESMA\_QUESTION\_245>

**Q246: Could alternative means of testing substitute testing scenarios provided by trading venues to avoid disorderly trading conditions? Do you consider that a certificate from an external IT audit would be also sufficient for these purposes?**

<ESMA\_QUESTION\_246>

Deutsche Börse Group thinks that participant use of alternative means of testing and trading venue acceptance of alternative means of testing should be considered at the discretion of the exchange, e.g. testing scenarios with canned data could be possible as well. A certificate from an external IT audit should remain a consideration at the discretion of the trading venue. It is not the intention of this trading venue to establish an external IT audit certification.

Certification by external IT audit cannot be easily validated and does not seem a plausible approach, as the differences in trading venues functionality and behaviour in case of technical or functional issues as well as security measures call for individualised testing environments.

We would like to highlight again that we strongly support the testing of all trading, not only algorithmic trading.

<ESMA\_QUESTION\_246>

**Q247: What are the minimum capabilities that testing environments should meet to avoid disorderly trading conditions?**

<ESMA\_QUESTION\_247>

Deutsche Börse Group thinks the test environment should mirror the live environment (1-to-1 functionality). Every functionality which will have an influence on the conduct of trading in the live environment will need to be tested; therefore there should be a one-to-one relationship of functionality in the live environment to the testing environment. As the live environment of the different trading venues varies greatly, a detailed list of minimum capabilities will depend upon the trading venue.

<ESMA\_QUESTION\_247>

**Q248: Do you agree with the proposed approach?**

<ESMA\_QUESTION\_248>

With respect to equities and equity-like instruments:

As rightly stated in paragraph 45, Deutsche Börse Group believes that members and trading participants are responsible for the orders they submit to the trading platform. Neither the risk checks on trading venue- nor on CCP-side can replace the internal risk management of its clearing members, especially regarding exchange traded derivatives. The ultimate responsibility for the orders submitted must remain on member/participant side.

Deutsche Börse Group would also like to emphasize that the concept of open offer and novation come into play at the point where pre-trade risk checks are mandatory. In case a pre-trade risk check of any sort fails, a rejection of the trade would make it impossible to pursue an open offer approach.

Furthermore, Deutsche Börse Group has strong reservations concerning point 48.iii and 48.viii. To be able to determine the market impact it would be necessary for the front end entry to know the entire order book at any time, to be able to forecast an order-book impact according to the matching rules.

This complex approach would impact negatively on latency to the extent that latency limits would be exceeded. No front end known to Deutsche Börse Group has currently this capacity. Also, it is not clear what would happen with an order that would have market impact, since this is objectively difficult to assess.

We agree with 48 i): The exchange should have drill-through protection such as price collars in place to restrict orders from immediately trading up or down an unlimited number of price intervals. At Deutsche

Börse Group we operate a so called ‘volatility interrupt’ functionality which prevents price moves beyond a certain range. In case of a volatility interruption, an auction phase is started which is manually handled.

Deutsche Börse Group agrees with 48 vii): The so called ‘Stop-Button’ is implemented on CCP side, where clearing members can stop their NCMs and NCMs can stop individual traders.

Moreover, Eurex Clearing offers clearing members and NCMs the possibility to set limits in terms of the risk they and their NCMs take up, i.e. the margin obligation they create towards the CCP. This is called the ‘Advanced Risk Protection’. The limit can be set on various action levels. The lowest level would be just an info message, the second level would be a throttle according to a time frame specified in advance, and the third action level would be a complete stop of trading. Deutsche Börse Group wants to emphasize that this service should be understood as a last layer of defence and cannot replace internal risk management systems on clearing member side.

With respect to derivatives:

As rightly stated in 45) members and trading participants are responsible for the orders they submit to the trading platform. Neither the risk checks on trading venue- nor on CCP-side can replace the internal risk management of its clearing members, especially regarding exchange traded derivatives. The ultimate responsibility for the orders submitted must remain on member / participant side.

We would also like to emphasize that the concept of open offer and novation come into play at the point where pre-trade risk checks are mandatory. In case a pre-trade risk check of any sort fails, a rejection of the trade would make it impossible to pursue an open offer approach.

Furthermore, we have strong reservations concerning point 48.iii and 48.viii. To be able to determine the market impact it would be necessary for the front end entry to know the entire order book at any time, to be able to forecast an order-book impact (incl. synthetic matching) according to the matching rules. This complex approach would impact negatively on latency to the extent that latency limits would be exceeded. No front end known to us currently has this capacity. Also, it is not clear what would happen with an order that would have market impact, since this is objectively difficult to assess.

We agree with 48 i): The exchange should have drill-through protection such as price collars in place to restrict orders from immediately trading up or down an unlimited number of price intervals. At Eurex we operate a so called “volatility interrupt” functionality which prevents price moves beyond a certain range in a specified time frame. In case of a Volatility Interruption, an auction phase is started which is manually quit when the market has calmed down.

We agree with 48 iv): Eurex’s new trading architecture has implemented an overall limit of open orders and quotes sides per product. Each Eurex member can have currently at most 10,000 open orders and quote sides for a single product at any time. Members can define for themselves lower individual limits. We support the idea of 48 v) and vi): Eurex uses the so called “market maker protection” functionality which allows participants to set a limit on quote execution. It enables mass quoting without risking participants being overrun due to technical issues, human errors or other exogenous events.

We agree with 48 vii): The so called “Stop-Button” is implemented on CCP side, where Clearing Members can stop their NCMs and NCMs can stop individual traders.

With respect to ii): Eurex offers a maximum order quantity which may be used by CMs to limit the number of contracts per order.

Moreover, Eurex Clearing offers Clearing Members and NCMs the possibility to set limits in terms of the risk they and their NCMs take up, i.e. the margin obligation they create towards the CCP. This is called the “Advanced Risk Protection”. The limit can be set on various action levels. The lowest level would be just an info message, the second level would be a throttle according to a time frame specified in advance, and the third action level would be a complete stop of trading. We want to emphasize that this service should be



understood as a last layer of defence and cannot replace internal risk management systems on Clearing Member side.

<ESMA\_QUESTION\_248>

**Q249: In particular, should trading venues require any other pre-trade controls?**

<ESMA\_QUESTION\_249>

Deutsche Börse Group is of the opinion that a comprehensive set of risk controls has already been provided by ESMA. It is recommended to delete 'order value' and 'market impact assessment' and to avoid making pre-trade risk controls mandatory, due to the reasons mentioned in question 248.

<ESMA\_QUESTION\_249>

**Q250: Do you agree that for the purposes of Article 48(5) the relevant market in terms of liquidity should be determined according to the approach described above? If, not, please state your reasons.**

<ESMA\_QUESTION\_250>

No, Deutsche Börse Group does not agree. The proposal will lead to a scenario where only one or two markets will be defined as 'relevant'. In our opinion, Article 48 (5) aims to identify all markets that are material in terms of liquidity. The proposal is therefore too restrictive.

As stated in Article 48 (5) the goal is to coordinate a market-wide response and determine whether it is appropriate to halt trading on other venues. It should be the responsibility and obligation of the regulated market to decide on a trading halt in order to be consistent with the short selling regulation approach.

<ESMA\_QUESTION\_250>

**Q251: Are there any other markets that should be considered material in terms of liquidity for a particular instrument? Please elaborate.**

<ESMA\_QUESTION\_251>

No, see Deutsche Börse Group's answer to question 250. The proposal will lead to a scenario where only one or two markets will be defined as 'relevant'. In our opinion, Article 48 (5) MiFID aims to identify all markets that are material in terms of liquidity. The proposal is therefore too restrictive.

As stated in Article 48 (5) MiFID the goal is to coordinate a market-wide response and determine whether it is appropriate to halt trading on other venues. It should be the responsibility and obligation of the regulated market to decide on a trading halt in order to be consistent with the short selling regulation approach.

<ESMA\_QUESTION\_251>

**Q252: Which of the above mentioned approaches is the most adequate to fulfil the goals of Article 48? Please elaborate**

<ESMA\_QUESTION\_252>

Deutsche Börse Group believes Option A is not a good option because it only provides rudimentary control over the members/participants as it only offers retrospective supervision. Therefore Deutsche Börse Group considers Option B to be the most adequate to fulfil the goals of Article 48. Article 48 para. 7 requires that trading venues are 'able to distinguish and if necessary to stop orders or trading by a person using direct electronic access separately from other orders or trading by the member or participant.' In Option A, trading venues set out a general framework and then are able to ban provision of DEA by participants; however, in this option it is not foreseeable that the trading venue would be able to separately stop DEA orders while continuing to allow non-DEA orders of the participant. Consequently, participants first need to ensure they meet the requirements of the exchange before offering this service, in order for the exchange to be able to distinguish separation of orders. Additionally, if an exchange wishes to prevent DEA from being offered at all, Deutsche Börse Group thinks that Option B better supports this distinction.

<ESMA\_QUESTION\_252>

**Q253: Do you envisage any other approach to this matter?**

<ESMA\_QUESTION\_253>

No, Deutsche Börse Group does not envisage any other approach.

<ESMA\_QUESTION\_253>

**Q254: Do you agree with the list of elements that should be published by trading venues to permit the provision of DEA to its members or participants?**

<ESMA\_QUESTION\_254>

Deutsche Börse Group thinks that the list of elements should additionally provide clarity that the DEA provider is required to conduct the aforementioned due diligence on clients (i.e. DEA users).

From an exchange perspective, the rulebook can only be applied in the relationship between venue and participant. The relation between the participant and the participants' clients are private contracts according to the German jurisdiction and cannot be integrated into the obligations of the participants stipulated in the rulebook. From a practitioner's point of view, it would be hard to verify the market and system knowledge of DEA clients as they access the venues through a variety of different front-ends. An in-depth knowledge of the trading system behaviour and its respective incorporated functionality is not necessarily needed, whereas the same is a pre-requisite for traders registered for participants to obtain a trader ID.

<ESMA\_QUESTION\_254>

**Q255: Do you agree with the list of systems and effective controls that at least DEA providers should have in place?**

<ESMA\_QUESTION\_255>

Mostly Deutsche Börse Group agrees, however, it needs to be determined, how e.g. the knowledge will be tested and documented. A clear regime needs to be in place and followed to guarantee equal treatment and does not spur surveillance arbitrage between the participants, due to different interpretations and implementations of the controls.

<ESMA\_QUESTION\_255>

**Q256: Do you consider it is necessary to clarify anything in relation to the description of the responsibility regime?**

<ESMA\_QUESTION\_256>

No, Deutsche Börse Group does not consider it necessary. Trading participants are responsible for all orders and quotes which are submitted with their ID code, whether or not they are DEA providers or not.

<ESMA\_QUESTION\_256>

**Q257: Do you consider necessary for trading venues to have any other additional power with respect of the provision of DEA?**

<ESMA\_QUESTION\_257>

Deutsche Börse Group, under the Exchange Supervisory Authority of the State of Hesse, is required to register and admit all traders following a thorough background check which includes experience and education related to trading. The DEA on offer via Deutsche Börse Group is designated clearly via a trader's user ID which indicates that this ID uses order routing for the purpose of submitting orders to the market from a third party. The trader who is responsible for the order routing user ID is therefore clearly identified as the responsible person to conduct the filter to remove erroneous or potentially disruptive orders. In the event that a halt is necessary – as outlined in Article 48, para. 7 – Deutsche Börse Group is however not able to stop orders from the DEA users. Furthermore, if a trading participant is supporting multiple DEA users, Deutsche Börse Group is not able to selectively stop orders from single (or multiple selected) DEA users without impacting others. Deutsche Börse Group is able to stop the ORS-system which may be used by multiple DEA users.

To ensure this, we have three different pillars established, the Trading Surveillance Office for proper conduct, audit group for participants on-site review and the Market Supervision team for taking immediate action in cases where a fair and orderly market is endangered.

<ESMA\_QUESTION\_257>

#### **4.4. Market making strategies, market making agreements and market making schemes**

**Q258: Do you agree with the previous assessment? If not, please elaborate.**

<ESMA\_QUESTION\_258>

With respect to equities and equity-like instruments:

Deutsche Börse Group understands ESMA's intention to introduce market making obligations under Art. 48 and 17 MiFID, because ESMA wants to reduce the impact of volatility in instruments where algorithmic traders are present (p. 272 of the Discussion Paper). However, we believe that actually algorithmic trading contributes to bearing volatility down. This has also been shown by academic research (see for example Brogaard (2010), 'High Frequency Trading and Its Impact on Market Quality'). We are convinced that algorithmic and high frequency traders provide essential liquidity to our markets by positing two-sided quotes. Higher liquidity reduces volatility. The study by Brogaard (2010) also shows that those firms have also been in the market despite turbulent market conditions. Those firms have heavily invested in effective risk management systems and trading systems that allow to amend quotes rapidly while continuing providing liquidity in a prudent manner by keeping spread tight. We certainly support enhanced market making obligations, but we would oppose a legislatively mandated continuous quoting obligation. We fear that if the imposition of minimum obligations on those firms is not carefully calibrated this might be a threat to existing business models and therefore to market quality. Therefore we ask ESMA to ensure that everything will be done to stimulate investment firms engaging in this business model to continue to do so. As a result we recommend that only main corner stones for market maker schemes should be defined only as each trading venue has its own characteristics and best understands its own structure, market participant mix, and requirements for products depending on liquidity level.

With respect to derivatives:

In Deutsche Börse Group's view, the approach of market making as described in MiFID I is different for derivatives markets. Hence, derivatives markets, other than underlying markets, had also liquidity providers on their markets which would be called market makers from a practitioner's point of view. They would not have the title and requirements of market makers of underlying markets, but they also needed to fulfil the requirements of the regulated market first, before they could be deemed to have fulfilled market making requirements in terms of the venue. Thus, the description under the proposal often mingles the idea of the underlying market traditional market makers and any new types of liquidity providers. In contrast, derivatives market who under MiFID I did have a different approach. The difficult part now is to bridge the underlying market customs and the derivatives markets customs with the new notion of a supposedly new breed of market makers that effectively is not really a new breed. In derivatives markets there have been liquidity providers of all sorts, in liquid and illiquid markets.

It is important to understand that market making is an integral part of any market, as it supports the establishment of price guidance, provides liquidity and thus creates market integrity. Without market makers markets would be much less efficient and it would in general be much more difficult and more expensive for investors to find a counterpart to their investment. In our opinion liquidity provided by market makers is thus just as 'real' and contributes towards creating efficient markets just as much as any other liquidity does.

By making prices, a market maker opens himself up to a range of risks. This risk exposure will be intensified under the new regulatory regime as it prescribes market participants how to manage that risk. We would like to raise the concern at this point that the imposition of minimum obligations on unofficial market makers, if not carefully calibrated to take into account the downside of engaging in this type of



business model will conflict with MiFID II's goals that investment firms should engage in prudent risk management, or worse, incentivise existing liquidity providers to reconsider their role and potentially shift to more opportunistic behaviour free from obligation.

Having said this, a possible consequence of the imposition of the proposed regulatory regime would be that in the future, trading venues would have to compensate for the increased risk by offering higher incentives or even offering incentives in cases where this had not been necessary at all previously.

Taking into account that the parameters for defining a market making strategy should mirror the requirements set by the market making agreements, our recommendation to ESMA would be to set thresholds at an adequately low level so as to

- a) capture a maximum amount of participants under the requirements set out in art. 17.4.
- b) not jeopardise liquidity provision in products where there is naturally no need for 'official' market makers.

Market making schemes on the other hand could then be offered to firms that adhere to more stringent requirements and could be incentivised with higher rebates.

Another aspect that ESMA should be aware of is that especially in the case of newly launched products in which initial liquidity might be very low and in case of highly illiquid products, introducing rigid market making agreements dictated by regulation could easily lead to these products ceasing to be traded altogether. We therefore recommend excluding these from the regulatory framework.

<ESMA\_QUESTION\_258>

**Q259: Do you agree with the preliminary assessments above? What practical consequences would it have if firms would also be captured by Article 17(4) MiFID II when posting only one-way quotes, but doing so in different trading venues on different sides of the order book (i.e. posting buy quotes in venue A and sell quotes in venue B for the same instrument)?**

<ESMA\_QUESTION\_259>

With respect to equities and equity-like instruments:

Deutsche Börse Group does not agree. In case, Art. 17(4) MiFID would capture firms posting only one-way quotes; this would mean that firms engaging in the most basic kind of arbitrage would be considered as market makers, which would not be correct. Strategies facilitated by high frequency technology have always been around. They have only been upgraded for an automated environment. Today markets are made by using the same business model as traditional market makers, but with lower costs, tighter bid-ask spreads and better risk management facilities due to the automation. Other strategies focus on cross-market arbitrage, i.e. to ensure that the price for a stock in Daimler is the same in Frankfurt as in London. This was also done by human traders in the past but is now conducted in a more efficient way with fast computers and thereby lower costs that in the end benefit all. In case this kind of arbitrage would be captured under the market making requirements, firms that base their business on arbitrage strategies would be captured although they do not conduct market making. As a result they might be forced to cease their business as they cannot circumvent the stringent requirements under MiFID II. This would have an impact on market quality as those market participants would cease over time. We might see a severe reduction in participants that would no longer keep prices across fragmented markets efficient while promoting stability for the market as a whole. Therefore firms posting only one-way quotes should not be captured.

With respect to derivatives

In Deutsche Börse Group's view there are two reasons why we would object to this proposal. First, posting 'one way quotes in different trading venues on different sides of the order book' cannot be defined as a market making strategy. Rather, these firms engage in cross market arbitrage, making sure that prices across trading venues for the same instrument remain the same and thus making an important contribution towards price discovery and the integrity of the markets.

Secondly, assessing a firm's trading behaviour across different trading venues is practically not feasible. Trading venues do not have access to the data needed to implement an assessment of quoting behaviour across different venues.

<ESMA\_QUESTION\_259>

**Q260: For how long should the performance of a certain strategy be monitored to determine whether it meets the requirements of Article 17(4) of MiFID II?**

<ESMA\_QUESTION\_260>

With respect to equities and equity-like instruments:

Deutsche Börse Group believes that the concept of an observation period to monitor the performance of a certain strategy is not necessary. First of all what observation period would be right (1 months, 3 months, 6 months or a year)? We think that this would enable some firms to 'game' in order to avoid being classified as a market maker and thereby create an un-level playing field. Secondly, this would mean that trading venues would have to implement additional mechanisms in order to be able to check for which participant a market making strategy is being used across asset classes. We think that this could be done in a simpler cost-effective way. To determine whether an investment firm is operating a market making strategy, it should be checked if the behaviour and requirements of market makers match. That means specifically it should be looked at the obligations of market making agreements such as maximum spread, minimum size and minimum percentage quoting presence during applicable trading hours. Besides, we like to emphasise that compliance offices of investment firms are required to document information about their algorithms anyway and therefore should know if the underlying strategy intends liquidity provision or not. They know whether the definition of a market making strategy is therefore met or not. Consequently investment firms should through a self-assessment be able to decide whether they will be required to enter into a market making agreement under Art. 17(4) MiFID. Besides, trading venues should never be forced to decide if an investment firm pursues a market making strategy or not as they are simply never in the position to do so.

With respect to derivatives:

Deutsche Börse Group recommends sticking to the rules currently customary in the market. In determining whether an investment firm is operating a market making strategy, we should just look at the parameters of market making agreements. An investment firm should be considered as pursuing a market making strategy if it meets the requirements of (1) maximum spread, (2) minimum size or amount and (3) minimum percentage quoting presence during applicable trading hours.

These parameters should be assessed continuously, e.g. ex-post on a monthly basis, to determine whether a firm still falls under the definition. Setting a timeframe for an observation period would set an arbitrary threshold, thus allowing participants to avoid being captured by adjusting their behaviour only for the duration of the observation period.

<ESMA\_QUESTION\_260>

**Q261: What percentage of the observation period should a strategy meet with regard to the requirements of Article 17(4) of MiFID II so as to consider that it should be captured by the obligation to enter into a market making agreement?**

<ESMA\_QUESTION\_261>

With respect to equities and equity-like instruments:

Deutsche Börse Group believes an observation period is not necessary. Further, we think that the parameters an investment firm that pursues a market making strategy is supposed to fulfil should be synchronised with the parameters of market making agreements in order to be fair, clear and to make implementation as easy as possible. It is common practice that the core elements of liquidity provision contracts are maximum spread, minimum size and minimum percentage quoting presence during applicable trading hours. In case these are met, we believe an investment firm should be captured under the requirements of Art. 17(4) MiFID.

With respect to derivatives:

The same answer as in Q260 holds.

Deutsche Börse Group recommends sticking with the rules currently customary in the market. In determining whether an investment firm is operating a market making strategy, we should just look at the parameters of market making agreements. An investment firm should be considered as pursuing a market making strategy if it meets the requirements of (1) maximum spread, (2) minimum size or amount and (3) minimum percentage quoting presence during applicable trading hours.

These parameters should be assessed continuously, e.g. ex-post on a monthly basis, to determine whether a firm still falls under the definition. Setting a timeframe for an observation period would set an arbitrary threshold, thus allowing participants to avoid being captured by adjusting their behaviour only for the duration of the observation period.

<ESMA\_QUESTION\_261>

**Q262: Do you agree with the above assessment?**

<ESMA\_QUESTION\_262>

With respect to equities and equity-like instruments:

Yes, Deutsche Börse Group agrees with ESMA that clients of investment firms, accessing the market indirectly through DEA arrangements are not a member or participant of a trading venue in the sense of Article 17(4) MiFID II and that therefore such indirect participants should not be forced to enter into a direct contractual relationship with the trading venue. Because we do not have a direct relationship with those firms difficulties would arise when it comes to performance measurements and legal restrictions in case they do not perform. The status of a firm should therefore be considered when determining the applicability of requirements as these ones.

With respect to derivatives:

Deutsche Börse Group agrees.

<ESMA\_QUESTION\_262>

**Q263: Do you agree with this interpretation?**

<ESMA\_QUESTION\_263>

With respect to equities and equity-like instruments:

Yes, Deutsche Börse Group agrees that a quote is firm as long as it is executable, i.e. can be matched against an opposite order under the rules of the different trading venues, provided this excludes 'indicative quotes'. Please note that market maker agreements including minimum requirements and market maker strategies cannot be treated equally as a trading venue is not able to measure liquidity provision across different platforms.

With respect to derivatives:

Deutsche Börse Group agrees.

<ESMA\_QUESTION\_263>

**Q264: Do you agree with the above assessment? If not, please elaborate.**

<ESMA\_QUESTION\_264>

With respect to equities and equity-like instruments:

Yes, Deutsche Börse Group agrees. Market maker strategies across different venues cannot be assessed by a trading venue but by the investment firm only. Deutsche Börse Group agrees with ESMA's view that the definition of a market making strategy should only contain strategies where an investment firm operates a firm, simultaneous two-way quote in a single instrument (at least one) on a single trading venue.

With respect to derivatives:

Yes, Deutsche Börse Group agrees with ESMA's proposals set out in point 17.

<ESMA\_QUESTION\_264>

**Q265: Do you agree with the above interpretation?**

<ESMA\_QUESTION\_265>

With respect to equities and equity-like instruments:

Deutsche Börse Group thinks that specifying «simultaneity of quotes» to one second would not add any value. The criterion should be set to either immediately or in dependence of technology progress. Also, we favor an approach whereby the characteristics of a market making strategy should link as closely as possible to the parameters of existing market-standard liquidity provider agreements. These look only to maximum spread, minimum size, and minimum percentage presence during trading hours. We recommend ESMA not get hung up on the concept of ‘simultaneous.’

With respect to derivatives:

Deutsche Börse Group does not believe defining simultaneous in a time frame has any added value in practice. A quote is only considered as such once both sides have been entered into the book. It is in the market makers’ interest to enter both sides as close in time to each other as possible, in order to not corrupt his market maker performance.

<ESMA\_QUESTION\_265>

**Q266: Do you agree with the above proposal?**

<ESMA\_QUESTION\_266>

With respect to equities and equity-like instruments:

Deutsche Börse Group recommends looking only to maximum spread, minimum size, and minimum percentage presence during trading hours as main criteria to define market maker strategies. By focusing on the overall exposure of a firm who buy and sell the same instrument on an ongoing basis arbitrage or hedging strategies could be mistaken as market maker strategies.

With respect to derivatives:

In Deutsche Börse Group’s view, comparable size should be at least the minimum size required from market makers recognised under the rules of the trading venue.

Stating that ‘the co-existence of different strategies ... makes seeking a co-relation between the orders posted on both sides irrelevant’ contradicts ESMA’s previous statements, e.g. defining simultaneity of quotes (‘quotes should be on both sides of the order book at the same second’). Thus, taking into account the overall proposal, it cannot be in ESMA’s interest to make an assessment on the basis of the overall exposure of the firm.

However, we acknowledge the fact that it would be difficult to distinguish between the different strategies pursued by a certain firm and therefore recommend a system where the trading venue or the investment firm itself defines whether or not they are pursuing a market making strategy. Given that investment firms are required under Art.17 .2. to be able to ‘...provide,..., a description of the nature of its algorithmic trading strategies,...’, investment firms should be in a good position to offer this information.

<ESMA\_QUESTION\_266>

**Q267: Do you agree with the above proposal?**

<ESMA\_QUESTION\_267>

With respect to equities and equity-like instruments:

Yes, Deutsche Börse Group’s preferred approach is to concentrate on max bid/offer spread only.

With respect to derivatives:

Yes, in Deutsche Börse Group’s view the prices should be within the maximum bid/offer spreads that are required from market makers recognised under the rules of the trading venue. In our opinion asymmetry does not have an impact on the competitiveness of prices.

<ESMA\_QUESTION\_267>

**Q268: Do you agree with the approach described (non-exhaustive list of quoting parameters)?**



<ESMA\_QUESTION\_268>

With respect to equities and equity-like instruments:

Yes, Deutsche Börse Group agrees as long as the quoting parameters are not 'hard-coded'. ESMA should set a framework for quoting parameters that allow market operators to design market making agreements in a way that take characteristics of instruments traded, its market and market segment into account. We urge ESMA that these parameters should reflect the content of current market practice into account which are maximum spread, percentage of market presence and minimum size.

With respect to derivatives:

Yes, Deutsche Börse strongly agrees with ESMA on setting principles rather than specific 'hard-coded' conditions. These principles should leave sufficient room for trading venues to design agreements that take into account the specific market, instrument, business model etc.

However, it needs to be clarified which kind of consequences ESMA is envisioning for market makers who are non compliant with these parameters. Eurex is of the strong opinion that there should be no monetary sanctions. The only sensible consequence would be the removal of benefits.

<ESMA\_QUESTION\_268>

**Q269: What should be the parameters to assess whether the market making schemes under Article 48 of MiFID II have effectively contributed to more orderly markets?**

<ESMA\_QUESTION\_269>

With respect to equities and equity-like instruments:

Deutsche Börse Group's recommended parameters are: maximum spread, minimum quotation volume and participation rate during trading hours.

With respect to derivatives:

In Deutsche Börse Group's view, market Making programs support the establishment of a price guidance in an electronic market. If market makers successfully participate in a market making program this goal is accomplished. A potential parameter would be: a successfully participating market maker.

<ESMA\_QUESTION\_269>

**Q270: Do you agree with the list of requirements set out above? Is there any requirement that should be added / removed and if so why?**

<ESMA\_QUESTION\_270>

With respect to equities and equity-like instruments:

Deutsche Börse Group believes that organizational requirements for investment firms engaging in market making should not be different from investment firms carrying out activities in algorithmic trading. On p. 266 ESMA proposes an additional list of minimum requirements applicable to an investment firm pursuing a market making strategy. However in Section 4.2, p. 213f ESMA has already proposed an extensive list of organizational requirements applicable to investment firms engage in algorithmic trading. Those provisions are already designed to be adaptable to different business models. Our concern is that if ESMA wants additional organizational requirements for a group of investment firms engaged in liquidity provision, ESMA creates the possibility for interpretive slippage between two set of requirements.

With respect to derivatives:

Deutsche Börse Group agrees in general. However, we would like to note that ESMA already identifies an extensive list of requirements for investment firms. It is questionable whether an additional set which applies to market makers only would indeed be constructive or whether this would result in confusion.

<ESMA\_QUESTION\_270>

**Q271: Please provide views, with reasons, on what would be an adequate presence of market making strategies during trading hours?**

<ESMA\_QUESTION\_271>

With respect to equities and equity-like instruments:

Deutsche Börse Group believes that the average presence time under a market making strategy should synchronize with the minimum percentage of market presence under the market making agreement. As this varies in practice depending on product, segment and venue, we believe 80 percent is an acceptable standard, at least for liquid shares. But we would also like to point out that it should not be taken as a metric to be applied to all instruments.

With respect to derivatives:

In Deutsche Börse Group's view, first of all, it must be clear that market making agreements can only be set on an instrument basis and that the criteria for what obliges a firm to enter into a market making agreement should be consistent with the obligations under the market making agreement. On that basis, we recommend setting a presence of 20% during trading hours for market making agreements. For market making schemes, which would be incentivised and apply to firms subject to more stringent requirements, it can be said that 80% is an acceptable figure for most instruments. Please note however, that these numbers should not be taken as a blanket metric for all instruments, as each class of derivatives has its own characteristics which need to be taken into account when setting thresholds.

<ESMA\_QUESTION\_271>

**Q272: Do you consider that the average presence time under a market making strategy should be the same as the presence time required under a market making agreement ?**

<ESMA\_QUESTION\_272>

With respect to equities and equity-like instruments:

In order to avoid a two-tier approach Deutsche Börse Group would recommend using the same parameters for market maker agreement and market making strategy.

With respect to derivatives:

Yes. Deutsche Börse Group believes the criteria for what obligates a firm to enter into a Market Making Agreement should be consistent with the obligations under the Market Making Agreements. The average presence time under a market making strategy should be the minimum percentage presence required in a Market Making Agreement during trading hours.

<ESMA\_QUESTION\_272>

**Q273: Should the presence of market making strategies during trading hours be the same across instruments and trading models? If you think it should not, please indicate how this requirement should be specified by different products or market models?**

<ESMA\_QUESTION\_273>

With respect to equities and equity-like instruments:

No, Deutsche Börse Group believes the presence of market making strategies should not be hard-coded. Trading venues should possess a degree of flexibility in defining participation rate by instrument type and trading model as they understand best their structure and trading characteristics. As of today based on different risk exposures for liquidity providers Deutsche Börse Group defines participation rate for market makers in dependence of instrument type (equities, ETFs & ETPs, asset class cluster) and in dependence of trading model (continuous trading with auctions and Designated Sponsors, continuous auctions with Specialist).

We believe that the average presence time under a market making strategy should synchronize with the minimum percentage of market presence under the market making agreement. As this varies in practice depending on product, segment and venue, we believe 80 percent is an acceptable standard, at least for liquid shares. But we would also like to point out that it should not be taken as a metric to be applied to all instruments.

With respect to derivatives:

No, in Deutsche Börse Group's view all parameters of any market making scheme/ agreement must be amendable depending on the instrument.

<ESMA\_QUESTION\_273>

**Q274: Article 48(3) of MiFID II states that the market making agreement should reflect “where applicable any other obligation arising from participation in the scheme”. What in your opinion are the additional areas that that agreement should cover?**

<ESMA\_QUESTION\_274>

With respect to equities and equity-like instruments:

Deutsche Börse Group thinks no other obligations are necessary. We think the main obligations should be: minimum size, maximum spread and market presence during applicable trading hours.

With respect to derivatives:

In Deutsche Börse Group’s view no other obligations are necessary. As stated before, the obligations arising from participation in a market making scheme should be (1) minimum size (2) maximum spread and (3) minimum presence in the market.

The trading venue should have the flexibility to set the details for these three categories depending on product and market specific need in order to ensure effective market making agreements that do not jeopardise liquidity and the integrity of the market.

<ESMA\_QUESTION\_274>

**Q275: Do you disagree with any of the events that would qualify as ‘exceptional circumstances’? Please elaborate.**

<ESMA\_QUESTION\_275>

With respect to equities and equity-like instruments:

Deutsche Börse Group has noted that ESMA limits these exceptional circumstances to two categories, i.e. technological issues and internal risk management issues. It is comprehensible that ESMA would like investment firms operating market making strategies to provide liquidity constantly in order to secure market stability, and that therefore the circumstances under which those firms may cease liquidity provision needs to be limited. We think that ESMA’s proposal might be limited as if implemented in such a way it would foil the objective of MiFID II, that is to achieve liquidity resilience. Our concern is that an exhaustive list as proposed by ESMA may result in the fact that liquidity providers might turn their back to the market, or at least reduce their activity. Therefore we think ESMA should set non-exhaustive parameters, i.e. including circumstances of extreme volatility, political and macroeconomic issues, system and operational matters, and circumstances which contradict the investment’s firm ability to maintain prudent risk management practices. As pointed out we fear that a very prescriptive limitation upfront might result in firms avoiding getting engaged in business models of market making.

With respect to derivatives:

No. However, in Deutsche Börse Group’s view this approach is much too limited. When taking on the important role of a market maker, this market maker exposes himself to specific operational as well as market risks. In general it should be said that in order to control the risk a market maker is exposed to he needs to be able to react in one way or another if price movements result in prices that no longer reflect the fundamental supply and demand characteristics. How these price movements came to be in the first place should be of secondary importance. In that sense, a market maker needs to have certain flexibility when deciding whether or not the prevailing situation in the markets allows him to safely continue posting quotes.

Limiting the ability to react to market movements by defining only certain exceptional circumstances in which a market maker would be allowed to alter his quoting behaviour would result in unwanted consequences such as, in the worst case scenario, the default of the market maker.

Our recommendation therefore would be to set non-exhaustive parameters instead of a prescriptive list of the types of risk that an investment firm should be allowed to protect itself against.

<ESMA\_QUESTION\_275>

**Q276: Are there any additional ‘exceptional circumstances’ (e.g. reporting events or new fundamental information becoming available) that should be considered by ESMA? Please elaborate.**

<ESMA\_QUESTION\_276>

With respect to equities and equity-like instruments:

Circumstances of extreme market volatility should allow market makers to interrupt their liquidity provision for a certain time period. As pointed out in our response to question 275 Deutsche Börse Group thinks that ESMA should rather set non-exhaustive parameters. As pointed out we fear that a very prescriptive limitation upfront might result in firms avoiding getting engaged in business models of market making.

With respect to derivatives:

The answer to question 275 needs to be repeated.

No. However, in Deutsche Börse Group’s view this approach is much too limited. When taking on the important role of a market maker, this market maker exposes himself to specific operational as well as market risks. In general it should be said that in order to control the risk a market maker is exposed to he needs to be able to react in one way or another if price movements result in prices that no longer reflect the fundamental supply and demand characteristics . How these price movements came to be in the first place should be of secondary importance. In that sense, a market maker needs to have certain flexibility when deciding whether or not the prevailing situation in the markets allows him to safely continue posting quotes.

Limiting the ability to react to market movements by defining only certain exceptional circumstances in which a market maker would be allowed to alter his quoting behaviour would result in unwanted consequences such as, in the worst case scenario, the default of the market maker. Our recommendation therefore would be to set non-exhaustive parameters instead of a prescriptive list of the types of risk that an investment firm should be allowed to protect itself against.

<ESMA\_QUESTION\_276>

**Q277: What type of events might be considered under the definition of political and macro-economic issues?**

<ESMA\_QUESTION\_277>

With respect to equities and equity-like instruments:

Instead of a list with political and macroeconomic issues Deutsche Börse Group would recommend to measure the volatility in the market as parameter for external exceptional circumstances. Deutsche Börse Group uses FDAX-movement to measure volatility intensity and interrupt performance measurement in case FDAX moves at least by  $\pm 1.5$  percent within previous half an hour. As pointed out earlier we fear that a very prescriptive limitation upfront might result in firms avoiding getting engaged in business models of market making.

With respect to derivatives:

The answer to question 275 needs to be repeated.

No. However, in Deutsche Börse Group’s view this approach is much too limited. When taking on the important role of a market maker, this market maker exposes himself to specific operational as well as market risks. In general it should be said that in order to control the risk a market maker is exposed to he needs to be able to react in one way or another if price movements result in prices that no longer reflect the fundamental supply and demand characteristics . How these price movements came to be in the first place should be of secondary importance. In that sense, a market maker needs to have certain flexibility when deciding whether or not the prevailing situation in the markets allows him to safely continue posting quotes.

Limiting the ability to react to market movements by defining only certain exceptional circumstances in which a market maker would be allowed to alter his quoting behaviour would result in unwanted consequences such as, in the worst case scenario, the default of the market maker.



Our recommendation therefore would be to set non-exhaustive parameters instead of a prescriptive list of the types of risk that an investment firm should be allowed to protect itself against.

<ESMA\_QUESTION\_277>

**Q278: What is an appropriate timeframe for determining whether exceptional circumstances no longer apply?**

<ESMA\_QUESTION\_278>

With respect to equities and equity-like instruments:

Deutsche Börse Group thinks that the timeframe should depend on the kind of exceptional circumstances. As long as exceptional circumstances are valid market participants should be allowed to interrupt their liquidity provision. In case of increased volatility Deutsche Börse Group suspends performance measurement for one hour.

With respect to derivatives:

In Deutsche Börse Group's view, this should not be measured as a matter of time, but assessed on a case by case basis.

<ESMA\_QUESTION\_278>

**Q279: What would be an appropriate procedure to restart normal trading activities (e.g. auction periods, notifications, timeframe)?**

<ESMA\_QUESTION\_279>

In Deutsche Börse Group's view, the procedure to restart normal trading depends on the impact the exceptional circumstances had and whether trading would have had to be suspended for a whole market, for individual firms only or not at all. Furthermore, different trading venues will follow different procedures depending on the respective market model, none of them being more or less appropriate than the other. We therefore recommend leaving it up to the trading venue to decide on the appropriate procedure for restarting trading depending on the circumstances prevalent.

<ESMA\_QUESTION\_279>

**Q280: Do you agree with this approach? If not, please elaborate.**

<ESMA\_QUESTION\_280>

With respect to equities and equity-like instruments:

Deutsche Börse Group only partly agrees. With respect to the first criteria (concept that trading venues must set a ceiling on the liquidity resulting from market making activity) we believe it is actually dangerous to dictate the percentage of liquidity that is allowed to come from market making participants. If implemented this would be harmful to market quality and anti-competitive with respect to new MM entrants.

With respect to the third criteria (publication of information regarding the compliance/performance of market makers) we think it is sufficient if compliance data is captured and retained by the respective trading venue and if requested to be made available to regulators, but it should not be published openly due to potential exposure of competitive and business-sensitive information.

With respect to the fourth criteria, we see no problem with the requirement that trading venues publicly disclose who the market maker is.

With respect to derivatives:

Deutsche Börse Group recommends ESMA to rethink its position on wanting to define the 'right' amount of market makers active in a certain product. We disagree with the notion that liquidity provided by market makers is somehow less valid than any other liquidity. For newly listed products for example, liquidity provided by Market Makers is vital, as it will make the product tradable even if the initial number of participants is low. However, this does not give 'a misleading impression of the liquidity available in the venue', as the liquidity available is tradable, i.e. 'real'.



<ESMA\_QUESTION\_280>

**Q281: Would further clarification be necessary regarding what is “fair and non-discriminatory”? In particular, are there any cases of discriminatory access that should be specifically addressed?**

<ESMA\_QUESTION\_281>

With respect to equities and equity-like instruments:

Yes, Deutsche Börse Group agrees; any cases that undermine the true multilateral nature of trading venues.

With respect to derivatives:

In Deutsche Börse Group’s view, no further clarification is necessary.

<ESMA\_QUESTION\_281>

**Q282: Would it be acceptable setting out any type of technological or informational advantages for participants in market making schemes for liquid instruments? If yes, please elaborate.**

<ESMA\_QUESTION\_282>

Deutsche Börse Group thinks it would not be acceptable.

<ESMA\_QUESTION\_282>

**Q283: In which cases should a market operator be entitled to close the number of firms taking part in a market making scheme?**

<ESMA\_QUESTION\_283>

With respect to equities and equity-like instruments:

Deutsche Börse Group thinks in case of less liquid instruments.

With respect to derivatives:

In Deutsche Börse Group’s view there should be no obligatory cap on the amount of firms taking part in a market making scheme. However, the trading venue should be able to close the number of firms taking part in a market making scheme, assessed on a case by case basis without set requirements by the regulator.

<ESMA\_QUESTION\_283>

**Q284: Do you agree that the market making requirements in Articles 17 and 48 of MiFID II are mostly relevant for liquid instruments? If not, please elaborate how you would apply the requirements in Articles 17 and 48 of MiFID II on market making schemes/agreements/strategies to illiquid instruments.**

<ESMA\_QUESTION\_284>

With respect to equities and equity-likes:

Deutsche Börse Group agrees.

With respect to derivatives:

Yes, Deutsche Börse Group recommends excluding illiquid products from the regulatory framework. However, Eurex also sees the introduction of obligatory requirements for market makers in liquid products as critical. As outlined in Q269 the purpose of a market making programme is to establish price guidance. In liquid instruments this price guidance is established via single orders. We remain very concerned that the imposition of minimum obligations on unofficial market makers, if not carefully calibrated to take into account the downside of engaging in this type of business model will incentivise existing liquidity providers to reconsider their role and potentially shift to more opportunistic behaviour free from obligation. The resulting scenario would be trading venues having to offer rebates for liquidity provision in products in which it was not necessary to do so prior to MiFID II.

We therefore recommend setting adequately low requirements for market making agreements and thus

- a) Capturing the biggest possible amount of participants pursuing a market making strategy and
- b) Ensuring that liquidity provision in already liquid products is not jeopardised.

We recommend the following requirements for market making agreements in liquid products:

- a) Maximum spread and minimum size should set depending on the product
- b) 20% presence of market making strategies during trading hours

As stated before, the determination of whether an investment firm is operating a market making strategy should be synchronized with the parameters of market making agreements. Thus, if an investment firm meets the above thresholds, it should be captured under the requirements of article 17(4). Not only would this capture the majority of firms pursuing a market making strategy, it would also ensure alignment with existing regulation, such as the German HFT Act.

<ESMA\_QUESTION\_284>

**Q285: Would you support any other assessment of liquidity different to the one under Article 2(1)(17) of MiFIR? Please elaborate.**

<ESMA\_QUESTION\_285>

With respect to equities and equity-like instruments:

Liquidity can also be assessed by spread and a round trip order to be defined. Please also note that Deutsche Börse Group believes a differentiation between liquid and less liquid ETFs as proposed by ESMA in Section 3.1 of the Consultation Paper does not actually reflect their true level of liquidity. Please refer to our answer to question 115 in the Consultation Paper.

<ESMA\_QUESTION\_285>

**Q286: What should be deemed as a sufficient number of investment firms participating in a market making agreement?**

<ESMA\_QUESTION\_286>

Deutsche Börse Group considers that is entirely dependent on the instruments and should not be defined as a one size fits all figure.

<ESMA\_QUESTION\_286>

**Q287: What would be an appropriate market share for those firms participating in a market making agreement?**

<ESMA\_QUESTION\_287>

With respect to equities and equity-like instruments:

Market share of firms participation in a market making agreement depend on degree of liquidity of respective equity. The less liquid an equity, the higher the market share. There is no accurate definition in Deutsche Börse Group's view for an appropriate market share.

With respect to derivatives:

In Deutsche Börse Group's view, this is entirely dependent on the instruments and should not be defined as a one size fits all figure.

<ESMA\_QUESTION\_287>

**Q288: Do you agree that market making schemes are not required when trading in the market via a market making agreement exceeds this market share?**

<ESMA\_QUESTION\_288>

With respect to equities and equity-like instruments:

Deutsche Börse Group thinks market maker schemes are not required in case of sufficient liquidity. Deutsche Börse Group defines 'high liquid' instruments based on two parameters: order book turnover  $\geq$  2.5 mn Euro on daily average + Xetra Liquidity Measure (XLM) for a roundtrip order of 25k EUR  $\leq$  100



bp. ETFs & ETPs require at least one market maker who takes care of liquidity provision as liquidity is defined by underlying and not by ETF & ETP.

With respect to derivatives:

In Deutsche Börse Group's view this is entirely dependent on the instruments and should not be defined as a one size fits all figure.

<ESMA\_QUESTION\_288>

**Q289: In which cases should a market operator be entitled to close the number of firms taking part in a market making scheme?**

<ESMA\_QUESTION\_289>

With respect to equities and equity-like instruments:

Deutsche Börse Group thinks only in case of less liquid instruments.

With respect to derivatives:

Deutsche Börse Group thinks that this question should be looked at on a case by case basis.

<ESMA\_QUESTION\_289>



## 4.5. Order-to-transaction ratio (Article 48 of MiFID II)

### Q290: Do you agree with the types of messages to be taken into account by any OTR?

<ESMA\_QUESTION\_290>

With respect to equities and equity-like instruments:

Deutsche Börse Group agrees with the general definition of an order to trade ratio as a ratio based on the number of orders divided by the number of executed transactions. However, this ratio should be adapted to volume, i.e. number of shares (for unit based instruments and the nominal value for per cent quoted instruments such as bonds) of orders and executed transactions, instead of the number of orders and executed transactions.

This shall be taken into account in order to avoid gaming as it is already stated in 4.5.4. of the Discussion Paper. We agree with the types of messages which shall be taken into account. Those are submissions, modifications, and deletions. However, ESMA shall consider that modifications are, by market participants, deployed in two different ways. Either the trading participant sends a single modification message or a deletion message in conjunction with a new order submission. Therefore, the same trading intention results in different figures for the OTR calculation. Hence, ESMA shall determine a stringent approach. A modification might be considered as the deletion of the old volume and the submission of the new volume. This is currently best practice in the calculation by Deutsche Börse Group. Furthermore, ESMA shall consider that there are system triggered deletions, i.e. deletions not intended by the trading participant but automatically performed by the trading system itself. Those deletions shall be excluded as trading participants neither intend to trigger a system deletion nor are trading participants able to influence system deletions.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

Resulting from the requirements of the German HFT Act, derivatives exchanges also had to implement an OTR, but in general we would support the notion under ESMA to minimize the requirement to underlying products.

If interested, the formula to calculate the OTR is as follows at the derivatives exchange:

$$\text{OTR} = [ \text{ordered volume} ] / [ \text{volume limit} ]$$

The ordered volume is the sum of the number of contracts generated by orders and quotes that are accepted by the matching engine and entered in the order book and the number of contracts that the Participant deletes from the matching engine and thus have not been executed. A modification of an order or quote is treated as a 'delete' followed by an 'add'. Thus, the original order and the new order will both be counted towards the ordered volume. This process applies regardless of which attribute of the order and/or quote is changed.

We therefore agree with the suggestion from ESMA to consider all the messages related to orders and quotes (adds, deletes or modifies), if the OTR shall be applicable to non underlying products. For more information regarding the volume limit see also question 292.

<ESMA\_QUESTION\_290>

### Q291: What is your view in taking into account the value and/or volume of orders in the OTRs calculations? Please provide:

<ESMA\_QUESTION\_291>

With respect to equities and equity-like instruments:

Deutsche Börse Group agrees with ESMA's proposal 291 5 iii taking into account 'the relative weight of orders and transactions in terms of volume' which is the volume of orders and executed trades for unit based instruments such as equities and equity-like instruments and, as bonds are per cent quoted instruments, the nominal value for bonds. It is of great importance to have this two folded approach in order to consider the 'units' the instruments are traded in.

i) reasoning for your opinion

Reason is that an OTR solely based on the number of orders and executed trades is prone to manipulation as already stated in 4.5.4. of the Discussion Paper.

ii) Pros and Cons:

4.5.5. i)

'An OTR based on the total number of orders divided by the total number of transactions executed; and'

Pro: Non-complex calculation method

Con: An OTR purely based on the number of orders and executed transactions is prone to manipulation as already stated in 4.5.4. of the Discussion Paper.

4.5.5. ii)

'the relative weight of orders and transactions in terms of value (turnover); and/or'

Pro: /

Con: An OTR regime encompassing values is not recommendable as this would be a very complex calculation method and potential issues due to price changes during the observation period would occur.

4.5.5. iii)

'the relative weight of orders and transactions in terms of volume (number of shares or contracts).'

Pro: Taking into account the volumes is beneficial as gaming is avoided (see 4.5.4. of the Discussion Paper), currently best practice by Deutsche Börse Group. Furthermore, absolute values shall be taken into account rather than relative values as this would lead to unnecessary calculation efforts.

Con: /

iii) Possible methodology to factor in volumes

Ordered Quantity = Absolute value, sum of submitted, modified and deleted volumes (shares = equities, nominal value = bonds) of orders

Executed Quantity = Absolute value, sum of volumes of executed transactions

Please find the complete calculation methodology in Q292.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. Eurex does not count the number of orders, quotes and trades since those are considered arbitrarily. Eurex solely counts the volume of orders or quotes per product. For example if a participant enters an order for 100 FDAX futures, then the ordered volume will be counted 100. When this order is deleted, the counter of the OTR goes to 200. This is counted per participant and per product on a monthly basis and the limits is set accordingly.

<ESMA\_QUESTION\_291>

**Q292: Should any other additional elements be taken into account to calibrate OTRs? If yes, please provide an explanation of why these variables are important.**

<ESMA\_QUESTION\_292>

With respect to equities and equity-like instruments:



Deutsche Börse Group thinks additional elements shall be taken into account to calibrate OTRs, those shall be volume factor and floor.

A volume factor serves as multiplier for the volume of executed transactions and shall be set per liquidity class or instrument group in order to consider the differences in liquidity and the risk of execution probability.

A floor is an allowance of volume due to execution risk in illiquid segments and in order to consider risk of execution probability. It allows a market participant to insert a certain volume without violating the OTR, even if he has no executions (or only a small number of executions) in an instrument. Reason is to not hinder market participants to trade, provide liquidity or serve as a market maker whilst participating in trading in a reasonable manner.

An OTR calculation considering those elements is presented in the following and is currently best practice by Deutsche Börse Group.

$$\text{OTR} = \text{Ordered Quantity} / (\text{Executed quantity} \times \text{Volume Factor} + \text{Floor})$$

Ordered Quantity = Sum of the number of shares of submitted, modified and deleted orders

Executed Quantity = Sum of the number of shares of executed transactions

Volume Factor = Multiplier for the executed quantity

Floor = Allowance

An OTR figure greater than one is considered a violation.

Parameters such as volume factor and floor are set by instrument group, i.e. liquidity class.

The floor element shall be different for regular trading participants and those with a market maker function. Market makers shall have a higher floor due to their liquidity contributing function.

Furthermore, the concept is based on a month-to-date approach and OTRs are calculated daily but assessed after the last trading day of a month. An OTR is calculated for each single ISIN.

#### Example

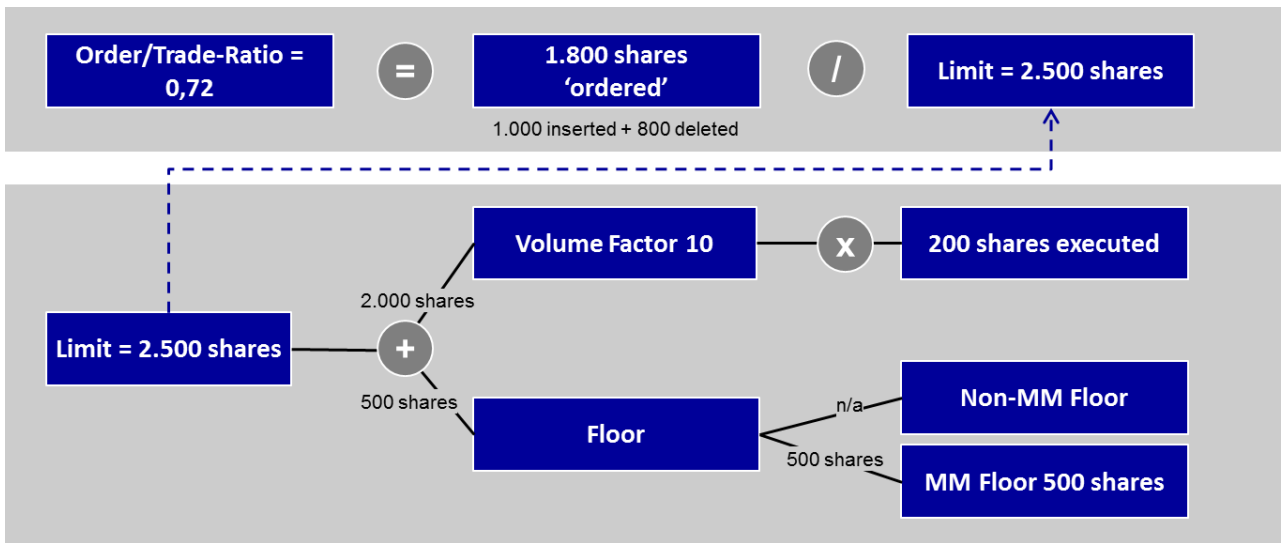
The OTR parameters are

- Volume factor = 10
- Market Maker Floor = 500 shares

#### Course of Trading

- A market maker inserts an order for 1.000 shares
- A total of 200 shares is executed
- Remainder of 800 shares is deleted

Note: Limit is a term for the figure which results by calculating the 'Executed quantity x Volume Factor + Floor'.



With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. The OTR on Eurex does not only count the number of traded contracts in the order book (for clarification: ESMA = number of transactions). Our model foresees a volume limit which is comprised of two components:

- A volume component, which is calculated by multiplying the traded volume in the order book by a predefined volume factor, and
- a monthly floor, which is defined for each Participant regardless of any traded volume in the order book. A Market Maker can receive a higher floor, depending on its Market-Making performance.

We believe that this monthly floor is necessary since it can not be guaranteed that trading activity will always lead to traded contracts. For example a market maker quoting in fairly illiquid options of single stock futures provides liquidity to the order book but will not know whether there is any interest from other participants which will lead to traded contracts. If the ordered volume would simply be divided by the number of contracts, then the market maker would be punished by the OTR for providing liquidity without having the possibility to have generated any trading volume. We therefore strongly suggest incorporating a monthly floor into the formula of the OTR. Market makers need a higher floor due to their quoting activities; this is why Eurex distinguishes between a static floor for normal participants and a dynamic floor for market makers which is connected to the market making activities. The better the market making quality, the higher the floor, thus the higher the monthly limit.

Besides OTR Eurex has also introduced a fee for excessive system usage (EUS Fee) which disincentivises excessive usage of system capacities. Other than for OTR, where violations can lead to sanctions against the member firm, for ESU Fee there are daily limits on the number of technical transactions which a participant is allowed to submit to the exchange system per product and day. If such a limit is breached then the fee is calculated based on the number of transactions above the limit.

<ESMA\_QUESTION\_292>

**Q293: Do you agree with the proposed scope of the OTR regime under MiFID II (liquid cash instruments traded on electronic trading systems)?**

<ESMA\_QUESTION\_293>

With respect to equities and equity-like instruments:

Deutsche Börse Group agrees with the proposed scope of an OTR regime under MiFID II to encompass liquid cash instruments with the categories of bonds, equities and equity-like products.





With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

Yes, based on the proposals made, Deutsche Börse Group agrees to limit the scope to liquid cash instruments on electronic trading systems.

<ESMA\_QUESTION\_293>

**Q294: Do you consider that financial instruments which reference a cash instrument(s) as underlying could be excluded from the scope of the OTR regime?**

<ESMA\_QUESTION\_294>

With respect to equities and equity-like instruments:

Deutsche Börse Group does agree to exclude financial derivative instruments which reference a cash instrument(s) as underlying from the scope of the OTR regime. The price of a derivative product depends on many elements notably, the price of the single or different underlying(s), so that any change in price or spread of the underlying(s) may require an adjustment of the derivative's. As an additional argument, it is noteworthy that the OTR of the underlying has an impact on both the price of the underlying and the price of the derivative. ETF's are equity-like products. Hence, ETF's shall not be excluded from the OTR regime as stated in question 293.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_294>

**Q295: Would you make any distinction between instruments which have a single instrument as underlying and those that have as underlying a basket of instruments? Please elaborate.**

<ESMA\_QUESTION\_295>

With respect to equities and equity-like instruments:

Deutsche Börse Group would not make any distinction between derivative instruments which have a single instrument as underlying and those that have a basket of instruments as underlying. Please see answer Q294 for further reasoning. Furthermore, ETF's are equity-like products. Hence, ETF's shall not be excluded from the OTR regime as stated in Q293.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. Yes. Eurex distinguishes between product types, e.g. Equity Index Options have different limit parameters than Equity Options. Different types of products need different limits because they trade differently. Quoting in options for example requires much more ordered volume and thus higher limits compared to trading in futures. And quoting an equity index option requires much more ordered volume compared to quoting a single equity option due to the number of price changes in the underlying.

Please see below the complete list of Eurex parameters by product type valid for OTR:

Product group*	Product type	Grace factor	Volume factor	Non-MM floor (in m)	Spread quality	MM base (in m)
Single Stock Futures	FSTK	0,25	500	50	0,0	3
					0,2	4
					0,3	5
					0,4	10
Equity Index Futures Volatility Index Futures Hurricane Futures	FINX FVOL FCRD	0,25	500	50	0,0	3
					0,2	6
					0,3	7
					0,4	8
Equity Index Options Equity Index Dividend Options	OINX OFIX	0,25	500	1.000	0,0	500
					0,2	600
					0,3	800
					0,4	1.000
Equity Options	OSTK	0,25	500	200	0,0	100
					0,2	150
					0,3	200
					0,4	300
Fixed Income Futures Money Market Futures	FBND FINT	0,25	500	50	0,0	2
					0,2	5
					0,3	10
					0,4	15
Options on Fixed Income Futures Options on Money Market Futures	OFBD OFIT	0,25	500	50	0,0	40
					0,2	60
					0,3	80
					0,4	100
New Asset Classes	New Asset Classes	0,25	500	1.000	0,0	500
					0,2	600
					0,3	800
					0,4	1.000

<ESMA\_QUESTION\_295>

**Q296: Do you agree with considering within the scope of a future OTR regime only trading venues which have been operational for a sufficient period in the market?**

<ESMA\_QUESTION\_296>

With respect to equities and equity-like instruments:

No, Deutsche Börse Group does not agree with an OTR regime only applicable to trading venues which have been operational for a sufficient period in the market. The major intention of an OTR regime is to secure market integrity by avoiding abusive trading behaviour, i.e. by manipulating prices and the market. Therefore, an OTR regime shall apply to all trading venues independently of the time of their existence as they are part of the European trading landscape. However, an exemption of the OTR regime shall be granted not in interdependence with the trading venue existence but with the instruments' existence, i.e. instruments which are newly admitted to trading. Those have to develop in liquidity and market partici-



pants would produce unreasonable OTRs due to that fact. Hence, this exemption is on an instrument level and would equally apply to all European trading venues.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. Eurex strongly believes that each trading venue should define its own limit parameters for OTR depending on the individual asset classes and structure of the liquidity pools. This should be done independent from the fact how long this market already operates.

<ESMA\_QUESTION\_296>

**Q297: If yes, what would be the sufficient period for these purposes?**

<ESMA\_QUESTION\_297>

With respect to equities and equity-like instruments:

No, Deutsche Börse Group does not agree with an OTR regime only applicable to trading venues which have been operational for a sufficient period in the market. The major intention of an OTR regime is to secure market integrity by avoiding abusive trading behaviour, i.e. by manipulating prices and the market. Therefore, an OTR regime shall apply to all trading venues independently of the time of their existence as they are part of the European trading landscape. However, an exemption of the OTR regime shall be granted not in interdependence with the trading venue existence but with the instruments' existence, i.e. instruments which are newly admitted to trading. Those have to develop in liquidity and market participants would produce unreasonable OTRs due to that fact. Hence, this exemption is on an instrument level and would equally apply to all European trading venues.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

<ESMA\_QUESTION\_297>

**Q298: What is your view regarding an activity floor under which the OTR regime would not apply and where could this floor be established?**

<ESMA\_QUESTION\_298>

With respect to equities and equity-like instruments:

Deutsche Börse Group thinks the element of a floor is essential. A floor ensures that members are not sanctioned for their trading intentions or liquidity provisioning even if they do not get matched and in periods of low market volumes. Therefore, a floor protects against risk of execution probability, and accounts for low market volumes.

However, we do not agree with ESMA's proposal of the establishment of a floor as a percentage of the overall number of messages of a participant. This approach focusses on the members' activity in general rather than implementing an up to the point measure by considering the liquidity and activity in the respective instruments. An instrument group or liquidity class set floor, applied per instrument provides an appropriate basis in order to ensure market integrity per instrument.

ESMA shall provide the trading venues the flexibility to independently determine the floor element, i.e. under the venues' consideration of their markets' individual liquidity. A concrete floor establishment might be a, by the trading venue determined, fixed amount of volume e.g. number of shares which shall be set per instrument group or liquidity class and applied per instrument traded.

Furthermore, ESMA shall consider an OTR regime with two floors. A floor for regular trading participants and a floor for market participants with a liquidity contributing function such as market makers. The market maker floor shall be greater than the floor for regular members in order to account for the liquidity contributing function.



With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. As already stated in Q292 Eurex has implemented a floor per product and participant and distinguishes between normal trading participants and market makers. This concept considers the liquidity providing function of market makers. We do not have a floor in place under which the OTR regime would not apply. We believe that each trading venue, especially for derivatives trading, is different and should therefore be in a position to set the limits which are deemed proper for the respective market.

<ESMA\_QUESTION\_298>

**Q299: Do you agree with the proposal above as regards the method of determining the OTR threshold?**

<ESMA\_QUESTION\_299>

With respect to equities and equity-like instruments:

Deutsche Börse Group does not agree with the proposed OTR approach with respect to the impact of an average value on the trading participant's behaviour. This approach might be inappropriate because trading participants would have to adapt to an average value set in dependence of the behaviour of other trading participants. An average OTR value means that the activity of others is determining the activity, behaviour and effectiveness of each other trading participant. ESMA shall rather base the OTR regime on certain parameters, which are developed in order to serve specific characteristics of different liquidity classes.

We do not agree with ESMA's proposal with respect to an average OTR encompassing a number of instruments. An average value would be inappropriate as activity and liquidity of the instruments differ. In addition, usual trading behaviour of the trading participants would be disturbed as they have to adapt their activity across a group of instruments. DBAG proposes to calculate an OTR for each single instrument as only the instrument specific and relevant figures are considered.

Furthermore, we do not agree with ESMA's proposal with respect to the determination of the group of instruments by liquidity bands of an applicable tick size table. In addition, the dependency on the tick size table might lead to very frequent and surprising changes of the parameters. ESMA shall provide the trading venues with the flexibility to independently determine the instrument groups, i.e. under the venues' consideration of their markets' individual liquidity and trading. Currently best practice is the implemented OTR regime by Deutsche Börse Group.

We do not agree with ESMA's proposed consideration of the existence of the trading venue and would rather suggest the consideration of the existence of an instrument. Please refer to Q296 for further detail.

We do not agree with ESMA's proposal of the calculation method to base the OTR regime on the 'average observed OTR of a venue' due to differences in distributions of trading activity of members per venue (Please refer to Q300 for further detail).

However, the ESMA proposal with its' general impact is discussed in the following under the assumption of a normal distribution. Considering the trading activity of a venue would be normally distributed, an average OTR value accounts for fifty per cent of the trading participants OTRs. ESMA's consideration of a multiplier  $x$  being 1 would then result in an OTR violation for 16% of the trading participants under the Gaussian distribution. This might not be appropriate as an OTR regime shall disable excessive trading behaviour and not plainly 16% of the trading participants of an average value.

In addition, the determination of  $x$  shall be made independently by each trading venue. The determination of the absolute OTR value and  $x$  shall be based on the venues individual extreme cases, i.e. OTRs of trading participants with excessive order submission which shall be disabled.

An OTR regime with parameters set per trading venue is preferable as trading members, their activity and liquidity varies between trading venues. The parameters shall be set per instrument group, i.e. liquidity class and applicable per instrument traded. Best practice is currently the OTR regime introduced by Deutsche Börse Group please see response to Q292 for further detail.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. Deutsche Börse Group does not agree. Eurex already has a very sophisticated model in place to calculate the OTR. The limits are set based on historic evaluation of the market behaviour of all participants. We did not use average ordered volume or a multiplier of such ordered volume to determine the limits. When defining the limits we looked into historic activity of all exchange participants and defined the limits so that the majority of the participants would stay below these limits. In some products certain participants showed behaviour which was beyond the defined limits. These participants were defined as 'outliers' and were consulted prior to the implementation of the OTR. The limits were set below these outlier activities and these participants had to adjust their trading behaviour in order to comply with the new rule. Using an average ordered volume and applying a multiplier is a similar approach for defining limits which will lead to similar results: some participants will need to change their trading behaviour. We strongly agree to the statement under 17., that trading venues which already have implemented more granular rules should have the ability to set their own limits by the means appropriate for this market.

<ESMA\_QUESTION\_299>

**Q300: In particular, do you consider the approach to base the OTR regime on the 'average observed OTR of a venue' appropriate in all circumstances? If not, please elaborate.**

<ESMA\_QUESTION\_300>

With respect to equities and equity-like instruments:

The proposed OTR approach might not be appropriate as trading participants would have to adapt to an average set in dependence of the behaviour of other trading participants rather than set parameters developed in order to serve specific characteristics of different liquidity classes.

In general, Deutsche Börse Group does not agree with the ESMA approach to base the OTR regime on the 'average observed OTR of a venue' as the calculation methodology would lead to unreasonable effects. The proposal does not consider differences in trading activity of venues and hence the fact that the distributions of those differ. Reason for the distribution differences is that the trading activity depends on the mixture of trading participants i.e. the types of trading participants involved, such as high-frequency traders, wholesale banks, retail banks and other financial institutions.

However, as distributions differ and the average OTRs for the same instruments traded on exchanges and MTFs differ as well regulatory arbitrage might occur due to the fact that the market participants would choose the venue with higher OTR values.

Therefore, DBAG proposes an OTR regime not being based on an average OTR value but the consideration of an absolute OTR value for each single instrument with parameters set per instrument group, i.e. liquidity class and applicable per instrument traded. Good experience is currently gained with the OTR regime introduced by Deutsche Börse Group, please see response to Q292 for further detail.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. As stated above, Deutsche Börse Group believes that the limit per product should be defined and implemented based on historic activity of all trading members.

<ESMA\_QUESTION\_300>

**Q301: Do you believe the multiplier  $x$  should be capped at the highest member's OTR observed in the preceding period?**

<ESMA\_QUESTION\_301>

With respect to equities and equity-like instruments:

Deutsche Börse Group thinks that the highest member's OTR of the preceding period might not be representative for the next trading period as market phases differ over time, e.g. high volume market phases and low volume market phases. Additionally, an individual member's OTR might not be representative for the overall market.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. Eurex did not use the highest member's OTR as a basis for the limit definition but looked into what the majority of the participants needs. The highest member's OTR was sometimes considered to be an outlier and therefore the implemented limit can be lower. In general an approach when defining the OTR where the majority of the participants with normal trading behaviour will not be affected by the limit is deemed appropriate. As per Eurex' observations the OTR needs to distinguish between the business models of the members. Market makers demand much higher order volume than regular participants. Taking an average across all participants and applying a factor  $x$  would either provide unreasonable, not justifiable headroom for the regular participant or hinder quoting activities of Eurex' best performing Market Makers.

<ESMA\_QUESTION\_301>

**Q302: In particular, what would be in your opinion an adequate multiplier  $x$ ? Does this multiplier have to be adapted according to the (group of) instrument(s) traded? If yes, please specify in your response the financial instruments/market segments you refer to.**

<ESMA\_QUESTION\_302>

With respect to equities and equity-like instruments:

The multiplier  $x$  shall be determined in order to restrain excessive trading activity. Hence, it shall provide the trading venues with the flexibility to set the multiplier  $x$  independently under consideration of the individual extreme cases of that venue, i.e. OTRs of trading participants with excessive order submission which shall be disabled.

However, a multiplier  $x$  should be set per instrument group or liquidity class and shall be applied per instrument as an OTR shall be calculated per instrument. In order to consider the liquidity contributing function of market makers and other liquidity providers, Deutsche Börse Group thinks there shall be a multiplier  $x$  with a higher value and a multiplier  $x$  for regular members. A comparable factor, and currently best practice, is the volume factor Deutsche Börse Group introduced in its OTR concept (please see response to Q292). The volume factor, as well as the floor, are set per instrument group in order to take different liquidity classes into account. Furthermore, the concept contains a volume factor for regular trading participants and a higher floor for market maker and other participants with a liquidity contributing function.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

<ESMA\_QUESTION\_302>

**Q303: What is your view with respect to the time intervals/frequency for the assessment and review of the OTR threshold (annually, twice a year, other)?**

<ESMA\_QUESTION\_303>

With respect to equities and equity-like instruments:

Deutsche Börse Group recommends that OTRs shall be calculated and provided to the trading participants on a daily basis. The assessment shall take place each calendar month. Hence, ESMA would provide trading participants with a reasonable frequency in order to oversee, control and adapt their trading behaviour when necessary.

Furthermore, The OTR threshold shall be reviewed annually. In addition, in order to offer the ability to react on volatile market phases an ad-hoc adaption has to be considered. ESMA shall provide trading venues with the flexibility to determine ad-hoc adaptations independently.

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. Eurex is constantly monitoring the appropriateness of the parameters as they have only been recently implemented in December 2013. Since then we have observed very few violations of the OTR which in most cases can be attributed to weaknesses of the model. The model will be further improved in the course of this year which should lead to an even fairer overall process. Eurex is reviewing the parameters on a regular basis. The interval/frequency should be decided by the individual market place. Right after the introduction a more frequent review/adjustment of the parameters might be necessary to fine-tune the limits. In general an annual review seems to be appropriate.

<ESMA\_QUESTION\_303>

**Q304: What are your views in this regard? Please explain.**

<ESMA\_QUESTION\_304>

With respect to equities and equity-like instruments:

ESMA singled out three possibilities how to consider market makers and other liquidity providers in the OTR regime.

4.5.20 i)

‘maintain the current practice consisting in requiring market makers and other liquidity providers to be subject to the OTR; or’

Deutsche Börse Group does opt for the OTR regime’s equal applicability to regular trading participants and market makers and other liquidity providers. However, as the liquidity contributing function has to be considered (as it is already stated in 4.5.18 of the Discussion Paper), ESMA shall introduce an OTR regime considering higher values of OTR calculation elements for liquidity contributing trading participants (for further detail please see Q298 and Q302).

4.5.20 ii)

maintain the current practice consisting in granting an exemption or special allowances to market makers and other liquidity providers from the OTR; or

Deutsche Börse Group does opt for an OTR regime containing a special allowance for market makers and other liquidity providers from the OTR. The liquidity contributing function has to be considered as it is already stated in 4.5.18 of the Discussion Paper. The allowance shall be included as market maker floor in conjunction with a regular floor for trading participants without a liquidity contributing function. The market maker floor shall have a higher amount of volume than the regular floor in order to consider the liquidity contributing function. This floor element is currently best practice by Deutsche Börse Group. For further reasoning please refer to Q298.

4.5.20 iii)

calculate an OTR that excludes the trading activity of market makers and other liquidity providers and apply that OTR regime to all other market members (non-market makers and other non-liquidity providers).



Deutsche Börse Group does not opt for the general exclusion of market makers and other liquidity providers from the OTR calculation. In order to treat market participants equally but on the other hand, to ensure that the liquidity provisioning function of respective trading members are considered, the OTR calculation shall encompass all trading participants. The consideration of the liquidity provisioning function shall be ensured by the introduction of a floor element, i.e. a market maker floor (for further details please refer to 4.5.20 ii) and a market maker multiplier x (for further details please refer to Q302).

With respect to bonds:

For bonds please refer to the equity and equity-like instruments section.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. In Deutsche Börse Group's view, market makers need different treatment in terms of the OTR due to their liquidity providing function which is vital for the quality of the order book. This differentiation can either be achieved by exempting market makers from the OTR or by providing appropriate limits. Eurex decided to not exempt market makers but takes their special market function in consideration by providing a dynamic floor which is much higher than the static floor for normal exchange participants. Several parameters from the market making measurement (such as spread quality, covered time or average quote size) are reflected in the formula for the market making floor which leads to a fair limit for market makers. This model is very much linked to the market making obligations of Eurex and would be difficult to implement on other trading venues. We therefore welcome the proposal to exempt market makers for the sake of simplicity.

It should be mentioned that Eurex does not grant a special license to market makers. Any exchange participant can quote in products where market making is defined. Any participant fulfilling a certain proportion (currently 25%) of the market making requirements in a certain product is treated as a market maker and qualifies for the higher floor.

<ESMA\_QUESTION\_304>

## **4.6. Co-location (Article 48(8) of MiFID II)**

### **Q305: What factors should ESMA be considering in ensuring that co-location services are provided in a 'transparent', 'fair' and 'non-discriminatory' manner?**

<ESMA\_QUESTION\_305>

In Deutsche Börse Group's view, the most relevant factors in ensuring transparent, fair and non-discriminatory provision of co-location services to trading participants (users) are already mentioned in the analysis. In essence the service needs to be available to all trading participants wishing to make use of it. Therefore a precise, comprehensive and public pricing scheme of the venue is key. All available co-location services shall be offered independently of standard access services so as to not limit a participants' possible choice (and therefore to provide trading participants with a choice of services provision based on their unique requirements).

In this respect the most relevant factors in ensuring transparent, fair and non-discriminatory provision of co-location services to trading participants are already mentioned in the analysis by ESMA. In line with ESMA's considerations we agree to the three identified factors, level of access, pricing of services, and level of technical support under additional considerations lined-out below.

Deutsche Börse Group would like to point out that the Co-location is primarily provided to allow trading participant access to its market. The terminology 'users' should therefore be understood to represent participants of a trading venue operator. In this respect Deutsche Börse supports that the level of access to services to its trading participants should be transparent, fair and non-discriminatory. We furthermore support that pricing of such services should be fair and transparent to all trading participants in question.



As regards the level of technical support, we appreciate that trading participants might like to make their own arrangements. Technical support of Third Party Service Provider directly commissioned by trading participants shall be allowed as well as long as they do not compromise the security of the trading venue. Certain minimum criteria might be specified by the trading venue, which need to be considered by the trading participants, respectively the commissioned service provider which might vary between trading venues.

<ESMA\_QUESTION\_305>

#### **4.7. Fee structures (Article 48 (9) of MiFID II)**

##### **Q306: Do you agree with the approach described above?**

<ESMA\_QUESTION\_306>

Deutsche Börse Group agrees to this approach.

<ESMA\_QUESTION\_306>

##### **Q307: Can you identify any practice that would need regulatory action in terms of transparency or predictability of trading fees?**

<ESMA\_QUESTION\_307>

###### With respect to equities and equity-like instruments:

In Deutsche Börse Group's view, programs offered by trading venues to its members which offer special tariffs depending on the activity and/or behavior of the trading member require regulatory action in terms of transparency. DBAG suggests that publication of such programs is obliged both in terms of the requirements to be met by the trading members and the tariffs offered to the trading members. In case requirements and tariffs are a result of a negotiation process, transparency should be required ex ante regarding the negotiation criteria and ex post regarding the negotiation results. All trading members of a trading venue should have access to such programs on a non-discriminatory basis.

###### With respect to derivatives:

No, Deutsche Börse Group cannot identify any practice.

<ESMA\_QUESTION\_307>

##### **Q308: Can you identify any specific difficulties in obtaining adequate information in relation to fees and rebates that would need regulatory action?**

<ESMA\_QUESTION\_308>

###### With respect to equities and equity-like instruments:

In Deutsche Börse Group's view programs offered by trading venues to its members which offer special tariffs depending on the activity and/or behavior of the trading member require regulatory action in terms of transparency. DBAG suggests that publication of such programs is obliged both in terms of the requirements to be met by the trading members and the tariffs offered to the trading members. In case requirements and tariffs are a result of a negotiation process, transparency should be required ex ante regarding the negotiation criteria and ex post regarding the negotiation results. All trading members of a trading venue should have access to such programs on a non-discriminatory basis.

###### With respect to derivatives:

No, Deutsche Börse Group cannot identify any difficulties.

<ESMA\_QUESTION\_308>

##### **Q309: Can you identify cases of discriminatory access that would need regulatory action?**

<ESMA\_QUESTION\_309>

With respect to equities and equity-like instruments:

In Deutsche Börse Group's view programs offered by trading venues to its members which offer special tariffs depending on the activity and/or behaviour of the trading member require regulatory action in terms of transparency. DBAG suggests that publication of such programs is obliged both in terms of the requirements to be met by the trading members and the tariffs offered to the trading members. In case requirements and tariffs are a result of a negotiation process, transparency should be required ex ante regarding the negotiation criteria and ex post regarding the negotiation results. All trading members of a trading venue should have access to such programs on a non-discriminatory basis.

With respect to derivatives

In Deutsche Börse Group's view one possible case could be unpublished, bilateral fee agreement between individual participants and the trading venue.

<ESMA\_QUESTION\_309>

**Q310: Are there other incentives and disincentives that should be considered?**

<ESMA\_QUESTION\_310>

With respect to equities and equity-like instruments:

Deutsche Börse Group does not assume MiFID II is limiting incentives or disincentives to the three types contemplated by ESMA. Firstly, the contemplated types should be able to be combined with other criteria, e.g. volume discounts with the type of service used by the trading member. Core requirement is that incentives and disincentives are made transparent. Secondly, also other incentives and disincentives should be possible under MiFID II, e.g. fees for excessive system usage in addition to fees based on OTRs.

With respect to derivatives:

Deutsche Börse Group considers that besides the already mentioned incentives under point 13 i.&ii., additional discounts, rebates and incentives should be considered which are already described under point 15 (iii, iv, v).

Besides having 'volume discounts' purely based on volume or the number of trades, the possibility should be given to also consider qualitative criteria of the volume such as size or origin (e.g. passive, aggressive). Additionally, as already described in point 15 v. and not listed in point 13, it should still be possible to offer additional (broader) incentives apart from trading fee rebates.

Beyond market maker rebates and volume rebates for proprietary trading, Eurex also offers trade size rebates which reduce the fee per contract above a certain threshold of the contract volume. For example in Single Stock Futures if one transaction of a market participant is larger than 2,000 contracts, then for the contract volume above this threshold a different fee applies.

Eurex also uses fee holidays or revenue sharing models to incentivise participation in newly launched products. These incentives are often connected to certain requirements, e.g. market making. These incentives are publicly announced in a circular and are available only on a temporary basis.

<ESMA\_QUESTION\_310>

**Q311: Do any of the parameters referred to above contribute to increasing the probability of trading behaviour that may lead to disorderly and unfair trading conditions?**

<ESMA\_QUESTION\_311>

With respect to equities and equity-like instruments:

Deutsche Börse Group does not believe that the listed parameters contribute to increasing the probability of trading behaviour that may lead to disorderly and unfair trading conditions. There are, however, other parameters for which this statement also applies, such as the type of service used by the trading member (e.g. the use of non-persistent vs. persistent orders).

With respect to derivatives:

As Eurex agrees to ESMA's assessment, the answer is 'no'.

<ESMA\_QUESTION\_311>

**Q312: When designing a fee structure, is there any structure that would foster a trading behaviour leading to disorderly trading conditions? Please elaborate.**

<ESMA\_QUESTION\_312>

With respect to equities and equity-like instruments:

Deutsche Börse Group believes that there are many fee structures which might result in an unbalanced treatment of trading members, which consequently might foster a trading behaviour leading to disorderly trading conditions. Basically, such fee structures comprise elements which define fees for a given type or quantity of trades of a trading member depending on the level of other types or quantities of trades (e.g. additional quantities as in the particular case contemplated by ESMA) of the respective trading member on the trading venue.

With respect to derivatives:

No, Deutsche Börse Group cannot identify structures that would foster disorderly trading conditions.

<ESMA\_QUESTION\_312>

**Q313: Do you agree that any fee structure where, upon reaching a certain threshold of trading by a trader, a discount is applied on all his trades (including those already done) as opposed to just the marginal trade executed subsequent to reaching the threshold should be banned?**

<ESMA\_QUESTION\_313>

With respect to equities and equity-like instruments:

Deutsche Börse Group agrees that the fee structure contemplated by ESMA (discount on all trades upon reaching a certain threshold) might result in an unbalanced treatment of trading members and agrees that such fee structures should be banned.

With respect to derivatives:

Yes. In Deutsche Börse Group's view this might indeed lead to wash trades because a participant who is very close to reaching the next rebate level will try to execute the missing traded contracts just for the purpose of getting the higher rebate applied to all volume and not just the volume above the threshold. This might lead to trades with no economic value for the participant and might even come with a loss of revenues in these trades but which is compensated by the higher rebate on the entire volume. Eurex would not introduce such a rebate scheme. Eurex has therefore established a volume rebate scheme with tiers in which only volume above the threshold is subject to the respective higher rebate.

<ESMA\_QUESTION\_313>

**Q314: Can you identify any potential risks from charging differently the submission of orders to the successive trading phases?**

<ESMA\_QUESTION\_314>

With respect to derivatives:

Eurex does not have different fees for different trading phases but can not identify any risk if this would be the case.

<ESMA\_QUESTION\_314>

**Q315: Are there any other types of fee structures, including execution fees, ancillary fees and any rebates, that may distort competition by providing certain market participants with more favourable trading conditions than their competitors or pose a risk to orderly trading and that should be considered here?**

<ESMA\_QUESTION\_315>

With respect to equities and equity-like instruments:

Deutsche Börse Group is not aware of such types of fee structures in practice. Deutsche Börse Group believes that there are many fee structures which might result in an unbalanced treatment of trading members, which consequently might foster a trading behaviour leading to disorderly trading conditions. Basically, such fee structures comprise elements which define fees for a given type or quantity of trades of

a trading member depending on the level of other types or quantities of trades (e.g. additional quantities as in the particular case contemplated by ESMA) of the respective trading member on the trading venue.

With respect to derivatives:

No. In Deutsche Börse Group's view it only needs to be ensured that fee structures need to be transparent to all market participants.

<ESMA\_QUESTION\_315>

**Q316: Are there any discount structures which might lead to a situation where the trading cost is borne disproportionately by certain trading participants?**

<ESMA\_QUESTION\_316>

With respect to equities and equity-like instruments:

Deutsche Börse Group is not aware of discount structures which might lead to a situation where the trading cost is borne disproportionately by certain trading participants, as long as discount structures are made transparent and are being offered non-discriminatorily on an equal basis. However, Deutsche Börse Group sees problems on trading venues with a general maker/taker scheme. We do have concerns about maker/taker fees because they distort the comparison of the order situation between trading venues, i.e., a liquidity provider can reflect the maker rebate in his quote and provide a price improvement, without having an economic impact. Therefore, maker/taker fee models appear to be suboptimal for the market, as they blur market transparency: Ceteris paribus, two markets with the same levels of liquidity and same revenues but different pricing models would result in the one with maker/taker rebate appear more attractive (due to tighter spreads), whereas at the same time having to apply higher explicit costs for the taker.

With respect to derivatives:

Deutsche Börse Group is not aware of such structures.

<ESMA\_QUESTION\_316>

**Q317: For trading venues charging different trading fees for participation in different trading phases (i.e. different fees for opening and closing auctions versus continuous trading period), might this lead to disorderly trading and if so, under which circumstances would such conditions occur?**

<ESMA\_QUESTION\_317>

Deutsche Börse Group does not believe that different trading fees in different trading phases might lead to disorderly trading.

<ESMA\_QUESTION\_317>

**Q318: Should conformance testing be charged?**

<ESMA\_QUESTION\_318>

In Deutsche Börse Group's view, there should be no dictated conformance tests. The responsibility of testing algorithms should lie with the member, monitored by the exchange. Testing environments need to be flexible and adjustable to the respective member's needs. A rigid, predefined order of testing would be counterproductive. (see also question 229).

In case, however, there should be a mandatory conformance test, such a service should be able to be charged. Deutsche Börse Group deems conformance testing as an important service to be provided to members of a trading venue. However, this will require significant additional investments by trading venues as well as additional operational expenditure on top. Therefore, we deem it necessary that such services may be charged in order to provide the required set-up. Otherwise, especially many smaller trading venues would not be in the position to offer the service necessary for a properly well-crafted and supported testing environment. Whether and how testing of algorithms is charged should be at the trading venue's discretion.

<ESMA\_QUESTION\_318>



**Q319: Should testing of algorithms in relation to the creation or contribution of disorderly markets be charged?**

<ESMA\_QUESTION\_319>

Deutsche Börse Group considers that whether and how testing of algorithms is charged should be at the trading venue's discretion.

<ESMA\_QUESTION\_319>

**Q320: Do you envisage any scenario where charging for conformance testing and/or testing in relation to disorderly trading conditions might discourage firms from investing sufficiently in testing their algorithms?**

<ESMA\_QUESTION\_320>

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<ESMA\_QUESTION\_320>

**Q321: Do you agree with the approach described above?**

<ESMA\_QUESTION\_321>

With respect to equities and equity-like instruments:

Deutsche Börse Group partly agrees. Market makers who fail to be compliant with minimum requirements should only face the risk of no incentives and termination of agreement but not an additional risk of fine. Market participants should be encouraged to participate in a market maker agreement.

With respect to derivatives:

In Deutsche Börse Group's view a trading venue should have the choice to not establish a market making scheme in certain instruments. The monitoring and maintenance efforts could become higher than the commercial benefit of having the product listed. As a result trading venues would not offer the product for trading and clearing and it would need to be traded OTC.

Penalties for not meeting Market Making requirements are detrimental to a Market Making Program. The number of firms willing to take those risks and further engage in Market Making strategies would shrink substantially and trading venues would be dependent on only few firms to provide liquidity. It will be impossible to establish Market Making programs for instruments that are not extremely liquid.

As of today, some trading venues have rebate programs in place – sometimes denominated 'market making programs' – which foster liquidity but do not oblige participants to perform a market making strategy or to comply with the requirements of such programs. Instead, participants are merely incentivized to act in accordance with the requirements of such programs and thereby foster liquidity as compliance will entitle them to fee rebates. Trading venues should have the possibility to make use of such programs also after MiFID II has been enacted. This would enable market operators to foster liquidity by providing them with a second tool in addition to market making programs/agreements under Art. 17(3)(b) MiFID II.

There is no provision in MiFID II which prohibits such incentive programs. ESMA should, however, state explicitly that such programs are admitted under MiFID II in addition to market making programs/agreements under Art. 17(3)(b) MiFID II.

<ESMA\_QUESTION\_321>

**Q322: How could the principles described above be further clarified?**

<ESMA\_QUESTION\_322>

With respect to equities and equity-like instruments:

Deutsche Börse Group is of the following opinion: In dependence of minimum requirements which are to be defined by using parameters of maximum spread, minimum quotation volume and participation rate during trading hours, incentive scheme can be defined on a daily or monthly basis. Market makers should be able to monitor their own performance via reports.

With respect to derivatives:

In Deutsche Börse Group's view the terms 'liquid' and 'sufficient number of firms engaged in market making agreements' are instrument specific and a generalization would produce instruments which need to be delisted as the sufficient number of Market Makers cannot be acquired. An extreme result would be trading venues with only a hand full of products while the rest of all instruments would need to be traded OTC.

<ESMA\_QUESTION\_322>

**Q323: Do you agree that OTR must be complemented with a penalty fee?**

<ESMA\_QUESTION\_323>

With respect to equities and equity-like instruments:

Deutsche Börse Group agrees to complement an OTR regime with a penalty fee.

However, currently best practice is the OTR concept of Deutsche Börse Group, which was implemented in course of the German High Frequency Trading Law. This concept encompasses a sanction regime for OTR violations. Furthermore, the law required having an excessive system usage fee (ESU fee), which is based on counting by the trading participant inserted orders and trades. This ESU fee concept encompasses a fee regime.

Finally, we do agree complementing the OTR regime with a penalty fee but it has to be a consistent approach for Europe as a whole. Additional measures such as sanction procedures shall not be applied in order to create a level playing field.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. In Deutsche Börse Group's view the German HFT Act does not define a concrete penalty fee in case of a violation. A violation against the OTR is treated like a violation against the rules and regulations of Eurex. We have implemented a daily report for each participant containing the OTR values per product. Members can utilize these reports to validate their own calculations and to constantly monitor their OTR values and take action if necessary. Independent Market Surveillance monitors and informs the Eurex Executive Board in case of any violations. The Executive Board and/or the Disciplinary Committee can impose sanctions on members. These sanctions could consist of warnings, fee penalties and/or even the suspension from trading depending on the severity of the violation. These potential measures/penalties are designed to prevent any breaches and our experience since the introduction in December 2013 shows that these measures work appropriately.

<ESMA\_QUESTION\_323>

**Q324: In terms of the approach to determine the penalty fee for breaching the OTR, which approach would you prefer? If neither of them are satisfactory for you, please elaborate what alternative you would envisage.**

<ESMA\_QUESTION\_324>

With respect to equities and equity-like instruments:

In general, Deutsche Börse Group opts for option B 4.7.35 ii) which is the approach of determining the penalty fee for breaching the OTR based on a common framework where all trading venues would incorporate a penalty fee to systematic breaches of OTR determined according to a homogeneous methodology, otherwise regulatory arbitrage might occur.

However, ESMA shall regard systematic breaches as follows. As OTR values shall be assessed on a monthly basis and the thresholds reviewed on an annual basis (please refer to Q303), three breaches per instrument or instrument group in course of a calendar year shall not be penalized. The fourth OTR breach and following breaches shall be penalized. Hence, ESMA would provide the trading participants with an opportunity to adapt their trading behaviour and account for volatile market phases.

We do not agree to ESMA's proposed calculation method of the determination of the penalty fee. In order to avoid unnecessary complex calculations, DBAG proposes to penalize each breach (as stated above the

first three breaches during a calendar year in an instrument/instrument group are not penalized). The penalty fee shall be a fixed amount equally applicable to all European trading venues.

With respect to derivatives:

Deutsche Börse Group considers that in case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. Eurex clearly prefers Option A, in which each trading venue can define its own rules regarding the OTR and connected penalties. Different national regulatory frameworks (e.g. the HFT act in Germany) require a flexible treatment of the OTR topic including penalties coming with the OTR. Each market place has different system capacities and might want to set the OTR for its products at different levels. Eurex believes that with the already implemented rules regarding OTR, it has set a sound framework for its market participants. Actually Eurex is already in line with option A, having implemented a completely separate scheme to enforce penalty fees on excessive system usage (ESU Fee).

<ESMA\_QUESTION\_324>

**Q325: Do you agree that the observation period should be the same as the billing period?**

<ESMA\_QUESTION\_325>

With respect to equities and equity-like instruments:

4.7.37 i)

Deutsche Börse Group agrees that the observation period shall be the same as the billing period.

4.7.37 ii)

Grace periods shall be considered, i.e. three breaches per instrument or instrument group in course of a calendar year shall not be penalized as stated in Q324.

4.7.37 iii)

Deutsche Börse Group agrees with ESMA's view to consider market makers and other liquidity providers. This shall be done in the calculation methodology, i.e. the calculation elements with higher amounts. An additional exemption from the fee structure is not necessary.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. In Deutsche Börse Group's view the German HFT law defines the OTR as a monthly limit per product and participant. This is how it is currently implemented at Eurex. A violation can only occur if the OTR is larger than 1 after the last day of trading of a calendar month. This is the observation period and it starts fresh at the beginning of each month. As there is no concrete fee mechanism in place, there is also no billing period defined in case of a violation. In the case of ESU Fee however, the observation period is daily and the billing period is monthly.

<ESMA\_QUESTION\_325>

**Q326: Would you apply economic penalties only when the OTR is systematically breached? If yes, how would you define "systematic breaches of the OTR"?**

<ESMA\_QUESTION\_326>

With respect to equities and equity-like instruments:

Yes,. As already stated in question 324, Deutsche Börse Group believes ESMA shall regard systematic breaches as follows. As OTR values shall be assessed on a monthly basis and the thresholds reviewed on an annual basis (please refer to question 303), three breaches per instrument or instrument group in course of a calendar year shall not be penalized. The fourth OTR breach and following breaches shall be penalized. Hence, ESMA would provide the trading participants with an opportunity to adapt their trading behaviour and account for volatile market phases.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. In Deutsche Börse Group's view there is no definition for a systemic breach of the OTR. Any OTR above 1 at the end of the month is a violation. However, for ESU Fee there is a differentiation

between accidental and systematic. Only in cases where one participant exceeds the transaction limit on more than 5 days in one calendar month can be considered systematic and a fee is applied. In accidental cases (of up to 5 violations per product and calendar month) no fee applies.

<ESMA\_QUESTION\_326>

**Q327: Do you consider that market makers should have a less stringent approach in terms of penalties for breaching the OTR?**

<ESMA\_QUESTION\_327>

With respect to equities and equity-like instruments:

Market makers have to fulfil certain minimum requirements and are obliged to update their quotes on a more frequently basis as other market participants. Therefore Deutsche Börse Group feels OTR thresholds for market makers should be higher.

With respect to derivatives:

In case the OTR is to be extended, information on derivatives can be provided, due to the national legislation in Germany. In Deutsche Börse Group's view market makers can receive higher limits depending on their market making activity but the overall approach is not less stringent when it comes to potential sanctions in case of violations. Each violation is treated equally.

<ESMA\_QUESTION\_327>

**Q328: Please indicate which fee structure could incentivise abusive trading behaviour.**

<ESMA\_QUESTION\_328>

Deutsche Börse Group is not aware of any fee structure currently in use by a trading venue providing an incentive to market abuse.

<ESMA\_QUESTION\_328>

**Q329: In your opinion, are there any current fee structures providing these types of incentives? Please elaborate.**

<ESMA\_QUESTION\_329>

Deutsche Börse Group is not aware of any fee structure currently in use by a trading venue providing an incentive to market abuse.

<ESMA\_QUESTION\_329>

## **4.8. Tick sizes (Article 48(6) and Article 49 of MiFID II)**

**Q330: Do you agree with the general approach ESMA has suggested?**

<ESMA\_QUESTION\_330>

Deutsche Börse Group agrees with the general approach suggested by ESMA. However, we believe there are important points that should be considered when establishing a European tick size regime.

We can see the reasons why regulators want to have a harmonised tick size regime in Europe (e.g. for the purpose of enforcement, control etc.), but we also believe that nevertheless trading venues should be left with some power when it comes to tailoring actual tick sizes within parameters of a regime defined by ESMA. The main reason is that regulation of tick sizes will have a high market impact. For example too small tick sizes will lead to thin liquidity at the top of the book, which deters those looking to trade larger volumes and may push such participants away from lit venues. However, overly constrained tick sizes cause also problems. Too large tick sizes will lead to too wide spreads, because volumes that are currently quoted at tight spreads will consolidate at new spreads, but those spreads will be wider. This could mean that cost for investors will increase, because liquidity takers will in the end pay more for the same liquidity which they currently get at cheaper prices. Especially retail investors will be worse off, as they subsidise



other market participants by paying higher prices (in form of spreads) due to wider tick sizes. Further if absolute tick sizes increase, volume will consolidate at touch points of wider spreads which means that queue priority will become very important as the time between posting and execution will increase. As a result speed in trading becomes more important.

To summarize non-optimal tick sizes (no matter if they are too large or too small) will push market participants away from trading at a venue (which contradicts with the explicit goal of MiFID II that trading should occur on lit and transparent markets), damage the price discovery process, reduce liquidity and make it more difficult for those wishing to raise capital to finance their growth.

Therefore we believe that ESMA should implement a somewhat flexible tick size regime that allows considering specific characteristics of a trading venue. We believe that this is possible with a slightly adjusted version of Option 2 that will be outlined further below (see answer to q 346). Last but not least we recommend that ESMA should consider conducting a pilot program similar to the one the SEC is conducting in the US in order to better understand and study the effects of tick size changes prior to implementing new rules. In case ESMA prefers not to do a data-driven study before tick sizes get implemented, we would encourage ESMA to review after two years in order to analyse how the tick size regime impacted the market and make adjustments where necessary.

<ESMA\_QUESTION\_330>

**Q331: Do you agree with adopting the average number of daily trades as an indicator for liquidity to satisfy the liquidity requirement of Article 49 of MiFID II? Are there any other methods/liquidity proxies that allow comparable granularity and that should be considered?**

<ESMA\_QUESTION\_331>

Deutsche Börse Group does not support Option 1. Option 1 suggests taking the average number of daily trades as an indicator of liquidity into account. We do have strong concerns about this proxy as it might be a misleading indicator of liquidity. First of all an instrument's liquidity is impacted by factors such as for example fee structures and the number of shares executed within each transaction. Secondly the number of trades is an inappropriate measure of liquidity when it comes to instruments such as ETFs for which ESMA also intends to introduce a European tick size regime. The liquidity of an ETF is primarily determined by the liquidity of the underlying market tracked by the ETF. Consequently, a large number of ETFs might be considered rather illiquid if the number of trades would be considered as an indication of their liquidity. However, if the liquidity of the underlying market is relatively high, the average spread of the ETF would very likely warrant a relatively small tick size despite a potentially small number of trades only. We strongly suggest that ESMA introduces tick size regimes for shares and ETFs that are based on the same methodology in order to reduce implementation complexity. As the number of trades is not a good liquidity proxy for ETFs Option 1 should no further be considered.

<ESMA\_QUESTION\_331>

**Q332: In your view, what granularity should be used to determine the liquidity profile of financial instruments? As a result, what would be a proper number of liquidity bands?**

<ESMA\_QUESTION\_332>

Deutsche Börse Group does not support Option 1 and believe that there is no level of granularity that would be sufficient to determine accurately the liquidity profile of an instrument if the metric being observed is the average daily number of transactions. As explained in q331, we think 'number of trades' is a misleading indicator of liquidity because important factors that impact an instrument's liquidity (e.g. fee structures and the average number of shares executed within each transaction) are neglected or is overall inappropriate for other instruments such as ETFs. We believe that it is very difficult to determine the right number of liquidity bands for a tick size regime without fully understanding the other components of the proposed regime. If we had to decide though we think that neither a very small number of bands (i.e. 1-4) nor a very large number of bands (e.g. 20+) is adequate. We believe an appropriate number of bands is in the range of 5 to 20. We think that Option 2 reflects this much better than Option 1 (i.e. SAF<sub>0</sub> to SAF<sub>19</sub>)

<ESMA\_QUESTION\_332>

**Q333: What is your view on defining the trade-off between constraining the spread without increasing viscosity too much on the basis of a floor-ceiling mechanism?**

<ESMA\_QUESTION\_333>

Overall Deutsche Börse Group agrees with ESMA's view on the viscosity trade-off, although we do not support Option 1. However, we think that a ceiling mechanism may negatively restrict the natural price discovery process. Besides it is less critical to have a tick size that is too small than a tick size that is too large. Therefore we suggest only having a floor mechanism which Option 2 is based on.

<ESMA\_QUESTION\_333>

**Q334: What do you think of the proposed spread to tick ratio range?**

<ESMA\_QUESTION\_334>

Deutsche Börse Group strongly disagrees with the optimal tick size as a proportion of 1.4 to 2.5 average spread for liquid shares and 1.4 to 5 for less liquid shares. As pointed out in q333 we think that a ceiling mechanism is not necessary as it may negatively restrict the natural price discovery process. For the floor mechanism we believe that 1.4 is far too low as the tick size becomes too big in relation to the instrument's average spread, i. e. it might be quite likely that the spread to tick ratio is compressed down to one (e.g. in times of high trading activity), meaning that the spread is artificially restricted by the tick size. Data analysis supports our argument. A spread to tick ratio of 1.4 (floor) would have a negative impact on instruments traded at Deutsche Börse Group (shares and ETFs alike). Overall we think that it is very difficult to agree in Europe on one spread to tick ratio as it will not take into account the dynamics of each individual market. A spread to tick ratio that is equally set for all European markets will eventually harm an instrument's natural price discovery process. For example although the price and liquidity range of two products might be the same, they may have different volatility profiles which may require a different spread to tick ratio, to avoid that the natural price discovery process may become restricted.

While Option 1 is based on one spread to tick ratio for Europe we think Option 2 may allow for more flexibility. Option 2 could slightly be adjusted in a way that the primary market (the market where the instrument is primarily listed) be allowed to set the appropriate spread to tick ratio within principle based guidelines as they have the institutional knowledge to do so optimally. This does not contradict with ESMA's intention to have harmonised tick sizes across Europe, it would only grant more flexibility to reflect characteristics of individual markets. The concept will be explained in more detail below (see question 346).

<ESMA\_QUESTION\_334>

**Q335: In your view, for the tick size regime to be efficient and appropriate, should it rely on the spread to tick ratio range, the evolution of liquidity bands, a combination of the two or none of the above?**

<ESMA\_QUESTION\_335>

As outlined in questions 330 to 334 Deutsche Börse Group has strong concerns about Option 1 and therefore do not support it. Instead we support a slightly modified version of the tick size regime proposed under Option 2 as we believe it seems more efficient and appropriate. The reasons along with the modifications are outlined further below.

<ESMA\_QUESTION\_335>

**Q336: What is your view regarding the common tick size table proposed under Option 1? Do you consider it easy to read, implement and monitor? Does the proposed two dimensional tick size table (based on both the liquidity profile and price) allow applying a tick size to a homogeneous class of stocks given its clear-cut price and liquidity classes?**

<ESMA\_QUESTION\_336>

As stated previously, Deutsche Börse Group is not a supporter of Option 1. Although it seems that it might be easy to read and implement (in case tick sizes will only be adjusted on an annual basis), we believe this advantage is outweighed by our belief that there is no such thing as a homogenous class of stocks. Any attempt to classify them as such will overlook their important, and unique, defining characteristics. Be-

sides, the concept does not work for ETFs as outlined above. We strongly suggest that ESMA introduces tick size regimes for shares and ETFs that are based on the same methodology in order to reduce implementation complexity.

<ESMA\_QUESTION\_336>

**Q337: What is your view regarding the determination of the liquidity and price classes?**

<ESMA\_QUESTION\_337>

As stated previously, Deutsche Börse Group is not a supporter of Option 1. As explained in q331, we think 'number of trades' is a misleading indicator of liquidity because important factors that impact an instrument's liquidity (e.g. fee structures and the average number of shares executed within each transaction) are neglected or is overall inappropriate for other instruments such as ETFs.

<ESMA\_QUESTION\_337>

**Q338: Considering that market microstructure may evolve, would you favour a regime that allows further calibration of the tick size on the basis of the observed market microstructure?**

<ESMA\_QUESTION\_338>

Deutsche Börse Group supports a tick size regime that allows for further calibration. While we do not support Option 1 because amongst other reasons as previously stated it is based on a spread to tick ratio that does not take into consideration the characteristics of individual markets, we believe this is possible with a slightly modified version of Option 2 which is outlined further below (see q346).

<ESMA\_QUESTION\_338>

**Q339: In your view, does the tick size regime proposed under Option 1 offer sufficient predictability and certainty to market participants in a context where markets are constantly evolving (notably given its calibration and monitoring mechanisms)?**

<ESMA\_QUESTION\_339>

As outlined previously Deutsche Börse Group believes Option 1 is not a good solution. We think that a slightly modified version of Option 2 would better serve the market. Details are outlined further below (see question 346).

<ESMA\_QUESTION\_339>

**Q340: The common tick size table proposed under Option 1 provides for re-calibration while constantly maintaining a control sample. In your view, what frequency would be appropriate for the revision of the figures (e.g., yearly)?**

<ESMA\_QUESTION\_340>

As stated previously, Deutsche Börse Group is not a supporter of Option 1. In general we believe revision of tick size tables should take place no more than once a year (unless market circumstances would require otherwise). We certainly do not recommend adjusting them more than twice a year.

<ESMA\_QUESTION\_340>

**Q341: In your view, what is the impact of Option 1 on the activity of market participants, including trading venue operators? To what extent, would it require adjustments?**

<ESMA\_QUESTION\_341>

The tick size regime as presented in Option 1 will have quite an impact on the current tick size of many stocks and ETFs trading at our market. Our analysis shows suboptimal results. As a result Deutsche Börse Group fears that liquidity might decrease. As outlined in our response to q330 we again like to emphasize that overly constrained tick sizes increase costs for investors, especially for retail investors, by forcing them to pay more (in form of spreads) for the same liquidity they get now at cheaper prices as well as emphasising the importance of speed in trading. We therefore do not support Option 1. Instead we will provide suggestions with respect to Option 2 further below. We believe that with some modifications the



impact it will have on our market is acceptable for us as well as for market participants trading on our venue.

<ESMA\_QUESTION\_341>

**Q342: Do you agree that some equity-like instruments require an equivalent regulation of tick sizes as equities so as to ensure the orderly functioning of markets and to avoid the migration of trading across instrument types based on tick size? If not, please outline why this would not be the case.**

<ESMA\_QUESTION\_342>

In general Deutsche Börse Group agrees that for ETFs an equivalent regulation of tick sizes is useful. We believe the methodology used should be the same as for shares to reduce implementation complexity. However, if deemed necessary we think calibration should be allowed to better reflect characteristics of this asset class (e.g. with respect to the fact that liquidity of an ETF highly depends on the liquidity of its underlying market). Details will be outlined further below where we suggest how a modified version of Option 2 can be used for ETFs (see question 346).

<ESMA\_QUESTION\_342>

**Q343: Are there any other similar equity-like instruments that should be added / removed from the scope of tick size regulation? Please outline the reasons why such instruments should be added / removed?**

<ESMA\_QUESTION\_343>

No, Deutsche Börse Group believes it should be restricted to ETFs.

<ESMA\_QUESTION\_343>

**Q344: Do you agree that depositary receipts require the same tick size regime as equities?**

<ESMA\_QUESTION\_344>

No, Deutsche Börse Group believes tick size regimes should be limited to shares and ETFs with the possible addition of DRs at some point in future once the concept has been successfully implemented for share and ETFs.

<ESMA\_QUESTION\_344>

**Q345: If you think that for certain equity-like instruments (e.g. ETFs) the spread-based tick size regime<sup>1</sup> would be more appropriate, please specify your reasons and provide a detailed description of the methodology and technical specifications of this alternative concept.**

<ESMA\_QUESTION\_345>

As explained Deutsche Börse Group does not believe that the number of trades is a good proxy for liquidity for ETFs and therefore we are not supporters of Option 1. Instead we suggest implementing a slightly adjusted version of Option 2. Details are outlined further below (see q346).

<ESMA\_QUESTION\_345>

**Q346: If you generally (also for liquid and illiquid shares as well as other equity-like financial instruments) prefer a spread-based tick size regime<sup>2</sup> vis-à-vis the regime as proposed under Option 1 and tested by ESMA, please specify the reasons and provide the following information:**

<ESMA\_QUESTION\_346>

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<sup>1</sup> Please see the description of Option 2 regarding tick sizes below.

<sup>2</sup> Please see the description of Option 2 regarding tick sizes below.

Deutsche Börse Group prefers a spread-based tick size regime. Option 2 provides such a regime that we generally support with some slight adjustments. We believe that when implementing tick size regimes one methodology for both shares and ETFs should be used to keep implementation cost and complexity low. We like to make two suggestions:

1) Recalibration of the tick size tables themselves: The reason is that the original tables (one for liquid shares and one for less liquid shares) suggested in Option 2 is not granular enough. While it might suit venues that are currently on FESE table 2, it would have quite an impact for venues that are today on FESE table 4. The effect for those would be suboptimal (e.g. negative impact on liquidity and natural price discovery process). Therefore the following two tables (one for liquid and one for less liquid shares) have been designed in a way that the needs of those being currently on FESE table 4 are better reflected. In addition the following tables are more symmetric and easier to read as they contain the corresponding tick sizes for different SAF factors. We support ESMA's proposal that for less liquid shares the table should be a modified version of the table for liquid shares whereby each tick size band is assigned a tick size that is one step larger in comparison to the corresponding tick size table for liquid instruments.

<b>TABLE adjusted (liquids)</b>										
	Stock Prices		Tick sizes							
Band	Lower Limit	Upper Limit	SAF <sub>0</sub>	SAF <sub>1</sub>	SAF <sub>2</sub>	SAF <sub>3</sub>	SAF <sub>4</sub>	SAF <sub>5</sub>	SAF <sub>x</sub>	SAF <sub>19</sub>
1	-	0.4999	0.0001							
2	0.5	0.9995	0.0002	0.0001						
3	1	1.999	0.0005	0.0002	0.0001					
4	2	4.998	0.001	0.0005	0.0002	0.0001				
5	5	9.995	0.002	0.001	0.0005	0.0002	0.0001			
6	10	19.99	0.005	0.002	0.001	0.0005	0.0002	0.0001		
7	20	49.98	0.01	0.005	0.002	0.001	0.0005	0.0002	[...]	
8	50	99.95	0.02	0.01	0.005	0.002	0.001	0.0005	[...]	
9	100	199.9	0.05	0.02	0.01	0.005	0.002	0.001	[...]	
10	200	499.8	0.1	0.05	0.02	0.01	0.005	0.002	[...]	
11	500	999.5	0.2	0.1	0.05	0.02	0.01	0.005	[...]	
12	1,000.00	1,999.00	0.5	0.2	0.1	0.05	0.02	0.01	[...]	
13	2,000.00	4,998.00	1	0.5	0.2	0.1	0.05	0.02	[...]	
14	5,000.00	9,995.00	2	1	0.5	0.2	0.1	0.05	[...]	
15	10,000.00	19,990.00	5	2	1	0.5	0.2	0.1	[...]	
16	20,000.00	39,980.00	10	5	2	1	0.5	0.2	[...]	
17	40,000.00	49,960.00	20	10	5	2	1	0.5	[...]	
18	50,000.00	79,950.00	50	20	10	5	2	1	[...]	
19	80,000.00	99,920.00	100	50	20	10	5	2	[...]	
20	100,000.00	-	200	100	50	20	10	5	[...]	0.0001
<b>TABLE adjusted (less liquids)</b>										
	Stock Prices		Tick sizes							
Band	Lower Limit	Upper Limit	SAF <sub>0</sub>	SAF <sub>1</sub>	SAF <sub>2</sub>	SAF <sub>3</sub>	SAF <sub>4</sub>	SAF <sub>5</sub>	SAF <sub>x</sub>	SAF <sub>19</sub>
1	-	0.4999	0.0002							
2	0.5	0.9995	0.0005	0.0002						
3	1	1.999	0.001	0.0005	0.0002					
4	2	4.998	0.002	0.001	0.0005	0.0002				
5	5	9.995	0.005	0.002	0.001	0.0005	0.0002			
6	10	19.99	0.01	0.005	0.002	0.001	0.0005	0.0002		
7	20	49.98	0.02	0.01	0.005	0.002	0.001	0.0005	[...]	
8	50	99.95	0.05	0.02	0.01	0.005	0.002	0.001	[...]	
9	100	199.9	0.1	0.05	0.02	0.01	0.005	0.002	[...]	
10	200	499.8	0.2	0.1	0.05	0.02	0.01	0.005	[...]	
11	500	999.5	0.5	0.2	0.1	0.05	0.02	0.01	[...]	
12	1,000.00	1,999.00	1	0.5	0.2	0.1	0.05	0.02	[...]	
13	2,000.00	4,998.00	2	1	0.5	0.2	0.1	0.05	[...]	
14	5,000.00	9,995.00	5	2	1	0.5	0.2	0.1	[...]	
15	10,000.00	19,990.00	10	5	2	1	0.5	0.2	[...]	
16	20,000.00	39,980.00	20	10	5	2	1	0.5	[...]	
17	40,000.00	49,960.00	50	20	10	5	2	1	[...]	
18	50,000.00	79,950.00	100	50	20	10	5	2	[...]	
19	80,000.00	99,920.00	200	100	50	20	10	5	[...]	
20	100,000.00	-	500	200	100	50	20	10	[...]	0.0002

We think that the differentiation between liquid and less liquid ETFs as proposed by ESMA in the Consultation Paper (section 3.1, q115) does not accurately reflect their true level of liquidity and that therefore ETFs should all be assigned to one table, i.e. to the table for liquid shares. As an alternative to assigning ETFs to the table for liquid shares, ESMA could apply de minimis numbers not only for the free float criterion, but also for the average daily number of transactions and the average daily turnover criteria when defining liquidity thresholds for ETFs in section 3.1 of the Consultation Paper, thus effectively classifying all ETFs as liquid instruments.

2) Adjustment of spread to tick ratio: The proposed spread to tick ratio of 2 might not work for all markets. As explained in our response to q330 it is important to approach tick sizes in a way that unique characteristics of markets will be taken into account. Therefore we suggest when determining the right spread to tick ratio for a market, it should be up to the primary markets (where the share has been primarily listed) to decide if they want to be on a low spread to tick ratio (which should be in the range of 2 to 4) or a high spread to tick ratio (which should be in the range of 4 to 8) in order to take the characteristics and dynamics of those markets into account.

With respect to ETFs we suggest it should be the venue with the highest turnover in a respective ETF due to the reason that ETFs are normally cross-listed simultaneously on multiple venues and therefore the concept of one primary market as single listing venue is more or less non-existent. Turnover as criteria is simple to calculate, transparent and accounts for the level of trading activity on each European venue (although we would like to emphasize that calculation of turnover needs to be accurately defined and should exclusively be based on order book transactions in order to have a meaningful and relevant basis underlying the tick size decision).

In general, the proposed tick size approach not only allows flexibility for markets but also ensures at the same time that tick sizes are going to be harmonised across Europe as every single instrument will be assigned to only one tick size. For example if a primary market chooses a high spread to tick ratio the tick size of a share will be determined according to this. Whatever the tick size will be all other venues must apply that tick size for that specific share so that the tick size will be harmonised across venues.

We think that primary market operators should have a binary choice between a low spread to tick ratio and a high one, but that the low and high spread to tick ratios are to be set by ESMA after a thoroughly data conducted study. As pointed out above, ESMA should set the low spread to tick ratio somewhere in the range of 2 to 4 and the high one somewhere in the range of 4 to 8.

In order to keep complexity low we recommend that a primary market should be allowed to decide only once every two years if they want to be either on a low or a high spread to tick ratio which would be applicable to both shares and ETFs.

Although this has not been suggested in Level I we strongly recommend that tick sizes regimes should also become applicable for systematic internalisers as otherwise it would be unfair and discriminatory with respect to regulated markets and MTFs.

<ESMA\_QUESTION\_346>

**Q347: Given the different tick sizes currently in operation, please explain what your preferred type of tick size regulation would be, giving reasons why this is the case.**

<ESMA\_QUESTION\_347>

Deutsche Börse Group's analysis shows that implementation of Option 1 will lead to non-optimal tick size settings. The effect would damage price discovery and cause negative impact on liquidity traded in the open which cannot be ESMA's intention. Therefore Deutsche Börse Group recommends implementing a regime that is capable of adapting characteristics of individual markets which we think is not possible with Option 1. However we believe this is possible with Option 2 (see answer to question 346).

<ESMA\_QUESTION\_347>

**Q348: Do you see a need to develop a tick size regime for any non-equity financial instrument? If yes, please elaborate, indicating in particular which approach you would follow to determine that regime.**

<ESMA\_QUESTION\_348>

No. Deutsche Börse Group questions the adequacy to develop a tick size regime for non-equity financial instruments because we believe that trading venues are the best to set them themselves.

<ESMA\_QUESTION\_348>

**Q349: Do you agree with assessing the liquidity of a share for the purposes of the tick size regime, using the rule described above? If not, please elaborate what criteria you would apply to distinguish between liquid and illiquid instruments.**

<ESMA\_QUESTION\_349>

Yes, Deutsche Börse Group agrees with ESMA that it should be distinguished between liquid and illiquid instruments when it comes to shares. We support the proposal that the existing definition of liquidity according to Art. 22 of the EC Regulation No. 1287/2006 of MiFID I should be taken into account, but urge ESMA to do a thorough market impact analysis as the definition of liquidity will also change with MiFID II. We disagree applying such a differentiation for ETFs (section 3.1, q 115 of the Consultation Paper) as the proposal does not accurately reflect the true level of liquidity of an ETF. Therefore we suggest applying only one table for ETFs, to be precise the table for liquid shares. As an alternative to assigning ETFs to the table for liquid shares, ESMA could apply de minimis numbers not only for the free float criterion, but also for the average daily number of transactions and the average daily turnover criteria when defining liquidity thresholds for ETFs in section 3.1 of the Consultation Paper, thus effectively classifying all ETFs as liquid instruments.

<ESMA\_QUESTION\_349>

**Q350: Do you agree with the tick sizes proposed under Option 2? In particular, should a different tick size be used for the largest band, taking into account the size of the tick relative to the price? Please elaborate.**

<ESMA\_QUESTION\_350>

Deutsche Börse Group believes that more granular tick sizes (see our answer to q346) will lead to fewer problems for market quality than tick sizes that are too coarse. We recommend recalibrating the proposed table for liquids and less liquids to the following tables:



<b>TABLE adjusted (liquids)</b>										
	Stock Prices		Tick sizes							
Band	Lower Limit	Upper Limit	SAF <sub>0</sub>	SAF <sub>1</sub>	SAF <sub>2</sub>	SAF <sub>3</sub>	SAF <sub>4</sub>	SAF <sub>5</sub>	SAF <sub>x</sub>	SAF <sub>19</sub>
1	-	0.4999	0.0001							
2	0.5	0.9995	0.0002	0.0001						
3	1	1.999	0.0005	0.0002	0.0001					
4	2	4.998	0.001	0.0005	0.0002	0.0001				
5	5	9.995	0.002	0.001	0.0005	0.0002	0.0001			
6	10	19.99	0.005	0.002	0.001	0.0005	0.0002	0.0001		
7	20	49.98	0.01	0.005	0.002	0.001	0.0005	0.0002	[...]	
8	50	99.95	0.02	0.01	0.005	0.002	0.001	0.0005	[...]	
9	100	199.9	0.05	0.02	0.01	0.005	0.002	0.001	[...]	
10	200	499.8	0.1	0.05	0.02	0.01	0.005	0.002	[...]	
11	500	999.5	0.2	0.1	0.05	0.02	0.01	0.005	[...]	
12	1,000.00	1,999.00	0.5	0.2	0.1	0.05	0.02	0.01	[...]	
13	2,000.00	4,998.00	1	0.5	0.2	0.1	0.05	0.02	[...]	
14	5,000.00	9,995.00	2	1	0.5	0.2	0.1	0.05	[...]	
15	10,000.00	19,990.00	5	2	1	0.5	0.2	0.1	[...]	
16	20,000.00	39,980.00	10	5	2	1	0.5	0.2	[...]	
17	40,000.00	49,960.00	20	10	5	2	1	0.5	[...]	
18	50,000.00	79,950.00	50	20	10	5	2	1	[...]	
19	80,000.00	99,920.00	100	50	20	10	5	2	[...]	
20	100,000.00	-	200	100	50	20	10	5	[...]	0.0001
<b>TABLE adjusted (less liquids)</b>										
	Stock Prices		Tick sizes							
Band	Lower Limit	Upper Limit	SAF <sub>0</sub>	SAF <sub>1</sub>	SAF <sub>2</sub>	SAF <sub>3</sub>	SAF <sub>4</sub>	SAF <sub>5</sub>	SAF <sub>x</sub>	SAF <sub>19</sub>
1	-	0.4999	0.0002							
2	0.5	0.9995	0.0005	0.0002						
3	1	1.999	0.001	0.0005	0.0002					
4	2	4.998	0.002	0.001	0.0005	0.0002				
5	5	9.995	0.005	0.002	0.001	0.0005	0.0002			
6	10	19.99	0.01	0.005	0.002	0.001	0.0005	0.0002		
7	20	49.98	0.02	0.01	0.005	0.002	0.001	0.0005	[...]	
8	50	99.95	0.05	0.02	0.01	0.005	0.002	0.001	[...]	
9	100	199.9	0.1	0.05	0.02	0.01	0.005	0.002	[...]	
10	200	499.8	0.2	0.1	0.05	0.02	0.01	0.005	[...]	
11	500	999.5	0.5	0.2	0.1	0.05	0.02	0.01	[...]	
12	1,000.00	1,999.00	1	0.5	0.2	0.1	0.05	0.02	[...]	
13	2,000.00	4,998.00	2	1	0.5	0.2	0.1	0.05	[...]	
14	5,000.00	9,995.00	5	2	1	0.5	0.2	0.1	[...]	
15	10,000.00	19,990.00	10	5	2	1	0.5	0.2	[...]	
16	20,000.00	39,980.00	20	10	5	2	1	0.5	[...]	
17	40,000.00	49,960.00	50	20	10	5	2	1	[...]	
18	50,000.00	79,950.00	100	50	20	10	5	2	[...]	
19	80,000.00	99,920.00	200	100	50	20	10	5	[...]	
20	100,000.00	-	500	200	100	50	20	10	[...]	0.0002



<ESMA\_QUESTION\_350>

**Q351: Should the tick size be calibrated in a more granular manner to that proposed above, namely by shifting a band which results in a large step-wise change?**

<ESMA\_QUESTION\_351>

Yes, Deutsche Börse Group believes they should be calibrated in a more granular manner (see our answer to question 346). We recommend recalibrating the proposed table for liquids and less liquids to the following tables:

<b>TABLE adjusted (liquids)</b>										
	Stock Prices		Tick sizes							
Band	Lower Limit	Upper Limit	SAF <sub>0</sub>	SAF <sub>1</sub>	SAF <sub>2</sub>	SAF <sub>3</sub>	SAF <sub>4</sub>	SAF <sub>5</sub>	SAF <sub>x</sub>	SAF <sub>19</sub>
1	-	0.4999	0.0001							
2	0.5	0.9995	0.0002	0.0001						
3	1	1.999	0.0005	0.0002	0.0001					
4	2	4.998	0.001	0.0005	0.0002	0.0001				
5	5	9.995	0.002	0.001	0.0005	0.0002	0.0001			
6	10	19.99	0.005	0.002	0.001	0.0005	0.0002	0.0001		
7	20	49.98	0.01	0.005	0.002	0.001	0.0005	0.0002	[...]	
8	50	99.95	0.02	0.01	0.005	0.002	0.001	0.0005	[...]	
9	100	199.9	0.05	0.02	0.01	0.005	0.002	0.001	[...]	
10	200	499.8	0.1	0.05	0.02	0.01	0.005	0.002	[...]	
11	500	999.5	0.2	0.1	0.05	0.02	0.01	0.005	[...]	
12	1,000.00	1,999.00	0.5	0.2	0.1	0.05	0.02	0.01	[...]	
13	2,000.00	4,998.00	1	0.5	0.2	0.1	0.05	0.02	[...]	
14	5,000.00	9,995.00	2	1	0.5	0.2	0.1	0.05	[...]	
15	10,000.00	19,990.00	5	2	1	0.5	0.2	0.1	[...]	
16	20,000.00	39,980.00	10	5	2	1	0.5	0.2	[...]	
17	40,000.00	49,960.00	20	10	5	2	1	0.5	[...]	
18	50,000.00	79,950.00	50	20	10	5	2	1	[...]	
19	80,000.00	99,920.00	100	50	20	10	5	2	[...]	
20	100,000.00	-	200	100	50	20	10	5	[...]	0.0001
<b>TABLE adjusted (less liquids)</b>										
	Stock Prices		Tick sizes							
Band	Lower Limit	Upper Limit	SAF <sub>0</sub>	SAF <sub>1</sub>	SAF <sub>2</sub>	SAF <sub>3</sub>	SAF <sub>4</sub>	SAF <sub>5</sub>	SAF <sub>x</sub>	SAF <sub>19</sub>
1	-	0.4999	0.0002							
2	0.5	0.9995	0.0005	0.0002						
3	1	1.999	0.001	0.0005	0.0002					
4	2	4.998	0.002	0.001	0.0005	0.0002				
5	5	9.995	0.005	0.002	0.001	0.0005	0.0002			
6	10	19.99	0.01	0.005	0.002	0.001	0.0005	0.0002		
7	20	49.98	0.02	0.01	0.005	0.002	0.001	0.0005	[...]	
8	50	99.95	0.05	0.02	0.01	0.005	0.002	0.001	[...]	
9	100	199.9	0.1	0.05	0.02	0.01	0.005	0.002	[...]	
10	200	499.8	0.2	0.1	0.05	0.02	0.01	0.005	[...]	
11	500	999.5	0.5	0.2	0.1	0.05	0.02	0.01	[...]	
12	1,000.00	1,999.00	1	0.5	0.2	0.1	0.05	0.02	[...]	
13	2,000.00	4,998.00	2	1	0.5	0.2	0.1	0.05	[...]	
14	5,000.00	9,995.00	5	2	1	0.5	0.2	0.1	[...]	
15	10,000.00	19,990.00	10	5	2	1	0.5	0.2	[...]	
16	20,000.00	39,980.00	20	10	5	2	1	0.5	[...]	
17	40,000.00	49,960.00	50	20	10	5	2	1	[...]	
18	50,000.00	79,950.00	100	50	20	10	5	2	[...]	
19	80,000.00	99,920.00	200	100	50	20	10	5	[...]	
20	100,000.00	-	500	200	100	50	20	10	[...]	0.0002



<ESMA\_QUESTION\_351>

**Q352: Do you agree with the above treatment for a newly admitted instrument? Would this affect the subsequent trading in a negative way?**

<ESMA\_QUESTION\_352>

Deutsche Börse Group does not agree with the proposal that newly admitted instruments should be treated as an illiquid instrument during the initial calibration period because this might constrain trading. Instead we recommend assigning a newly admitted stock to the equivalent table its peers have been assigned to, which is either the table for liquid shares or the table for less liquid shares. As explained in q346 we believe ETFs should be assigned to the table for liquid shares. As an alternative to assigning ETFs to the table for liquid shares, ESMA could apply de minimis numbers not only for the free float criterion, but also for the average daily number of transactions and the average daily turnover criteria when defining liquidity thresholds for ETFs in section 3.1 of the Consultation Paper, thus effectively classifying all ETFs as liquid instruments. With respect to the reassessment of a newly admitted share after a period of six weeks, we suggest checking at the end of the following quarter if a table change (and a SAF adjustment) is required or not under the condition that the share has been assigned to a respective table for at least a minimum of six weeks. We believe that if tick size adjustments for newly admitted shares will only take place at the beginning of a new quarter it will result in less market disruption. A share that floats on 5<sup>th</sup> of March would first be assigned to a new table and/or a SAF-factor by 1st of July as the initial trading period is less than six weeks. For ETFs the same applies with respect to the readjustment of the respective SAF-factor.

<ESMA\_QUESTION\_352>

**Q353: Do you agree that a period of six weeks is appropriate for the purpose of initial calibration for all instruments admitted to the pan-European tick size regime under Option 2? If not, what would be the appropriate period for the initial calibration?**

<ESMA\_QUESTION\_353>

Deutsche Börse Group does not agree with the proposed initial calibration period of six weeks. In fact we do believe it is not necessary. Instead we suggest when the new regime gets implemented that an instrument should be assigned to its correct SAF factor straight from the beginning. We believe this will be better in order to avoid market disruptions. In order to calculate the spread to tick ratio, we think it makes sense to take the annually time-weighted average spread before implementation of the new tables into account.

<ESMA\_QUESTION\_353>

**Q354: Do you agree with the proposal of factoring the bid-ask spread into tick size regime through SAF? If not, what would you consider as the appropriate method?**

<ESMA\_QUESTION\_354>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_354>

**Q355: Do you agree with the proposal to take an average bid-ask spread of less than two ticks as being too narrow? If not, what level of spread to ticks would you consider to be too narrow?**

<ESMA\_QUESTION\_355>

As stated in question 346 Deutsche Börse Group believes that the spread to tick ratio of 2 might not work for all markets. Hence we suggest when determining the right spread to tick ratio for a market, it should be up to the primary market (where the share has been primarily listed) to decide if they want to be on a low spread to tick ratio (which should be in the range of 2 to 4) or a high spread to tick ratio (which should be in the range of 4 to 8) in order to take the characteristics and dynamics of those markets into account.

With respect to ETFs we suggest it should be the venue with the highest turnover in a respective ETF due to the reason that ETFs are normally cross-listed simultaneously on multiple venues and therefore the

concept of one primary market as single listing venue is more or less non-existent. Turnover as criteria is simple to calculate, transparent and accounts for the level of trading activity on each European venue (although we would like to emphasize that calculation of turnover needs to be accurately defined and should exclusively be based on order book transactions in order to have a meaningful and relevant basis underlying the tick size decision).

In general, the proposed tick size approach not only allows flexibility for markets but also ensures that at the same time that tick sizes are going to be harmonised across Europe as every single instrument will be assigned to only one tick size. For example if a primary market chooses a high spread to tick ratio the tick size of a share will be determined according to this. Whatever the tick size will be all other venues must apply that tick size for that specific share so that the tick size will be harmonised across venues. As explained in q346 we think that primary market operators should have a binary choice between a low spread to tick ratio and a high one, but that the low and high spread to tick ratios are to be set by ESMA after a thoroughly data conducted study. As pointed out above, ESMA should set the low spread to tick ratio somewhere in the range of 2 to 4 and the high one somewhere in the range of 4 to 8.

In order to keep complexity low we recommend that a primary market should be allowed to decide only once every two years if they want to be either on a low or a high spread to tick ratio which would be applicable to both shares and ETFs.

Although this has not been suggested in Level I we strongly recommend that tick sizes regimes should also become applicable for systematic internalisers as otherwise it would be unfair and discriminatory with respect to regulated markets and MTFs.

<ESMA\_QUESTION\_355>

**Q356: Under the current proposal, it is not considered necessary to set an upper ceiling to the bid-ask spread, as the preliminary view under Option 2 is that under normal conditions the risk of the spread widening indefinitely is limited (and in any event a regulator may amend SAF manually if required). Do you agree with this view? If not, how would you propose to set an upper ceiling applicable across markets in the EU?**

<ESMA\_QUESTION\_356>

As pointed out in Deutsche Börse Group's answer to question 333 a ceiling mechanism may negatively restrict the natural price discovery process. Besides it is less critical to have a tick size that is too small than a tick size that is too large to the extent that it does not adversely create a proliferation of orders and negatively impact desired OTRs. Deutsche Börse Group believes that the proposed mechanism (NCA may manually change the SAF if deemed necessary) is sufficient. However a manual intervention by the NCA should be the exemption and the conditions under which a NCA may do this need to be specified.

<ESMA\_QUESTION\_356>

**Q357: Do you have any concerns of a possible disruption which may materialise in implementing a review cycle as envisioned above?**

<ESMA\_QUESTION\_357>

As pointed out previously (see our answer to question 353) Deutsche Börse Group thinks there is no need for an initial calibration period because it might cause market disruptions. We believe that a review of SAF once a year, preferably at the end of a calendar year would be appropriate. In addition we suggest that ESMA should establish in its database a list with all instruments and their assigned tick sizes (respectively SAF-factors) which market participants can download in a standardised and machine readable format.

<ESMA\_QUESTION\_357>

**Q358: Do you agree that illiquid instruments, excluding illiquid cash equities, should be excluded from the scope of a pan-European tick size regime under Option 2 until such time that definitions for these instruments become available? If not, please explain why. If there are any equity-like instruments per Article 49(3) of MiFID II that you feel should be included in the pan-European tick size regime at the same time as for cash equities, please list these instruments together with a brief reason for doing so.**

<ESMA\_QUESTION\_358>

Deutsche Börse Group believes that for shares a differentiation between liquid and illiquid shares is appropriate and agrees to the changes proposed by ESMA in Section 3.1 of the Consultation Paper. However, as previously stated, we do not agree with the definition of a liquid market for ETFs (please see our answer to question 349). Instead we suggest that these should be assigned to one common table (i.e. table for liquid shares). As an alternative to assigning ETFs to the table for liquid shares, ESMA could apply de minimis numbers not only for the free float criterion, but also for the average daily number of transactions and the average daily turnover criteria when defining liquidity thresholds for ETFs in section 3.1 of the Consultation Paper, thus effectively classifying all ETFs as liquid instruments.

<ESMA\_QUESTION\_358>

**Q359: Do you agree that financial instruments, other than those listed in Article 49(3) of MiFID II should be excluded from the scope of the pan-European tick size regime under Option 2 at least for the time being? If not, please explain why and which specific instruments do you consider necessary to be included in the regime.**

<ESMA\_QUESTION\_359>

Deutsche Börse Group believes that tick size regimes should only be implemented for shares and ETFs. Before those regimes have been implemented and proved to work, other instruments such as DRs should not be considered.

<ESMA\_QUESTION\_359>

**Q360: What views do you have on whether tick sizes should be revised on a dynamic or periodic basis? What role do you perceive for an automated mechanism for doing this versus review by the NCA responsible for the instrument in question? If you prefer periodic review, how frequently should reviews be undertaken (e.g. quarterly, annually)?**

<ESMA\_QUESTION\_360>

Deutsche Börse Group agrees to maintain the price as a dynamic factor with which to determine appropriate tick sizes during the normal course of trading. The tick size should only be adjusted via the SAF factor periodically. This should be done no more than once a calendar year, preferably at the end of it. As explained in question 346 we believe that primary markets should decide on the spread to tick ratio (either low or high) or with respect to ETFs it should be the venue with the highest turnover. In order to keep complexity low we believe a primary market should be allowed to review its spread to tick ratio (either low or high) no more than every two years.

<ESMA\_QUESTION\_360>

## 5. Data publication and access

### 5.1. General authorisation and organisational requirements for data reporting services (Article 61(4), MiFID II)

**Q361: Do you agree that the guidance produced by CESR in 2010 is broadly appropriate for all three types of DRS providers?**

<ESMA\_QUESTION\_361>

We generally support similar approaches for the authorization and organization of DRS like APAs, CTPs and ARMs where possible. However, there are certain differences which should be taken into account.

#### **Dissemination**

Deutsche Börse Group agrees with the facilitation of consolidation of data through data being available in a machine readable way. Data should be made available by the data sources (IFs, SIs and Trading Venues) for APAs and CTPs in a streaming feed mode (push data) but not only available via an internet page (pull) which would require grabbing of data by the Consolidator. Instructions as regards changes to those protocols should be distributed well in advance.

We agree that data which is being published through APAs and consolidated by CTPs for public view, should be available at non-discriminatory terms and at reasonable commercial terms. However, data submitted to ARMs of course should not be made public, as it contains private data.

#### **Security**

Deutsche Börse Group agrees that for all DRS there should be security for who is submitting data and that data should not be able to be compromised. We agree with the suggested measures by ESMA.

#### **Identification of incomplete or potentially erroneous information**

Deutsche Börse Group deems this requirement to be only applicable for APAs as well as ARMs, but not to CTPs. Data is being submitted to APAs and ARMs by IFs sometimes in a non-standardized way, and as regards transaction reports to ARMs often enough with manual interventions and therefore prone to potential mistakes. Data submitted by trading venues to CTPs is already of high quality and does not require additional checks. The same should hold true for APAs submitting data to CTPs going forward. CTPs therefore should not be required to check on detail level for incomplete or erroneous information.

#### **Correction of trade information**

Deutsche Börse Group does not agree with this suggestion, for neither of the DRS, due to various reasons:

- A CTP only acts as a consolidator for data provided by Trading Venues and by APAs.
- IFs are obliged by regulation to submit trade reports in order for them to be made public via APAs. It is questionable why the APA should be in a better situation to correct any trade report on behalf of the customer.
- As regards ARMs, we deem it questionable to interfere with customer compliance, as this could create difficult legal problems for an ARM. We therefore reject this requirement for an ARM.

What still would need to be defined, however, is the question within which time frame a trade report which is supposed to be provided in real-time for public transparency reasons should be able to be corrected. The correction itself will require significant manual intervention in case historical market data would need to be adapted as well. So in fact ex post corrections should only be allowed intra-day.



### **Monitoring**

Deutsche Börse Group agrees with this requirement for all three DSPs.

### **Operational hours**

Deutsche Börse Group would like to suggest, that operational hours should not be defined upfront due to the fact that some efficient service operators might not be able to provide services which might be sufficient for the majority of investment firms but not for all. Instead, we would strongly recommend to require that APAs clearly advertise and make transparent within their marketing, service levels and contracts what their operating hours are, in order to provide for ample choice amongst investment firms. This requirement will both support competition and choice for investment firms.

### **Resources and contact arrangements**

Deutsche Börse Group agrees with ESMA suggestions.

### **Recovery provisions**

Deutsche Börse Group generally agrees with ESMA suggestions.

However, in some cases, it is impossible to set up a fully redundant fail-over as the cost-benefit relation would not be sensible at all. As an example; an APA operated by a trading venue via its existing trading infrastructure would not be able to provide for a fail-over into an additional set-up. This should be taken into account by ESMA. In this case it might be necessary, to have a second APA as a back-up solution at customer site.

### **Conflict of interests**

Deutsche Börse Group agrees with ESMA suggestions.

### **Outsourcing**

Deutsche Börse Group agrees with ESMA suggestions.

### **Regulatory Reporting Requirements**

#### *Periodic reports*

Deutsche Börse Group agrees with regulatory suggestions. Periodic reports should be provided once p.a.

However, we question ESMA's assumption that an APA did not publish a trade report due to the fact that information was likely to be erroneous. In a case where data seems to be erroneous, the APA could act in two different ways a) not publishing the report and risking that submitted data was correct, however, and creating a late report or b) publishing the data with an Alert Flag that this trade report might not be correct and at the same time requesting a double check on reporting customer side to confirm or adapt the trade data accordingly. The latter procedure would allow for timely publication in any case with the market being alerted that the data might not be correct. Hence, ESMA should clearly advise on the requested procedure. In any case the procedure should be harmonized on EU Level in order to allow for easy consolidation.

#### *Ad hoc reports*

In order for APAs to be compliant with these requirements the periods of review should ideally be defined by ESMA upfront. Taking into account that an IF would need to be consistently providing low quality data, we would suggest to align those reports to the periodic reports.

<ESMA\_QUESTION\_361>

### **Q362: Do you agree that there should also be a requirement for notification of significant system changes?**

<ESMA\_QUESTION\_362>

Deutsche Börse Group is of the opinion, that only significant system changes should be requested to be discussed with the NCA, e.g. in case mechanisms applied within the infrastructure of a DRS would be



altered in a way compromising the approved services in terms of data checks etc., or in case of an ARM altering the system in such a way that affects the data submitted to the NCA. Adaptions to soft- and hardware can happen frequently, usually not affecting desired output data. Liaising with NCA in any case would significantly lengthen time to market for all adaptions with a need to implement notice periods.  
<ESMA\_QUESTION\_362>

**Q363: Are there any other general elements that should be considered in the NCAs' assessment of whether to authorise a DRS provider?**

<ESMA\_QUESTION\_363>

No, Deutsche Börse Group does not see any additional requirements to be applied.

<ESMA\_QUESTION\_363>

## **5.2. Additional requirements for particular types of Data Reporting Services Providers**

**Q364: Do you agree with the identified differences regarding the regulatory treatment of ARMs.**

<ESMA\_QUESTION\_364>

Please refer to Deutsche Börse Group's answers to Q361

Deutsche Börse Group generally supports similar approaches for the authorization and organization of DSP like APAs, CTPs and ARMs where possible. However, there are certain differences which should be taken into account.

### **Dissemination**

Deutsche Börse Group agrees with the facilitation of consolidation of data through data being available in a machine readable way. Data should be made available by the data sources (IFs, SIs and Trading Venues) for APAs and CTPs in a streaming feed mode (push data) but not only available via an internet page (pull) which would require grabbing of data by the Consolidator. Instructions as regards changes to those protocols should be distributed well in advance.

We agree that data which is being published through APAs and consolidated by CTPs for public view, should be available at non-discriminatory terms and at reasonable commercial terms. However, data submitted to ARMs of course should not be made public, as it contains private data.

### **Security**

Deutsche Börse Group agrees that for all DRS there should be security for who is submitting data and that data should not be able to be compromised. We agree with the suggested measures by ESMA.

### **Identification of incomplete or potentially erroneous information**

Deutsche Börse Group deems this requirement to be only applicable for APAs as well as ARMs, but not to CTPs. Data is being submitted to APAs and ARMs by IFs sometimes in a non-standardized way, and as regards transaction reports to ARMs often enough with manual interventions and therefore prone to potential mistakes. Data submitted by trading venues to CTPs is already of high quality and does not require additional checks. The same should hold true for APAs submitting data to CTPs going forward. CTPs therefore should not be required to check on detail level for incomplete or erroneous information.

### **Correction of trade information**

Deutsche Börse Group does not agree with this suggestion, for neither of the DRSs, due to various reasons:

- A CTP only acts as a consolidator for data provided by Trading Venues and by APAs.

- IFs are obliged by regulation to submit trade reports in order for them to be made public via APAs. It is questionable why the APA should be in a better situation to correct any trade report on behalf of the customer.
- As regards ARMs, we deem it questionable to interfere with customer compliance, as this could create difficult legal problems for an ARM. We therefore reject this requirement for an ARM.

What still would need to be defined, however, is the question within which time frame a trade report which is supposed to be provided in real-time for public transparency reasons should be able to be corrected. The correction itself will require significant manual intervention in case historical market data would need to be adapted as well. So in fact ex post corrections should only be allowed intra-day.

### **Monitoring**

We agree with this requirement for all three DRSs.

### **Operational hours**

Deutsche Börse Group would like to suggest, that operational hours should not be defined upfront due to the fact that some efficient service operators might not be able to provide services which might be sufficient for the majority of investment firms but not for all. Instead, we would strongly recommend to require that APAs clearly advertise and make transparent within their marketing, service levels and contracts what their operating hours are, in order to provide for ample choice amongst investment firms. This requirement will both support competition and choice for investment firms.

### **Resources and contact arrangements**

Deutsche Börse Group agrees with ESMA suggestions.

### **Recovery provisions**

Deutsche Börse Group generally agrees with ESMA suggestions.

However, in some cases, it is impossible to set up a fully redundant fail-over as the cost-benefit relation would not be sensible at all. As an example; an APA operated by a trading venue via its existing trading infrastructure would not be able to provide for a fail-over into an additional set-up. This should be taken into account by ESMA. In this case it might be necessary, to have a second APA as a back-up solution at customer site.

### **Conflict of interests**

Deutsche Börse Group agrees with ESMA suggestions.

### **Outsourcing**

Deutsche Börse Group agrees with ESMA suggestions.

### **Regulatory Reporting Requirements**

#### *Periodic reports*

Deutsche Börse Group agrees with regulatory suggestions. Periodic reports should be provided once p.a.

However, we question ESMA's assumption that an APA did not publish a trade report due to the fact that information was likely to be erroneous. In a case where data seems to be erroneous, the APA could act in two different ways a) not publishing the report and risking that submitted data was correct, however, and creating a late report or b) publishing the data with an Alert Flag that this trade report might not be correct and at the same time requesting a double check on reporting customer side to confirm or adapt the trade data accordingly. The latter procedure would allow for timely publication in any case with the market being alerted that the data might not be correct. Hence, ESMA should clearly advise on the requested procedure. In any case the procedure should be harmonized on EU Level in order to allow for easy consolidation.

#### *Ad hoc reports*



In order for APAs to be compliant with these requirements the periods of review should ideally be defined by ESMA upfront. Taking into account that an IF would need to be consistently providing low quality data, we would suggest to align those reports to the periodic reports.

<ESMA\_QUESTION\_364>

**Q365: What other significant differences will there have to be in the standards for APAs, CTPs and ARMs?**

<ESMA\_QUESTION\_365>

Please refer to Deutsche Börse Group's answers to Q361

Deutsche Börse Group generally supports similar approaches for the authorization and organization of DRS like APAs, CTPs and ARMs where possible. However, there are certain differences which should be taken into account.

**Dissemination**

Deutsche Börse Group agrees with the facilitation of consolidation of data through data being available in a machine readable way. Data should be made available by the data sources (IFs, SIs and Trading Venues) for APAs and CTPs in a streaming feed mode (push data) but not only available via an internet page (pull) which would require grabbing of data by the Consolidator. Instructions as regards changes to those protocols should be distributed well in advance.

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**Security**

Deutsche Börse Group agrees that for all DRS there should be security for who is submitting data and that data should not be able to be compromised. We agree with the suggested measures by ESMA.

**Identification of incomplete or potentially erroneous information**

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- A CTP only acts as a consolidator for data provided by Trading Venues and by APAs.
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**Monitoring**



We agree with this requirement for all three DSPs.

### **Operational hours**

Deutsche Börse Group would like to suggest, that operational hours should not be defined upfront due to the fact that some efficient service operators might not be able to provide services which might be sufficient for the majority of Investment Firms but not for all. Instead, we would strongly recommend to require that APAs clearly advertise and make transparent within their marketing, service levels and contracts what their operating hours are, in order to provide for ample choice amongst Ifs. This requirement will both support competition and choice for Ifs.

### **Resources and contact arrangements**

Deutsche Börse Group agrees with ESMA suggestions.

### **Recovery provisions**

Deutsche Börse Group generally agrees with ESMA suggestions.

However, in some cases, it is impossible to set up a fully redundant fail-over as the cost-benefit relation would not be sensible at all. As an example; an APA operated by a trading venue via its existing trading infrastructure would not be able to provide for a fail-over into an additional set-up. This should be taken into account by ESMA. In this case it might be necessary, to have a second APA as a back-up solution at customer site.

### **Conflict of interests**

Deutsche Börse Group agrees with ESMA suggestions.

### **Outsourcing**

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### **Regulatory Reporting Requirements**

#### *Periodic reports*

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However, we question ESMA's assumption that an APA did not publish a trade report due to the fact that information was likely to be erroneous. In a case where data seems to be erroneous, the APA could act in two different ways a) not publishing the report and risking that submitted data was correct, however, and creating a late report or b) publishing the data with an Alert Flag that this trade report might not be correct and at the same time requesting a double check on reporting customer side to confirm or adapt the trade data accordingly. The latter procedure would allow for timely publication in any case with the market being alerted that the data might not be correct. Hence, ESMA should clearly advise on the requested procedure. In any case the procedure should be harmonized on EU Level in order to allow for easy consolidation.

#### *Ad hoc reports*

In order for APAs to be compliant with these requirements the periods of review should ideally be defined by ESMA upfront. Taking into account that an IF would need to be consistently providing low quality data, we would suggest to align those reports to the periodic reports.

<ESMA\_QUESTION\_365>

## **5.3. Technical arrangements promoting an efficient and consistent dissemination of information – Machine readability Article 64(6), MiFID II**

**Q366: Do you agree with the proposal to define machine-readability in this way? If not, what would you prefer?**



<ESMA\_QUESTION\_366>

Deutsche Börse Group fully agrees with ESMA's suggestion to replace the terminology of 'physical form' by 'electronic form' and the amendment of the definition accordingly.

However, we have a significantly different opinion as regards the acknowledgement of web-sites, html files, pdf files, or even typewritten pages as being machine-readable for the purpose of real-time regulatory driven data publication, in the sense of MiFID. Although we agree that data can be accessed via web-sites as well, however, as regards consolidation of real-time data current evidence shows that OTC trade data only being published on web-pages of reporting IFs is not being consolidated due to the fact that this is in no way efficient. Fact is that none of these data ever is being consolidated which as well led to the complaint of some groups that there was no proper data consolidation in Europe. Going forward, in case ESMA is allowing machine-readability to be interpreted in this way for the submission of real-time trade reports the facilitation of Consolidated Tapes which satisfy the regulator will continue to be at risk. Then OTC data has been the problem and will continue to be the problem as regards providing a Consolidated Post-Trade Tape. It is a fact that as of today many OTC trades are not being consolidated due to the fact that data is only being 'dumped' on IFs web-sites, and would have to be 'grabbed'/'pulled' by Market Data Vendors/Consolidators instead of being properly 'pushed' via a data feed for consolidation to real-time Consolidators.

Furthermore, for processing of real-time data a submission of data within html files, pdf files will not be sufficient either as this is clearly not state of the art for any real-time data feeds. However, data submission in this form might be sufficient in the case of ARMs to the NCA as this data is not real-time streaming data due to the fact that it needs to be made available no later than t+1.

Deutsche Börse Group agrees with ESMA that the service provider should put at the disposal of their users the relevant instructions outlining how users can access the data. We furthermore agree with ESMA on the definition of format, but reject HTML, PDF, and similar means as a format for real-time data which should only be submitted via state of the art real-time protocols.

<ESMA\_QUESTION\_366>

## 5.4. Consolidated tape providers

**Q367: Should the tapes be offered to users on an instrument-by-instrument basis, or as a single comprehensive tape, or at some intermediate level of disaggregation? Do you think that transparency information should be available without the need for value-added products to be purchased alongside?**

<ESMA\_QUESTION\_367>

Deutsche Börse Group explicitly rejects the thought of offering data 'on a share by share basis' as this would be impossible to administer and very costly for all involved parties: data sources, data vendors, as well as data users. The assumed cost-achievements on customer site would significantly be outweighed by the additional administration costs and potential errors along the chain. It is more than questionable how this should be administered by all aforementioned parties not to speak about the additionally involved costs for such an administration. Additionally, disaggregation of data feed content is burdensome alongside the data processing chain including exchanges, data vendors and brokers and prone to errors along the chain. However, it certainly does not make sense at all to come up with one Consolidated Tape over all Assets classes as the other extreme.

Having said this, Deutsche Börse Group supports the consolidation per asset class, meaning we deem it sensible to consolidate equity and equity like instruments and certain defined asset classes within the non-equity sector. In this respect, a similar approach is being applied in the US which has been referred as the benchmark model by those promoting an EU Tape. In the US there are 3 equity tapes (TAPE A, B and C), as well as a bond tape (TRACE), and a Tape for equity options (OPRA).

However, Deutsche acknowledges that disaggregation by asset class could make sense in order to support respective post-trade data consolidation by asset class – any further would require extra cost for all market participants. Disaggregation on CTP level would require respective disaggregation on data source site at least as regards licensing arrangements.

Deutsche Börse Group agrees that users should be able to use transparency without having to purchase any other value-added products. However, this is a very generic statement and would need further definition of what exactly a value-adding product would be. It is out of question, that most data users do consume data via certain front-ends, be it a Market Data Vendor Screen, or be it an Investment Firms retail web-site, or be it a Third Party Front End or simply an internet page. ESMA needs to take into account that those front-ends should not be seen as being bundled, as they simply provide a means to ‘see’ or ‘use’ the data.

<ESMA\_QUESTION\_367>

**Q368: Are there other factors or considerations regarding data publication by the CTP that are not covered in the standards for data publication by APAs and trading venues and that should be taken into account by ESMA?**

<ESMA\_QUESTION\_368>

Deutsche Börse Group is no aware about any other factors.

<ESMA\_QUESTION\_368>

**Q369: Do you agree that CTPs should be able to provide the services listed above? Are there any others that you think should be specified?**

<ESMA\_QUESTION\_369>

In case of the envisaged model of a competing data consolidation Deutsche Börse Group supports that the services outlined by ESMA and provided by Third Party Consolidators should be possible to be offered as well. This is due to the fact that as of today those entities already provide for consolidation services across the line, and thus the creation of a dedicated post-trade Tape would be one amongst several services offered, allowing for an efficient set-up.

<ESMA\_QUESTION\_369>

## 5.5. Data disaggregation

**Q370: Do you agree that venues should not be required to disaggregate by individual instrument?**

<ESMA\_QUESTION\_370>

Deutsche Börse Group agrees with ESMA that disaggregation down to instrument level should not be requested.

In general it needs to be pointed out that the market data industry is a global one, and that such suggestions are unique on a global scale. Entitlement systems applied for the rights management of market data would most likely not be able to cope with such a scenario.

Deutsche Börse Group currently provides access to over 35.000 cash equity instruments in its data stream, plus over 1.3 mn instrument data within its Scoach data just to mention two markets. Unbundling on instrument level obviously would not be a sensible solution as instrument data is as well available for different customer groups and various use cases and in various market depths over several hundred data vendors and several thousand customers, each of them being affected by unprecedented administration efforts as well as costs. Additionally, it should be noted that within the EU there are over 250 trading venues as of now.

Usually, end users rather require exchanges not to split their products into too many small products, due to the reason explained above. Following is a quote from a market data manager of an Investment firm at a panel with representatives of market data managers from major European banks (Inside Market Data, Volume 27, No.2, Oct 3, 2011, p. 11):

Some exchanges have sliced data into “far too many products to manage, which are far too complicated to administer,” and could lead to compliance issues as well as higher costs, panelists said.

Furthermore, disaggregation on instrument level could also result in a loss of visibility for small companies (SMEs) listed. Even in case trading venues would be required to disaggregate on instrument level, customers may not benefit. After all, it would be required that Market Data Vendors and other Third Parties physically delivering data to end users would also offer instrument-level data to their customers. They may simply not do this and continue to offer only aggregated data because of the administrative burden otherwise incurred. In that case trading venues would have to bear significant additional costs without producing any effect in the market.

<ESMA\_QUESTION\_370>

**Q371: Do you agree that venues should be obliged to disaggregate their pre-trade and post-trade data by asset class?**

<ESMA\_QUESTION\_371>

Deutsche Börse Group agrees that it could be sensible to disaggregate instrument data on asset class level in order to support respective consolidation of post-trade data for non-equities, e.g. in case of Fixed Income Instruments

<ESMA\_QUESTION\_371>

**Q372: Do you believe the list of asset classes proposed in the previous paragraph is appropriate for this purpose? If not, what would you propose?**

<ESMA\_QUESTION\_372>

No, Deutsche Börse Group suggests that less granular would be more sensible in order to not create too many distinct data products which would increase administrative costs across the chain.

The disaggregation should pursue the goal of offering the appropriate data package to some more or less homogeneous groups of data consumers. We could offer service around the three main groups of activities traditionally present in investment banking:

- Equities
- FICC (Fixed-Income, Currency, Commodities)
- Derivatives

The unbundling of derivatives products looks much too granular and would face a too limited audience. Only very few retail investors would subscribe to derivatives packages. Furthermore, derivatives data is less expensive than is the US already.

<ESMA\_QUESTION\_372>

**Q373: Do you agree that venues should be under an obligation to disaggregate according to the listed criteria unless they can demonstrate that there is insufficient customer interest?**



<ESMA\_QUESTION\_373>

Deutsche Börse Group does not agree with this suggestion, due to various reasons as outlined below.

The segmentation of financial products must in all cases rely on unambiguous categorization and clear definitions. Considering the long chain of dependencies and the large amount of technical systems potentially impacted there is no room for educated guesses on securities classification. Lack of clear guidance on securities classification might end up in costly bug fixing. We potentially speak of more than 1.3 million listed financial products in Europe. None of the criteria proposed in the Consultation Paper is actually unambiguous and easy to implement.

- i. Asset class: issue with hybrid structured products or ETFs with interest rates underlying for example
- ii. Country of issue: outside the plain-vanilla equity universe this feature is no more that self-explanatory. Most ETFs are for example incorporated in Ireland or Luxemburg, but are not listed on those two exchanges but listed on major RMs (there is no concept of home market) and the central pool of liquidity is not located in those two countries.
- iii. Currency: lots of products are tradable in multiple currencies, even some plain-vanilla equities.
- iv. Industry sector of issuers: there is no universally applied standard; private proprietary standards are fee liable (ICB, GICS). Relying on multiple competing standard means there is no unambiguous classification across the various data sources. NACE classification has very little acceptance within the finance industry.
- v. All members of a major index (for equities); there are multiple competing families of widely used indices (STOXX, FTSE, MSCI, national indices). The securities categorization grid and definitions for individual categories are different for each provider. Allowing multiple standards would violate the unambiguity principle. Choosing one index provider would arbitrarily disqualify the other index providers. In addition, this might support cherry picking on equity blue chips data and trigger a lack of visibility on mid and small cap data.
- vi. Auction vs continuous trading: competing orders are persistent across the various phases of trading mode within lit books (see MMT data hierarchy). They are consequently integrated and interacting pieces of the same transparent price formation process. Continuous trading without auction and the other way round does not make any sense for efficient trading/investing behaviour.

<ESMA\_QUESTION\_373>

**Q374: Are there any other criteria according to which it would be useful for venues to disaggregate their data, and if so do you think there should be a mandatory or comply-or-explain requirement for them to do so?**

<ESMA\_QUESTION\_374>

As stated in question 373, Deutsche Börse Group confirms that trading venues should not be required to disaggregate their data more than into

- Equities
- FICC (Fixed-Income, Currency, Commodities)
- Derivatives

due to the obvious reason of significantly inflating administration costs .

Consequently, there should not be any other criteria according to which data is disaggregated. There will be very little demand for unbundled auction data in the market. Also, unbundling this data is not relevant



from a competition perspective. As the rapid gain in market share of MTFs in Europe shows, competition among trading venues is working very well as of today.

<ESMA\_QUESTION\_374>

**Q375: What impact do you think greater disaggregation will have in practice for overall costs faced by customers?**

<ESMA\_QUESTION\_375>

Greater disaggregation will not only result in significantly higher costs in distributing and administering market data, but it will also lead to confusion among investors who no longer can rely on receiving all the relevant market data. The market should decide on the level of disaggregation and unless the regulator can control what the market data vendor does with the data there is no point in imposing an obligation on a trading venue which will then be ignored by the Third Party between the trading venue and the end user.

In addition:

- Trading venues, data vendors and brokers and any other third parties would have to significantly enlarge their administration operations to manage access rights.
- Categorising a very large universe of securities according to hard scientific criteria in an unambiguous manner is a burdensome task. Specialised vendors and proprietary standard owners (ICB, GICS) charge a substantial amount of money for this type of activity.
- Securities classification is mature only for plain-vanilla equities. It is fragmented, incomplete and enjoys little acceptance for other asset classes
- Disaggregation based on multiple securities classification standards simultaneously will trigger confusion and costly bug fixing considering the large complexity of the market segmentation matrix

All these attempts to structure market data alongside the above mentioned criteria would generate large additional costs which the industry as a whole would have to cover.

<ESMA\_QUESTION\_375>

**5.6. Identification of the investment firm responsible for making public the volume and price transparency of a transaction (Articles 20(3) (c) and 21(5)(c), MiFIR)**

**Q376: Please describe your views about how to improve the current trade reporting system under Article 27(4) of MiFID Implementing Regulation.**

<ESMA\_QUESTION\_376>

Deutsche Börse Group appreciates the possibility to make several suggestions as regards the publication of OTC transactions.

First of all, the shortcoming of OTC data quality is one of the major points why discussions about a consolidated tape have heated up during the crafting of MiFID II. Obviously, not at least due to this reason we have a significant interest that MiFID II will result in improved overall transparency including OTC data. Generally, we need to point out that the broad choice provided by MiFID I as regards who submits the OTC trade for publication of course introduces additional weaknesses into the system. However, we understand that obviously the granted flexibility is supportive and more economic for smaller IFs. A cost / impact analysis might be necessary in order to find the right and fair balance here.

However, having said that, Deutsche Börse Group sees additional and potentially not yet fully addressed problems in the area of OTC trade publication. In the advent of MiFID I it became clear very quickly that EU market participants were missing 1:1 harmonized trade publication rules on a Pan-EU Level, taking into account national specifics and explaining clearly how to adhere to rather complex requirements and rules. E.g. it seems that in the UK there is still a concentration rule for listed shares in the UK to be reported on exchange, which seems to be very similar in Italy. Unless there are clear and transparent rules accessible at one place, there will always be insecurities at IFs as regards who reports which trade where. Deutsche Börse Group therefore would suggest that a set of very clear and harmonized OTC trade publication rules across Europe shall be implemented with the possibility to seek clarity from the regulators in case of insecurity by one of the affected institutions.

<ESMA\_QUESTION\_376>

## **5.7. Access to CCPs and trading venues (Articles 35-36, MiFIR)**

**Q377: Do you agree that exceeding the planned capacity of the CCP is grounds to deny access?**

<ESMA\_QUESTION\_377>

In Deutsche Börse Group's view, exceeding the planned capacity in terms of anticipated volume of transactions shall be a reason for a CCP to deny access.

In principle, CCPs have systems in place which are designed to cope with their operational needs and which are scalable to a certain extent based on the regular capacity planning. If however, providing access to a new applicant would result in projected volumes exceeding planned capacities, it might not be feasible to take on that business based on available resources, operational capacity and risk mitigation procedures. Even if CCPs do have scalable systems and redundant capacities in place it will be difficult to ensure prompt availability of sufficient resources and operational capacity to continue serving existing markets and services for which the CCP is authorized under EMIR and at the same time cater for additional software maintenance, hardware maintenance as well as risk management services for the new products to be introduced.

**As to the time limits in MiFID Article 35 (3):**

- Any access arrangement would require significant due diligence and on-going compliance of the applicant trading venue and its clearing members and users with the rules of the CCP. It would also involve extensive commercial and operational evaluation prior to implementation of the access arrangement. Time and resources required to actually implement all technical, functional, legal and operational aspects of an access arrangement heavily depend on the level of overlap in terms of clearing members and users with existing trading venues and the adjacency with the existing operating model and products cleared.
- Against this background, we note that the time limits in MiFID Article 35 (3) (in conjunction with the specific conditions under Article 35(6)) provide a six month period in which to respond in writing to a request of an applicant trading venue. However, if the access request requires capacities or functionalities (or any other kind of material investments to scale systems and operations) beyond existing capabilities, this will, in many cases, require more than the three months provided for in Article 35(3).
- We also note that even where a CCP is able to meet its mandatory timescales according to MiFID Article 25 (3), the applicant trading venue, which is under no corresponding timing obligation, need not implement the relevant systems capacities and functionalities within any particular timeframe. This, in turn, could lead to significant levels of wasted costs and time on the part of the CCP to meet the timing obligation whilst the applicant trading venue is not operationally ready.

- Further, it is also critically important that a CCP's clearing members are engaged in any assessment as to the basis on which non-discriminatory access will be provided. In principle, clearing members must not be compelled to offer clearing services for a particular applicant trading venue, a particular asset class or product type of a particular applicant trading venue or particular users or groups of users of a particular applicant trading venue as a result of the non-discriminatory access arrangements between a CCP and an applicant trading venue. However, there needs to be a sufficiently large number of clearing members offering clearing services for the applicant trading venues so as to provide full coverage for all users as well as all asset classes and products subject to the access arrangements with the applicant trading venue. Insofar, the readiness and commitment of a sufficient number of existing or newly to be connected and admitted clearing members in terms of available connectivity and processing capacities is a prerequisite for entering into access arrangements.
- We ask ESMA to acknowledge these material concerns and to anticipate that these risks, commercial and operational issues could result in a CCP electing to deny access if the CCP and the respective clearing members are incapable of resolution within the 6 to 9 months allowed by MiFID Article 36(3) to 'go live' with access upon receipt of the access request. Eventually, we ask ESMA, to the extent that it is able, to remove any timescale obligations in relation to access requests or at least ensure that they are reciprocal between CCP and trading venue and that they take into account the operational and commercial readiness of a sufficiently large number of clearing members offering clearing services under the access arrangements.

**As to the consideration of 'capacity planning' as defined in EMIR:**

- Neither ESMA nor any National Competent Authority should assume that just because the CCP has been authorised/recognised under EMIR, its operations are by definition sufficiently scalable to meet any access request within the time limits mandated by MiFIR in Article 35 (3).
- Further, the uncertainty of potential future access requests from other trading venues would make it difficult for a CCP to plan with any degree of certainty on its capability of meeting future levels of trading activity from its existing trading venues and OTC clearing services.
- If facilitating the access request would exceed planned capacity and the CCP is not able to demonstrate to the satisfaction of its National Competent Authority that it is unable to build the required additional capacity in time for go live of the access request per Article 35(3) of MiFIR, then that should be a relevant consideration for the national competent authority to deny access.

**As to the consideration of 'sufficient redundant capacity' as defined in EMIR:**

- Reference is made in paragraph 13 on page 344 of the Discussion Paper to Article 9(1) of the Commission Delegated Regulation (EU) No. 153/2013, which requires CCPs to maintain 'sufficient redundant capacity'. We note that the scope of the circumstances in which sufficient redundant capacity is required under Article 9(1) is limited as to 'to allow the system to process all remaining transactions before the end of the day in circumstances where a major disruption occurs'.
- Accordingly, the aim of Article 9(1) is to look at the effectiveness of IT systems intra-day in the context of stressed markets and major disruption events. Consequently, 'sufficient redundant capacity' must not be used to accommodate any access request and a CCP may elect to deny not accept an access request which uses up all of its minimal level of 'sufficient redundant capacity' because it could then be in breach of the EMIR obligation to retain sufficient redundant capacity to process transactions at times of market stressed or when there are major disruption events.

<ESMA\_QUESTION\_377>

**Q378: How would a CCP assess that the anticipated volume of transactions would exceed its capacity planning?**

<ESMA\_QUESTION\_378>

Deutsche Börse Group believes that the applicant trading venue should as part of its application make available its own calculations and methodologies by which it has assessed anticipated volumes. Starting from there, there are a number of ways for a CCP to assess the anticipated volume of transactions and verify the validity of the volume projection made by the applicant trading venue.

The applicant trading venue should be best positioned to make reasonable assessments of expected transaction volumes (and also of the expected / required number of new direct and indirect clearing participants). However, there need to be provisions in place for workable agreements to share the economic and mitigate the operational risks in case the assessment of the CCP and the applicant trading venue differ materially.

In general, to meet its regulatory requirements, managerial prudence and commitments to already linked trading venues the CCP will always have to provide capacities for the higher of its own and the applicant trading venue's assessment. For example, assuming the CCP assessment is by far below the applicant trading venue's assessment the CCP would still have to invest in the required capacities in line with the applicant trading venue's assessment. In this case the CCP should not bear the economic risk and sunk cost of idle capacity. The applicant trading venue should assume the economic risk and sunk costs. However, in order to avoid any incentive for the applicant trading venue to systematically underestimate required capacities, the applicant trading venue should also bear the economic risk when its own assessment is below that of the CCP.

Similar conflicts of interests exist regarding a potential denial of access due to a lack of CCP capacities. Applicant trading venues should not be incentivized to systematically underestimate capacity requirements at the expense of the CCP and already linked trading venues. Again, there need to be workable agreements in place between the applicant trading venue, the CCP and already linked trading venues to share the risks and economics of prudential capacity planning and the investments undertaken in extending sufficient capacities.

ESMA should consider that in the interest of transparency certain aspects, such as the projected volume of an access requests, should be made public. At the very least the CCP receiving an access request should be entitled to conduct an independent review to validate this analysis if it considers that such a review would be appropriate.

<ESMA\_QUESTION\_378>

**Q379: Are there other risks related to the anticipated volume of transactions that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA\_QUESTION\_379>

In Deutsche Börse Group's view, the Level 1 text and the Discussion Paper both envisage problems caused by large numbers of transactions being introduced to the CCP as a result of it granting access to an applicant trading venue. Hence, the grounds on which the CCP can decline an access request are predominantly and narrowly related to the perspective of the trading venue seeking access and the CCP from whom access is requested.

There are further aspects to be considered beyond this narrow perspective: (1) considerations of the costs and uncertainty in capacity planning for future access requests, (2) considerations of the capacity constraints on the level of clearing members and users, (3) considerations of adverse impact on the existing trading venues already linked to the CCP and (4) considerations of too little anticipated volume to recover the enormous expense and resource that would be consumed.

**As to (1) considerations of the costs and uncertainty in capacity planning for future access requests:**

CCPs are required at all times to provide for 'procedures and capacity planning as well as for sufficient redundant capacity' (see quote in paragraph 13 of Discussion Paper, page 344). Accordingly, capacity

planning needs to take into account not only whether the CCP has sufficient planned and redundant capacity to accommodate the access request at hand, but whether, immediately following the implementation of the access request, the CCP has further increased its capacity by developing sufficient new planned and redundant capacity.

Therefore, accepting an access request from a particular trading venue requires the use of available planned capacity to deal with the access request at hand, the building of new capacity to cope with an uncertain number (and scale) of potential future access requests and the provision of sufficient additional redundant capacity to operate at times of market stress. If an access request would absorb a significant part of the current planned and redundant capacity, there is an increased likelihood that building further additional redundant capacity for future access requests will be required on a greater scale. All in all, uncertainty in capacity planning increases significantly with the uncertainty of future access requests in scale and number. This will result in a high level of over-capacity across CCPs, i.e., it will increase the cost base and create inefficiencies.

To the extent that an access request would absorb a significant part of current planned capacity, the CCP should determine whether it can reasonably increase capacity in due course and, if so, set out how it proposes to do so without creating the risk of having insufficient capacities to cope with the capacity needs of existing trading venues and OTC clearing services.

**As to (2) considerations of the capacity constraints on the level of clearing members and user:**

As already emphasized in the response to question 377 above, any assessment of a particular access request needs to take into account the perspective of the concerned clearing members and users. Because risk controls, safety mechanisms, margining procedures and the operating model of a CCP and its clearing members are closely interlocked, any capacity issues and operational shortcomings on the level of clearing members and users in relation to clearing services for an applicant trading venue would create undue risk for the CCP.

If a trading venue requests access to a CCP for the clearing of a particular financial instrument, but clearing members of the CCP are uncomfortable accepting transactions with respect to it (based on their own risk assessments), then clearing members will decline to accept transactions submitted by their clients and users of the applicant trading venue, on the basis that their risk and operational issues have not been addressed. Accordingly, it will always be in the general interest to ensure that clearing members' concerns are identified and taken into account when assessing an access request.

**As to (3) considerations of adverse impact on the existing trading venues already linked to the CCP:**

The provision of access by a CCP to an applicant trading venue must not put existing venues already cleared by that CCP at risk or result in existing venues not being able to meet regulatory requirements. The same holds for any other authorized clearing services offered.

ESMA should expressly acknowledge that a CCP may be able to deny an access request on duly justified risk grounds that relate to risk management/operational concerns of other trading venues with existing clearing relationships with the CCP, the trading venues' members and clearing members.

**As to (4) considerations of too little anticipated volume to recover the enormous expense and resource that would be consumed:**

Potentially, a CCP could receive a number of requests for access from trading venues with very low volume projections and premature business models. Without any further provisions and objective criteria for prioritization and pre-selection of access requests CCPs will be forced to commit significant financial and human resources towards assessing and potentially implementing smallest access request.

The failure to meet a minimum level of anticipated volume and liquidity should be a ground for denying access. Not having a lower boundary in terms of anticipated volumes and liquidity would lead to fragmented and less efficient markets. It would also increase the risk of market manipulation and other abusive behaviour. Further, non-discriminatory access provisions should not force a CCP into an arrangement where the CCP is not able to recover its costs involved in meeting the access request. In this regard, the cost and operational impact on clearing members should also be considered, i.e. if clearing members have to adapt their own systems and operations to support new arrangements, but it is unlikely that those clearing members will recover their investments, then it could be just as unreasonable to force CCPs to enter into access arrangements with too low volume projections. The principal to be applied is that the access arrangement must be economically viable for all impacted parties.

ESMA notes in paragraph 9 on page 343 of the Discussion Paper that risk grounds are the main reason on which access should be denied. However, the core part of Article 35(6)(a) ('the specific conditions under which an access request may be denied, including...') does not make any reference to risk or operational issues, meaning that ESMA is granted the discretion to specify such specific non-risk/operational grounds for denying an access request in the Level 1 text.

<ESMA\_QUESTION\_379>

**Q380: Do you agree that exceeding the planned capacity of the CCP is grounds to deny access?**

<ESMA\_QUESTION\_380>

In Deutsche Börse Group's view, exceeding the planned capacity in terms of number and types of users shall be a reason for a CCP to deny access.

EMIR Art. 37 requires CCPs to provide open and fair access to the extent that the CCP is not exposed to additional risk. Adding a high number of users (i.e. Clearing Members, clients of Clearing Members as well as indirect clients) will expose the CCP to additional risk from the compliance perspective. Art. 37 EMIR further stipulates that the application of the participation criteria is met on an ongoing basis including a comprehensive review of the compliance.

The scaling of resources (staffing and operational capacity) for those reviews and admittance is planned on the basis of the existing trading venues and services for which the CCP is authorized under EMIR. A high number of additional users (Clearing Members, Registered Customers and other clients) would require additional resources.

Please note that all arguments itemized in the answer to question 377 in respect of the time limits in MI-FID Article 35 (3) above apply mutatis mutandis to the capacity considerations for number and types of users. In this regard, capacity constraints on the level of clearing members are even more critical as clearing members would have to on-board the new users of the applicant trading venue.

<ESMA\_QUESTION\_380>

**Q381: How would a CCP assess that the number of users expected to access its systems would exceed its capacity planning?**

<ESMA\_QUESTION\_381>

Deutsche Börse Group believes that the concerns and recommendations spelled out in response to question 378 above apply mutatis mutandis in regard to the assessment whether the number of users would exceed planned capacity. Further complexity arises where the applicant trading venue has – or plans to have – users located in jurisdictions not yet covered by the CCP and its existing clearing member base.

<ESMA\_QUESTION\_381>

**Q382: Are there other risks related to number of users that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA\_QUESTION\_382>

Deutsche Börse Group believes that the concerns and recommendations spelled out in response to question 379 above apply mutatis mutandis in regard to the assessment whether there are other risks related to the number of users.

<ESMA\_QUESTION\_382>

**Q383: In what way could granting access to a trading venue expose a CCP to risks associated with a change in the type of users accessing the CCP? Are there any additional risks that could be relevant in this situation?**

<ESMA\_QUESTION\_383>

In Deutsche Börse Group's view, granting access to a trading venue could expose a CCP to risk associated with a change in the type of users accessing the CCP in scenarios, (i) where new clearing members or new clients of clearing members are located in non-EU countries for which the CCP does not have or is not able to the required regulatory approval, (ii) where new clearing members or new clients of clearing members are located in non-EU countries, in which the CCP rules are not enforceable due to local laws or (iii) where new clearing members or new clients of clearing members are located in countries on which state sanctions are imposed which could threaten directly or indirectly the business of the CCP.

For example, a risk that relates to the type (and jurisdiction) of a new clearing member is the enforceability of close-out netting. The CCP will (for risk and default management purposes) need to obtain a legal opinion from external counsel that confirms that both pre-default payment netting and (following the default of either the clearing member or the CCP) post-default close out netting is valid, binding and enforceable against that new clearing member. Such opinions take significant amounts of time and take longer than the 6 plus 3 months that the CCP is granted pursuant to MiFIR Article 35(3) to grant or deny the access request.

Accordingly, there is a material risk that the CCP (purely because of there being insufficient time for it to carry out a full payment/close out netting analysis to its satisfaction) will have no choice but to decline an access request from a trading venue if that trading venue potentially brings with it a number of new clearing members to the CCP that are of a type, and/or are located in a jurisdiction, which is different from the CCP's existing clearing members.

In respect of the number, type and activity of its users, it is important for an applicant trading venue to have in place procedures, arrangements and controls to avoid undue risk to the CCP and, in turn, to existing trading venues, including equivalence of the trading venue's risk monitoring systems and controls or disciplinary, investigatory and enforcement procedures to those of existing venues, controls on exposure to financial crime (anti-money laundering, sanctions policies, etc.), compatibility of IT systems, legal enforceability of contracts, adequacy of dispute procedures, etc.

It is appropriate for CCPs to co-operate with trading venues in line with their respective regulatory responsibilities. It is worth emphasising that it is the trading venue that retains responsibility for monitoring and reporting open interest and ensuring fair and orderly settlement for its contracts. Whilst a CCP can provide information to allow this responsibility to be discharged, the trading venue cannot delegate this responsibility to a CCP. Some of these obligations may be extremely complex. Unless the CCP has prior experience in this area, there is a material risk that it may be exposed to undue risks as a result of not having sufficient time to implement such operational and risk management systems.

<ESMA\_QUESTION\_383>

**Q384: How would a CCP establish that the anticipated operational risk would exceed its operational risk management design?**

<ESMA\_QUESTION\_384>

Deutsche Börse Group considers that there is a range of situations which could result in anticipated operational risk exceeding risk management design and operating model, including the following:

- Since a CCP may not have the necessary expertise, resources, risk management systems or procedures to provide clearing services in a new product, it should not be required to provide clearing

services for a product, which it is not already clearing, simply because it is authorised to do so. For example, Eurex Clearing is authorised to clear interest rate derivatives, but that should not mean that Eurex Clearing should automatically be expected to accept all access requests to clear any type of interest rate derivative.

- Since a CCP's operating model and procedures are the basis of its regulatory approval, changes stipulated by a trading venue requesting access should not be mandatory if the implementation would jeopardise the CCPs regulatory approval or generate either an unacceptable level of increased risk or the kind of capacity problems referred to earlier in this response. For example, Eurex Clearing operates a so-called open offer mechanism to accept trades at the point of trade from closely linked trading venues. This mechanism is complemented with certain controls and functions on the clearing as well as on the trading layer. Hence, Eurex Clearing should not be expected to accept access request requiring material changes to its operating model and procedures.

<ESMA\_QUESTION\_384>

**Q385: Are there other risks related to arrangements for managing operational risk that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA\_QUESTION\_385>

Deutsche Börse Group considers that there are other risks that should be considered and which may, if significant, provide legitimate grounds for denying access. Examples include exposure to financial crime (anti-money laundering, sanctions policies, etc.), incompatibility of IT systems, no legal enforceability of contracts, differences in the trading venue's risk monitoring systems and controls or its disciplinary, investigatory and enforcement procedures, execution of business outside the scope of the CCP's coverage, etc.

CCPs should draw up objective and non-discriminatory operational standards (including risk management standards) and apply these standards, as set out in Article 35(1) of MiFIR. Further, there should be an over-arching principle that a CCP should not be required to lower its risk management standards.

<ESMA\_QUESTION\_385>

**Q386: Given there will be costs to meeting an access request, what regard should be given to those costs that would create significant undue risk?**

<ESMA\_QUESTION\_386>

In Deutsche Börse Group's view, as identified by ESMA each access request will cause costs to the CCP. Costs arise in all areas outlined in questions 377 to 385. CCPs have to consider additional costs for higher resource requirements based on high additional volumes (hardware and software set-up/changes and maintenance), additional resource requirement for potentially different clearing members and client structure. This also includes high legal costs necessary to judge if the potentially new and different legal frameworks that need to be added comply with the applicable law of the CCP and that all legal requirements are enforceable. In sum this also adds legal and operational risk which might transpose into higher capital requirements.

If costs can be evidenced, it is anticipated that the trading venue submitting the access request would pay all of the CCP's costs relating to the assessment and implementation of an access request.

<ESMA\_QUESTION\_386>

**Q387: To what extent could a lack of harmonization in certain areas of law constitute a relevant risk in the context of granting or denying access?**

<ESMA\_QUESTION\_387>

Deutsche Börse Group does not agree with the statement under point 28 according to which 'the legal harmonisation within the EEA is significant'. The relevant insolvency laws of the EU member states and the states of the EEA are rarely harmonized. Even in areas where a harmonization is intended (e.g. based on the EU Settlement Finality Directive or the EU Securities Collateral Directive) many differences and unsolved conflict of law issues remain. These issues are discussed and described in detail in the legal literature.



The national civil laws (including property law) are also an area of many important differences between the different jurisdictions.

The lack of harmonization in the named areas of law within the EU/EEA are able to constitute relevant and significant legal risk as the enforceability of the CCP rules which cover the relationships between CCP, clearing members and clients could be in question. The situation is even worse when legal relationships between EU/EEA CCPs and non-EU/EEA clearing members and their clients are taken into account. The described risks arise from the provision of access as new types of customers (located in foreign jurisdictions) might request access/connection to the CCP (see also answer to Q383 above).

As a related point, if access jeopardises a CCP's regulatory status in any other country, or if the CCP does not have the regulatory status necessary to clear a contract and those kinds of issues are not capable of being resolved, that could offer legitimate grounds for denying access.

<ESMA\_QUESTION\_387>

**Q388: Do you agree with the risks identified above in relation to complexity and other factors creating significant undue risks?**

<ESMA\_QUESTION\_388>

Please refer to answers to question 386 and 387 above.

<ESMA\_QUESTION\_388>

**Q389: Q: Are there other risks related to complexity and other factors creating significant undue risks that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA\_QUESTION\_389>

In Deutsche Börse Group's view, it is unclear whether the final sentence of point 24 on page 346 is intended to provide that a CCP may immediately, without any further review, reject an access request on the grounds that it is not currently authorised under EMIR to clear the respective product.

Authorisation may typically cover a wide range of contracts not currently cleared by a CCP and no assumption of expertise should be made on the basis that a CCP is authorised to clear such contracts. A CCP required to clear a contract that it does not currently clear may encounter additional elements of complexity and added operational and risk management aspects where its resources are diluted or its expertise spread too thinly. One of the main risks will be whether the CCP is able to hire sufficiently experienced staff that are familiar with the new products and then for them and the CCPs members to get up to speed with the particular offering on that specific CCP by the time access has been granted.

Another area of focus is pre-execution checks: CCPs are concerned to ensure that the pre-execution checks carried out for a trade executed at an applicant trading venue do not result in any overall reduction or dilution in risk controls. In particular, for exchange traded derivatives, such pre-trade execution checks should be no less diligent than those carried out by existing trade venues and compatible with the controls in place at existing trade venues. The particular importance for this requirement for exchange-traded derivatives is a consequence of the particular regulatory responsibilities of trading venues (including existing trading venues) relating to such contracts. Applicant trading venues should have in place compatible pre-execution surveillance procedures. Overall standards should not be reduced because of non-discriminatory access arrangements.

<ESMA\_QUESTION\_389>

**Q390: Do you agree with the analysis above and the conclusion specified in the previous paragraph?**

<ESMA\_QUESTION\_390>

With respect to equities and equity-like instruments:



No, Deutsche Börse Group does not agree with the angle taken by ESMA which focusses only on risks incurred by the trading venues themselves; we believe that attention should be paid not only to risks incurred directly by a trading venue but also by their clients and consequently the market as a whole.

Hence the concerns rose with regard to a CCP being requested access and which are highlighted in the previous questions, are also valid for trading venues that have received a request for access by a CCP. In other words, a CCP requesting access to a trading venue must be able to demonstrate that it has properly taken into consideration the concerns discussed above. This is paramount to avoid that the trading venue allow a CCP to expose the whole market to undue risks.

In that regard, as rightly reminded by ESMA in its analysis and proposal regarding access to CCP, authorisation under EMIR does not ensure in all cases that the CCP is able to cope with the additional risk that would derive from an extension of its activity in case the trading venue would grant access. For these reasons, we believe that any CCP requesting access to a trading venue should be able to meet notably capacity and performance requirements (through e.g. adequate technical resources including scalability capability) imposed by the trading venue to ensure that granting access will not adversely impact the levels of operational efficiency.

See Questions 397 and 398 on conditions on which access can be granted for further details.

With respect to derivatives:

No, Deutsche Börse Group does not agree. There are several reasons how granting access to a new CCP would impact a trading venue in such a way that it would have to deny access on reasonable risk grounds.

We do not agree with the angle taken by ESMA which focusses only on risks incurred by the trading venues themselves; we believe that attention should be paid not only to risks incurred directly by a trading venue but also by their users and consequently the market as a whole.

Hence, the concerns raised with regard to a CCP being requested access and which are highlighted in the answers to the previous questions 377 to 389, are also valid for trading venues that have received a request for access by a CCP. In other words, a CCP requesting access to a trading venue must be able to demonstrate that it has properly taken into consideration the concerns discussed above. This is paramount to avoid that the trading venue allow a CCP to expose the whole market to undue risks.

In that regard, as rightly reminded by ESMA in its analysis and proposal regarding access to CCP, authorisation under EMIR does not ensure in all cases that the CCP is able to cope with the additional risk that would derive from an extension of its activity in case the trading venue would grant access. For these reasons, we believe that any CCP requesting access to a trading venue should be able to meet notably capacity and performance requirements imposed by the trading venue to ensure that granting access will not adversely impact the levels of operational efficiency and resilience.

<ESMA\_QUESTION\_390>

**Q391: To what extent would a trading venue granting access give rise to material risks because of anticipated volume of transactions and the number of users? Can you evidence that access will materially change volumes and the number of users?**

<ESMA\_QUESTION\_391>

With respect to equity and equity-like instruments:

Deutsche Börse Group does not have any specific views on this.

With respect to derivatives:

On the basis of the provisions in Article 35 (4) and 36 (4) regarding interoperability and liquidity fragmentation, Deutsche Börse Group does not envisage that providing access to an applicant CCP will give rise to material risks because of volume of transactions and the number of users increases to levels not previously anticipated.

However, complexities and potential risks would to a large part be driven by the overlap between the members/users of the applicant CCP and the members/users of the trading venue providing access. In principle, the higher the overlap, the lower the risk.

<ESMA\_QUESTION\_391>

**Q392: To what extent would a trading venue granting access give rise to material risks because of arrangements for managing operational risk?**

<ESMA\_QUESTION\_392>

With respect to equity and equity-like instruments:

Deutsche Börse Group is of the opinion that trading venues are responsible for maintaining a fair and orderly functioning of their markets. Core to contribute to these objectives, is to ensure a high level of operational efficiency through the set-up of a reliable and stable post-trade infrastructure for clearing and settling their participants' obligations.

In addition to the requirements already mentioned above, answer to question 398 below lists a series of conditions that should be met by any requesting CCPs regarding the day-to-day conduct of business as well as the handling of emergency situations.

Although this not being part of ESMA consultation, we are also concerned that the timeframe imposed by MiFIR for processing an access request introduce material risks, particularly in the case of transferable securities and money market instruments where CCP interoperability arrangements have to be set up. Six-month period from the request submission to fully implement such accesses goes far beyond what the industry has been capable to achieve so far.

With respect to derivatives:

In Deutsche Börse Group's view, risks may arise where the CCP's risk management procedures impose demands on the trading venue that the trading venue was not confident that it could adhere to (for example an aggressive timeline for disabling a user in extremis) or where the CCP's trade registration rules led to a risk of trade rejection inconsistent with either regulation or the trading venue's rules.

Trading venues are responsible for maintaining a fair and orderly functioning of their markets. Core to contribute to these objectives, is to ensure a high level of operational efficiency through the set-up of a reliable and stable post-trade infrastructure for clearing and settling their participants' obligations.

In addition to the requirements already mentioned above, answer to question 398 below lists a series of conditions that should be met by any requesting CCP regarding the day-to-day conduct of business as well as the handling of emergency situations.

Although this not being part of ESMA consultation, we are also concerned that the timeframe imposed by MiFIR for processing an access request introduce material risks, particularly in the case of transferable securities and money market instruments where CCP interoperability arrangements might have to be set up. Six-month period from the request submission to full implementation of such accesses goes far beyond what the industry has been capable to achieve so far. This is in particular the case when several requests are received by a trading venue.

<ESMA\_QUESTION\_392>

**Q393: Given there will be costs to meeting an access request, what regard should be given to those costs that would create significant undue risk?**

<ESMA\_QUESTION\_393>

Deutsche Börse Group does not expect any significant undue risks in respect to cost coverage arrangements between the involved parties.

In general, in Deutsche Börse Group's view it is anticipated that the CCP submitting the access request would pay all of the trading venue's costs relating to the assessment and implementation of the access

request. Accordingly, it is not envisaged that the costs relating to an access request would be so substantial as to create significant undue risk.

Any such costs should be charged on reasonable commercial terms and the CCP submitting the access request should not be expected to cover future costs for connectivity by other CCPs to the same trading venue.

Further, a trading venue should not be required to make significant changes to its existing operating model in order to afford access to a CCP, particularly where this will undermine its regulatory approval and/or generate additional significant levels of risk or where there is inherent incompatibility with the trading venue.

<ESMA\_QUESTION\_393>

**Q394: Do you believe a CCP's model regarding the acceptance of trades may create risks to a trading venue if access is provided? If so, please explain in which cases and how.**

<ESMA\_QUESTION\_394>

Deutsche Börse Group is of the strong opinion that the model regarding the acceptance of trades (including the legal device – open offer or novation- under which trades are cleared and the point of CCP interposition) is first a matter of decision of the trading venue that any requesting CCP must comply with.

We agree with paragraph 32 on page 348 of the Discussion Paper. For example, all transactions concluded on Eurex result in contracts between the respective clearing member and the Eurex Clearing as Eurex' acceptance model is 'open offer'. At CCPs which offer 'novation' as trade acceptance model, it is not always guaranteed that a transaction concluded on an exchange results in respective contracts (e. g. Eurex providing access to a CCP which provides novation as trade acceptance model). This would create uncertainty and/or unequal treatment of identical contracts depending on the CCP on which a transaction is to be cleared. Such uncertainty and/or unequal treatment would impact the value of a transaction to be concluded on an exchange, i. e. the value of a transaction with regard to which the parties to the transaction are sure that such transaction will result in a cleared contract is higher compared to the value of a transaction where the parties to the transaction cannot be sure that such transaction will result in a cleared contract.

The uncertainty and/or unequal treatment of identical contracts and the fact that such uncertainty and/or unequal treatment of identical contracts cannot be factored in by trading participants creates significant undue risks for orderly price determination on an exchange.

On this background, ESMA should specify in its draft regulatory technical standards that a trading venue may set a standard for clearing certainty. This means that a trading venue should be allowed to define whether it requires a CCP to provide full clearing certainty or whether the trading venue requires a CCP not to provide full clearing certainty. Such standard should then be fulfilled by all CCPs which require access to it. A trading venue should be allowed to deny access to a CCP which offers a different standard for clearing certainty than the standard specified by it. Such decision should be designated by ESMA as one factor creating significant undue risks under Article 36(6)(a) MiFIR.

Please see section on conditions under which access can be granted for further details.

<ESMA\_QUESTION\_394>

**Q395: Could granting access create unmanageable risks for trading venues due to conflicts of law arising from the involvement of different legal regimes?**

<ESMA\_QUESTION\_395>

Deutsche Börse Group takes note that ESMA in its analysis considers that even within the European Economic Area, conflicts of laws cannot be fully disregarded (even if expected to be rare). We consider that a trading venue should be entitled to impose governing laws on a non-discriminatory basis.

However, ESMA addresses a very relevant issue in paragraph 32 and the corresponding questions 395 on page 348 of the Discussion Paper. Granting access to CCPs from different jurisdictions could lead to significant undue legal risk for trading venues and CCPs.

Firstly, a contract which is designed by a trading venue to be traded on such trading venue is regularly subject to the laws of the member state in which the trading venue is situated. When contracts are cleared by a CCP in the same member state, the same law applies to such contract for trading as for clearing. If such contract was to be cleared by a CCP in another member state which has access to the trading venue on which the transaction has been concluded, another law – i.e., regularly the law of the member state in which the CCP is situated – would apply to clearing of such transaction. It cannot be excluded that a contract which has been concluded under the laws of the one member state (where the trading venue is situated) is construed differently under the laws another member state (where the CCP is situated). This would cause legal uncertainty. Such legal uncertainty cannot be factored in by trading participants and creates significant undue risks for orderly price determination on an exchange.

There is evidence that this assessment is shared by the market. OTC derivatives transactions are sometimes novated in order to replace one contracting party to an OTC derivatives transaction or a portfolio of OTC derivatives transactions by another contracting party. This can entail a change of the contractual basis of the OTC derivatives transactions which are to be novated, the underlying master agreement, e. g. where the former contracting parties had concluded an English law ISDA Master Agreement, the new contracting parties may use a German Master Agreement as contractual basis for all of their OTC derivatives transactions. In this situation, it is not uncommon for the new contracting parties to stipulate in the course of the novation that the novated OTC derivatives transaction or portfolio of OTC derivatives transactions is to be construed according to English law rules where German law would lead to a different construction of such contract. This shows that the law under which a contract is concluded can play a significant role.

Consequently, it must be ensured that a CCP that requests access to a trading venue applies the same laws to clearing of such contract that were applicable when the contract was concluded, i.e., regularly the laws of the member state where the trading venue is situated in order to avoid undue complexity and significant undue legal risks and uncertainty. Conversely, a trading venue should be allowed to deny access to a CCP which cannot guarantee that uniform laws are applied to a contract with respect to clearing.

We take note that ESMA in its analysis considers that even within the European Economic Area, conflicts of laws cannot be fully disregarded (even if expected to be rare). We consider that a trading venue should be entitled to impose governing laws on a non-discriminatory basis.

Further, unmanageable risks could be created from the perspective of the trading venue if the applicant CCP does not have in place arrangements which allow the trading venue to meet its compliance with relevant financial sanctions regimes, anti-money laundering or anti-corruption requirements, position management requirements or other regulatory requirements.

Please also see section on conditions under which access can be granted for further detail.  
<ESMA\_QUESTION\_395>

**Q396: Are there other risks related to complexity and other factors creating significant undue risks that should be considered? If so, how would such risks arise from the provision of access?**

<ESMA\_QUESTION\_396>

In Deutsche Börse Group's view, as also outlined in detail in the answers to questions 377 to 389 on access requests by an applicant trading venue to a CCP any consideration needs to take into account that granting access is not just a matter for the trading venue and the clearing house. It also has an enormous impact on existing CCPs, the trading venues and clearing members, as well as end users. The clearing members will need to update their IT and operational systems to cater for the new connectivity. They will also have to

review and consider any changes to the rulebooks of either venue. These risks should be carefully assessed and addressed with respect to any access request.

In this regard, the CCP arrangements must for example (1) provide systems for reporting to the trading venue to ensure it continues to operate proper market supervision, position management, position reporting and other regulatory obligations, (2) protect the trading venue's regulatory status in third countries, (3) have in place the necessary security and licensing arrangements, (4) meet the terms of any other regulatory or legal requirements which must be met by the trading venue and (5) be able to give suitable assurances regarding data security.

<ESMA\_QUESTION\_396>

**Q397: Do you agree with the conditions set out above? If you do not, please state why not.**

<ESMA\_QUESTION\_397>

In Deutsche Börse Group's view the list of conditions seems fairly comprehensive. However, in particular potential risks and risk standards should be closely monitored. It should not be allowed that accessing CCPs have lower risk standards compared to existing CCPs.

We would forward the following complements and clarifications:

- Confidentiality (see paragraph 35 ii. of the Discussion Paper: The information covered by confidentiality must comprise *'all non-public and commercially sensitive information, including any information provided during the development phase of financial instruments'* and it should be fully ensured even when outsourcing arrangements are used by one party to the access arrangement.
- Legal requirement regarding enforceability in all relevant jurisdictions (see paragraph 35 iv. a. of the Discussion Paper): Trading venues should be entitled to decide on the legal jurisdiction applying to clearing and settlement in order to avoid exposing trading members to legal risk arising from a multi-jurisdictional environment (e.g., the buyer must receive ownership of the deliverable securities according to the chosen jurisdiction).
- Moment of entry of transfer orders and moment of irrevocability (see paragraph 35 iv. d. of the Discussion Paper): We firmly believe that the trading venues must be empowered to decide which legal device (e.g. Open Offer, Novation) shall apply to the clearing of their trades and which rules should govern the point of CCP interposition (including trade acceptance rules followed by the CCP).
- Consultation in case of changes (see paragraph 35 iii. b. of the Discussion Paper): we fully support the requirement to consult the other party to the access arrangement in case of any change that may have materially impact to the arrangement. This should explicitly include changes to clearing conditions that are enforced by the CCP. In addition we consider that the access arrangement should provide for a process for agreeing such changes.

<ESMA\_QUESTION\_397>

**Q398: Are there any other conditions CCPs and trading venues should include in their terms for agreeing access?**

<ESMA\_QUESTION\_398>

In addition to the conditions set out in paragraph 35 of the Discussion Paper, Deutsche Börse Group believes that trading venues must be empowered to require CCPs requesting access to fulfil the conditions itemized below. Otherwise, granting access may threaten the smooth and orderly functioning of the markets and may adversely affect systemic risk.

1. Open Interest

For listed derivatives, the trading venue is required to monitor the open interest in positions executed at its venue and monitor the settlement of those contracts. Part of the access arrangements between a trading venue and a CCP will need to include the procedures to be followed whereby the

CCP can provide the necessary information to the trading venue on the positions outstanding at the trading venue in order to enable the trading venue to fulfil its regulatory requirements.

## 2. Governance requirements for granting access to a trading venue

- The requesting CCP must demonstrate an effective governance structure, which empowers the trading venue in matters relating to the clearing of its trade feed,
- The eligible settlement locations should be defined by the trading venue,
- The requesting CCP must grant the trading venue access on request to systems, documents and databases directly relating to the clearing of trades on this trading venue (in order to enable the trading venue to assess the CCP's management of the service).

## 3. Credit and Liquidity requirements

- Access by the CCP to Central Bank Money EUR for the settlement of cash relating to securities deliveries and margins through a direct account in a Eurozone Central Bank;
- The CCP must be able to demonstrate that (1) it has sufficient liquidity to perform its obligations consistent with CPSS IOSCO Principle 4 and Article 44 in EMIR,
- And (2) its investment policy is consistent with Article 47 in EMIR (in particular with regard to the reuse of collateral of its Clearing Members).

## 4. Minimum scope of instrument covered (within the same class of financial instruments)

We believe that trading venues must be able to impose a minimum scope of instruments / market segments covered by the access arrangement, based on a common set of criteria that would apply to all CCPs requesting or having already access to the trade feed. Otherwise CCPs, in an attempt to preserve (or gain) the viability of their models, may restrict their offering to the most traded instruments (even within the same class) in order to avoid to cope with higher complexity and instrument scalability that would unavoidably derive from a broader instrument coverage. This may end up then in a situation where eventually only benchmarks would be cleared, thus affecting adversely market integrity on a given class of instruments and being counterproductive as regards the goals pursued by MiFIR.

## 5. Operational requirements

- The requesting CCP must disclose sufficient information regarding its operations to the trading venue (CPSS IOSCO Principles for FMI, Principle 20 – FMI Links) in order for the latter to be able to conduct regular operational risk assessments, in accordance with CPSS IOSCO Principles for FMI, Principle 17 – Operational Risk.
- The CCP must be fully operable for every trading day of the trading venue. Further, the CCP must provide the trading venue with contacts having sufficient knowledge and experience for the management of the service. The appointed contacts must be available throughout the pre-agreed operational day. Additionally, the CCP must ensure that resources are available to investigate and resolve operational issues when they occur.
- The CCP must provide extracts of its member static data configuration at least on a daily basis (e.g. before the opening of the market each day), for static data reconciliation purposes.
- The CCP must provide a permanently-available simulation environment, connected to the simulation environment of the trading venue in order to allow members to end-to-end test.

## 6. Segregation and portability

The CCP must demonstrate that the segregation and portability that it provides to its Clearing Members, is consistent with CPSS IOSCO Principles for FMI, Principle 14 – Segregation and Portability and EMIR Articles 39 and 48.

#### 7. Emergency situation handling / Business Continuity

- The access arrangement must address the unavailability of systems, workspace and suppliers as well as the loss of significant staff by the requesting CCP in order to ensure the continuity of the critical operations. Incident and crisis management process must be in place to ensure appropriate response and rapid recovery.
- A procedure must be agreed in case of members' failure/insolvency.

#### 8. Member support

The CCP must provide evidence of member support, referring to specific clients, with stated commitment from them to utilise the services of the CCP for the trading venue. Where a trading venue has to process multiple requests with all requesting CCPs meeting the above criteria on a standalone basis, we consider indeed that granting access to all of them may result in introducing unacceptable operational risks. In such a case, we consider then legitimate to use member demand as a criterion for granting access.

#### 9. Resolution planning

Alignment of resolution planning of the CCPs and TVs and concrete analyses of how those resolution plans will interact in case of insolvency.

<ESMA\_QUESTION\_398>

#### **Q399: Are there any other fees that are relevant in the context of Articles 35 and 36 of MiFIR that should be analysed?**

<ESMA\_QUESTION\_399>

Deutsche Börse Group shares the views expressed by ESMA in its analysis of transparent and non-discriminatory fees and does not see any other fees that would be relevant in the context of Articles 35 and 36 of MiFIR.

<ESMA\_QUESTION\_399>

#### **Q400: Are there other considerations that need to be made in respect of transparent and non-discriminatory fees?**

<ESMA\_QUESTION\_400>

Deutsche Börse Group does not fully agree with the considerations in paragraph 40 of the Discussion Paper on page 351 as - depending on the operating and business model and legal structures of the CCP - also clients of clearing members could be obliged to pay fees directly to the CCP. This should be limited to clients with a direct legal relationship (not necessarily a transaction based relationship) to the CCP, but not to clearing members. Clients of clearing members can also have direct legal relationships to the CCP, but in the same moment no not be parties of a transaction.

<ESMA\_QUESTION\_400>

#### **Q401: Do you consider that the proposed approach adequately reflects the need to ensure that the CCP does not apply discriminatory collateral requirements? What alternative approach would you consider?**

<ESMA\_QUESTION\_401>

Deutsche Börse Group considers that first of all, the CCP is obliged to calculate the Margin Requirements with respect to the requirements outlined in ESMA Commission Delegated Acts 153/213, Articles 24 – 28. The goal has to be to adequately cover the potential risks arising over the liquidation period in the event of a default.

We note that the term 'economically equivalent' is not defined anywhere in the level 1 text or the Discussion Paper. Accordingly, we have no guidance as to the scope of the equivalence, nor who determines such



equivalence. We assume that the CCP is expected to make the determination and to discuss such determinations with its NCA, ahead of implementing any cross-product margining.

We also caution against taking a one-size-fits-all approach to collateral and margining. The appropriateness of having different margining methodologies for seemingly 'economically equivalent' contracts turns on precisely how equivalent they are - if the contracts are completely identical, then the margining methodologies should not be different. However, if the two trades have differences in some core (or even non-core) provisions such as size, corporate action provisions etc. then there may be grounds for its being appropriate to use differing margin methodologies and for considering that (contrary to the assertion in paragraph 44 on page 351 of the Discussion Paper) the two economically equivalent contracts do not have the same risk characteristics.

When it comes to the calculation of the margin requirement, one must distinguish between the forward and backward looking margins. The backward looking margin (Premium Margin, Variation margin) keeps track of the portfolio's current market value on a daily basis, where the forward looking margin, the Initial Margin, aims to cover potential losses that could realise in the liquidation period. At Eurex Clearing, the Initial Margin aims to take into account both Market Risk and Liquidity Risk and is designed to match the Default Management Process.

Generally speaking, one could apply the same margin methodology for economically equivalent contracts. However, the outcome of course depends on the input factors, which may be specific to the respective market on which the instrument is traded. This applies in particular to the calculation of liquidity risk. Therefore, the expectation to get the same margin figures for contracts which are considered to be economically equivalent is not valid in general. In order to get identical margin figures, all input risk factors for the margin calculation would need to be identical, which is unlikely when different markets are involved.

In general, we challenge the concept of economical equivalence. It requires exactly identical data spaces, technical environments, contract specifications and legal terms. Considering that trading happens within a micro second universe data spaces will hardly ever be exactly identical. The technical setups of different exchanges or market places are severe. Risk protection functionalities, a pivotal element of the overall framework differ greatly. This includes for example mis-trade rules, circuit breakers and heart beat monitors. While it is generally possible to align most of these factors, full economical equivalence will be extremely difficult to achieve. The remaining differences, even if small, will add a new and potential critical risk element to the market. One can easily imagine settlement issues at expiry if final prices only differ slightly.

The overall approach to acceptable collateral is governed by regulation and it should be open to a CCP to determine, subject to compliance with those overarching requirements (e.g. as to high liquidity and loss resistance), which type of collateral is most appropriate for which types of products, risks and users.

<ESMA\_QUESTION\_401>

**Q402: Do you see other conditions under which netting of economically equivalent contracts would be enforceable and ensure non-discriminatory treatment for the prospective trading venue in line with all the conditions of Article 35(1)(a)?**

<ESMA\_QUESTION\_402>

With respect to equities and equity-like instruments:

Regarding settlement netting across trading venues, Deutsche Börse Group does not agree with the statement in § 47; indeed we believe that when contracts are economically equivalent and can be legally netted with contracts from other trading venues, the consent of the respective trading venues must be given prior to applying cross-venue settlement netting; such a consent must notably be subject to equivalent level of settlement discipline actually achieved by the market participants of the respective trading venues.

With respect to derivatives:

Regardless of whether a CCP or an NCA considers two financial instruments to be economically equivalent, in Deutsche Börse Group's view no two different financial instruments should be required as a matter of regulation to be netted (be that via position offset, pre-default payment net or close-out net) unless and until the NCA, the CCP or the clearing members (either collectively or individually) of the CCP have obtained a legal opinion to their satisfaction from a reputable international law firm that confirms that such netting is valid, binding and enforceable for regulatory capital purposes under CRD IV (and for balance sheet netting purposes under IAS 32) and that such netting would not lead to any impairment in the ability of the CCP or its existing venues to meet their regulatory obligations.

For example, under local laws 'netting' can also be understood as a legal 'set-off'. Under German law for example a legal set-off requires legal obligations which are 'substantially of the same nature', which requires much more than 'economically equivalent' contracts. Therefore, the local legal understanding and requirements have to be taken into account. This can lead to a situation where 'legally identical contracts' rather than just 'economically equivalent' contracts are required.

Regarding settlement netting across trading venues, we do not agree with the statement in paragraph 47 if the Discussion Paper on page 352. We believe that even when contracts of an existing trading venue are legally identical and could be legally netted with contracts transacted at an applicant trading venue, the consent of the respective trading venues must be given prior to applying cross-venue settlement netting. Such consent must notably be subject to equivalent levels of settlement discipline actually achieved by the market participants of the respective trading venues.

<ESMA\_QUESTION\_402>

**Q403: The approach above relies on the CCP's model compliance with Article 27 of Regulation (EU) No 153/2013, do you see any other circumstances for a CCP to cross margin correlated contracts? Do you see other conditions under which cross margining of correlated contracts would be enforceable and ensure non-discriminatory treatment for the prospective trading venue?**

<ESMA\_QUESTION\_403>

Deutsche Börse Group believes that the goal must not be to charge as little margin as possible, but charging the right amount of margin to still account for the potential risk based on the respective confidence level. The focus of the question should therefore be: Under which circumstances may a CCP apply Portfolio Margining across open positions relating to different trading venues, where the requirements set out by ESMA Article 27 are still fully respected?

Portfolio Margining comes into play when the Market Risk is calculated on Portfolio level. The market risk can be calculated following different approaches, e.g. a product by product approach, where margins are calculated on product level and the summed up to portfolio level or a portfolio approach, where the market risk is calculated for the portfolio level as a whole in the first place. The new risk model Eurex Clearing PRISMA follows that approach by calculating the Value at risk for the set of positions, which can be jointly liquidated in the default case. (Please note that both approaches have to be considered as equivalently appropriate from a risk management point of view.)

Independently of the approach, any sort of risk netting can only be done if the legal basis for a joint liquidation of the positions is well defined (see question 402). This is also related to Article 27 (1) which requires all financial instruments in scope for portfolio margining to be covered by the same default fund (unless the allocation to several default funds was approved by the college in advance).

If that is the case the question would be how to calculate jointly the market and liquidity risk for the portfolio consisting of positions in instruments traded on different trading venues.

As said before, the basic prerequisite would be that all requirements set out in Article 21 are met. That means in particular, that (1) there is an economic rationale in place, (2) the correlations are significantly high, and (3) the correlations are stable and have proven to hold even in stress periods.



But beyond that the actual calculation of the margin would need to meet the risk calculation standards from the individual CCP.

At Eurex Clearing the risk is calculated intraday, close to real time. This sets extremely high standards for all technical systems involved. Therefore, the systems across trading venues would need to be extremely compatible if not identical to limit the risk that a margin calculation fails to a minimum. Please be aware that in today's world, where a lot of trading happens in mille seconds, a failure of the margin calculation could expose the CCP to material risks.

<ESMA\_QUESTION\_403>

**Q404: Do you agree with ESMA that the two considerations that could justify a national competent authority in denying access are (a) knowledge it has about the trading venue or CCP being at risk of not meeting its legal obligations, and (b) liquidity fragmentation? If not, please explain why.**

<ESMA\_QUESTION\_404>

Deutsche Börse Group shares ESMA's general view that access should be denied where '*CCPs and trading venues are unlikely or unable to meet their obligations and to provide their services efficiently and to fulfil their economic functions*', i.e., we agree with the two considerations that could justify a national competent authority to deny access.

However, we would in addition propose to broaden such considerations to include increased and significant risk for existing trading venues and existing CCP being affected by the respective access arrangements.

<ESMA\_QUESTION\_404>

**Q405: How could the above mentioned considerations be further specified?**

<ESMA\_QUESTION\_405>

Deutsche Börse Group considers that with the exception of including possible affects on existing trading venues and existing CCP, the considerations should not be further specified as only this general wording provides the national competent authority with the required level of discretion to cover all relevant scenarios.

<ESMA\_QUESTION\_405>

**Q406: Are there other conditions that may threaten the smooth and orderly functioning of the markets or adversely affect systemic risk? If so, how would such risks arise from the provision of access?**

<ESMA\_QUESTION\_406>

Deutsche Börse Group would further suggest that the National Competent Authority takes into consideration the impact that the CCP would have on the trading venues' ability to innovate and remain competitive and relevant within the market. Trading venues are subject to constant national and global competition, so that, in order to remain relevant and competitive within a particular market, it is necessary for them to adapt and innovate. The pace of innovation will be significantly affected and the cost will increase vastly, where there is more than one CCP associated with a particular trading venue. For example, a trading venue would only be able to update its IT systems where the new systems are compatible with all CCPs. The trading venues will be reliant on the CCPs to introduce the changes and therefore the pace of any change will be dictated by the slowest CCP. This may result in European trading venues becoming out-of-date and irrelevant in a fast-changing market, which will lead investors to seek more efficient trading mechanisms in third countries or OTC. Should the national competent authority have concerns that permitting the request will be to the detriment of a trading venue in this regard, then the request can be denied.

Please also refer to answer to question 398 above.

<ESMA\_QUESTION\_406>

**Q407: Do you agree with ESMA’s proposed approach that where there are equally accepted alternative approaches to calculating notional amount, but there are notable differences in the value to which these calculation methods give rise, ESMA should specify the method that should be used?**

<ESMA\_QUESTION\_407>

Deutsche Börse Group believes that firstly, this approach would appear to contradict ESMA's own guidance in para 66 on page 355, which states that ‘ESMA considers that the calculation of a trading venue's annual notional amount should be conservative’ - which would suggest the lower value be used, not the higher one that is advocated in paragraph 67 on page 356.

Secondly, notional is sometimes a questionable metric. For example, a 30 year bond contract with notional EUR 100,000 leads to a greater exposure to a given shift in interest rates than a short term interest rate contract of notional EUR 1 million. For interest rate instruments, notional could be calculated on a 10 year equivalent basis or similar, which would more accurately reflect the risk transacted than pure notional.

<ESMA\_QUESTION\_407>

**Q408: Do you agree that the examples provided above are appropriate for ESMA to adopt given the purpose for which the opt-out mechanism was introduced? If not, why, and what alternative(s) would you propose?**

<ESMA\_QUESTION\_408>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_408>

**Q409: For which types of exchange traded derivative instruments do you consider there to be notable differences in the way the notional amount is calculated? How should the notional amount for these particular instruments be calculated?**

<ESMA\_QUESTION\_409>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_409>

**Q410: Are there any other considerations ESMA should take into account when further specifying how notional amount should be calculated? In particular, how should technical transactions be treated for the purposes of Article 36(5), MiFIR?**

<ESMA\_QUESTION\_410>

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<ESMA\_QUESTION\_410>

## **5.8. Non- discriminatory access to and obligation to license benchmarks**

**Q411: Do you agree that trading venues require the relevant information mentioned above? If not, why?**

<ESMA\_QUESTION\_411>

**General comments**

### **Scope of Art 37 MiFIR**

Deutsche Börse Group would like to point out upfront that Art 37 explicitly refers to Trading Venues and CCPs exclusively. Art 37 does not form a legal basis on which index providers could be obliged to grant access also to the users of a Trading Venue or a CCP as suggested by ESMA. The text of Art 37 refers clearly



and unambiguously to Trading Venues and CCPs only. Also, Art 37 does not extend to data derived from trading of Index based Derivatives (“Index Derivatives”).

We would like to point out further, that for the trading and clearing of Index Derivatives by Trading Venues and CCPs only such data is being required, which is already available as of today either under license by the Index Provider or third party data sources or which is even made freely available to the public. As of today, a large number of Index Derivatives is traded and cleared and in no way, have there been any problems as regards the availability of the relevant data.

Deutsche Börse Group sees a clear danger that parties with vested interests trying to make use of this legislative process to free ride in future on the significant investments an Index Provider has to make to ensure high quality index products by requiring Index Providers to provide access to data that is not needed by Trading Venues and CCPs. A balanced and focused view by ESMA on this topic therefore is urgently needed not to endanger future developments of high quality indices due to a lack of sufficient protection of innovation and investment.

### **Persons with proprietary rights to the benchmark (Index Providers)**

Persons with proprietary rights to the benchmark (Index Providers) **hold proprietary rights on all of the data used for the creation of an index, but only on the index itself including its trademark protected brands, index level data, files containing index data, index methodology, and other self-created data like weightings.** While some of these items are protected by intellectual property rights, for example the index provider’s brand is protected under trademark law and the databases containing constituent level index data or other index related data are protected by a specific ‘sui generis’ data base protection based on the European Database Directive 96/9/EC.

In most cases Index Providers creating a benchmark sign up as licensees for the specific use of input data themselves from the various data sources like Regulated Markets, News Agencies in the case of corporate action data or other third parties. Only in some cases Index Providers may hold proprietary rights on the input data used for the calculation of an index as well.

**The input data is usually being (technically) sourced by Index Providers from Market Data Vendors. In the same way Index Providers are being able to obtain the necessary input data via Market Data Vendors, also any other interested party like Trading Venues or CCPs, or even their respective users can access this data without any restriction.**

Data made available via Market Data Vendors usually comprise of constituent data, index levels, corporate action data, as well as historical data on constituents and index level data from various Index Providers, amongst many other data provided. Corporate actions data is usually being available via ad hoc news publication service providers like HUGIN, Equity Story, or even in a consolidated view via Market Data Vendors.

On this background the requirement to make information available **for Trading Venues and CCPs** is already being **satisfied** for data not owned by Index Providers **by the fact that input data used by the Index Providers is also being made (publicly) available by third party data sources, in particular by Market Data Vendors. In no case shall the Index Provider be required to re-sume the role of a Market Data Vendor himself** in order to provide access to the data he does not hold own IP rights on, e.g. real-time constituent instrument data or data relating to corporate actions. In fact this would not be proportionate at all. It might even result in the fact that the Index Provider ceases to calculate the index in question, due to the fact that he will not be able to comply with a too large in scope publication obligation under Art 37.

Thus, only the portion of information for which the Index Providers holds own Intellectual Property rights should be subject to the data access provisions under Art. 37 provided, however, that only such portion of this data has to be made available which is strictly necessary for the ‘purpose of trading and clearing’ of Index based Derivatives as elaborated further below.

## **Data required by Trading Venues**

The following data is relevant for Trading Venues (for the purpose of trading index-based derivatives):

<b>Element of benchmark information</b>	<b>What is the specific data / information which is needed?</b>	<b>Sources from which information is available</b>
Relevant price and data feed	Index level (real-time and/or delayed) required	Market Data Vendors and also directly from Index Providers for Licensees (such license being available without restrictions)
Composition	Index composition is not required	N.A.
Methodology	Index rules required	Index Providers
Pricing	Pricing information is not required	N.A.

\* Index providers usually only make end-of-data index levels available directly to their clients.

Index level data are already available under license to Trading Venues in real-time. We agree that the terminology 'as soon as it is calculated' as a description for the industry term 'real-time' makes sense in this context. While the index composition and its values are not required from a pure trading point of view, the index levels themselves are required for the trading of Index based Derivatives. This proprietary data is made available either by the Index Provider directly or via Market Data Vendors for its Licensees. We agree that changes to the methodology shall be announced as soon as reasonably possible in advance.

<ESMA\_QUESTION\_411>

### **Q412: Is there any other additional information in respect of price and data feeds that a trading venue would need for the purposes of trading?**

<ESMA\_QUESTION\_412>

Deutsche Börse Group would like to point out that for cash settled instruments no additional information besides real-time index levels is necessary for a Trading Venue for the purposes of trading.

Additional information like the real-time data of the index constituents are available via Market Data Vendors or from the data sources directly. Corporate actions are not relevant for Trading Venues or CCPs. Any corporate action and its impact on the benchmark will be reflected in the index levels and is not separately required for the trading of an Index based Derivative.

Trading members may require other information for the purpose of making investment decisions and trading. Despite the fact that Art. 37 is completely silent on providing access to information to trading members which therefore are out of scope, all required information, however, is available either via the Index Provider itself or third parties like Market Data Vendors, News Agencies etc.

As of today benchmarks are being traded and cleared within this existing market structure in which the Index Provider cannot and should not be regarded as the 'single source of information' in this regard.

<ESMA\_QUESTION\_412>

### **Q413: Do you agree that CCPs require the relevant information mentioned above? If not, why?**

<ESMA\_QUESTION\_413>

Deutsche Börse Group deems the following data to be relevant for CCPs (for the purpose of clearing index-based derivatives):

Element of benchmark information	What is the specific data / information which is needed?	Sources from which information is available
Relevant price and data feed	Index level (real-time and/or delayed)	Market Data Vendors and also directly from Index Providers for Licensees (such license being available without restrictions)
Composition	Index composition is not required	N.A.
Methodology	Index rules required	Index Providers
Pricing	Pricing information is not required	N.A.

\* Index providers usually only make end-of-data index levels available directly to their clients

Index level data should be available to CCPs under license in real-time where necessary. We agree that the terminology ‘as soon as it is calculated’ as a description for the industry term ‘real-time’ makes sense in this context. While the index composition, weighting or pricing of the individual index constituents is not required from a clearing point of view (although made available for licensees either by the Index Provider or by Market Data Vendors), changes to the methodology are important and shall be announced to as soon as reasonably possible in advance.

However, in case of additional data requirements as suggested in the ESMA Level 2 Discussion Paper we again would like to point out that corporate actions data is made available via specialized ad hoc news publication service providers like Hugin, Equity Story or in a consolidated view via Market Data Vendors without any restrictions. Real-time and historical data for the index constituents is also generally available for any index which is based on regulated market data. CCPs and Trading Venues like the Index Providers themselves have to license this data from third-party rights owners either directly or via Market Data Vendors. Historical data for index level data is usually available via Market Data Vendors as well.

<ESMA\_QUESTION\_413>

**Q414: Is there any other additional information in respect of price and data feeds that a CCP would need for the purposes of clearing?**

<ESMA\_QUESTION\_414>

Deutsche Börse Group likes to point out that usually index level data should be sufficient for use of a CCP. Please refer as well to our comments under question 412.

<ESMA\_QUESTION\_414>

**Q415: Do you agree that trading venues should have access to benchmark values as soon as they are calculated? If not, why?**

<ESMA\_QUESTION\_415>

Yes, Deutsche Börse Group agrees that Trading Venues as licensees of such data should have access to index levels as soon as they are calculated.

Index level data is either provided through Market Data Vendors or via direct feeds offered by the Index Providers themselves or by third parties to which the dissemination has been assigned by the Index Provider.

<ESMA\_QUESTION\_415>

**Q416: Do you agree that CCPs should have access to benchmark values as soon as they are calculated? If not, why?**

<ESMA\_QUESTION\_416>

Yes, Deutsche Börse Group agrees that CCPs as licensees of such data should have access to index levels as soon as they are calculated in case this is necessary.



Index level data is either provided through Market Data Vendors or via direct feeds offered by the Index Providers themselves or by third parties to which the dissemination has been assigned by the Index Provider.

<ESMA\_QUESTION\_416>

**Q417: Do you agree that trading venues require the relevant information mentioned above? If not, why?**

<ESMA\_QUESTION\_417>

Deutsche Börse Group does not agree with ESMA as regards the necessity of the information suggested by ESMA for the trading of Index based Derivatives by Trading Venues. Some of the requirements may be of interest in the case of physical delivery; however, cash settlement is the marketable way of trading and clearing in those products today.

However, in case the information suggested by ESMA should be required for a particular purpose besides the pure trading of Index based Derivatives, such information is already available either to index licensees, index level licensees or directly to the public thus encompassing Trading Venues as well.

The index composition is not required from a pure trading point of view as the value of the index based derivative is directly deviated from the index level without any additional information on its composition being required, however, changes to the composition are already being announced to the licensees of an index as soon as reasonably possible in advance. End-of-day weightings are being made available to each interested index licensee directly by the index provider against a fee, e.g. via STOXX. All of the foregoing information is easy accessible under license to interested parties.

Changes to the methodology are announced via media communication by index providers and are being published on the Index Providers website. Also, a new rule book is released including a change log. This information is easily accessible to the public even without any subscription.

<ESMA\_QUESTION\_417>

**Q418: Is there any other additional information in respect of composition that a trading venue would need for the purposes of trading?**

<ESMA\_QUESTION\_418>

No, Deutsche Börse Group is not aware of any additional requirements from trading venues as regards additional data provision.

<ESMA\_QUESTION\_418>

**Q419: Do you agree that CCPs require the relevant information mentioned above? If not, why?**

<ESMA\_QUESTION\_419>

Deutsche Börse Group does not agree with ESMA as regards the necessity of the information suggested by ESMA for the clearing of Index based Derivatives by CCPs.

However, in case the information suggested by ESMA is being required for particular purposes besides the pure clearing of Index based Derivatives, such information is made available already either to index licensees, index level licensees or even to the public without any restrictions thus encompassing CCPs as well.

Again, composition changes are not needed by CCPs as only the index level data is relevant for the clearing of an index based derivative. However, changes to the composition are being announced to the licensees of an index as soon as reasonably possible in advance. End-of-day weightings are being made available to each interested index licensee directly by the index provider against a fee, e.g. via STOXX. All of the foregoing information is easy accessible under license to interested parties.

Changes to the methodology are announced via media communication by index providers and are being published on the Index Providers website. Also, a new rule book is released including a change log. This information is easily accessible to the public even without any subscription.

<ESMA\_QUESTION\_419>



**Q420: Is there any other additional information in respect of composition that a CCP would need for the purposes of clearing?**

<ESMA\_QUESTION\_420>

No, we are not aware about any justified additional requirements from CCPs for the purpose of clearing of Index based Derivatives.

<ESMA\_QUESTION\_420>

**Q421: Do you agree that trading venues and CCPs should be notified of any planned changes to the composition of the benchmark in advance? And that where this is not possible, notification should be given as soon as the change is made? If not, why?**

<ESMA\_QUESTION\_421>

Deutsche Börse Group disagrees that information about composition changes for an index is necessary for Trading Venues and CCPs as only index level data is relevant for the trading and clearing of Index based Derivatives.

<ESMA\_QUESTION\_421>

**Q422: Do you agree that trading venues need the relevant information mentioned above? If not, why?**

<ESMA\_QUESTION\_422>

Although we do not agree that Trading Venues do require all information as listed by ESMA, Deutsche Börse Group is about to implement the IOSCO Principles for Financial Benchmarks and to make all information available as required by IOSCO, namely under Principle 11.

However, the Methodology has to be made transparent only to the extent necessary to conduct a due diligence on the benchmark.

<ESMA\_QUESTION\_422>

**Q423: Is there any other additional information in respect of methodology that a trading venue would need for the purposes of trading?**

<ESMA\_QUESTION\_423>

No, Deutsche Börse Group does not think that this is the case.

<ESMA\_QUESTION\_423>

**Q424: Do you agree that CCPs require the relevant information mentioned above? If not, why?**

<ESMA\_QUESTION\_424>

No, Deutsche Börse Group does not agree that this information is being required by CCPs. However, as already pointed out several times in our response all data is already available either via the Index Provider itself or via third parties.

<ESMA\_QUESTION\_424>

**Q425: Is there any other additional information in respect of methodology that a CCP would need for the purposes of clearing?**

<ESMA\_QUESTION\_425>

No, we do not think that this is the case.

<ESMA\_QUESTION\_425>

**Q426: Is there any information in respect of the methodology of a benchmark that a person with proprietary rights to a benchmark should not be required to provide to a trading venue or a CCP?**

<ESMA\_QUESTION\_426>

Changes to the methodology are announced via broad media communication by Index Providers and are being published on the Index Provider's website. Also, a new rule book is released including a change log. This information is easily accessible to the public without license even without any subscription.

Deutsche Börse Group considers that conditions under which access to information is to be granted must strike a balance between legitimate information requirements of index users and the protection of the Index Provider's Intellectual Property and other proprietary rights. It is therefore of particular importance that this protection is not undermined by requiring Index Providers to provide access to data that is not strictly needed by Trading Venues and CCPs but might nevertheless be requested in this consultation trying to make use of this legislative process to free ride on the significant investments an Index Provider has to make to ensure high quality index products. In this context detailed operational rules of the index provider are not required by Trading Venues or CCPs and thus should not be required to be disclosed.<ESMA\_QUESTION\_426>

**Q427: Do you agree that trading venues require the relevant information mentioned above (values, types and sources of inputs, used to develop benchmark values)? If not, why?**

<ESMA\_QUESTION\_427>

Although Deutsche Börse Group does not agree with ESMA as regards the necessity of the information suggested by ESMA for Trading Venues and CCPs, we agree with ESMA that the types and 'sources of data used for index calculation' shall be disclosed to the licensees of a benchmark.

We consider that in case of constituent data being already published, e.g. prices of regulated trading venues or ad hoc notifications in the case of corporate actions, the respective information should not fall under Art. 37. Index Provider shall be regarded as being compliant with Art 37, as it is being ensured that a Trading Venue or CCP will be able to access and use the data if required through Market Data Vendors or direct feeds as the case may be. In our firm view this is a fair and reasonable approach as also the Index Provider itself has to source the necessary data for which he does not hold proprietary rights in the same fashion.

<ESMA\_QUESTION\_427>

**Q428: Is there any other additional information in respect of pricing that a trading venue would need for the purposes of trading?**

<ESMA\_QUESTION\_428>

Deutsche Börse Group sees no additional requirements.

<ESMA\_QUESTION\_428>

**Q429: In what other circumstances should a trading venue not be able to require the values of the constituents of a benchmark?**

<ESMA\_QUESTION\_429>

Deutsche Börse Group has the strong view that Art 37 does not provide for a legal basis requiring Index Providers to ensure access to users of Trading Venues as regards access to index levels under license. In case the Trading Venue would decide to source in constituent data from relevant data sources in order to submit such data to its users, the Trading Venue would need to be compliant with respective licensing terms of the data sources and Market Data Vendors – applicable for any interested party alike - including being able to operate respective entitlement systems tracking detailed information on data usage. Trading venue members are in the position to license the underlying data they deem to be required.

<ESMA\_QUESTION\_429>

**Q430: Do you agree that CCPs require the relevant information mentioned above? If not, why?**

<ESMA\_QUESTION\_430>

Deutsche Börse Group does not agree that CCPs need all this information as outlined by ESMA. In fact the index level data is sufficient as well for CCPs.

<ESMA\_QUESTION\_430>

**Q431: Is there any other additional information in respect of pricing that a CCP would need for the purposes of clearing?**

<ESMA\_QUESTION\_431>

Deutsche Börse Group would like to point out, that there are no additional requirements. All necessary data for the clearing of Index based Derivatives by a CCP as well as any additional data a CCP might deem useful to have at hand is being already made available under license by the Index Providers themselves and/or third parties.

<ESMA\_QUESTION\_431>

**Q432: In what other circumstances should a CCP not be able to require the values of the constituents of a benchmark?**

<ESMA\_QUESTION\_432>

Deutsche Börse Group would like to point out that as long as the values of the constituents of an index are being made available, either free of charge with a timely delay or in real-time under license, the CCP is of course free to source the data for use according to its needs, i.e. for real-time data under the applicable license terms.

To the contrary, a CCP should not require access to data which is obviously not needed for clearing of Index based Derivatives and which is neither generally available to the public for free or under license against fees.

However, under no circumstance can an Index Provider provide access to input data used for the calculation of its benchmarks but sourced from a third party for this particular purpose.

<ESMA\_QUESTION\_432>

**Q433: Do you agree that trading venues require the additional information mentioned above? If not, why?**

<ESMA\_QUESTION\_433>

Deutsche Börse Group likes to point out, that Index Providers and their distribution service providers usually promptly notify both the public and its licensees in case of any inaccuracies or miscalculations as regards index levels. Information is being disseminated to the public including licensees at non-discriminatory terms, meaning at the same time via different news channels. Licensees are usually being informed with direct mails in addition.

We agree that in case of data being sourced directly from the Index Provider or their distribution service provider any changes to the feed shall be advertised upfront in good time before the change is implemented. The same holds true for data being sourced from Market Data Vendors. The Index Provider, however, has no influence on the Market Data Vendor in this respect, which should be acknowledged by ESMA. However, timely upfront information is good industry practice as Market Data Vendors have significant interests in providing reliable services to their customers. Usually, these issues are contractually covered between Market Data Vendors and their customers.



Again, Art 37 does not provide for a legal basis requiring Index Providers to ensure permission for access to users of a Trading Venue as regards index levels or any other information a user may deem useful to have at hand.

<ESMA\_QUESTION\_433>

**Q434: Do you agree that CCPs require the additional information mentioned above? If not, why?**

<ESMA\_QUESTION\_434>

Index Providers and their distribution service providers usually promptly notify both the public and its licensees in case of any inaccuracies or miscalculations as regards index levels. Information is being disseminated to the public including licensees at non-discriminatory terms, meaning at the same time via different news channels. Licensees are usually being informed with direct mails in addition.

We agree that in case of data being sourced directly from the Index Provider or their distribution service provider any changes to the feed shall be advertised upfront in good time before the change is implemented. The same holds true for data being sourced from Market Data Vendors. However, this is good practice and already sort of industry standard.

Again, Art 37 does not provide for a legal basis requiring Index Providers to ensure permission for access to users of a CCP as regards index levels or any other information a user may deem useful to have at hand.

<ESMA\_QUESTION\_434>

**Q435: Is there any other information that a trading venue would need for the purposes of trading?**

<ESMA\_QUESTION\_435>

No, in Deutsche Börse Group's view there is no other information required. Calculation calendar might be necessary, however, they are already made freely available to any interested party.

<ESMA\_QUESTION\_435>

**Q436: Is there any other information that a CCP would need for the purposes of clearing?**

<ESMA\_QUESTION\_436>

No, in Deutsche Börse Group's view there is no other information required.

<ESMA\_QUESTION\_436>

**Q437: Do you agree with the principles described above? If not, why?**

<ESMA\_QUESTION\_437>

Deutsche Börse Group appreciates ESMA's confirmation that Art 37 does not necessarily foresee the provision of input data like constituent level data to members of the Trading Venues or CCPs and that it should be in the discretion of the Index Provider via which path it provides its information. We fully agree with ESMA in this respect. Obviously, the latter can only relate to information to which the Index Provider has proprietary rights.

However, ESMA also suggests that index level data may be licensed via Trading Venues and/or CCPs to their users. We do not deem this to be a sensible option, as in this case any Trading Venue and/or CCP which intends to disseminate respective data would have to resume the role of a Market Data Vendor in order to comply with the relevant licensing requirements. This would most likely require unnecessary and substantial investments for the Trading Venue or the CCP as they would have to be able and prove that they are able to administer data usage according to licensing terms and conditions (e.g. implementing a reporting process and an entitlement system for data usage, setting up audit departments to make onsite inspections). Although, we agree with ESMA that this might be a theoretical solution, we have the firm



opinion that this solution would be everything but ideal based on the fact that as of today, index level data as well as constituent level data is already made available to any interested party, both via direct feeds or via Market Data Vendors in an efficient way. ESMA indicates that public availability of necessary data shall suffice in order to cater for Trading Venue's and/or CCP's users additional data requirements instead. We fully agree.

Furthermore, and most important, we explicitly appreciate ESMA's acknowledgement of the efforts undertaken to create a reliable and trustworthy benchmark and that there should be protection of the person with Intellectual Property and other proprietary rights to the benchmark. Deutsche Börse Group also agrees that the conditions under which access is to be granted must strike a balance between legitimate information requirements and the protection required for Index Providers. It is therefore of significant importance that this protection is not undermined by requiring Index Providers to provide access to data that is not strictly needed by Trading Venues or CCPs for the trading or clearing of Index based Derivatives. As Art. 37 directly affects the core of the Index Providers business – its Intellectual Property – it is a logical consequence that the scope of the mandatory licensing of information has to be strictly limited on a 'need to know' basis.

For data not publicly available via Market Data Vendors, and where Index Providers hold proprietary rights to, licenses should be granted directly by the Index Provider to users of Trading Venues/CCPs provided, however, that such users accept the applicable terms and conditions of the relevant license agreement (including restrictions on the onwards distribution of data and the payment of the applicable license fees).

<ESMA\_QUESTION\_437>

**Q438: Do users of trading venues need non-publicly disclosed information on benchmarks?**

<ESMA\_QUESTION\_438>

Deutsche Börse Group considers that all necessary data is usually made publicly available to users of Trading Venues via Market Data Vendors, or via Index Providers or its distribution service providers. Due to this broad availability of data we cannot think of any data which a user of a Trading Venue would need and which is not already publicly available under license without any restriction.

<ESMA\_QUESTION\_438>

**Q439: Do users of CCPs need non-publicly disclosed information on benchmarks?**

<ESMA\_QUESTION\_439>

Deutsche Börse Group considers that all necessary data is usually made publicly available to users of CCPs via Market Data Vendors, or via Index Providers or its distribution service providers. Due to this broad availability of data we cannot think of any data which a user of a CCP would need and which is not already publicly available under license without any restriction.

<ESMA\_QUESTION\_439>

**Q440: Where information is not available publicly should users be provided with the relevant information through agreements with the person with proprietary rights to the benchmark or with its trading venue / CCP?**

<ESMA\_QUESTION\_440>

ESMA confirms that Art 37 does not foresee the provision of input data like index level data to users of the Trading Venues or CCPs.

<ESMA\_QUESTION\_440>

**Q441: Do you agree with the conditions set out above? If not, please state why not.**

<ESMA\_QUESTION\_441>

Deutsche Börse Group generally agrees with most of the suggestions made by ESMA. However, due to the substantial interference with the Intellectual Property rights and other proprietary rights of the Index

Providers by Art. 37 we suggest that the obligations of an Index Provider in this context are reasonable and subject to an adequate materiality standard. In more detail:

- Deutsche Börse Group agrees that 46 (i), 46 (iv) (c) and 46 (iv) (e) is acceptable, provided that the information duties under this proposal are applied to material information only.
- We agree with ESMA that the protection of IP rights (see already 41(i)) in 46 (ii) and 46 (iii)), [...] is of crucial importance for Index Providers.
- 46(iv) (a) is acceptable if only 'reasonable' measures are required.
- 46 (iv) (b) is acceptable provided that the index provider can decide if and how to consult with which market participants.
- We agree with 46 (v) (a).

Deutsche Börse Group explicitly likes to stress that passing on of data to users of CCPs and/or Trading Venues according to 46(v)(b) should be subject to either i) a limitation in scope (e.g. freely accessible data or insubstantial amounts of protected data) or ii) a license agreement between the index provider and the recipient.

<ESMA\_QUESTION\_441>

**Q442: Are there any other conditions persons with proprietary rights to a benchmark and trading venues should include in their terms for agreeing access?**

<ESMA\_QUESTION\_442>

Deutsche Börse Group suggests that Trading Venues and CCPs should include the Index Provider's standard disclaimers in their informational materials regarding the Index based Derivatives traded or cleared on their platforms.

<ESMA\_QUESTION\_442>

**Q443: Are there any other conditions persons with proprietary rights to a benchmark and CCPs should include in their terms for agreeing access?**

<ESMA\_QUESTION\_443>

Deutsche Börse Group suggests that Trading venues and CCPs should include the index provider's disclaimers in their informational materials.

<ESMA\_QUESTION\_443>

**Q444: Which specific terms/conditions currently included in licensing agreements might be discriminatory/give rise to preventing access?**

<ESMA\_QUESTION\_444>

Deutsche Börse Group is not aware about any discriminatory issues in this respect.

<ESMA\_QUESTION\_444>

**Q445: Do you have views on how termination should be handled in relation to outstanding/significant cases of breach?**

<ESMA\_QUESTION\_445>

In Deutsche Börse Group's view there should be a right to terminate license agreements immediately or with short notice in case of outstanding/significant cases of breach, with a cool-off period before the licensor is required to enter into a new license agreement with the relevant licensee, or with the right to require reasonable security as a condition for a new license agreement.

<ESMA\_QUESTION\_445>

**Q446: Do you agree with the approach ESMA has taken regarding the assessment of a benchmark's novelty, i.e., to balance/weight certain factors against one another? If not, how do you think the assessment should be carried out?**

<ESMA\_QUESTION\_446>



Deutsche Börse Group in principle agrees with ESMA to perform a case by case analysis to consider the relevant factors in each case. As described below special care is required when selecting the correct factors to assess in each case.

<ESMA\_QUESTION\_446>

**Q447: Do you agree that each newly released series of a benchmark should not be considered a new benchmark?**

<ESMA\_QUESTION\_447>

Deutsche Börse Group agrees with ESMA.

<ESMA\_QUESTION\_447>

**Q448: Do you agree that the factors mentioned above could be considered when assessing whether a benchmark is new? If not, why?**

<ESMA\_QUESTION\_448>

Deutsche Börse Group agrees that most of the factors could be considered when assessing whether an index provider creates a new benchmark or simply adjusts the existing one in question.

Existing competition between index providers leads to innovation and the creation of new benchmarks based on the different market needs and demands. Competition of existing benchmarks covering the same markets, regions or sectors takes place in form of the ongoing maintenance and continuous development of the respective index methodologies by the index providers. This means that during the lifetime of a financial instrument the underlying indices are likely to undergo changes. In addition, as the IOSCO principles for Financial Benchmarks require the suitability of benchmarks, there is an inherent need to have the flexibility to adjust benchmarks to a potentially evolving economic reality.

Changes to benchmarks can be classified in two main groups:

- Regular review according to the rule book (methodology), e.g. change of constituents or re-balancing weighting
- Review of the index methodology itself to reflect changes in the respective market the benchmark is covering, e.g. changing regulatory framework, corporate actions, data sources, covered constituents, rules to weightings

A regular review of the benchmark according to the existing index rule book/methodology has no impact on a financial instrument.

However, a change of the index rule book/methodology may have significant impact on the benchmark in case the character of an index is being significantly altered. In this context, certain examples shall be given under which circumstances a benchmark could be considered as ‘new’ but also highlight the complexity of such changes:

- **Number of constituents:** While a reduction of constituents could be driven by liquidity, a significant increase of constituents could lead to a broader index (large and midcap). However, a reduction of constituents could also lead to a too narrow index.
- **Regions:** Inclusion or exclusion of certain countries may be the inevitable consequence of political changes (e.g. joining EU or Eurozone) or economic developments (e.g. emerging vs. developed market classification) but may change the original subject of the benchmark

It shall be highlighted that in case of any new benchmark created by the index provider in form of a new index which is not a replacement, trading venues and CCPs would not be able to replace a former benchmark used in existing financial instruments, but would be required to list new financial instruments instead which would lead to the necessity to create of a new liquidity pool for this new instrument and leaving the existing liquidity pool for the existing financial instrument untouched. This obviously encompasses a significant effort for all related parties, and would obviously even in theory not be an economical way to circumvent any regulatory requirements.

<ESMA\_QUESTION\_448>

**Q449: Are there any factors that would determine that a benchmark is not new?**

<ESMA\_QUESTION\_449>

Deutsche Börse Group would not consider a benchmark to be new if it

- follows the same methodology and only uses a different pricing source
- follows the same methodology with insignificant changes to some methodology parameters (e.g. 101 components rather than 100, weights capped at 9.5% rather than 10%, etc.)
- becomes based on a different price source than before

In any case, the criteria if a benchmark is being considered to be new should always be based on facts, certainly not on perception only.

<ESMA\_QUESTION\_449>



## 6. Requirements applying on and to trading venues

### 6.1. Admission to Trading

#### **Q450: What are your views regarding the conditions that have to be satisfied in order for a financial instrument to be admitted to trading?**

<ESMA\_QUESTION\_450>

Deutsche Börse Group agrees with ESMA's view that it is important that the requirements for admitting securities to trading on a regulated market can operate and may need to be assessed in conjunction with the requirements for admitting securities to official listing on a stock exchange as prescribed by the Consolidated Listing Directive. We also agree with ESMA's view that the regulatory requirements for admission to trading on a regulated market as prescribed by MiFID should not be stricter than the requirements for being listed on an official list as prescribed by the Consolidated Listing Directive.

<ESMA\_QUESTION\_450>

#### **Q451: In your experience, do you consider that the requirements being in place since 2007 have worked satisfactorily or do they require updating? If the latter, which additional requirements should be imposed?**

<ESMA\_QUESTION\_451>

Deutsche Börse Group agrees with ESMA's fact finding that the above-mentioned provisions have proven to be appropriate and no specific problems in supervisory practice have been reported.

<ESMA\_QUESTION\_451>

#### **Q452: More specifically, do you think that the requirements for transferable securities, units in collective investment undertakings and/or derivatives need to be amended or updated? What is your proposal?**

<ESMA\_QUESTION\_452>

Deutsche Börse Group does not have any specific recommendations regarding the requirements for transferable securities, units in collective investment undertakings and/or derivatives.

<ESMA\_QUESTION\_452>

#### **Q453: How do you assess the proposal in respect of requiring ETFs to offer market making arrangements and direct redemption facilities at least in cases where the regulated market value of units or shares significantly varies from the net asset value?**

<ESMA\_QUESTION\_453>

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<ESMA\_QUESTION\_453>

#### **Q454: Which arrangements are currently in place at European markets to verify compliance of issuers with initial, on-going and ad hoc disclosure obligations?**

<ESMA\_QUESTION\_454>

The following ones are in place at Deutsche Börse Group:

##### 1. Initial Disclosure Obligations

As a rule, the publication of an approved securities prospectus is a requirement for the initial admission of securities to the regulated market. This means that the approval and publication of the securities prospectus obligatorily has to take place prior to the decision on admitting the securities to the floor. The securi-

ties prospectus enables the future investors to gain a picture of the securities offered and the company and to decide on their investment based on this information. The competent authority for the approval of the securities prospectus is the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) [German Federal Agency for Financial Market Supervision]. As a control mechanism serves the prospectus liability regulated in the Wertpapierprospektgesetz [German Securities Prospectus Act] and regulates incorrect and incomplete prospectus.

### 2. On-going disclosure obligations

There are several on-going disclosure obligations, disclosure obligations regarding issuers regulated in the General Standard Segment are dealt by the BaFin, disclosure obligations regarding issuers regulated in the Prime Standard Segment are dealt by Deutsche Börse Group. In detail these disclosure obligations include annual financial statements, half-yearly and quarterly financial statements, financial calendar, analysts meeting and obligation of publication and notification of insider information. The obligations in Prime Standard are higher than in General Standard.

### 3. Ad hoc disclosure obligations

There are ad hoc disclosure obligations in place which are supervised by the BaFin.

<ESMA\_QUESTION\_454>

#### **Q455: What are your experiences in respect of such arrangements?**

<ESMA\_QUESTION\_455>

The above-mentioned arrangements have proven to be appropriate and Deutsche Börse Group is not aware of any specific problems in the supervisory practice.

<ESMA\_QUESTION\_455>

#### **Q456: What is your view on how effective these arrangements are in performing verification checks?**

<ESMA\_QUESTION\_456>

Deutsche Börse Group is not aware of any specific problems in the supervisory practice concerning verification checks.

<ESMA\_QUESTION\_456>

#### **Q457: What arrangements are currently in place on European regulated markets to facilitate access of members or participants to information being made public under Union law?**

<ESMA\_QUESTION\_457>

Several initial, on-going and ad hoc disclosure obligations facilitate access of members or participants to information in Germany according to the principles set out in our answer to question Q 454. Deutsche Börse Group would like to point out that in Germany the issuers are in charge of such obligations only and that we are not aware of any specific problems by the undertaking of this practice. Therefore, we see no reason to adopt any other systems (e.g. management control systems, sponsors) regarding the undertaking of such responsibilities and obligations.

<ESMA\_QUESTION\_457>

#### **Q458: What are your experiences in respect of such arrangements?**

<ESMA\_QUESTION\_458>

Deutsche Börse Group is not aware of any specific problems in the supervisory practice.

<ESMA\_QUESTION\_458>

#### **Q459: How do you assess the effectiveness of these arrangements in achieving their goals?**

<ESMA\_QUESTION\_459>



Deutsche Börse Group supports the general idea to establish arrangements to facilitate the access of members or participants to information being made public under Union law. However, the issuer shall be in charge of the promotion of access of such information.

<ESMA\_QUESTION\_459>

**Q460: Do you agree with that, for the purpose of Article 51 (3) (2) of MiFID II, the arrangements for facilitating access to information shall encompass the Prospectus, Transparency and Market Abuse Directives (in the future the Market Abuse Regulation)? Do you consider that this should also include MiFIR trade transparency obligations?**

<ESMA\_QUESTION\_460>

Deutsche Börse Group supports ESMA's view to promote access of members and participants on regulated markets to information published in accordance with Union law. We agree that the relevant Union law for these purposes appear to be the Prospectus, Transparency and Market Abuse Directives (or Market Abuse Regulation) as well as potentially the MiFIR trade transparency information as it shall be ensured that members and participants are aware of relevant information that may have influence on the valuation of a financial instrument on as equal terms as possible. Again, we support the view that the issuer shall be in charge of promoting access of such information.

<ESMA\_QUESTION\_460>

## **6.2. Suspension and Removal of Financial Instruments from Trading - connection between a derivative and the underlying financial instrument and standards for determining formats and timings of communications and publications**

**Q461: Do you agree with the specifications outlined above for the suspension or removal from trading of derivatives which are related to financial instruments that are suspended or removed?**

<ESMA\_QUESTION\_461>

Yes, Deutsche Börse Group agrees with these specifications.

<ESMA\_QUESTION\_461>

**Q462: Do you think that any derivatives with indices or a basket of financial instruments as an underlying the pricing of which depends on multiple price inputs should be suspended if one or more of the instruments composing the index or the basket are suspended on the basis that they are sufficiently related? If so, what methodology would you propose for determining whether they are "sufficiently related"? Please explain.**

<ESMA\_QUESTION\_462>

No, Deutsche Börse Group agrees with ESMA's reasoning in 6.2 recitals 24 and 25.

<ESMA\_QUESTION\_462>

**Q463: Do you agree with the principles outlined above for the timing and format of communications and publications to be effected by trading venue operators?**

<ESMA\_QUESTION\_463>

Yes, Deutsche Börse Group agrees with the principles outlined for the timing and format of communications and publications to be effected by trading venue operators. With respect to Section 6.2 recital 28 of the Discussion Paper, it should be clarified by ESMA that trading venue operators shall be obliged to publish the suspension, removal or lifting of a suspension shall be effected on its webpage. On the other hand, such publication by a trading venue operator on its webpage shall be sufficient and the trading venue operator shall not be obliged (e. g. by national law) to publish such steps in any other form.



<ESMA\_QUESTION\_463>

## 7. Commodity derivatives

### 7.1. Ancillary Activity

**Q464: Do you see any difficulties in defining the term ‘group’ as proposed above?**

<ESMA\_QUESTION\_464>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_464>

**Q465: What are the advantages and disadvantages of the two alternative approaches mentioned above (taking into account non-EU activities versus taking into account only EU activities of a group)? Please provide reasons for your answer.**

<ESMA\_QUESTION\_465>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_465>

**Q466: What are the main challenges in relation to both approaches and how could they be addressed?**

<ESMA\_QUESTION\_466>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_466>

**Q467: Do you consider there are any difficulties concerning the suggested approach for assessing whether the ancillary activities constitute a minority of activities at group level? Do you consider that the proposed calculations appropriately factor in activity which is subject to the permitted exemptions under Article 2(4) MiFID II? If no, please explain why and provide an alternative proposal.**

<ESMA\_QUESTION\_467>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_467>

**Q468: Are there other approaches for assessing whether the ancillary activities constitute a minority of activities at group level that you would like to suggest? Please provide details and reasons.**

<ESMA\_QUESTION\_468>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_468>

**Q469: How should “minority of activities” be defined? Should minority be less than 50% or less (50 - x)%? Please provide reasons.**

<ESMA\_QUESTION\_469>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_469>



**Q470: Do you have a view on whether economic or accounting capital should be used in order to define the elements triggering the exemption from authorisation under MiFID II, available under Article 2(1)(j)? Please provide reasons.**

<ESMA\_QUESTION\_470>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_470>

**Q471: If economic capital were to be used as a measure, what do you understand to be encompassed by this term?**

<ESMA\_QUESTION\_471>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_471>

**Q472: Do you agree with the above assessment that the data available in the TRs will enable entities to perform the necessary calculations?**

<ESMA\_QUESTION\_472>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_472>

**Q473: What difficulties do you consider entities may encounter in obtaining the information that is necessary to define the size of their own trading activity and the size of the overall market trading activity from TRs? How could the identified difficulties be addressed?**

<ESMA\_QUESTION\_473>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_473>

**Q474: What do you consider to be the difficulties in defining the volume of the transactions entered into to fulfil liquidity obligations?**

<ESMA\_QUESTION\_474>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_474>

**Q475: How should the volume of the overall trading activity of the firm at group level and the volume of the transactions entered into in order to hedge physical activities be measured? (Number of contracts or nominal value? Period of time to be considered?)**

<ESMA\_QUESTION\_475>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_475>

**Q476: Do you agree with the level of granularity of asset classes suggested in order to provide for relative comparison between market participants?**

<ESMA\_QUESTION\_476>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_476>

**Q477: What difficulties could there be regarding the aggregation of TR data in order to obtain information on the size of the overall market trading activity? How could these difficulties be addressed?**



<ESMA\_QUESTION\_477>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_477>

**Q478: How should ESMA set the threshold above which persons fall within MiFID II's scope? At what percentage should the threshold be set? Please provide reasons for your response.**

<ESMA\_QUESTION\_478>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_478>

**Q479: Are there other approaches for determining the size of the trading activity that you would like to suggest?**

<ESMA\_QUESTION\_479>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_479>

**Q480: Are there other elements apart from the need for ancillary activities to constitute a minority of activities and the comparison between the size of the trading activity and size of the overall market trading activity that ESMA should take into account when defining whether an activity is ancillary to the main business?**

<ESMA\_QUESTION\_480>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_480>

**Q481: Do you see any difficulties with the interpretation of the hedging exemptions mentioned above under Article 2(4)(a) and (c) of MiFID II? How could potential difficulties be addressed?**

<ESMA\_QUESTION\_481>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_481>

**Q482: Do you agree with ESMA's proposal to take into account Article 10 of the Commission Delegated Regulation (EU) No 149/2013 supplementing EMIR in specifying the application of the hedging exemption under Article 2(4)(b) of MiFID II? How could any potential difficulties be addressed?**

<ESMA\_QUESTION\_482>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_482>

**Q483: Do you agree that the obligations to provide liquidity under Article 17(3) and Article 57(8)(d) of MiFID II should not be taken into account as an obligation triggering the hedging exemption mentioned above under Article 2(4)(c)?**

<ESMA\_QUESTION\_483>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_483>

**Q484: Could you provide any other specific examples of obligations of "transactions in commodity derivatives and emission allowances entered into to fulfil obligations to provide liquidity on a trading venue" which ESMA should take into account?**



<ESMA\_QUESTION\_484>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_484>

**Q485: Should the (timeframe for) assessment be linked to audit processes?**

<ESMA\_QUESTION\_485>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_485>

**Q486: How should seasonal variations be taken into account (for instance, if a firm puts on a maximum position at one point in the year and sells that down through the following twelve months should the calculation be taken at the maximum point or on average)?**

<ESMA\_QUESTION\_486>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_486>

**Q487: Which approach would be practical in relation to firms that may fall within the scope of MiFID in one year but qualify for exemption in another year?**

<ESMA\_QUESTION\_487>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_487>

**Q488: Do you see difficulties with regard to the two approaches suggested above?**

<ESMA\_QUESTION\_488>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_488>

**Q489: How could a possible interim approach be defined with regard to the suggestion mentioned above (i.e. annual notification but calculation on a three years rolling basis)?**

<ESMA\_QUESTION\_489>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_489>

**Q490: Do you agree that the competent authority to which the notification has to be made should be the one of the place of incorporation?**

<ESMA\_QUESTION\_490>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_490>

## **7.2. Position Limits**

**Q491: Do you agree with ESMA's proposal to link the definition of a risk-reducing trade under MiFID II to the definition applicable under EMIR? If you do not agree, what alternative definition do you believe is appropriate?**

<ESMA\_QUESTION\_491>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_491>





**Q492: Do you agree with ESMA’s proposed definition of a non-financial entity? If you do not agree, what alternative definition do you believe is appropriate?**

<ESMA\_QUESTION\_492>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_492>

**Q493: Should the regime for subsidiaries of a person other than entities that are wholly owned look to aggregate on the basis of a discrete percentage threshold or on a more subjective basis? What are the advantages and risks of either approach? Do you agree with the proposal that where the positions of an entity that is subject to substantial control by a person are aggregated, they are included in their entirety?**

<ESMA\_QUESTION\_493>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_493>

**Q494: Should the regime apply to the positions held by unconnected persons where they are acting together with a common purpose (for example, “concert party” arrangements where different market participants collude to act for common purpose)?**

<ESMA\_QUESTION\_494>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_494>

**Q495: Do you agree with the approach to link the definition of economically equivalent OTC contract, for the purpose of position limits, with the definitions used in other parts of MiFID II? If you do not agree, what alternative definition do you believe is appropriate?**

<ESMA\_QUESTION\_495>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_495>

**Q496: Do you agree that even where a contract is, or may be, cash-settled it is appropriate to base its equivalence on the substitutability of the underlying physical commodity that it is referenced to? If you do not agree, what alternative measures of equivalence could be used?**

<ESMA\_QUESTION\_496>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_496>

**Q497: Do you believe that the definition of “economically equivalent” that is used by the CFTC is appropriate for the purpose of defining the contracts that are not traded on a trading venue for the position limits regime of MiFID II? Give reasons to support your views as well as any suggested amendments or additions to this definition.**

<ESMA\_QUESTION\_497>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_497>

**Q498: What arrangements could be put in place to support competent authorities identifying what OTC contracts are considered to be economically equivalent to listed contracts traded on a trading venue? ?**

<ESMA\_QUESTION\_498>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_498>

**Q499: Do you agree with ESMA’s proposal that the “same” derivative contract occurs where an identical contract is listed independently on two or more different trading venues? What other alternative definitions of “same” could be applied to commodity derivatives?**

<ESMA\_QUESTION\_499>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_499>

**Q500: Do you agree with ESMA’s proposals on aggregation and netting? How should ESMA address the practical obstacles to including within the assessment positions entered into OTC or on third country venues? Should ESMA adopt a model for pooling related contracts and should this extend to closely correlated contracts? How should equivalent contracts be converted into a similar metric to the exchange traded contract they are deemed equivalent to?**

<ESMA\_QUESTION\_500>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_500>

**Q501: Do you agree with ESMA’s approach to defining market size for physically settled contracts? Is it appropriate for cash settled contracts to set position limits without taking into account the underlying physical market?**

<ESMA\_QUESTION\_501>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_501>

**Q502: Do you agree that it is preferable to set the position limit on a contract for a fixed (excluding exceptional circumstances) period rather than amending it on a real-time basis? What period do you believe is appropriate, considering in particular the factors of market evolution and operational efficiency?**

<ESMA\_QUESTION\_502>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_502>

**Q503: Once the position limits regime is implemented, what period do you feel is appropriate to give sufficient notice to persons of the subsequent adjustment of position limits?**

<ESMA\_QUESTION\_503>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_503>

**Q504: Should positions based on contracts entered into before the revision of position limits be grandfathered and if so how?**

<ESMA\_QUESTION\_504>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_504>

**Q505: Do you agree with ESMA’s proposals for the determination of a central or primary trading venue for the purpose of establishing position limits in the same derivative contracts? If you do not agree, what practical alternative method should be used?**

<ESMA\_QUESTION\_505>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_505>

**Q506: Should the level of “significant volume” be set at a different level to that proposed above? If yes, please explain what level should be applied, and how it may be determined on an ongoing basis?**

<ESMA\_QUESTION\_506>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_506>

**Q507: In using the maturity of commodity contracts as a factor, do you agree that competent authorities apply the methodology in a different way for the spot month and for the aggregate of all other months along the curve?**

<ESMA\_QUESTION\_507>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_507>

**Q508: What factors do you believe should be applied to reflect the differences in the nature of trading activity between the spot month and the forward months?**

<ESMA\_QUESTION\_508>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_508>

**Q509: Do you agree with ESMA’s proposal for trading venues to provide data on the deliverable supply underlying their contracts? If you do not agree, what considerations should be given to determining the deliverable supply for a contract?**

<ESMA\_QUESTION\_509>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_509>

**Q510: In the light of the fact that some commodity markets are truly global, do you consider that open interest in similar or identical contracts in non-EEA jurisdictions should be taken into account? If so, how do you propose doing this, given that data from some trading venues may not be available on the same basis or in the same timeframe as that from other trading venues?**

<ESMA\_QUESTION\_510>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_510>

**Q511: In the absence of published or easily obtained information on volatility in derivative and physical commodity markets, in what ways should ESMA reflect this factor in its methodology? Are there any alternative measures that may be obtained by ESMA for use in the methodology?**

<ESMA\_QUESTION\_511>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_511>

**Q512: Are there any other considerations related to the number and size of market participants that ESMA should consider in its methodology?**

<ESMA\_QUESTION\_512>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_512>

**Q513: Are there any other considerations related to the characteristics of the underlying commodity market that ESMA should consider in its methodology?**

<ESMA\_QUESTION\_513>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_513>

**Q514: For new contracts, what approach should ESMA take in establishing a regime that facilitates continued market evolution within the framework of Article 57?**

<ESMA\_QUESTION\_514>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_514>

**Q515: The interpretation of the factors in the paragraphs above will be significant in applying ESMA's methodology; do you agree with ESMA's interpretation? If you do not agree with ESMA's interpretation, what aspects require amendment?**

<ESMA\_QUESTION\_515>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_515>

**Q516: Are there any other factors which should be included in the methodology for determining position limits? If so, state in which way (with reference to the proposed methodology explained below) they should be incorporated.**

<ESMA\_QUESTION\_516>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_516>

**Q517: What do you consider to be the risks and/or the advantages of applying a different methodology for determining position limits for prompt reference contracts compared to the methodology used for the position limit on forward maturities?**

<ESMA\_QUESTION\_517>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_517>

**Q518: How should the position limits regime reflect the specific risks present in the run up to contract expiry?**

<ESMA\_QUESTION\_518>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_518>

**Q519: If a different methodology is set for the prompt reference contract, would it be appropriate to make an exception where a contract other than the prompt is the key benchmark used by the market?**

<ESMA\_QUESTION\_519>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_519>

**Q520: Do you agree that the baseline for the methodology of setting a position limit should be the deliverable supply? What concrete examples of issues do you foresee in obtaining or using the measure?**

<ESMA\_QUESTION\_520>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_520>

**Q521: If you consider that a more appropriate measure exists to form the baseline of the methodology, please explain the measure and why it is more appropriate. Consideration should be given to the reliability and availability of such a measure in order to provide certainty to market participants.**

<ESMA\_QUESTION\_521>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_521>

**Q522: Do you agree with this approach for the proposed methodology? If you do not agree, what alternative methodology do you propose, considering the full scope of the requirements of Article 57 MiFID II?**

<ESMA\_QUESTION\_522>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_522>

**Q523: Do you have any views on the level at which the baseline (if relevant, for each different asset class) should be set, and the size of the adjustment numbers for each separate factor that ESMA must consider in the methodology defined by Article 57 MiFID II?**

<ESMA\_QUESTION\_523>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_523>

**Q524: Does the approach to asset classes have the right level of granularity to take into account market characteristics? Are the key characteristics the right ones to take into account? Are the conclusions by asset class appropriate?**

<ESMA\_QUESTION\_524>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_524>

**Q525: What trading venues or jurisdictions should ESMA take into consideration in defining its position limits methodology? What particular aspects of these experiences should be included within ESMA's work?**

<ESMA\_QUESTION\_525>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_525>

**Q526: Do you agree that the RTS should accommodate the flexibility to express position limits in the units appropriate to the individual market? Are there any other alternative measures or mechanisms by which position limits could be expressed?**

<ESMA\_QUESTION\_526>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_526>



**Q527: How should the methodology for setting limits take account of a daily contract structure, where this exists?**

<ESMA\_QUESTION\_527>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_527>

**Q528: Do you agree that limits for option positions should be set on the basis of delta equivalent values? What processes should be put in place to avoid manipulation of the process?**

<ESMA\_QUESTION\_528>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_528>

**Q529: Do you agree that the preferred methodology for the calculation of delta-equivalent futures positions is the use of the delta value that is published by trading venues? If you do not, please explain what methodology you prefer, and the reasons in favour of it?**

<ESMA\_QUESTION\_529>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_529>

**Q530: Do you agree that the description of the approach outlined above, combined with the publication of limits under Article 57(9), would fulfil the requirement to be transparent and non-discriminatory?**

<ESMA\_QUESTION\_530>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_530>

**Q531: What challenges are posed by transition and what areas of guidance should be provided on implementation? What transitional arrangements would be considered to be appropriate?**

<ESMA\_QUESTION\_531>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_531>

### **7.3. Position Reporting**

**Q532: Do you agree that, in the interest of efficient reporting, the data requirements for position reporting required by Article 58 should contain elements to enable competent authorities and ESMA to monitor effectively position limits? If you do not agree, what alternative approach do you propose for the collection of information in order to efficiently and with the minimum of duplication meet the requirements of Article 57?**

<ESMA\_QUESTION\_532>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_532>



**Q533: Do you agree with ESMA’s definition of a “position” for the purpose of Article 58? Do you agree that the same definition of position should be used for the purpose of Article 57? If you do not agree with either proposition, please provide details of a viable alternative definition.**

<ESMA\_QUESTION\_533>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_533>

**Q534: Do you agree with ESMA’s approach to the reporting of spread and other strategy trades? If you do not agree, what approach can be practically implemented for the definition and reporting of these trades?**

<ESMA\_QUESTION\_534>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_534>

**Q535: Do you agree with ESMA’s proposed approach to use reporting protocols used by other market and regulatory initiatives, in particular, those being considered for transaction reporting under MiFID II?**

<ESMA\_QUESTION\_535>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_535>

**Q536: Do you have any specific comments on the proposed identification of legal persons and/or natural persons? Do you consider there are any practical challenges to ESMA’s proposals? If yes, please explain them and propose solutions to resolve them.**

<ESMA\_QUESTION\_536>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_536>

**Q537: What are your views on these three alternative approaches for reporting the positions of an end client where there are multiple parties involved in the transaction chain? Do you have a preferred solution from the three alternatives that are described?**

<ESMA\_QUESTION\_537>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_537>

**Q538: What alternative structures or solutions are possible to meet the obligations under Article 58 to identify the positions of end clients? What are the advantages or disadvantages of these structures?**

<ESMA\_QUESTION\_538>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_538>

**Q539: Do you agree with ESMA’s proposal that only volumes traded on-exchange should be used to determine the central competent authority to which reports are made? If you do not agree, what alternative structure may be used to determine the destination of position reports?**

<ESMA\_QUESTION\_539>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_539>



**Q540: Do you agree that position reporting requirements should seek to use reporting formats from other market or regulatory initiatives? If not mentioned above, what formats and initiatives should ESMA consider?**

<ESMA\_QUESTION\_540>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_540>

**Q541: Do you agree that ESMA should require reference data from trading venues and investment firms on commodity derivatives, emission allowances, and derivatives thereof in order to increase the efficiency of trade reporting?**

<ESMA\_QUESTION\_541>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_541>

**Q542: What is your view on the use of existing elements of the market infrastructure for position reporting of both on-venue and economically equivalent OTC contracts? If you have any comments on how firms and trading venues may efficiently create a reporting infrastructure, please give details in your explanation.**

<ESMA\_QUESTION\_542>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_542>

**Q543: For what reasons may it be appropriate to require the reporting of option positions on a delta-equivalent basis? If an additional requirement to report delta-equivalent positions is established, how should the relevant delta value be determined?**

<ESMA\_QUESTION\_543>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_543>

**Q544: Does the proposed set of data fields capture all necessary information to meet the requirements of Article 58(1)(b) MiFID II? If not, do you have any proposals for amendments, deletions or additional data fields to add the list above?**

<ESMA\_QUESTION\_544>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_544>

**Q545: Are there any other fields that should be included in the Commitment of Traders Report published each week by trading venues other than those shown above?**

<ESMA\_QUESTION\_545>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_545>



## 8. Market data reporting

### 8.1. Obligation to report transactions

**Q546: Do you agree with ESMA’s proposal for what constitutes a ‘transaction’ and ‘execution of a transaction’ for the purposes of Article 26 of MiFIR? If not, please provide reasons.**

<ESMA\_QUESTION\_546>

Deutsche Börse Group is of the opinion that a more detailed specification as well as case studies are necessary in order to achieve a consistent and harmonized reporting requirements as regards what constitutes a transaction according to Art 26 (1) MiFIR.

This applies especially to the event definition (e.g. compression, assignment, novation, termination, redemption). In the current set-up the range of events that are considered execution of a transaction may not be consistently captured across industry participants which may lead to difficulties in consistently reporting them.

<ESMA\_QUESTION\_546>

**Q547: Do you anticipate any difficulties in identifying when your investment firm has executed a transaction in accordance with the above principles?**

<ESMA\_QUESTION\_547>

Deutsche Börse Group is of the opinion that a more detailed specification as well as case studies are necessary in order to achieve a consistent and harmonized reporting requirements as regards what constitutes a transaction according to Art 26 (1) MiFIR.

This applies especially to the event definition (e.g. compression, assignment, novation, termination, redemption). In the current set-up the range of events that are considered execution of a transaction may not be consistently captured across industry participants which may lead to difficulties in consistently reporting them.

<ESMA\_QUESTION\_547>

**Q548: Is there any other activity that should not be reportable under Article 26 of MiFIR?**

<ESMA\_QUESTION\_548>

Deutsche Börse Group suggests to exclude the expiry of derivatives and repos.

<ESMA\_QUESTION\_548>

**Q549: Do you foresee any difficulties with the suggested approach? Please elaborate.**

<ESMA\_QUESTION\_549>

Deutsche Börse Group foresees some difficulties as regards the 'standardisation in the industry of the 'circumstances' under which the relevant details will be deemed to be passed. Counterparties may agree different circumstance under which a transaction is deemed to have been transmitted which will introduce a burden and may lead to inconsistencies and the potential that neither the transmitter nor receiver reports because the rules are unclear.

<ESMA\_QUESTION\_549>

**Q550: We invite your comments on the proposed fields and population of the fields. Please provide specific references to the fields which you are discussing in your response.**

<ESMA\_QUESTION\_550>



Deutsche Börse Group is concerned as regards Art 25 (5) MiFIR.

According to Art 26 (5) MiFIR the operator of a trading venue shall report details of transactions in financial instruments traded on its platform which are executed through its systems by a firm which is not subject to this regulation in accordance with Art 26 (1) and (3).

The operator itself will be liable to report and thus responsible to report accurately and completely (Art. 26 (1) MIFIR). This means that Deutsche Börse Group is accountable for the content of the reported transactions. As a consequence, ESMA is to distinctly define that the operator of a trading venue has to fill the fields to be reported solely from the operator's point of view. In practice this means that Deutsche Börse Group, similar to any other trading venue in the same position, is not able to deliver the data for the transaction reporting fields 'Client Identification' (designation and additional details), 'Short Selling Flag', 'Algo ID' and 'Trader ID'. These fields may only be sourced in by the trading participants liable to transaction reporting directly. Furthermore, only the trading participants themselves are capable of assuming full responsibility for the correctness of the data to be reported.

Additionally, the fields mentioned above are neither part of the order nor the execution confirmation. It is an uphill task to integrate these fields to the speed-oriented trading process for the purpose of transaction reporting. It is therefore indispensable to obtain comprehensive case studies by ESMA for further clarification.

Any definition of fields also used for EMIR transaction reporting must be the same to allow EMIR reporting to also fulfil MiFIR obligations. Fields need to be clear and unambiguous in their definition, acceptable values and the decision tree in order to get consistent values submitted by all participants in the market.

In this context, under EMIR the BUY/SELL indicator seems clearly specified; it is a mandatory field, reportable on all instruments types, with only two possible values, that appear self-evident as to what needs reported. However, feedback from Trade Repositories is that the matching rate on this field is low. Consider the example of a Fixed versus Float IRS, both parties may consider themselves the 'buyer' or indeed the 'seller'. This leads to poor quality data.

<ESMA\_QUESTION\_550>

**Q551: Do you have any comments on the designation to identify the client and the client information and details that are to be included in transaction reports?**

<ESMA\_QUESTION\_551>

Deutsche Börse Group supports the LEI to be utilised for legal entities. As for private persons, please refer to our answer for Q 550.

Deutsche Börse Group would like to point out – with reference to our answer in Q550 – that ESMA needs to distinctly define that the operator of a trading venue has to fill the fields to be reported solely from the operator's point of view for Art 26 (5). In practice this means that Deutsche Börse Group, similar to any other trading venue in the same position, is not able to deliver the data for the transaction reporting fields 'Client Identification' (designation and additional details), 'Short Selling Flag', 'Algo ID' and 'Trader ID'. These fields may only be sourced by the trading participants liable to transaction reporting themselves.

<ESMA\_QUESTION\_551>

**Q552: What are your views on the general approach to determining the relevant trader to be identified?**

<ESMA\_QUESTION\_552>

Deutsche Börse Group generally agrees with this approach, however, would like to refer again to our answer to Q550.

Deutsche Börse Group would like to point out – with reference to our answer in Q550 – that ESMA needs to distinctly define that the operator of a trading venue has to fill the fields to be reported solely from the operator's point of view for Art 26 (5). In practice this means that Deutsche Börse Group, similar to any

other trading venue in the same position, is not able to deliver the data for the transaction reporting fields ‘Client Identification’ (designation and additional details), ‘Short Selling Flag’, ‘Algo ID’ and ‘Trader ID’. These fields may only be sourced by the trading participants liable to transaction reporting themselves.

<ESMA\_QUESTION\_552>

**Q553: In particular, do you agree with ESMA’s proposed approach to assigning a trader ID designation for committee decisions? If not, what do you think is the best way for NCAs to obtain accurate information about committee decisions?**

<ESMA\_QUESTION\_553>

Deutsche Börse Group foresees some problems as regards providing unique, consistent Trader IDs across multiple systems as this will be difficult for IF organizations. It will most likely require significant aggregation/mapping.

As regards the committee approach we deem this a questionable approach, as it is open to abuse when additional information is required on the committee composition over time (unless this is captured elsewhere).

<ESMA\_QUESTION\_553>

**Q554: Do you have any views on how to identify the relevant trader in the cases of Direct Market Access and Sponsored Access?**

<ESMA\_QUESTION\_554>

Deutsche Börse Group suggests that it would seem logical to require the Investment firm to issue trader IDs to external traders in the case of Direct Market Access and Sponsored Access. Whilst this is procedurally possible it may cause issues in legacy systems in identifying the external trader.

<ESMA\_QUESTION\_554>

**Q555: Do you believe that the approach outlined above is appropriate for identifying the ‘computer algorithm within the investment firm responsible for the investment decision and the execution of the transaction’? If not, what difficulties do you see with the approach and what do you believe should be an alternative approach?**

<ESMA\_QUESTION\_555>

Deutsche Börse Group would like to answer this question in a broader context, i.e. in combination with Art. 48.10 MiFID. Art. 48.10 MiFID states that ‘[...] Member States shall require a regulated market to be able to identify, by means of flagging from members or participants, orders generated by algorithmic trading, the different algorithms used for the creation of orders and the relevant persons initiating those orders. [...]’. It is in our view unfortunate that ESMA was not tasked to draft regulatory technical standards in this context as efficient and uniform implementation throughout Europe will be impossible without second level detailing of the above provisions. The reasoning for this opinion is set out below. We recommend that ESMA should thus issue respective guidelines and recommendations under Art. 16.1 Regulation 1095/2010 (‘ESMA Regulation’) in due course.

Trading venues and market participants alike require second level detailing and harmonized specifications with regard to the flagging of algorithms because of the following two reasons:

- 1) Regulatory Arbitrage: If every Member State applies different rules this would allow for regulatory arbitrage. Some Member States might implement stricter rules than others. As a result the perceived benefits for regulators would vanish if different rules would be applied across Europe. Same rules will allow national competent authorities (NCAs) to detect instances more efficiently where certain algorithms were used in potential market abuse or disorderly trading activities.
- 2) Enormous growth in complexity without second level rules: The amount of complexity investment firms would have to deal with, due to a lack of harmonised rules, would be tremendous and result in high IT implementation costs. Therefore we urge ESMA to develop guidelines that are applicable across Europe.

Deutsche Börse Group would like to contribute the following aspects to potential ESMA guidelines and recommendations.

#### 1) Definition of algorithm

As a prerequisite, in order to define principles for the labelling requirement the definition of what constitutes an algorithm is essential but has not yet been defined. In the Discussion Paper it is suggested that the investment firm will have the responsibility and discretion over how it identifies its algorithms throughout the lifecycle of the algorithm (79 on page 453 Discussion Paper) and thereby hints to the importance of having precise definitions for the term ‘algorithm’ and the determination of the respective chain of action that constitutes the ‘algorithmic trading activity’ based upon the definition of the term ‘algorithm’. These definitions are essential in order to achieve consistency across Europe as otherwise there would be no level-playing field. We agree that it should be the investment firm’s responsibility to identify them, but that ESMA should provide a definition of what constitutes an algorithm. Besides, Art. 17 MiFID requires investment firms to provide a description of the nature of algorithms and under Art. 25(1) MiFIR they are required to have adequate records to orders & transactions, i.e. being able to answer in relation to matters such as (i) what algo was responsible for the transaction (ii) characteristics of the algorithm and (iii) role of an algo in execution. Ultimately at that point in time, a definition of the term would be inevitable.

We believe that two fundamental definitions are necessary in order to make algorithmic flagging effective: (1) a precise definition for the term ‘algorithm’ and (2) the determination of the respective chain of action that constitutes the ‘algorithmic trading activity’ based upon the definition of the term ‘algorithm’.

#### 2) Flagging principles

We have noticed that ESMA proposes one element that should be adopted for the identification of algorithms in the context of transaction reporting under Art. 26.3 MiFIR (see p. 453-454 in the Discussion Paper). This refers to identifiers which must be unique, consistent and precise. ESMA proposes that the same algorithm identifier should apply for a specific algorithm code regardless of the products or markets that the algorithm applies to (82 (iii), p. 454). ESMA hereby explicitly points to the need for a precise definition of the term ‘algorithm’ and the chain of processes deemed to determine algorithmic trading (see point 1). Moreover, a volume-weighted average price (VWAP) algorithm used in the cash market might be different from a VWAP algorithm used in the derivatives market. We therefore recommend that an algorithm identifier should apply for a specific algorithm per product/market, as also markets can have specifics, not attributable to other markets.

According to ESMA an algorithm’s designation must be unique over time (82 (iv), p. 453) and not be used again once the usage of an algorithm discontinued. We believe that such uniqueness principle will still be fulfilled as long as the code being used to identify the discontinued algorithm will not be used for a while (e.g. three months). Due to the high number of algorithms active in markets and the definition what constitutes an algorithm and algorithmic trading, the uniqueness requirement might encounter potential restrictions in terms of technical capabilities of implementations within trading systems, we recommend ESMA to reconsider this aspect.

In addition to those principles ESMA does not mention anything further of how algorithms should be flagged. We suggest that ESMA takes a look at countries where flagging has been implemented as they could provide ideas for an implementation in Europe.

Further only members and participants need to flag (Art. 48.10 MiFID), thereby only direct members of an exchange and direct participants of an MTF (cf. Recital 16 MiFID). Art. 26.3 MiFIR (transaction reporting) refers to investment firms responsible for the investment decision and the execution decision. However, ESMA proposes in the Discussion Paper to flag the algorithm generated by the investment firm (investment decision) separately from the execution decision (33 on page 502). Currently it is best practice in countries where an algo-flag has been introduced that the sequence of instructions that determine an algorithm requires labelling, but not to use separate flags to identify the investment decision and the execution decision. There is no benefit of having two separate flags. It also would not make sense to have investment decisions labelled by any indirect market participant alone as only the last interacting algorithm, which is typically with the direct members or participants, would leave its footprint for the

order and no other root could be afterwards. For example a directional order being routed through a VWAP algorithm will always appear to be VWAP and not directional at all. Besides, this would add legal, functional and technical complexity to a high degree. We recommend that only direct exchange participants that chose to use indirect channels need to flag, because these are relevant participants for the exchange environment. Therefore we would kindly ask ESMA to reconsider this.

We recommend that the requirement to flag algorithms should only apply to executable orders, i.e. orders that can be matched against an opposite order under the rules of the different trading venues.

To summarize, we believe it is essential that algo-flagging rules are harmonised across Europe to ensure a level-playing field. The minimum requirements suggested by ESMA in the Discussion Paper in the context of transaction reporting could be used as a starting point but should be complemented by additional elements especially with respect to what constitutes an algorithm (term & scope) and how to flag those algorithms.

<ESMA\_QUESTION\_555>

**Q556: Do you foresee any problem with identifying the specific waiver(s) under which the trade took place in a transaction report? If so, please provide details.**

<ESMA\_QUESTION\_556>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_556>

**Q557: Do you agree with ESMA's proposed approach to adopt a simple short sale flagging approach for transaction reports? If not, what other approaches do you believe ESMA should consider and why?**

<ESMA\_QUESTION\_557>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_557>

**Q558: Which option do you believe is most appropriate for flagging short sales? Alternatively, what other approaches do you think ESMA should consider and why?**

<ESMA\_QUESTION\_558>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_558>

**Q559: What are your views regarding the two options above?**

<ESMA\_QUESTION\_559>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_559>

**Q560: Do you agree with ESMA's proposed approach in relation to reporting aggregated transactions? If not, what other alternative approaches do you think ESMA should consider and why?**

<ESMA\_QUESTION\_560>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_560>

**Q561: Are there any other particular issues or trading scenarios that ESMA should consider in light of the short selling flag?**

<ESMA\_QUESTION\_561>

TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_561>

**Q562: Do you agree with ESMA’s proposed approach for reporting financial instruments over baskets? If not, what other approaches do you believe ESMA should consider and why?**

<ESMA\_QUESTION\_562>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_562>

**Q563: Which option is preferable for reporting financial instruments over indices? Would you have any difficulty in applying any of the three approaches, such as determining the weighting of the index or determining whether the index is the underlying in another financial instrument? Alternatively, are there any other approaches which you believe ESMA should consider?**

<ESMA\_QUESTION\_563>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_563>

**Q564: Do you think the current MiFID approach to branch reporting should be maintained?**

<ESMA\_QUESTION\_564>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_564>

**Q565: Do you anticipate any difficulties in implementing the branch reporting requirement proposed above?**

<ESMA\_QUESTION\_565>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_565>

**Q566: Is the proposed list of criteria sufficient, or should ESMA consider other/extra criteria?**

<ESMA\_QUESTION\_566>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_566>

**Q567: Which format, not limited to the ones above, do you think is most suitable for the purposes of transaction reporting under Article 26 of MiFIR? Please provide a detailed explanation including cost-benefit considerations.**

<ESMA\_QUESTION\_567>

Similar to the answer to question 550 above, Deutsche Börse Group considers that the format used for reporting needs to promote accuracy and consistency to ensure that the eventual data set captured is of good quality.

Rather than add general fields that then require additional text clarification as to whether they are mandatory or optional, it would be possible to capture some of these business rules within a well-defined schema. This can then be used for validation/verification of the data. Create specific sections in the schema that are applicable to particular products or groups of data. Define what should happen if a value is not applicable or not available at the time of reporting explicitly; this will avoid participants adopting ad-hoc internal policies or inventing new values to submit.

<ESMA\_QUESTION\_567>

## 8.2. Obligation to supply financial instrument reference data

**Q568: Do you anticipate any difficulties in providing, at least daily, a delta file which only includes updates?**

<ESMA\_QUESTION\_568>

Yes, Deutsche Börse Group anticipates difficulties providing a delta file and would suggest a full daily file instead. Using a Delta File would require the recipient of the file to always have and maintain the correct data universe. The full daily file delivery would ensure that no data is being missed out and the recipient has always the full data set available while being more efficient at the same time.

<ESMA\_QUESTION\_568>

**Q569: Do you anticipate any difficulties in providing, at least daily, a full file containing all the financial instruments?**

<ESMA\_QUESTION\_569>

Deutsche Börse Group supports the approach of submitting a full file per day in order to minimize any potential mistakes. One zipped full file per day with public domain attributes is feasible.

<ESMA\_QUESTION\_569>

**Q570: Do you anticipate any difficulties in providing a combination of delta files and full files?**

<ESMA\_QUESTION\_570>

Yes, Deutsche Börse Group anticipates difficulties providing a delta file and would suggest a full daily file instead. We therefore recommend to deliver one full file per day only.

<ESMA\_QUESTION\_570>

**Q571: Do you anticipate any difficulties in providing details of financial instruments twice per day?**

<ESMA\_QUESTION\_571>

Currently intraday admission, cancellations or changes to existing exchange listings on our markets do not exist. As a result, the need for additional intraday data deliveries from our data vendors is quasi non-existing.

Instrument data may change, instruments will be cancelled or changed during the course of the day but changes to listing data triggered by changes of instrument data do only become effective the next trading day.

<ESMA\_QUESTION\_571>

**Q572: What other aspects should ESMA consider when determining a suitable solution for the timeframes of the notifications? Please include in your response any foreseen technical limitations.**

<ESMA\_QUESTION\_572>

Deutsche Börse Group would like to suggest a single delivery within a reasonable timeframe for a delivery between market close and the next day's opening. Minority of derivative instruments and practically no cash market instruments are created intraday.

<ESMA\_QUESTION\_572>

**Q573: Do you agree with the proposed fields? Do trading venues and investment firms have access to the specified reference data elements in order to populate the proposed fields?**

<ESMA\_QUESTION\_573>

No, Deutsche Börse cannot agree to the proposed scope of data fields. ESMA needs take into consideration that the suggested list of data fields is significantly broader than trading venues and IFs will be able to provide for. This is due to the fact that most trading venues do likely not hold the IP rights on the respective data. Many of the proposed fields are not free of Third Party Rights (e.g. by National Numbering Agency, NNA).

In the case of Deutsche Börse Group the NNA is WM Wertpapiermitteilungen, who holds IP rights on the requested instrument data. However, in line with global agreements some data fields are being provided free of licensing arrangements by the NNAs. Data fields free of data license fees usually encompass the following data fields (e.g. as defined by Association of National Numbering Agencies ANNA):

- ISIN
- Instrument status
- Instrument category
- Issue description
- Issue currency
- Maturity/expiry date
- Type of interest
- Issuer long name
- Issuer legal registration country

Taking into consideration that the NCAs are supposed to submit the data technically provided by the trading venues (and Ifs) to ESMA who will publish the data on an open web-page, only the above lined out data fields can be submitted by trading venues to the NCAs. Any additional data field submission would require a license agreement between the user of the data (in this case the NCA and possibly ESMA) but would restrict public display of the data (apart from the free of charge data) on the ESMA web-page.

However, we are confident that for the required purposes the restricted data set as outlined above will be sufficient. Already as of today, some of the requested data is being displayed on the ESMA web-page. In case the NCA or ESMA would need additional data for NCA or ESMA internal use only, a contract with the respective NNA would be necessary, though trading venues would be in the position to provide the technical delivery to the NCAs.

<ESMA\_QUESTION\_573>

**Q574: Are you aware of any available industry classification standards you would consider appropriate?**

<ESMA\_QUESTION\_574>

As regards appropriate classification Deutsche Börse Group suggests the CFI-code for cash market instruments and the Alternative Instrument Identifier (AII) to be appropriate to classify derivative contracts.

- MIC-Code of Trading Venue
- Exchange product code: e.g. FGB
- Derivative type: F = Future, O = option
- Call/put identifier: C = Call, P = Put or empty for futures
- expiry date (YYYY-MM-DD)
- strike price for options

<ESMA\_QUESTION\_574>

**Q575: For both MiFID and MAR (OTC) derivatives based on indexes are in scope. Therefore it could be helpful to publish a list of relevant indexes. Do you foresee any difficulties in providing reference data for indexes listed on your trading venue? Furthermore, what reference data could you provide on indexes?**

<ESMA\_QUESTION\_575>

Deutsche Börse Group does not foresee any problems as regards the additional submissions to the NCA. We suggest the following data fields:

- Index ISIN
- Index name





- Constituent ISINs

<ESMA\_QUESTION\_575>

**Q576: Do you agree with ESMA's intention to maintain the current RCA determination rules?**

<ESMA\_QUESTION\_576>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_576>

**Q577: What criteria would you consider appropriate to establish the RCA for instruments that are currently not covered by the RCA rule?**

<ESMA\_QUESTION\_577>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_577>

<ESMA\_QUESTION\_1>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_1>

### **8.3. Obligation to maintain records of orders**

**Q578: In your view, which option (and, where relevant, methodology) is more appropriate for implementation? Please elaborate.**

<ESMA\_QUESTION\_578>

Deutsche Börse Group likes to point out that it considers Art 25 MiFIR as an important article, and supports ESMA in developing technical standards to maintain records of orders. However, time has not been sufficient to provide for a detailed opinion as regards this important topic. Therefore, instead of providing a final view in this respect, Deutsche Börse Group will provide some overall guiding principles and opinions to start with.

As to be assumed, Deutsche Börse Group would naturally prefer option 1 overall all other options due to the obvious reasons. However, option 3 might be necessary in order to come up with a partial harmonization of several data. ESMA has correctly identified various data which would need to be made available in a specified format. These encompass:

- member ID,
- participant which transmitted the order,
- order ID, and
- date and time,

Of course the application and use of industry standards like ISO, or LEI could be supportive in order to come up with harmonized data sets in this respect.

However, application of those standards within existing infrastructures across markets usually requires time for adaption taking into account that technical implementation requires long-term planning, As of today the LEI is not yet fully implemented. Adaptions by participants to come up with harmonized data fields will take time. ESMA in any case should therefore, in any case allow for sufficient time to implement those requirements.



We would like to take the opportunity to refer to Art 26 as regards the application of an Algo Flag. This flag should be harmonized as well across the EU. The flag applied through the German HFT law, should be considered in this respect as a valid option avoiding unnecessary burden on the industry.

<ESMA\_QUESTION\_578>

**Q579: In your view, what are the data elements that cannot be harmonised? Please elaborate.**

<ESMA\_QUESTION\_579>

Deutsche Börse Group likes to point out that this is no final view due to a lack of time for more granular research up to now,

However, we would suggest that most likely it will be impossible to provide for a harmonized order ID across venues. This data would need to be stored at the IF when submitting connected orders across various markets in the same instrument at the same time,

Additionally, and referring to our input to questions 602 and questions 604 clocks cannot be 100% synchronized across Europe. However, there are narrow substitutes for this.

<ESMA\_QUESTION\_579>

**Q580: For those elements that would have to be harmonised under Option 2 or under Option 3, do you think industry standards/protocols could be utilised? Please elaborate.**

<ESMA\_QUESTION\_580>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_580>

**Q581: Do you foresee any difficulties with the proposed approach for the use of LEI?**

<ESMA\_QUESTION\_581>

On a long term basis, Deutsche Börse Group would assume that LEI should be broadly used; however, in this context it would be necessary to allow for a sufficiently long implementation period, as technical adjustments on trading infrastructures need careful consideration and implementation which requires time.

<ESMA\_QUESTION\_581>

**Q582: Do you foresee any difficulties maintaining records of the Client IDs related with the orders submitted by their members/participants? If so, please elaborate.**

<ESMA\_QUESTION\_582>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_582>

**Q583: Are there any other solutions you would consider as appropriate to track clients' order flows through member firms/participants of trading venues and to link orders and transactions coming from the same member firm/participant?**

<ESMA\_QUESTION\_583>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_583>

**Q584: Do you believe that this approach allows the order to be uniquely identified If not, please elaborate**

<ESMA\_QUESTION\_584>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_584>



**Q585: Do you foresee any difficulties with the implementation of this approach? Please elaborate**

<ESMA\_QUESTION\_585>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_585>

**Q586: Do you foresee any difficulties with the proposed approach? Please elaborate**

<ESMA\_QUESTION\_586>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_586>

**Q587: Do you foresee any difficulties with the proposed approach? Please elaborate.**

<ESMA\_QUESTION\_587>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_587>

**Q588: Would the breakdown in the two categories of order types create major issues in terms of mapping of the orders by the Trading Venues and IT developments? Please elaborate**

<ESMA\_QUESTION\_588>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_588>

**Q589: Do you foresee any problems with the proposed approach?**

<ESMA\_QUESTION\_589>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_589>

**Q590: Are the proposed validity periods relevant and complete? Should additional validity period(s) be provided? Please elaborate.**

<ESMA\_QUESTION\_590>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_590>

**Q591: Do you agree that standardised default time stamps regarding the date and time at which the order shall automatically and ultimately be removed from the order book relevantly supplements the validity period flags?**

<ESMA\_QUESTION\_591>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_591>

**Q592: Do venues use a priority number to determine execution priority or a combination of priority time stamp and sequence number?**

<ESMA\_QUESTION\_592>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_592>

**Q593: Do you foresee any difficulties with the three options described above? Please elaborate.**

<ESMA\_QUESTION\_593>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_593>

**Q594: Is the list of specific order instructions provided above relevant? Should this list be supplemented? Please elaborate.**

<ESMA\_QUESTION\_594>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_594>

**Q595: Are there any other type of events that should be considered?**

<ESMA\_QUESTION\_595>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_595>

**Q596: Do you foresee any difficulties with the proposed approach? Please elaborate.**

<ESMA\_QUESTION\_596>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_596>

**Q597: Do you foresee any problems with the proposed approach? Do you consider any other alternative in order to inform about orders placed by market makers and other liquidity providers?**

<ESMA\_QUESTION\_597>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_597>

**Q598: Do you foresee any difficulties in generating a transaction ID code that links the order with the executed transaction that stems from that order in the information that has to be kept at the disposal of the CAs? Please elaborate.**

<ESMA\_QUESTION\_598>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_598>

**Q599: Do you foresee any difficulties with maintaining this information? Please elaborate.**

<ESMA\_QUESTION\_599>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_599>

#### **8.4. Requirement to maintain records of orders for firms engaging in high-frequency algorithmic trading techniques (Art. 17(7) of MIFID II)<sup>3</sup>**

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<sup>3</sup> Please note that this section has to be read in conjunction with the section on the “Record keeping and co-operation with national competent authorities” in this DP.

**Q600: Do you foresee any difficulties with the elements of data to be stored proposed in the above paragraph? If so, please elaborate.**

<ESMA\_QUESTION\_600>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_600>

**Q601: Do you foresee any difficulties in complying with the proposed timeframe?**

<ESMA\_QUESTION\_601>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_601>

## **8.5. Synchronisation of business clocks**

**Q602: Would you prefer a synchronisation at a national or at a pan-European level? Please elaborate. If you would prefer synchronisation to a single source, please indicate which would be the reference clock for those purposes.**

<ESMA\_QUESTION\_602>

Due to technical reasons Deutsche Börse Group does not agree with introducing a synchronisation of business clocks for recording data and time of reportable events at a national or at a pan-European level and rejects Option 2.

Deutsche Börse Group strongly discourages from synchronizing to only one distinct reference time source as the individual network distance to this single reference source causes divergences and carries time drifts of unknown extent by law of physics. Given only one reference source, depending on the distance from the individual networks, this may even lead to unintended consequences of less time coherence of European trading venues compared to a situation in which individual networks are governed by the below mentioned standards and best practices.

Also, Deutsche Börse Group rejects Option 1 as the problem of divergences and time drifts is not solved even if synchronization takes place with the closest available timing centres. While the distance from the individual networks to the timing centres is unequal, no specific protocol for synchronizing the internal network clocks can equalize resulting latencies but only compensate them to a certain extent.

Instead, Deutsche Börse Group holds that standards and best practices like the Network Time Protocol (NTP) and Precision Time Protocol (PTP; IEEE-1588) are best suited to continuously synchronize internal systems if the installations include GPS and / or DCF77 as clock reference sources with European-wide or global (GPS) availability (DCF77 is used as back-up of GPS by Deutsche Börse Group). The individual network planning then has to be individually optimized, including decisions upon the internal distances between a GPS antenna placed on the roof and the technical network installations within the building.

This implies that Deutsche Börse Group shares ESMA's preliminary view that each trading venue should rely on an atomic clock to issue timestamps – given that an atomic reference clock is part of the mentioned internationally recognized standards and best practices and no direct connection to an atomic clock is required.

<ESMA\_QUESTION\_602>

**Q603: Do you agree with the requirement to synchronise clocks to the microsecond level?**

<ESMA\_QUESTION\_603>



No, Deutsche Börse Group does not agree with the requirement to synchronize clocks to the microsecond. Indeed, Deutsche Börse Group holds that network synchronisation should be required at the accuracy of milliseconds in normal case.

With Network Time Protocol (NTP) being the most common protocol, its technical synchronisation accuracies reach levels within the millisecond range.

In contrast to this, only Precision Time Protocol achieves accuracies within the microsecond range. Still, this synchronisation accuracy depends not only on an optimized Local Area Network (LAN) and a PTP grandmaster server but also on an optimized network topology including switches and slave hardware.

Deutsche Börse Group would also like to point out the following:

Individual networks of trading venues and market data dissemination systems (which carry the continuous data feed to be published under the post-trade transparency requirements (Articles 6, 7, 10, 11, 20 and 21 of MiFIR) do reach individual accuracies within the millisecond range in normal case. Nevertheless it is not indicated to synchronize these different networks among each other beyond the used time protocol standards as market data dissemination systems only transfer the original, precise timestamp of the trading system (network) to customers and do not carry own timestamps with relevance for customers.

In this context, Deutsche Börse Group disagrees with ESMA that data reporting services (APAs, ARMs and CTPs) should be subject to clock synchronisation among each other as they only receive, process and disseminate timestamps of reportable events which have already been printed by upstream systems of trading venues. None of them create timestamps in their own right.

<ESMA\_QUESTION\_603>

**Q604: Which would be the maximum divergence that should be permitted with respect to the reference clock? How often should any divergence be corrected?**

<ESMA\_QUESTION\_604>

Deutsche Börse Group argues that the maximum permitted divergence with respect to the reference clock should be one millisecond relative to CET or CEST in normal case but also asks for an appropriate transition period for the implementation of the concept of maximum divergence as a regulatory standard.

Again, Deutsche Börse Group refers to the Network Time Protocol (NTP) which is the most common protocol and enables synchronisation accuracies only within the millisecond range but not beyond.

Although not being seen as useful, but if required by ESMA, Deutsche Börse Group acknowledges that the conversion of CET to UTC based synchronisation and time stamping is principally feasible. Yet this would require a longer transition period for scoping, implementation and testing of all relevant internal systems of at least one to two years.

Deutsche Börse Group is of the opinion that measurements of internal divergences should take place continuously and divergences should be controlled for not exceeding threshold values.

In this context, Deutsche Börse Group highly recommends that market participants / members synchronize their clocks to the clocks of trading venues; this should however not be written out as a hard requirement.

Finally, as regards 'reportable events' mentioned in Article 50 (2) MiFID, Deutsche Börse Group agrees with ESMA that these should encompass:

- publication of post-trade transparency data for equity, equity-like and non-equity instruments, as prescribed by Articles 6, 7, 10, 11, 20 and 21 of MiFIR;
- transaction reporting under Article 26 MiFIR;
- data related to orders placed or submitted that might be requested by NCAs to trading venues under Article 25(2) MiFIR.



<ESMA\_QUESTION\_604>

## 9. Post-trading issues

### 9.1. Obligation to clear derivatives traded on regulated markets and timing of acceptance for clearing (STP)

**Q605:** What are your views generally on (1) the systems, procedures, arrangements supporting the flow of information to the CCP, (2) the operational process that should be in place to perform the transfer of margins, (3) the relevant parties involved these processes and the time required for each of the steps?

<ESMA\_QUESTION\_605>

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<ESMA\_QUESTION\_605>

**Q606:** In particular, who are currently responsible, in the ETD and OTC context, for obtaining the information required for clearing and for submitting the transaction to a CCP for clearing? Do you consider that anything should be changed in this respect? What are the current timeframes, in the ETD and OTC context, between the conclusion of the contract and the exchange of information required for clearing on one hand and on the other hand between the exchange of information and the submission of the transaction to the CPP?

<ESMA\_QUESTION\_606>

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<ESMA\_QUESTION\_606>

**Q607:** What are your views on the balance of these risks against the benefits of STP for the derivatives market and on the manner to mitigate such risks at the different levels of the clearing chain?

<ESMA\_QUESTION\_607>

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<ESMA\_QUESTION\_607>

**Q608:** When does the CM assume the responsibility of the transactions? At the time when the CCP accepts the transaction or at a different moment in time?

<ESMA\_QUESTION\_608>

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<ESMA\_QUESTION\_608>

**Q609:** What are your views on how practicable it would be for CM to validate the transaction before their submission to the CCP? What would the CM require for this purpose and the timeframe required? How would this validation process fit with STP?

<ESMA\_QUESTION\_609>

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<ESMA\_QUESTION\_609>



**Q610: What are your views on the manner to determine the timeframe for (1) the exchange of information required for clearing, (2) the submission of a transaction to the CCP, and the constraints and requirements to consider for parties involved in both the ETD and OTC contexts?**

<ESMA\_QUESTION\_610>  
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<ESMA\_QUESTION\_610>

**Q611: What are your views on the systems, procedures, arrangements and timeframe for (1) the submission of a transaction to the CCP and (2) the acceptance or rejection of a transaction by the CCP in view of the operational process required for a strong product validation in the context of ETD and OTC? How should it compare with the current process and timeframe? Does the current practice envisage a product validation?**

<ESMA\_QUESTION\_611>  
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<ESMA\_QUESTION\_611>

**Q612: What should be the degree of flexibility for CM, its timeframe, and the characteristics of the systems, procedures and arrangements required to supporting that flexibility? How should it compare to the current practices and timeframe?**

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<ESMA\_QUESTION\_612>

**Q613: What are your views on the treatment of rejected transactions for transactions subject to the clearing requirement and those cleared on a voluntary basis? Do you agree that the framework should be set in advance?**

<ESMA\_QUESTION\_613>  
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<ESMA\_QUESTION\_613>

## **9.2. Indirect Clearing Arrangements**

**Q614: Is there any reason for ESMA to adopt a different approach (1) from the one under EMIR, (2) for OTC and ETD? If so, please explain your reasons.**

<ESMA\_QUESTION\_614>  
Deutsche Börse Group believes that adopting a different approach from the one under EMIR would entail the risk of creating uncertainty as to how the different regimes would have to be applied in case of cleared OTC and/or ETD business. Therefore, ESMA should mandate the same approach.

Should ESMA however decide to make adjustments, which deviate from the current approach under EMIR, it needs to be assured, that these are implemented across all regulation concurrently in order to ensure consistency.

<ESMA\_QUESTION\_614>

**Q615: In your view, how should it compare with current practice?**

<ESMA\_QUESTION\_615>  
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<ESMA\_QUESTION\_615>

