



European Securities and  
Markets Authority

# Reply form for the ESMA MiFID II/MiFIR Consultation 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 Consultation 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:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. 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. Exemption from the applicability of MiFID for persons providing an investment service in an incidental manner**

**Q1: Do you agree with the proposed cumulative conditions to be fulfilled in order for an investment service to be deemed to be provided in an incidental manner?**

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

### **2.2. Investment advice and the use of distribution channels**

**Q2: Do you agree that it is appropriate to clarify that the use of distribution channels does not exclude the possibility that investment advice is provided to investors?**

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

### **2.3. Compliance function**

**Q3: Do you agree that the existing compliance requirements included in Article 6 of the MiFID Implementing Directive should be expanded?**

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

**Q4: Are there any other areas of the Level 2 requirements concerning the compliance function that you consider should be updated, improved or revised?**

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

### **2.4. Complaints-handling**



**Q5: Do you already have in place arrangements that comply with the requirements set out in the draft technical advice set out above?**

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

## **2.5. Record-keeping (other than recording of telephone conversations or other electronic communications)**

**Q6: Do you consider that additional records should be mentioned in the minimum list proposed in the table in the draft technical advice above? Please list any additional records that could be added to the minimum list for the purposes of MiFID II, MiFIR, MAD or MAR.**

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

**Q7: What, if any, additional costs and/or benefits do you envisage arising from the proposed approach? Please quantify and provide details.**

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

## **2.6. Recording of telephone conversations and electronic communications**

**Q8: What additional measure(s) could firms implement to reduce the risk of non-compliance with the rules in relation to telephone recording and electronic communications?**

<ESMA\_QUESTION\_8>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_8>

**Q9: Do you agree that firms should periodically monitor records to ensure compliance with the recording requirement and wider regulatory requirements?**

<ESMA\_QUESTION\_9>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_9>

**Q10: Should any additional items of information be included as a minimum in meeting minutes or notes where relevant face-to-face conversations take place with clients?**

<ESMA\_QUESTION\_10>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_10>



**Q11: Should clients be required to sign these minutes or notes?**

<ESMA\_QUESTION\_11>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_11>

**Q12: Do you agree with the proposals for storage and retention set out in the above draft technical advice?**

<ESMA\_QUESTION\_12>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_12>

**Q13: More generally, what additional costs, impacts and/or benefits do you envisage as a result of the requirements set out in the entire draft technical advice above?**

<ESMA\_QUESTION\_13>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_13>

## **2.7. Product governance**

**Q14: Should the proposed distributor requirements apply in the case of distribution of products (e.g. shares and bonds as well as over-the-counter (OTC) products) available on the primary market or should they also apply to distribution of products on the secondary market (e.g. freely tradable shares and bonds)? Please state the reason for your answer.**

<ESMA\_QUESTION\_14>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_14>

**Q15: When products are manufactured by non-MiFID firms or third country firms and public information is not available, should there be a requirement for a written agreement under which the manufacturer must provide all relevant product information to the distributor?**

<ESMA\_QUESTION\_15>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_15>

**Q16: Do you think it would be useful to require distributors to periodically inform the manufacturer about their experience with the product? If yes, in what circumstances and what specific information could be provided by the distributor?**

<ESMA\_QUESTION\_16>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_16>

**Q17: What appropriate action do you think manufacturers can take if they become aware that products are not sold as envisaged (e.g. if the product is being widely sold to clients outside of the product's target market)?**

<ESMA\_QUESTION\_17>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_17>

**Q18: What appropriate action do you think distributors can take, if they become aware of any event that could materially affect the potential risk to the identified target market (e.g. if the distributor has mis-judged the target market for a specific product)?**

<ESMA\_QUESTION\_18>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_18>

**Q19: Do you consider that there is sufficient clarity regarding the requirements of investment firms when acting as manufacturers, distributors or both? If not, please provide details of how such requirements should interact with each other.**

<ESMA\_QUESTION\_19>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_19>

**Q20: Are there any other product governance requirements not mentioned in this paper that you consider important and should be considered? If yes, please set out these additional requirements.**

<ESMA\_QUESTION\_20>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_20>

**Q21: For investment firms responding to this consultation, what costs would you incur in order to meet these requirements, either as distributors or manufacturers?**

<ESMA\_QUESTION\_21>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_21>

## **2.8. Safeguarding of client assets**

**Q22: Do you agree with the proposal for investment firms to establish and maintain a client assets oversight function?**

<ESMA\_QUESTION\_22>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_22>

**Q23: What would be the cost implications of establishing and maintaining a function with specific responsibility for matters relating to the firm's compliance with its obligations regarding the safeguarding of client instruments and funds?**

<ESMA\_QUESTION\_23>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_23>

**Q24: Do you think that the examples in this chapter constitute an inappropriate use of TTCA? If not, why not? Are there any other examples of inappropriate use of or features of inappropriate use of TTCA?**



<ESMA\_QUESTION\_24>

In order to set the topic in context, Deutsche Börse Group recommends the restrictions on the use of TTCA must not apply to CCPs in the course of their clearing business. This follows already from the scope of application of MiFID II. Nevertheless, the restrictions on the use of TTCA for investment firms may indirectly affect CCPs where a title transfer of collateral is required by the CCP in relation to the posting of client margin. Any restrictions should be designed such that they do not conflict with the posting of client margin by way of full title transfer where such client collateral relates to the clearing of client transactions. The examples would in our view not constitute an inappropriate use of TTCA to the extent they were to be applied in the context of the clearing of client transactions. CCPs and firms have relied upon the use of TTCA as a legitimate European-wide mechanism for collateral transfer to facilitate the introduction of individually segregated accounts as required by EMIR.

<ESMA\_QUESTION\_24>

**Q25: Do you agree with the proposal to clarify that the use of TTCA is not a freely available option for avoiding the protections required under MiFID? Do you agree with the proposal to place high-level requirements on firms to consider the appropriateness of TTCA? Should risk disclosures be required in this area? Please explain your answer. If not, why not?**

<ESMA\_QUESTION\_25>

As mentioned in the response to question 24 above, Deutsche Börse Group recommends the use of TTCA should be freely available where it is used to post client collateral to a CCP in connection with the clearing of client transactions. There should be no requirements on firms to demonstrate the appropriateness of the use of TTCA in a clearing context. Collateral posted to a CCP in relation to the clearing of client transactions is protected by the segregation, porting and client protection mechanics provided under EMIR.

<ESMA\_QUESTION\_25>

**Q26: Do you agree with the proposal to require a reasonable link between the client's obligation and the financial instruments or funds subject to TTCA?**

<ESMA\_QUESTION\_26>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_26>

**Q27: Do you already make any assessment of the suitability of TTCAs? If not, would you need to change any processes to meet such a requirement, and if so, what would be the cost implications of doing so?**

<ESMA\_QUESTION\_27>

As mentioned in the response to question 25 above, Deutsche Börse Group recommends the use of TTCA should be freely available where it is used to post client collateral to a CCP in connection with the clearing of client transactions. There should be no requirements on firms to demonstrate the appropriateness of the use of TTCA in a clearing context. Collateral posted to a CCP in relation to the clearing of client transactions is protected by the segregation, porting and client protection mechanics provided under EMIR.

<ESMA\_QUESTION\_27>

**Q28: Are any further measures needed to ensure that the transactions envisaged under Article 19 of the MiFID Implementing Directive remain possible in light of the ban on concluding TTCAs with retail clients in Article 16(10) of MiFID II?**

<ESMA\_QUESTION\_28>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_28>

**Q29: Do you agree with the proposal to require firms to adopt specific arrangements to take appropriate collateral, monitor and maintain its appropriateness in respect of securities financing transactions?**





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

**Q30: Is it suitable to place collateral, monitoring and maintaining measures on firms in respect of retail clients only, or should these be extended to all classes of client?**

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

**Q31: Do you already take collateral against securities financing transactions and monitor its appropriateness on an on-going basis? If not, what would be the cost of developing and maintaining such arrangements?**

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

**Q32: Do you agree that investment firms should evidence the express prior consent of non-retail clients to the use of their financial instruments as they are currently required to do so for retail clients clearly, in writing or in a legally equivalent alternative means, and affirmatively executed by the client? Are there any cost implications?**

<ESMA\_QUESTION\_32>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_32>

**Q33: Do you anticipate any additional costs in order to comply with the requirements proposed in relation to securities financing transactions and collateralisation? If yes, please provide details.**

<ESMA\_QUESTION\_33>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_33>

**Q34: Do you think that it is proportionate to require investment firms to consider diversification of client funds as part of the due diligence requirements when depositing client funds? If not, why? What other measures could achieve a similar objective?**

<ESMA\_QUESTION\_34>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_34>

**Q35: Are there any cost implications to investment firms when considering diversification as part of due diligence requirements?**

<ESMA\_QUESTION\_35>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_35>

**Q36: Where an investment firm deposits client funds at a third party that is within its own group, should an intra-group deposit limit be imposed? If yes, would imposing an intra-group deposit limit of 20% in respect of client funds be proportionate? If not, what other percentage could be proportionate? What other measures could achieve similar objectives? What is the rationale for this percentage?**



<ESMA\_QUESTION\_36>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_36>

**Q37: Are there any situations that would justify exempting an investment firm from such a rule restricting intra-group deposits in respect of client funds, for example, when other safeguards are in place?**

<ESMA\_QUESTION\_37>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_37>

**Q38: Do you place any client funds in a credit institution within your group? If so, what proportion of the total?**

<ESMA\_QUESTION\_38>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_38>

**Q39: What would be the cost implications for investment firms of diversifying holdings away from a group credit institution?**

<ESMA\_QUESTION\_39>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_39>

**Q40: What would be the impact of restricting investment firms in respect of the proportion of funds they could deposit at affiliated credit institutions? Could there be any unintended consequences?**

<ESMA\_QUESTION\_40>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_40>

**Q41: What would be the cost implications to credit institutions if investment firms were limited in respect of depositing client funds at credit institutions in the same group?**

<ESMA\_QUESTION\_41>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_41>

**Q42: Do you agree with the proposal to prevent firms from agreeing to liens that allow a third party to recover costs from client assets that do not relate to those clients, except where this is required in a particular jurisdiction?**

<ESMA\_QUESTION\_42>

To set the topic in the wider regulatory context again, Deutsche Börse Group recommends the restrictions on the use of liens must not apply to CCPs in the course of their clearing business. This follows already from the MiFID II scope of application. The proposal to prevent firms from agreeing to liens with third parties should not apply to CCPs, as third parties where assets are pledged to the CCP as collateral for client transactions as long as this collateral is maintained in accordance with the segregation requirements under EMIR.

<ESMA\_QUESTION\_42>

**Q43: Do you agree with the proposal to specify specific risk warnings where firms are obliged to agree to wide-ranging liens exposing their clients to the risk?**



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

**Q44: What would be the one off costs of reviewing third party agreements in the light of an explicit prohibition of such liens, and the on-going costs in respect of risk warnings to clients?**

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

**Q45: Should firms be obliged to record the presence of security interests or other encumbrances over client assets in their own books and records? Are there any reasons why firms might not be able to meet such a requirement? Are there any cost implications of recording these?**

<ESMA\_QUESTION\_45>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_45>

**Q46: Should the option of ‘other equivalent measures’ for segregation of client financial instruments only be available in third country jurisdictions where market practice or legal requirements make this necessary?**

<ESMA\_QUESTION\_46>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_46>

**Q47: Should firms be required to develop additional systems to mitigate the risks of ‘other equivalent measures’ and require specific risk disclosures to clients where a firm must rely on such ‘other equivalent measures’, where not already covered by the Article 32(4) of the MiFID Implementing Directive?**

<ESMA\_QUESTION\_47>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_47>

**Q48: What would be the on-going costs of making disclosures to clients when relying on ‘other equivalent measures’?**

<ESMA\_QUESTION\_48>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_48>

**Q49: Should investment firms be required to maintain systems and controls to prevent shortfalls in client accounts and to prevent the use of one client’s financial instruments to settle the transactions of another client, including:**

<ESMA\_QUESTION\_49>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_49>

**Q50: Do you already have measures in place that address the proposals in this chapter? What would be the one-off and on-going cost implications of developing systems and controls to address these proposals?**



<ESMA\_QUESTION\_50>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_50>

**Q51: Do you agree that requiring firms to hold necessary information in an easily accessible way would reduce uncertainty regarding ownership and delays in returning client financial instruments and funds in the event of an insolvency?**

<ESMA\_QUESTION\_51>  
To provide a view from a market infrastructure perspective, Deutsche Börse Group recommends that information maintained in an easily accessible way can help reduce delays in returning client financial instruments and funds in the event of an insolvency and can also facilitate the porting of client assets in accordance with Article 48 of EMIR. While assets that have been posted with a CCP and are subject to porting can already today be easily identified by the CCP, it may not always be possible to identify the clients for which the assets have been posted and who are required to consent to the porting of the assets. If such information was maintained in an easily accessible way by firms, it could help to improve the likelihood of porting in these cases.  
<ESMA\_QUESTION\_51>

**Q52: Do you think the information detailed in the draft technical advice section of this chapter is suitable for including in such a requirement?**

<ESMA\_QUESTION\_52>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_52>

**Q53: Do you already maintain the information listed in a way that would be easily accessible on request by a competent person, either before or after insolvency? What would be the cost of maintaining such information in a way that is easily accessible to an insolvency practitioner in the event of firm failure?**

<ESMA\_QUESTION\_53>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_53>

## **2.9. Conflicts of interest**

**Q54: Should investment firms be required to assess and periodically review - at least annually - the conflicts of interest policy established, taking all appropriate measures to address any deficiencies? Please also state the reason for your answer.**

<ESMA\_QUESTION\_54>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_54>

**Q55: Do you consider that additional situations to those identified in Article 21 of the MiFID Implementing Directive should be mentioned in the measures implementing MiFID II? Please explain your rationale for any additional suggestions.**

<ESMA\_QUESTION\_55>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_55>



**Q56: Do you consider that the distinction between investment research and marketing communications drawn in Article 24 of the MiFID Implementing Directive is sufficient and sufficiently clear? If not, please suggest any improvements to the existing framework and the rationale for your proposals.**

<ESMA\_QUESTION\_56>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_56>

**Q57: Do you consider that the additional organisational requirements listed in Article 25 of the MiFID Implementing Directive and addressed to firms producing and disseminating investment research are sufficient to properly regulate the specificities of these activities and to protect the objectivity and independence of financial analysts and of the investment research they produce? If not, please suggest any improvements to the existing framework and the rationale for your proposals.**

<ESMA\_QUESTION\_57>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_57>

## **2.10. Underwriting and placing – conflicts of interest and provision of information to clients**

**Q58: Are there additional details or requirements you believe should be included?**

<ESMA\_QUESTION\_58>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_58>

**Q59: Do you consider that investment firms should be required to discuss with the issuer client any hedging strategies they plan to undertake with respect to the offering, including how these strategies may impact the issuer client's interest? If not, please provide your views on possible alternative arrangements. In addition to stabilisation, what other trading strategies might the firm take in connection with the offering that would impact the issuer?**

<ESMA\_QUESTION\_59>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_59>

**Q60: Have you already put in place organisational arrangements that comply with these requirements?**

<ESMA\_QUESTION\_60>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_60>

**Q61: How would you need to change your processes to meet the requirements?**

<ESMA\_QUESTION\_61>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_61>



**Q62: What costs would you incur in order to meet these requirements?**

<ESMA\_QUESTION\_62>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_62>

## **2.11. Remuneration**

**Q63: Do you agree with the definition of the scope of the requirements as proposed? If not, why not?**

<ESMA\_QUESTION\_63>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_63>

**Q64: Do you agree with the proposal with respect to variable remuneration and similar incentives? If not, why not?**

<ESMA\_QUESTION\_64>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_64>

## **2.12. Fair, clear and not misleading information**

**Q65: Do you agree that the information to retail clients should be up-to-date, consistently presented in the same language, and in the same font size in order to be fair, clear and not misleading?**

<ESMA\_QUESTION\_65>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_65>

**Q66: Do you agree that the information about future performance should be provided under different performance scenarios in order to illustrate the potential functioning of financial instruments?**

<ESMA\_QUESTION\_66>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_66>

**Q67: Do you agree that the information to professional clients should comply with the proposed conditions in order to be fair, clear and not misleading? Do you consider that the information to professional clients should meet any of the other conditions proposed for retail clients?**

<ESMA\_QUESTION\_67>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_67>



## **2.13. Information to clients about investment advice and financial instruments**

**Q68: Do you agree with the objective of the above proposals to clarify the distinction between independent and non-independent advice for investors?**

<ESMA\_QUESTION\_68>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_68>

**Q69: Do you agree with the proposal to further specify information provided to clients about financial instruments and their risks?**

<ESMA\_QUESTION\_69>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_69>

**Q70: Do you consider that, in addition to the information requirements suggested in this CP (including information on investment advice, financial instruments, costs and charges and safeguarding of client assets), further improvements to the information requirements in other areas should be proposed? If yes, please specify, by making reference to existing requirements in the MiFID Implementing directive.**

<ESMA\_QUESTION\_70>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_70>

## **2.14. Information to clients on costs and charges**

**Q71: Do you agree with the proposal to fully apply requirements on information to clients on costs and charges to professional clients and eligible counterparties and to allow these clients to opt-out from the application of these requirements in certain circumstances?**

<ESMA\_QUESTION\_71>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_71>

**Q72: Do you agree with the scope of the point of sale information requirements?**

<ESMA\_QUESTION\_72>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_72>

**Q73: Do you agree that post-sale information should be provided where the investment firm has established a continuing relationship with the client?**

<ESMA\_QUESTION\_73>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_73>



**Q74: Do you agree with the proposed costs and charges to be disclosed to clients, as listed in the Annex to this chapter? If not please state your reasons, including describing any other cost or charges that should be included.**

<ESMA\_QUESTION\_74>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_74>

**Q75: Do you agree that the point of sale information on costs and charges could be provided on a generic basis? If not, please explain your response.**

<ESMA\_QUESTION\_75>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_75>

**Q76: Do you have any other comments on the methodology for calculating the point of sale figures?**

<ESMA\_QUESTION\_76>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_76>

**Q77: Do you have any comments on the requirements around illustrating the cumulative effect of costs and charges?**

<ESMA\_QUESTION\_77>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_77>

**Q78: What costs would you incur in order to meet these requirements?**

<ESMA\_QUESTION\_78>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_78>

## **2.15. The legitimacy of inducements to be paid to/by a third person**

**Q79: Do you agree with the proposed exhaustive list of minor non-monetary benefits that are acceptable? Should any other benefits be included on the list? If so, please explain.**

<ESMA\_QUESTION\_79>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_79>

**Q80: Do you agree with the proposed approach for the disclosure of monetary and non-monetary benefits, in relation to investment services other than portfolio management and advice on an independent basis?**

<ESMA\_QUESTION\_80>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_80>



**Q81: Do you agree with the non-exhaustive list of circumstances and situations that NCAs should consider in determining when the quality enhancement test is not met? If not, please explain and provide examples of circumstances and situations where you believe the enhancement test is met. Should any other circumstances and/or situations be included in the list? If so, please explain.**

<ESMA\_QUESTION\_81>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_81>

**Q82: Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details.**

<ESMA\_QUESTION\_82>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_82>

## **2.16. Investment advice on independent basis**

**Q83: Do you agree with the approach proposed in the technical advice above in order to ensure investment firm's compliance with the obligation to assess a sufficient range of financial instruments available on the market? If not, please explain your reasons and provide for alternative or additional criteria.**

<ESMA\_QUESTION\_83>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_83>

**Q84: What type of organisational requirements should firms have in place (e.g. degree of separation, procedures, controls) when they provide both independent and non-independent advice?**

<ESMA\_QUESTION\_84>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_84>

**Q85: Do you anticipate any additional costs in order to comply with the requirements proposed in this chapter? If yes, please provide details.**

<ESMA\_QUESTION\_85>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_85>

## **2.17. Suitability**

**Q86: Do you agree that the existing suitability requirements included in Article 35 of the MiFID Implementing Directive should be expanded to cover points discussed in the draft technical advice of this chapter?**

<ESMA\_QUESTION\_86>



TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_86>

**Q87: Are there any other areas where MiFID Implementing Directive requirements covering the suitability assessment should be updated, improved or revised based on your experiences under MiFID since it was originally implemented?**

<ESMA\_QUESTION\_87>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_87>

**Q88: What is your view on the proposals for the content of suitability reports? Are there additional details or requirements you believe should be included, especially to ensure suitability reports are sufficiently 'personalised' to have added value for the client, drawing on any initiatives in national markets?**

<ESMA\_QUESTION\_88>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_88>

**Q89: Do you agree that periodic suitability reports would only need to cover any changes in the instruments and/or circumstances of the client rather than repeating information which is unchanged from the first suitability report?**

<ESMA\_QUESTION\_89>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_89>

## **2.18. Appropriateness**

**Q90: Do you agree the existing criteria included in Article 38 of the Implementing Directive should be expanded to incorporate the above points, and that an instrument not included explicitly in Article 25(4)(a) of MiFID II would need to meet to be considered non-complex?**

<ESMA\_QUESTION\_90>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_90>

**Q91: Are there any other areas where the MiFID Implementing Directive requirements covering the appropriateness assessment and conditions for an instrument to be considered non-complex should be updated, improved or revised based on your experiences under MiFID I?**

<ESMA\_QUESTION\_91>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_91>

## **2.19. Client agreement**



**Q92: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement with their professional clients, at least for certain services? If yes, in which circumstances? If no, please state your reason.**

<ESMA\_QUESTION\_92>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_92>

**Q93: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement for the provision of investment advice to any client, at least where the investment firm and the client have a continuing business relationship? If not, why not?**

<ESMA\_QUESTION\_93>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_93>

**Q94: Do you agree that investment firms should be required to enter into a written (or equivalent) agreement for the provision of custody services (safekeeping of financial instruments) to any client? If not, why not?**

<ESMA\_QUESTION\_94>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_94>

**Q95: Do you agree that investment firms should be required to describe in the client agreement any advice services, portfolio management services and custody services to be provided? If not, why not?**

<ESMA\_QUESTION\_95>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_95>



**2.20.**

## **2.21. Reporting to clients**

**Q96: Do you agree that the content of reports for professional clients, both for portfolio management and execution of orders, should be aligned to the content applicable for retail clients?**

<ESMA\_QUESTION\_96>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_96>

**Q97: Should investment firms providing portfolio management or operating a retail client account that includes leveraged financial instruments or other contingent liability transactions be required to agree on a threshold with retail clients that should at least be equal to 10% (and relevant multiples) of the initial investments (or the value of the investment at the beginning of each year)?**

<ESMA\_QUESTION\_97>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_97>

**Q98: Do you agree that Article 43 of the MiFID Implementing Directive should be updated to specify that the content of statements is to include the market or estimated value of the financial instruments included in the statement with a clear indication of the fact that the absence of a market price is likely to be indicative of a lack of liquidity?**

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

**Q99: Do you consider that it would be beneficial to clients to not only provide details of those financial instruments that are subject to TTCA at the point in time of the statement, but also details of those financial instruments that have been subject to TTCA during the reporting period?**

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

**Q100: What other changes to the MiFID Implementing Directive in relation to reporting to clients should ESMA consider advising the Commission on?**

<ESMA\_QUESTION\_100>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_100>



## 2.22. Best execution

**Q101: Do you have any additional suggestions to provide clarity of the best execution obligations in MiFID II captured in this section or to further ESMA’s objective of facilitating clear disclosures to clients?**

<ESMA\_QUESTION\_101>

Deutsche Börse Group generally appreciates all of ESMA’s suggestions in this respect. We only would like to suggest three minor adaptations:

- a. Paragraph 2 of draft technical advice on details of execution policies should also specify why the venue is preferred;
- b. Paragraph 12 of the above needs to specify market quality comparative metrics that will be useful to give clients some understanding over the quality offered on each venue;
- c. Paragraph 15: the choice of an OTC venue / entity alone should be avoided when other trading options are available.

<ESMA\_QUESTION\_101>

**Q102: Do your policies and your review procedures already the details proposed in this chapter? If they do not, what would be the implementation and recurring cost of modifying them and distributing the revised policies to your existing clients? Where possible please provide examples of the costs involved.**

<ESMA\_QUESTION\_102>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_102>

## 2.23. Client order-handling

**Q103: Are you aware of any issues that have emerged with regard to the application of Articles 47, 48 and 49 of the MiFID Implementing Directive? If yes, please specify.**

<ESMA\_QUESTION\_103>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_103>

## 2.24. Transactions executed with eligible counterparties

**Q104: Do you agree with the proposal not to allow undertakings classified as professional clients on request to be recognised as eligible counterparties?**

<ESMA\_QUESTION\_104>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_104>



**Q105: For investment firms responding to this consultation, how many clients have you already classified as eligible counterparties using the following approaches under Article 50 of the MiFID Implementing Directive:**

<ESMA\_QUESTION\_105>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_105>

**Q106: For investment firms responding to this consultation, what costs would you incur in order to meet these requirements?**

<ESMA\_QUESTION\_106>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_106>



## **2.25. Product intervention**

**Q107: Do you agree with the criteria proposed?**

<ESMA\_QUESTION\_107>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_107>

**Q108: Are there any additional criteria that you would suggest adding?**

<ESMA\_QUESTION\_108>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_108>

### 3. Transparency

#### 3.1. Liquid market for equity and equity-like instruments

**Q109: Do you agree with the liquidity thresholds ESMA proposes for equities? Would you calibrate the thresholds differently? Please provide reasons for your answers.**

<ESMA\_QUESTION\_109>

Deutsche Börse Group supports ESMA's proposal of lowering the existing thresholds as well as applying all four criteria cumulatively. The new thresholds support the objective of greater transparency. With regard to the free float criteria, we would like to point out that we will not be able to deliver data, as free float constantly changes and we do not keep track of those changes.

<ESMA\_QUESTION\_109>

**Q110: Do you agree that the free float for depositary receipts should be determined by the number of shares issued in the issuer's home market? Please provide reasons for your answer.**

<ESMA\_QUESTION\_110>

A depositary receipt is nothing else than a physical certificate that allows investors to hold shares in equity of a firm in another country. Therefore, Deutsche Börse Group agrees with the approach that the free float for DRs should be determined by the number of shares issued in the issuer's home market.

<ESMA\_QUESTION\_110>

**Q111: Do you agree with the proposal to set the liquidity threshold for depositary receipts at the same level as for shares? Please provide reasons for your answer.**

<ESMA\_QUESTION\_111>

Yes, as explained in Deutsche Börse Group's answer to question 110, a depositary receipt is nothing else than a physical certificate that allows investors to hold shares in equity of a firm in another market. Therefore, Deutsche Börse Group considers that the threshold for depositary receipts should be set at the same level as for shares.

<ESMA\_QUESTION\_111>

**Q112: Do you agree with the liquidity thresholds ESMA proposes for depositary receipts? Would you calibrate the thresholds differently? Please provide reasons for your answers.**

<ESMA\_QUESTION\_112>

Yes, as explained in Deutsche Börse Group's answer to question 110, a depositary receipt is nothing else than a physical certificate that allows investors to hold shares in equity of a firm in another market. Deutsche Börse Group agrees with the liquidity thresholds and would not calibrate them differently.

<ESMA\_QUESTION\_112>

**Q113: Do you agree that the criterion of free float could be addressed through the number of units issued for trading? If yes, what *de minimis* number of units would you suggest? Is there any other more appropriate measure in your view? Please provide reasons for your answer.**

<ESMA\_QUESTION\_113>





Deutsche Börse Group supports a de minimis number of units issued for trading since it would ensure that the largest possible number of ETFs would qualify as having a liquid market under the free float criterion. Please see also our answer to question 115.

<ESMA\_QUESTION\_113>

**Q114: Based on your experience, do you agree with the preliminary results related to the trading patterns of ETFs? Please provide reasons for your answer.**

<ESMA\_QUESTION\_114>

Yes, Deutsche Börse Group agrees. The preliminary results related to the trading patterns of ETFs seem to be representative of data collected from DBG's trading venue Xetra.

<ESMA\_QUESTION\_114>

**Q115: Do you agree with the liquidity thresholds ESMA proposes for ETFs? Would you calibrate the thresholds differently? Please provide reasons for your answers, including describing your own role in the market (e.g. market-maker, issuer etc).**

<ESMA\_QUESTION\_115>

No, Deutsche Börse Group does not agree. Since ETFs benefit from multiple layers of liquidity due to their inherent creation/redemption mechanism, Deutsche Börse Group believes that any criteria based on actual trading data such as the average daily number of transactions or the average daily turnover may not be well-suited to accurately reflect their true level of liquidity. 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 a significant difference in trading-related data such as ADT. In these cases, any 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. To account for the limited relevance of trading-related data in determining the liquidity of ETFs, ESMA could consider using an alternative liquidity proxy for ETFs that is more closely aligned with the liquidity of their underlying market. However, if ESMA is bound to use the same criteria as applied to shares, ESMA should consider applying de minimis numbers also for the average daily number of transactions and the average daily turnover, thus effectively classifying almost all ETFs as instruments with a liquid market. Deutsche Börse Group operates Xetra, Europe's largest trading platform for ETFs.

<ESMA\_QUESTION\_115>

**Q116: Can you identify any additional instruments that could be caught by the definition of certificates under Article 2(1)(27) of MiFIR?**

<ESMA\_QUESTION\_116>

No, Deutsche Börse Group cannot identify any additional instruments.

<ESMA\_QUESTION\_116>

**Q117: Based on your experience, do you agree with the preliminary results related to the trading patterns of certificates? Please provide reasons for your answer.**

<ESMA\_QUESTION\_117>

Yes, Deutsche Börse Group agrees with the preliminary results related to the trading patterns of certificates.

<ESMA\_QUESTION\_117>

**Q118: Do you agree with the liquidity thresholds ESMA proposes for certificates? Would you calibrate the thresholds differently? Please provide reasons for your answer.**

<ESMA\_QUESTION\_118>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_118>



**Q119: Do you agree that the criterion of free float could be addressed through the issuance size? If yes, what *de minimis* issuance size would you suggest? Is there any other more appropriate measure in your view? Please provide reasons for your answer.**

<ESMA\_QUESTION\_119>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_119>

**Q120: Do you think the discretion permitted to Member States under Article 22(2) of the Commission Regulation to specify additional instruments up to a limit as being liquid should be retained under MiFID II?**

<ESMA\_QUESTION\_120>  
Yes, Deutsche Börse Group thinks this should be maintained.  
<ESMA\_QUESTION\_120>

### **3.2. Delineation between bonds, structured finance products and money market instruments**

**Q121: Do you agree with ESMA's assessment concerning financial instruments outside the scope of the MiFIR non-equity transparency obligations?**

<ESMA\_QUESTION\_121>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_121>

### **3.3. The definition of systematic internaliser**

**Q122: For the systematic and frequent criterion, ESMA proposes setting the percentage for the calculation between 0.25% and 0.5%. Within this range, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the threshold should be set at a level outside this range, please specify at what level this should be with justifications.**

<ESMA\_QUESTION\_122>

With regard to equities and equity-like instruments:

Deutsche Börse Group believes that for frequent and systematic the range of 0.25% to 0.5% of number of transactions should be lower compared to what has been suggested for substantial basis, because systematic internalisers, when trading with institutional clients, tend to have big ticket sizes. The result is a small number of big trades. We therefore consider a level of 0.10% appropriate (see our answer to question 124). This level equals the Q2/2014 market shares of smaller trading venues like Posit, Equiduct and Blockmatch in many DAX instruments.

With regard 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.***

***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 waiver 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\_122>

**Q123: Do you support calibrating the threshold for the systematic and frequent criterion on the liquidity of the financial instrument as measured by the number of daily transactions?**

<ESMA\_QUESTION\_123>

Yes, Deutsche Börse Group supports this proposal.

<ESMA\_QUESTION\_123>

**Q124: For the substantial criterion, ESMA proposes setting the percentage for the calculation 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 and between 0.25% and 0.5% of the total turnover in that financial instrument in the Union. Within these ranges, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the thresholds should be set at levels outside these ranges, please specify at what levels these should be with justifications.**

<ESMA\_QUESTION\_124>

Deutsche Börse Group believes the range of 15% to 25% is too high and should be lowered to 5%. For the second criteria we consider 0.25% to be the appropriate level.

<ESMA\_QUESTION\_124>

**Q125: Do you support thresholds based on the turnover (quantity multiplied by price) as opposed to the volume (quantity) of shares traded? Do you agree with the definition of total trading by the investment firm? If not please provide alternatives and reasons for your answer.**

<ESMA\_QUESTION\_125>

Yes, Deutsche Börse Group agrees to base the thresholds on the turnover (quantity multiplied by price).

<ESMA\_QUESTION\_125>

**Q126: ESMA has calibrated the initial thresholds proposed based on systematic internaliser activity in shares. Do you consider those thresholds adequate for:**

<ESMA\_QUESTION\_126>



Yes, Deutsche Börse Group does consider them adequate for depositary receipts as well.

<ESMA\_QUESTION\_126>

**Q127: Do you consider a quarterly assessment of systematic internaliser activity as adequate? If not, which assessment period would you propose? Do you consider that one month provides sufficient time for investment firms to establish all the necessary arrangements in order to comply with the systematic internaliser regime?**

<ESMA\_QUESTION\_127>

Yes, Deutsche Börse Group agrees with a quarterly assessment of systematic internaliser activity.

<ESMA\_QUESTION\_127>

**Q128: For the systematic and frequent criterion, do you agree that the thresholds should be set per asset class? Please provide reasons for your answer. If you consider the thresholds should be set at a more granular level (sub-categories) please provide further detail and justification.**

<ESMA\_QUESTION\_128>

With regard to bonds:

Deutsche Börse Group agrees that the threshold should be set on asset class basis.

With regard 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.

As a result, for potential instruments in scope, the thresholds should be set per asset class. There is a number of derivatives that require product-specific thresholds as they vary strongly in liquidity and trade frequency within one asset class. Also, trade per day is more suitable to define the 'minimum trading frequency'.

However, 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\_128>

**Q129: With regard to the 'substantial basis' criterion, do you support thresholds based on the turnover (quantity multiplied by price) as opposed to the volume (quantity) of instruments traded. Do you agree with the definition of total trading by the investment firm? If not please provide alternatives and reasons for your answer.**

<ESMA\_QUESTION\_129>



With regard to bonds:

Deutsche Börse Group supports nominal traded volume as this is the figure the industry uses to publish statistics etc. The metric should be the same as for other criteria like ADT etc.

With regard 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.

Based on this principle, yes, the percentages should be assessed based on the traded volume in contracts and the notional value per contract to cater to different contract specifications.

However, 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 waiver 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\_129>

**Q130: Do you agree with ESMA's proposal to apply the systematic internaliser thresholds for bonds and structured finance products at an ISIN code level? If not please provide alternatives and reasons for your answer.**

<ESMA\_QUESTION\_130>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_130>

**Q131: For derivatives, do you agree that some aggregation should be established in order to properly apply the systematic internaliser definition? If yes, do you consider that the tables presented in Annex 3.6.1 of the DP could be used as a basis for applying the systematic internaliser thresholds to derivatives products? Please provide reasons, and when necessary alternatives, to your answer.**

<ESMA\_QUESTION\_131>

With regard 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



ic 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.

However, 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 waiver 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\_131>

**Q132: Do you agree with ESMA's proposal to set a threshold for liquid derivatives? Do you consider any scenarios could arise where systematic internalisers would be required to meet pre-trade transparency requirements for liquid derivatives where the trading obligation does not apply?**

<ESMA\_QUESTION\_132>

With regard 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.

Otherwise, the approach could broadly be agreed with, if the liquid market definition is going to capture forward looking elements as well. Meaning, if the potential of a market development due to multilateral trading is included and if the criteria could be considered also in a staggered approach.

However, 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 waiver 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\_132>

**Q133: Do you consider a quarterly assessment by investment firms in respect of their systematic internaliser activity is adequate? If not, what assessment period would you propose?**

<ESMA\_QUESTION\_133>

In general, Deutsche Börse Group agrees with such an assessment.

<ESMA\_QUESTION\_133>

**Q134: Within the ranges proposed by ESMA, what do you consider to be the appropriate level? Please provide reasons for your answer. If you consider that the threshold should be set at a level outside this range, please specify at what level this should be with justifications and where possible data to support them.**

<ESMA\_QUESTION\_134>

With regard 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.

If there are instruments that cannot be captured by order-books, the minimum trading frequency should definitely be reduced from once a week to daily.

However, 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 waiver 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\_134>

**Q135: Do you consider that thresholds should be set as absolute numbers rather than percentages for some specific categories? Please provide reasons for your answer.**

<ESMA\_QUESTION\_135>

Deutsche Börse Group refers to its answer to question 134.

<ESMA\_QUESTION\_135>

**Q136: What thresholds would you consider as adequate for the emission allowance market?**

<ESMA\_QUESTION\_136>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_136>

### **3.4. Transactions in several securities and orders subject to conditions other than the current market price**

**Q137: Do you agree with the definition of portfolio trade and of orders subject to conditions other than the current market price? Please give reasons for your answer?**

<ESMA\_QUESTION\_137>

With regards to equities and equity-like instruments:

Deutsche Börse Group suggests deleting 2 (i) because for a VWAP or a TWAP every point in time has a price and therefore a current market price is available. Further, we request adding to 2 (iii) “market order” because otherwise all market orders could easily be traded within the current quote of the SI, rendering the strict requirements towards an SI quote meaningless.

With regards 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, if the size can be traded through a transparent order book of the trading venue/ regulated market.

Based on the remaining scope of derivatives, the definition and requirement of ‘involving 10 or more financial instruments’ is too stringent in relation to options trading, in which a large share of overall volume is executed as a delta neutral options strategy. This portfolio/ combination trade consists of an options leg and the respective futures leg. Price discrepancies to options traded on a standalone outright basis occur for the options leg based on either the defined futures quantity (the delta of the option to be hedged) or the underlying reference price of the futures contract. Also, price discrepancies occur as options traded in isolation, are subject to market risk (price risk of the underlying) and the volatility risk of the option, where then combination trade is primarily subject to volatility risk. At Eurex, option volatility trades are conducted in ‘round lot sizes’ in which each unit involves 100 options and a user defined number of futures contracts. This further impacts the ability to compare a market quote of an outright option and the respective option volatility strategy as the size of a transaction also impacts the bid offer spread a market maker or dealer can quote.

The definition as proposed is very specifically geared towards basket trading, whereas combined trades in derivatives can be done without the inclusion of borrowing costs. Dispersion trading is a common trading strategy to express a view on implied correlation by buying index options (straddles) while shorting a select basket of single name equity options that are part of the index’s constituents. Again, the minimum number of names can be far less than the 10 outlined, as these trades can be expressed with as few as 4 products all together (1 index option & 3 single names).

For example, so-called exchange-for-physicals (EFPs) in fixed income derivatives, differ from the price quotes in outright fixed income futures, and involve only the combined pricing of an exchange traded derivative, and the respective underlying bonds that together form the basis.

However, 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 waiver 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\_137>



### 3.5. Exceptional market circumstances and conditions for updating quotes

**Q138: Do you agree with the list of exceptional circumstances? Please give reasons for your answer. Do you agree with ESMA's view on the conditions for updating the quotes? Please give reasons for your answer.**

<ESMA\_QUESTION\_138>

Deutsche Börse Group supports ESMA's definition of exceptional market circumstances (i.e. trading is halted, market making obligations are suspended and reliable market price is not available for a significant number of instruments underlying the ETF or index). Deutsche Börse Group does not agree with the fact that the total number and/or the volume of orders sought by clients exceed the norm and that thereby the SI decides to limit the number of transactions from different clients should be considered as an exceptional circumstance because this might open loopholes or circumvention options for SIs. With regard to the conditions updating the quotes Deutsche Börse Group agrees with the proposal by ESMA that a SI should be allowed to update its quotes anytime as market-wide or instrument-specific circumstances change or following any transaction executed with a client.

<ESMA\_QUESTION\_138>

### 3.6. Orders considerably exceeding the norm

**Q139: Do you agree that each systematic internaliser should determine when the number and/or volume of orders sought by clients considerably exceed the norm? Please give reasons for your answer?**

<ESMA\_QUESTION\_139>

With regard 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, if the size can be traded through a transparent order book of the trading venue/ regulated market.

Based on the principle described above, as the quantities resulting in undue market impact will vary strongly by market share and size of trading positions of individual Systematic Internalisers, this approach could be supported.

However, 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\_139>

### **3.7. Prices falling within a public range close to market conditions**

**Q140: Do you agree that any price within the bid and offer spread quoted by the systematic internaliser would fall within a public range close to market conditions? Please give reasons for your answer.**

<ESMA\_QUESTION\_140>

ESMA suggest that SIs can execute at a price within the bid and offer quotes of the SI quote if they prefer, eventually giving their clients 'price improvement' at their sole discretion, which is not compatible with the requirement to provide firm quotes and execute solely at these quotes.

With regard to equities and equity-like instruments:

Deutsche Börse Group is of the opinion that this would not be fair but rather discriminatory not only towards their clients but also towards trading venues because they can execute comparable dark trades under the reference price waiver at the mid-point only. Instead we propose that SIs can only execute either at their quotes or within their own bid and offer quotes at the precise mid-point of their own quote in order to achieve a level playing field to the ability of trading venues executing dark trades.

<ESMA\_QUESTION\_140>

### **3.8. Pre-trade transparency for systematic internalisers in non-equity instruments**

**Q141: Do you agree that the risks a systematic internaliser faces is similar to that of an liquidity provider? If not, how do they differ?**

<ESMA\_QUESTION\_141>

With regard to bonds:

In general, we agree that liquidity providers and systematic internalisers (SI) should be subject to the same size regimes.

With regards 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.

Provided the above description holds, in general, Deutsche Börse Group agrees that liquidity providers and Systematic Internalisers should be subject to the same size regimes.

The risk for a Systematic Internaliser in terms of providing execution prices to clients regardless of the market side the client chooses is similar to that of a market maker but with a significant difference. A market maker has no information regarding the client identity, and therefore has no information regarding the client's typical trading patterns, and surely not of existing positions the client may have. This knowledge puts a Systematic Internaliser at an information advantage that can be utilized if systematically evaluated by means of data mining client behaviour and positions.

Furthermore, a market maker has no knowledge of liquidity levels in an instrument that could indicate when he will be able to exit a position. If a client of a Systematic Internaliser has bought a call option, for example, with delta 0.10, and the market rises and the call delta increases to at-the-money levels, it becomes very likely that the client will seek to sell his call option to book the profit as the options' price sensitivity becomes less dynamic (lower gamma). A Systematic Internaliser may thus decide to skew quote prices in anticipation of specific client flows.

<ESMA\_QUESTION\_141>

**Q142: Do you agree that the sizes established for liquidity providers and systematic internalisers should be identical? If not, how should they differ?**

<ESMA\_QUESTION\_142>

With regard to bonds:

Deutsche Börse Group agrees for reasons of simplification that liquidity providers and systematic internalisers (SI) should be subject to the same size regimes.

With regards 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.

Provided the above, Deutsche Börse Group agrees that liquidity providers and Systematic Internalisers (SI) should be subject to the same size regimes. Apart from the agreement, we would like to highlight again the differences to market makers as provided in question 141.

<ESMA\_QUESTION\_142>

## 4. Data publication

### 4.1. Access to systematic internalisers' quotes

#### **Q143: Do you agree with the proposed definition of “regular and continuous” publication of quotes? If not, what would definition you suggest?**

<ESMA\_QUESTION\_143>

Deutsche Börse Group agrees with ESMA's Draft Technical Advice. We agree on both paragraph 1 as well as 3.

<ESMA\_QUESTION\_143>

#### **Q144: Do you agree with the proposed definition of “normal trading hours”? Should the publication time be extended?**

<ESMA\_QUESTION\_144>

Deutsche Börse Group agrees with ESMA's Draft Technical Advice.

<ESMA\_QUESTION\_144>

#### **Q145: Do you agree with the proposal regarding the means of publication of quotes?**

<ESMA\_QUESTION\_145>

No, Deutsche Börse Group does not agree with all of the proposal for Draft Technical Advice due to various reasons.

First of all, Deutsche Börse Group rejects paragraph 4 (ii) in its current wording due to the fact that there are no clear relations between being a Market Maker or a Systematic Internaliser. Both roles are distinct from each other. We agree that Systematic Internaliser quotes may be published through the facilities of any regulated market which has the instrument in question admitted to trading, according to Level 1. This in fact holds true as well to SI who are no market makers on-exchange but still a trading member of that exchange. However, in any case it should always be clear that publication clearly does not happen under the rules of the regulated market in question, and that both information are distinct from each other. Due to this fact, publication would not happen within the own data set of the regulated market anyways. We therefore suggest to delete paragraph 4 (ii).

Second, paragraph 4 (iv) cannot be accepted. In case publication requirements would be deemed to be satisfied by publication via a web-site only, trading venues should be allowed just the same in order to cater for a level playing field. Trading venues publish data as well via proprietary means; however, even proprietary means need to comply with some minimum standards, and publication via web-site alone will not provide for wide availability of SI quotes within the market. In fact web-site only publication would be equal to 'no publication at all' as was to be experienced in the aftermath of MiFID I. Significant amounts of OTC post-trades have been published via Investment Firms web-sites only, which led to the fact that this data never became aggregated and the discussion about a reliable Consolidated Tape started. Data 'published' via a web-site needs to be grabbed (pulled) meaning significant effort for any market data vendor, leading to the fact, that it will never be made available via existing aggregators for easy use. This clearly should be avoided.

Furthermore, SIs should disclose (and maintain these disclosures up-to-date) the arrangements which they apply to display their quotes via ESMA's database for easy update of market participants and the public.

<ESMA\_QUESTION\_145>



**Q146: Do you agree that a systematic internaliser should identify itself when publishing its quotes through a trading venue or a data reporting service?**

<ESMA\_QUESTION\_146>

Yes, Deutsche Börse Group agrees with ESMA in this respect.

<ESMA\_QUESTION\_146>

**Q147: Is there any other mean of communication that should be considered by ESMA?**

<ESMA\_QUESTION\_147>

As pointed out above, Deutsche Börse Group suggests that SIs should disclose (and maintain these disclosures up-to-date) the arrangements they apply to display their quotes via ESMA's database for easy update of market participants and the public.

<ESMA\_QUESTION\_147>

**Q148: Do you agree with the importance of ensuring that quotes published by investment firms are consistent across all the publication arrangements?**

<ESMA\_QUESTION\_148>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_148>

**Q149: Do you agree with the compulsory use of data standards, formats and technical arrangements in development of Article 66(5) of MiFID II?**

<ESMA\_QUESTION\_149>

In this context of low latency market data Deutsche Börse Group cannot agree with ESMA's definition of machine readability or its suggestion to use an SIs homepage as a sole publication channel.

Deutsche Börse Group has 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 Investment Firms is not being consolidated due to the fact that this is in no way efficient and way too costly. 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 streaming data feeds.

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\_149>

**Q150: Do you agree with the imposing the publication on a 'machine-readable' and 'human readable' to investment firms publishing their quotes only through their own website?**

<ESMA\_QUESTION\_150>

Deutsche Börse Group does not agree with ESMA's neither as regards their suggestion that SIs may publish solely through their web-page, nor as regards their definition of machine readable in the context of real-time data distribution (see our answer to question 151 above).

ESMA states in paragraph 12 that it is concerned about the data aggregation of different formats in the case of SI quotes as this will be time consuming and result in different times across various displays of that

quote, Furthermore, ESMA is consulting as well on the display of time stamps suggesting nano-seconds to be used. The above considerations should be kept in mind when considering the way how SI quotes should be published. It is well known that publication via web-sites provides for the highest latency as regards real-time market data. This is due to the fact that there are no straight and dedicated lines involved within the transmission and various POPs can be used during data publication resulting in additional latency for published data.

Therefore, 'proprietary means' shall in no way just mean web-site, but instead a dedicated data feed to a consolidator just like trading venues are applying.

<ESMA\_QUESTION\_150>

**Q151: Do you agree with the requirements to consider that the publication is 'easily accessible'?**

<ESMA\_QUESTION\_151>

No, due to the above outlined reasons Deutsche Börse Group does not consider that publication as defined by ESMA should be considered as being easily accessible.

<ESMA\_QUESTION\_151>

## **4.2. Publication of unexecuted client limit orders on shares traded on a venue**

**Q152: Do you think that publication of unexecuted orders through a data reporting service or through an investment firm's website would effectively facilitate execution?**

<ESMA\_QUESTION\_152>

Deutsche Börse Group is not fully convinced that advertising of an unexecuted order through an APA should effectively facilitate execution in a reliable way. The publication would need to trigger the interest of a trading participant of the SI who has set-up the necessary facilities in order to trade with the SI. However, this is a possibility. In case SI quotes would only be published on its web-site, however, it is rather unlikely that a lot of market participants would realize this offer.

Another way for immediate execution could be the submittance to a trading venue as defined within the Best Execution policy of a systematic internaliser, as chances of a swift execution will be increased.

<ESMA\_QUESTION\_152>

**Q153: Do you agree with this proposal. If not, what would you suggest?**

<ESMA\_QUESTION\_153>

Deutsche Börse Group agrees with ESMA's proposal.

<ESMA\_QUESTION\_153>

## **4.3. Reasonable commercial basis (RCB)**

**Q154: Would these disclosure requirements be a meaningful instrument to ensure that prices are on a reasonable commercial basis?**

<ESMA\_QUESTION\_154>

Deutsche Börse Group would like to stress that there is no market failure within the EU as regards access and pricing of exchange market data. Any measures considered when defining ‘reasonable commercial terms’ should take this into account. The economic study conducted by Oxera (‘Pricing of market data services – An economic analysis’, 2014) confirms that a market failure necessitating regulatory intervention is not present in exchange market data licensing. Competition in trade execution and market data is working, as for example the market entry of BATS/Chi-X in Europe demonstrates. Within few years, BATS/Chi-X was able to become one of the largest exchanges in overall European equities trading and established a well-functioning market data business. As a general principle, exchange market data is being provided to all interested parties (including competitors) at non-discriminatory terms. Prices for cash markets data have also on average increased with less than the EU inflation rate. Furthermore, prices for cash market level 1 data (i.e., last price and best bid/offer data) in the US and the EU are shaped by structural differences between both markets (economies of scale, regulatory framework), as also outlined in the study by Oxera. Cash market level 2 data (i.e., level 1 data plus more detailed order book data) is only slightly cheaper in the US. In derivatives markets, data licensing fees are often even lower in the EU than in the US. For instance, while Eurex charges EUR 37 per month for professional use of level 1 real-time derivatives market data and EUR 50 per month for level 2 data, CME charges USD 85 (~EUR 63; source: CME fee schedule) separately for data from each of its 4 trading venues (CME, CBOT, NYMEX, COMEX). That is, a data user requiring access to all CME data would have to pay USD 340 (~EUR 253). Prices for data from each venue are identical even though the venues are of different size (contract volumes June 2014 YTD: CME 827 mn, NYMEX and COMEX 238 mn, CBOT 565 mn; source: CME Group volume reports). In addition, three of these four trading venues (NYMEX, COMEX, and CBOT) are substantially smaller than Eurex (contract volume June 2014 YTD 753 mn) but still charge more for their data. In sum, we therefore believe prices are being set on a reasonable commercial basis within the EU.

This being said, we acknowledge that the proposed EU-wide harmonized disclosure requirements could be beneficial to the end customers of market data. In particular, they will enable data users to compare the exchange fees for market data with the costs they actually have for receiving the data. Over 90% of market data is not delivered directly by exchanges to users but by third parties (e.g., including investment firms in the case of retail investors), who usually charge mark-ups on these fees (among others to cover the costs of data aggregation and distribution). In general, total data cost to end users are only driven to a small part by exchange data fees. The study by Atradia (‘The cost of access to real time pre & post trade order book data in Europe’, 2010) as well as own discussion with banks show that these fees account for 8 – 15% of end user market data costs (the rest is third-party-related costs and IT infrastructure). Price regulating exchange data fees would thus address only a small share of end user costs and the effect would still have to be passed on to end users by intermediaries. The case of transaction fee reductions shows that intermediaries have not acted in this way in the past. For example, while trading-platform driven costs per transaction decreased on average by 48% in 2006 – 2009 following the introduction of MiFID (compare Oxera: ‘Monitoring prices, costs and volumes of trading and post-trading services’, 2011), the 2010 IMA report shows that fund managers accessing trading platform through intermediaries have not benefitted from these fee reductions.

We support the notion that current data licensing fees, price changes, and the most recent historic prices should be published. This will give users the required degree of transparency at reasonable costs of implementation. It could also be considered to disclose further information on the value of data to the customers. Relevant dimensions would be the number of instruments covered by the data as well as the information depth. The number of instruments covered by a single data product enables users to judge the convenience as well as the value of using that product. For instance, our cash market data product covers over 35,000 instruments (for comparison: cash market data by BATS/Chi-X covers about 3,600 instruments).

<ESMA\_QUESTION\_154>

**Q155: Are there any other possible requirements in the context of transparency/disclosure to ensure a reasonable price level?**

<ESMA\_QUESTION\_155>

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<ESMA\_QUESTION\_155>

**Q156: To what extent do you think that comprehensive transparency requirements would be enough in terms of desired regulatory intervention?**

<ESMA\_QUESTION\_156>

As briefly outlined in Deutsche Börse Group's response to Q 154, there is no market failure requiring regulatory intervention, as also stated in the study by Oxera ('Pricing of market data services – An economic analysis', 2014). Any regulatory measures to be proposed should take the principle of proportionality into account. This means that the principles-based approach focusing on transparency, augmented with the constructive solution we introduce in our answer to Q 164, should be preferred as it achieves the regulatory objective of making prices fair, reasonable, and non-discriminatory without being a disproportionate regulatory intervention given the small size of the market and the expected benefits of regulation.

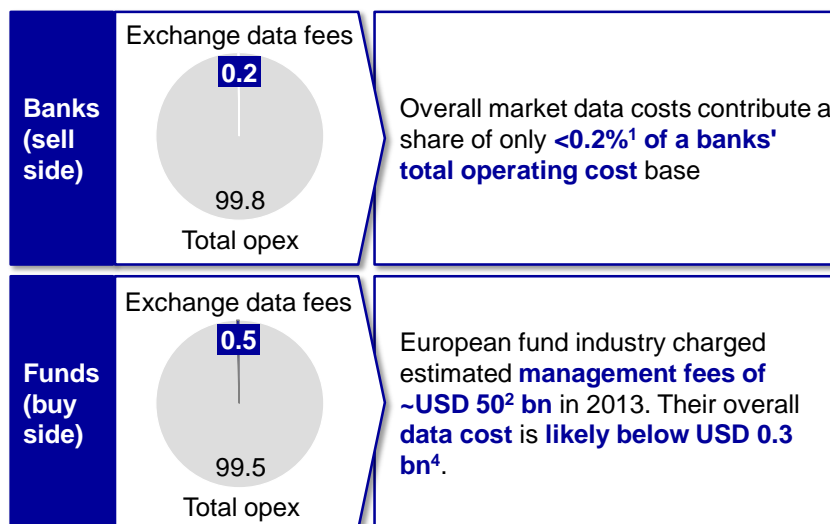
From our perspective, heavier regulatory intervention is not justified, since it would be very complex to implement and the study by Oxera ('Pricing of market data services – An economic analysis', 2014) shows that expected benefits are small. While a principles-based approach can be implemented with reasonable effort on the part of both industry and regulator, revenue-based and cost-based approaches would impose a substantially higher effort on all parties. Especially the cost-based approach would take very long to implement and be difficult to administer for both regulators and regulated entities (see Q 163 for more details on these costs).

With estimated total revenues of EUR 0.75 bn in 2013 (based on TABB Group Real Time Market Data Assessment, November 2013, scaled to European market using Burton-Taylor EMEA Market Data/Analysis share, 2012), the European exchange real-time market data industry is small. It needs to be considered as well that the above quoted figure encompasses other market data revenues (e.g., news services, services for other trading venues, index business) in addition those covered by Article 13 MiFIR. In comparison, the European telecommunications industry, for instance, which was subject to price regulation, is about 390 times as large with total revenues of EUR 293 bn in 2013 (Pyramid Research, 2013).

Market volume already indicates that the cost of market data licensing for market participants is small. For large banks, only less than 0.2% of their operating expenses are estimated to relate to their global consumption of exchange market data (see exhibit 1). Also, analyses show that fund management fees charged to investors in Europe are caused to less than 0.5% by exchange market data usage. Data users thus do not stand to benefit much from heavy regulatory intervention, making a meaningful welfare effect of price regulation unlikely.



## Comparison of market data cost with overall cost base of sell and buy side users

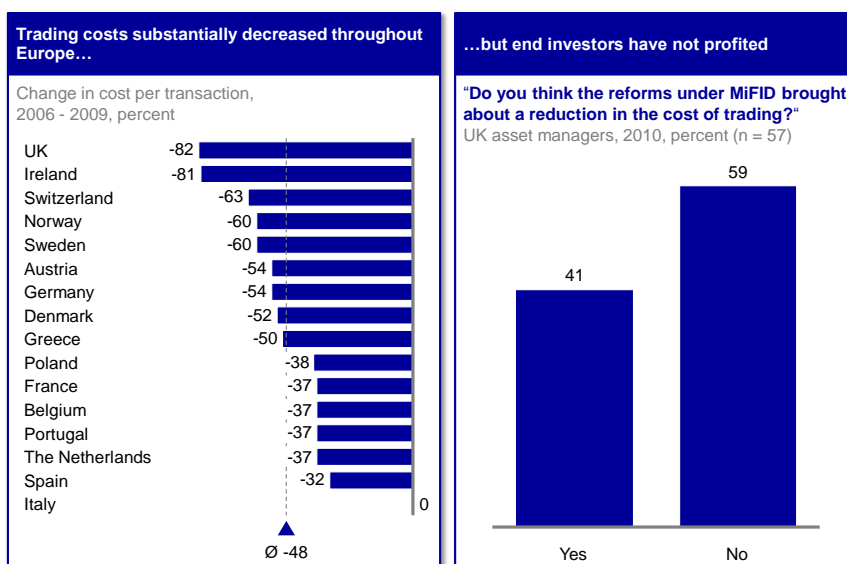


<sup>1</sup> Own estimate based on annual reports and proprietary data    <sup>2</sup> Estimate based on total assets under management of European funds industry (EUR 5.9 trn) and average net investment management fees of 60 bp (range reported by EFAMA: 49 – 74 bp)    <sup>3</sup> European market data revenues estimated at EUR 0.75 bn in 2013 (based on TABB Group estimate of global revenues of EUR 2 bn and Burton Taylor Estimate of European share of global market data industry)    <sup>4</sup> Own estimates based on proprietary data indicate that buy side customers typically account for about 30% of exchange market data spend  
 Source: Thomson Reuters European Fund Market Review 2013; European Fund Management Association; Burton Taylor; TABB Group Real Time Market Data Assessment (2013); annual reports; own analysis

Compounding this is the fact that exchanges typically do not license their market data directly to end users. Rather, over 90% of users access market data via third parties (e.g., investment firms in the case of retail investors or data vendors in the case of asset managers). So, not only would the benefits to data users be very small, as described, it is also possible that they do not even reach the users at all, but are consumed by other market participants. This has apparently happened with the reduction in trading costs following the introduction of MiFID in 2007. While trading fees charged by exchanges have dropped precipitously, the majority of fund managers surveyed in the 2010 IMA report stated that they have not benefitted from this (see exhibit 2).

Finally, heavy regulation of EU exchanges would create an un-level playing field with the US. Already in 2001, an SEC Advisory Committee recommended not to introduce price regulation for market data fees (Joel Seligman: 'Report of the Advisory Committee on Market Information: A Blueprint for responsible change', 2001). Today, US exchanges profit from a customer guarantee for their level 1 (top of order book and last price) data, since consumption of this data is mandated by Regulation NMS. Prices for level 2 data (level 1 data plus additional order book data) are also not much lower in the US than in the EU, as the study by Oxera ('Pricing of market data services – An economic analysis', 2014) shows. In sum, price regulation of market data would therefore weaken European exchanges at a time of ongoing industry consolidation. This consolidation is often led by US-based exchange groups (e.g., takeover of NYSE Euronext by ICE), which already own significant parts of the global financial infrastructure. Not only could this impact the important financing function that stock exchanges have for the real economy (e.g., SMEs), but it may also influence the role regulated markets have played in ensuring financial stability and transparency.

## Analysis of pass-through of cost savings by intermediaries



Source: Oxera (2011); IMA Survey: Asset Management in the UK 2010-2011 – The IMA Annual Survey

<ESMA\_QUESTION\_156>

### Q157: What are your views on controlling charges by fixing a limit on the share of revenue that market data services can represent?

<ESMA\_QUESTION\_157>

Deutsche Börse Group considers that this option is less preferable than the principles-based approach. It is not a meaningful approach towards ensuring a 'reasonable commercial basis' for market data licensing for several reasons. First of all, exchanges are very heterogeneous regarding the share of revenues they earn from market data licensing. An analysis presented in the ESMA Consultation Paper (page 222, FN 96) shows that this share exhibits a broad range. This is due to exchanges' strategic differentiation and different product and customer focus. Defining a rigid upper limit on the market data share of revenues would thus unduly limit strategic freedom and growth opportunities of exchanges and hit players that are focusing on differentiating their business models disproportionately hard. Furthermore, the share of data revenues can change over time even if market data fees are not adjusted.

Especially smaller exchanges often earn an essential part of their revenues in their market data businesses. They require these revenues to recover their substantial fixed costs and could be put into trouble if a revenue-share limit were to stop them from doing this. Accordingly, a very stringent limit would be especially detrimental for smaller exchanges.

<ESMA\_QUESTION\_157>

### Q158: Which percentage range for a revenue limit would you consider reasonable?

<ESMA\_QUESTION\_158>

As already pointed out, Deutsche Börse Group sees several downsides in this approach. If it were nevertheless to be chosen, a limit should be set on the high end to take into consideration the differences across exchanges as already laid out in question 157. After all, there is no 'right' percentage of revenues that

exchanges should be allowed to earn from market data licensing and due consideration needs to be given to the impact of such a regulation on small exchanges.

<ESMA\_QUESTION\_158>

**Q159: If the definition of “reasonable commercial basis” is to be based on costs, do you agree that LRIC+ is the most appropriate measure? If not what measure do you think should be used?**

<ESMA\_QUESTION\_159>

As outlined in question 154, there is no market failure warranting regulatory intervention. Given the small impact price regulation is expected to have on data users, a cost-based definition of ‘reasonable commercial basis’ would be a disproportionately complex and invasive solution and thus not in line with the principle of proportionality. Indeed, it would require substantial effort on the parts of both regulators and regulated entities. Implementing such a regulation requires, i.a., establishing common cost accounting guidelines, subjecting them to market consultations, building and finally auditing cost allocation models. For instance, the incumbent British Telecom had to first establish accounting separation of network services in 1995 before development of LRIC+ models could start in 1997 (OECD: ‘Regulatory Reform in the Telecommunications Industry – Regulatory Reform in UK’, 2002). In market data, there are a very high number of trading venues potentially to be regulated (currently 243 in Europe) and experience with price regulation is lacking in financial services (British Telecom had been price regulated since 1984, compare Jamison: ‘Regulation: Price Cap and Revenue Cap’, 2007). It can therefore be expected that establishing cost-based regulation for market data will take substantially longer, potentially up to 5 years.

The LRIC+ approach also faces several methodological challenges:

First of all, this approach is very assumption-driven. Small modifications to input factors produce huge swings in the price calculated by LRIC+ models. For example, a change of the assumed WACC by 10 pp might change LRIC+ prices by 99% (own analysis based on LRIC+ model published by Ofcom). This would make it very hard to maintain a level playing field across Europe.

Second, the complexity and lack of balance of LRIC+ creates a severe downside risk for unintended consequences. There is a real possibility that LRIC+ will prevent exchanges from recovering their actual costs. This would deter exchanges from actively expanding their technological capacities, which is a necessity in a time of ever increasing data volumes, as well as from being a reliable service provider for market participants even in extraordinary situations like those experienced in 2008. It would also stifle innovation, growth, and investment in the European exchange sector.

The risk of cost under-recovery arises for three reasons. One of them is the proposal to determine costs by modelling a hypothetical efficient data provider (‘bottom-up modelling’). This will lead to cost under-recovery if hypothetical costs are below actual costs exchanges face. This would result in fewer services which could be provided to customers going forward. A second reason is that the Consultation Paper is not completely clear about the inclusion of joint costs. While it does state that a fair share of joint costs should be included, the relevant increment considered for LRIC+ modelling is proposed to be the data dissemination service only. This would not reflect economic reality by neglecting the nature of market data as a joint product with trade execution (compare Oxera: ‘Pricing of market data services – An economic analysis’, 2014; Reuben Lee: ‘What is an Exchange? The Automation, Management, and Regulation of Financial Markets’, 1999). Without trading, there is no market data, and without market data, market participants are not able to trade. The relevant costs for providing market data are therefore not just the cost of data dissemination, as wrongly stated by Copenhagen Economics (‘Regulating access to and pricing of equity market data’, 2013), but also the cost for the trading platform. Information goods like software, music, movies, and market data are characterized by high fixed costs and low-to-zero marginal costs of production. As far back as 20 years ago, economic theory realized that this implied that prices for these goods cannot be set at marginal cost. Producers would simply go out of business if this were the case, unable to cover their fixed expenditures (Varian: ‘Pricing Information Goods’, 1995). A third reason is that LRIC+ is often combined with regular price reviews. As experience from the telecommunications industry shows,



such price reviews in combination with declining asset prices prevent companies from recovering their actual investments (Mandy/Sharkey: 'Dynamic Pricing and Investment from Static Proxy Models', 2003).

Third, the experience in the European telecommunications industry, in which LRIC+ has been applied extensively, is also not an overall positive one. Stringent cost-based price regulation has led to severely diminished investments in this key industry and significantly damaged the competitiveness of Europe. The EU is now severely lagging in fibre/4G penetration when compared to the US or Japan and Korea. Accordingly, the European agenda for telecommunications is now being rethought, as focus shifts from price regulation towards rekindling growth and investment.

Likewise, exchanges are a crucial part of Europe's financial markets infrastructure. They provide funding for companies, transparency and integrity in regulated markets as well as stability for trade execution. This becomes especially evident in turbulent times like the recent financial crisis, when the exchanges' CCPs (central counterparties) have proven their capabilities in mitigating counterparty risk and reducing contagion and uncertainty. Furthermore, exchanges were able to cope with unprecedented data volumes providing for reliable data services even in those times. Furthermore, the funding function of regulated markets is especially vital to SMEs, which currently experience tight credit markets. Weakening exchanges by imposing cost-based price regulation on them could be detrimental for European financial markets infrastructure as a whole. Importantly, unlike telecommunication companies, exchanges also do not represent the so called 'last mile' to the customer. In fact, over 90% of market data is provided to the customer through third parties and not directly by exchanges. Exchanges therefore do not have full control over end-user prices. It would thus be inappropriate to impose LRIC+ on them.

It is for good reasons that other regulators have refrained from establishing a definition of 'reasonable commercial terms' in general and from cost-based regulation in particular. The respective SEC Advisory Committee concluded in 2001 that a cost-based approach to market data fee setting was unnecessary and impractical (Joel Seligman: 'Report of the Advisory Committee on Market Information: A Blueprint for responsible change', 2001). Price regulation for market data in Europe would create an un-level playing field globally. This would happen at a time when industry consolidation is ongoing and often driven by US-based exchange groups (for example, takeover of NYSE Euronext by ICE) which already own significant parts of the global financial infrastructure. Not only could this impact the important financing function that stock exchanges have for SMEs and the economy as a whole, but it may also influence the role regulated markets have played in ensuring financial stability and transparency.

<ESMA\_QUESTION\_159>

**Q160: Do you agree that suppliers should be required to maintain a cost model as the basis of setting prices against LRIC+? If not how do you think the definition should be implemented?**

<ESMA\_QUESTION\_160>

Deutsche Börse Group does not support the LRIC+ approach for the reasons stated (see Q159). If it were to be implemented nevertheless, we think it is vital that a) it is fully accepted that trading venues data are a joint product with trade execution services and b) the cost model is held and maintained by trading venues themselves. Given the heterogeneity in cost structures across exchanges, it is hard to prevent an uneven impact on exchanges otherwise. The risk of substantial cost under-recovery would still be present even in this case due to the proposed use of theoretical cost models.

<ESMA\_QUESTION\_160>

**Q161: Do you believe that if there are excessive prices in any of the other markets, the same definition of "reasonable commercial basis" would be appropriate, or that they should be treated differently? If the latter, what definition should be used?**

<ESMA\_QUESTION\_161>

Deutsche Börse Group is of the opinion that market data licensing fees are generally being set on a reasonable basis already. Therefore, there is no need for disproportionate regulatory intervention.

<ESMA\_QUESTION\_161>

**Q162: Within the options A, B and C, do you favour one of them, a combination of A+B or A+C or A+B+C? Please explain your reasons.**

<ESMA\_QUESTION\_162>

Deutsche Börse Group favours option A for the reasons stated above. The other options would be disproportionate, pose a significant risk of unintended consequences, and impose substantial costs on both regulators and regulated entities.

<ESMA\_QUESTION\_162>

**Q163: What are your views on the costs of the different approaches?**

<ESMA\_QUESTION\_163>

Deutsche Börse Group considers that the costs of the different approaches cannot be seen in isolation but must be judged against the benefits expected from regulatory intervention. Since there is no market failure and the market for exchange data is small, these benefits are limited. Option A is therefore to be favoured from this perspective, since it represents the least invasive method to ensure a 'reasonable commercial basis'.

The costs of option B are hard to assess since it is unclear how such an approach would be implemented in practice. Depending on this implementation, the costs could be high if granular and frequent monitoring of exchanges is required.

Option C is the most cost-intensive approach, especially given that ESMA and the National Competent Authorities are not competition/price control authorities and that no experience for this complex task is available in financial services regulation. Establishing LRIC+ does not only require building models. Rather, it would first require establishing accounting separation of the regulated services. In a next step, common cost accounting guidelines would have to be established across Europe to ensure consistent implementation of cost-based regulation. Finally, actual cost models would have to be built. As outlined above, building and maintaining LRIC+ models is a complex task placing a burden on both regulators and exchanges. For example, all 243 currently existing trading venues would need to hire experts to build models for them and employees at the regulated venues would be needed to maintain the models. Furthermore, regulatory authorities in 28 member states would have to create additional capacities to audit the models and monitor the 243 trading venues. This would also create the risk of an un-level playing field within the EU if national solutions emerge. Given the small size of the industry and the small impact of market data fees on users, such an effort is not justified.

<ESMA\_QUESTION\_163>

**Q164: Is there some other approach you believe would be better? Why?**

<ESMA\_QUESTION\_164>

In its request for technical advice, the European Commission has asked ESMA to 'explore a 'principles-based approach' which is that of defining principles against which data providers and their customers could appreciate the reasonableness of data prices'. We believe that this approach provides the optimal framework for a constructive solution focused on lowering cash markets data costs for professional and retail investors (in derivatives markets, prices are not higher in the EU than in the US). We propose to augment the principles laid out by ESMA with further constructive measures reducing data costs, forming an option A+.

This option A+ continues the good practice of proactive exchange-driven measures, on which exchanges have always delivered, e.g., the development of MMT under the FESE umbrella and implementing MMT in multiple exchange feeds (further reducing costs of consolidation). We propose to continue on this path by implementing a solution that fulfills the requirements set out by the European Commission: achieving price transparency, taking into consideration the price reductions achieved by unbundling, and further cost reductions.



Our solution rests on two pillars: (a) enhancing transparency of license terms and data fees through publication of data license terms and price lists in combination with (b) cost reductions for equity market data fees through targeted license offerings.

This solution would achieve cost reductions across all customer groups:

- **All customers:** Unbundling post-trade data from pre-trade data to reduce costs for market participants when licensing data (in line with Article 12 MiFIR). Implementation of a harmonized delay period of 15 minutes across the EU, making valuable data available to users without trading venues' data license fees.
- **Retail investors:** Attractive price structure for retail consolidated (post-trade) tape at reduced fees.
- **Buy side and issuers:** Unbundled post-trade data supports consolidated post-trade tape. This could be used, for instance, for best execution verification at buy side, turnover monitoring by issuers, or transaction cost analysis. All previously mentioned use cases could also be processed free of exchange data fees with the 15 minutes delayed data mentioned above.
- **Buy side and sell side:** Support of Price per User license (PPU) as a means to reduce multiple payments for the same set of data product consumed via multiple screens by the same user. This requires direct contracts with the trading venues in order for them to administer the data fee netting process.

The proposed solution should focus on stock market data since a comparison with the US shows that data licensing fees in the derivatives markets are not higher in Europe. Our proposal is designed to reflect the principle of proportionality, keep a level playing field in a competitive global market, reduce the risk of unintended consequences, and keep additional administrative burden and costs for both trading venues and regulators at bay. Furthermore, it would be in line with the European Commission's request to ensure data dissemination on a reasonable commercial basis and could be implemented in a timely fashion.

<ESMA\_QUESTION\_164>

**Q165: Do you think that the offering of a 'per-user' pricing model designed to prevent multiple charging for the same information should be mandatory?**

<ESMA\_QUESTION\_165>

In general, Deutsche Börse Group believes that offering price per user (PPU) as a pricing model in addition to price per device should prevent that users are being charged multiple times for the same information. Accordingly, it addresses an important element of the European Commission's mandate, namely to achieve data cost reductions for end users. We therefore support the PPU license model. As ESMA points out in its Consultation Paper, this model may not be appropriate for all customers due to the administrative effort required to implement it. Exchanges should therefore be able to set eligibility criteria for customers participating in a PPU approach.

<ESMA\_QUESTION\_165>

**Q166: If yes, in which circumstances?**

<ESMA\_QUESTION\_166>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_166>

## 5. Micro-structural issues

### 5.1. Algorithmic and high frequency trading (HFT)

#### **Q167: Which would be your preferred option? Why?**

<ESMA\_QUESTION\_167>

As of today there exists a variety of different definitions of what constitutes high-frequency trading. Overall, Deutsche Börse Group believes that in general it would be better to focus on broad principles that capture the universe of automated proprietary trading instead of referring to narrow prescriptive parameters based on statistics but understand at the same time that the regulator needs to come up with a definition. Out of the two suggested options we believe that Option 1 is best suited as it is well defined, has absolute criteria and is quite similar to what has been implemented in Germany under the German HFT Act. Further, it does not allow a market participant's status to be impacted or determined by the activity of other market participants. By changing the effective numbers for transactions per second and bandwidth it offers the flexibility to adapt to technology improvements in the future. We believe that Option 1 is the better practical alternative when it comes to implementation, however we also have some aspects that could improve Option 1 (please refer to our answer to question 168).

<ESMA\_QUESTION\_167>

#### **Q168: Can you identify any other advantages or disadvantages of the options put forward?**

<ESMA\_QUESTION\_168>

Deutsche Börse Group believes that both alternatives have limitations and drawbacks because we do not believe that a clear definite distinction can be made between high-frequency trading and automated trading.

That being said, Option 1 has been implemented in some form already and would require somewhat less effort for firms who comply with existing German requirements. We think that Option 1 would be the best option though, as it is easier to implement and market participants comply with existing German requirements that are similar to those as proposed under Option 1. However, we suggest adding the criteria of 'proprietary trading' as this is essential when it comes to high-frequency trading.

As the key for high frequency trading firms is mainly speed and not bandwidth we think that the definition should contain the fastest connection available. As technology evolves, a 10 Gig line might not be the fastest connection anymore in five year's time. This would then need readjustment. However, the advantage is that with the bandwidth you could precisely determine which firm would be covered and which not. This has also been implemented in Germany and proves to be working. Hence the definition should reference to the fastest connection available: 'The participant/member uses the fastest connection offered by the respective trading venue.'

Further we suggest to define an absolute number with regard to messages (e.g. 75,000 messages) and not as suggested by ESMA to have 2 messages per second over the entire trading day. This would otherwise lead to an un-level playing field as this would mean there would be trading venues with higher and lower messages rates due to different trading hours. The absolute message (to be set by ESMA) should apply per trading venue identified by its MIC (market identifier code).

In addition we like to emphasise that it has been suggested in the Discussion Paper that immediate or cancel (IOC) orders are double counted which is not correct as it contains specifically only one data set. In addition to IOCs also fill or kill (FOK) and book or cancel (BOC) orders should only be counted once.



Quotes on the other side and mass quotes can be double counted while system initiated transaction should not be counted as the participant has no power over those.

With Option 2 there is only rare data available and no real study has been conducted to analyse the appropriateness of this option. Deutsche Börse Group is convinced that it is too complex to implement, maintain and administer because the parameters cannot be easily predicted. Overall, we believe that such a definition will make it very hard for market participants to be in control of their status as a high frequency trader, also because this status can be impacted and influenced by trading behaviour of other market participants. This is especially true during periods of growth and change. Option 2 suggests that the message-related factor should be set at a threshold which would include participants who have a median order lifetime shorter than the median for the entire trading venue. This approach might introduce incentives for all market participants to collectively act to increase the median order lifetime on a trading venue by increasing their respective individual order lifetimes. This could be achieved by, e.g. submitting a large amount of orders that are (due to a very low buy limit price, for example) never actually meant to be executed. We do not believe that this can be ESMA's intention. In addition we are concerned that Option 2 might lead to an un-level playing field amongst trading venues as the HFT definition would depend on the overall activity on a respective trading venue. This would split Europe into markets with "slow" and "fast" venues, where the median daily lifetime of the orders is higher and shorter.

<ESMA\_QUESTION\_168>

**Q169: How would you reduce the impact of the disadvantages identified in your preferred option?**

<ESMA\_QUESTION\_169>

As Deutsche Börse Group is convinced that Option 1 is the better alternative proposed by ESMA for the reasons provided in the answer to question 167, we further suggest to define an absolute number with regard to messages (e.g. 75,000 messages) and not as suggested by ESMA to have 2 messages per second over the entire trading day. This would otherwise lead to an un-level playing field as this would mean there would be trading venues with higher and lower messages rates due to different trading hours. The absolute message (to be set by ESMA) should apply per trading venue identified by its MIC (market identifier code). We further suggest that a periodical review of the numbers used can minimize the impact of the disadvantage. In contrast to a principle based approach, participants have a reliable concept to determine their own status without/minimised uncertainty. Besides this, the definition is only dependent on the behaviour of the participant itself and can provide a stable picture over time.

<ESMA\_QUESTION\_169>

**Q170: If you prefer Option 2, please advise ESMA whether for the calculation of the median daily lifetime of the orders of the member/participant, you would take into account only the orders sent for liquid instruments or all the activity in the trading venue.**

<ESMA\_QUESTION\_170>

Deutsche Börse Group does not support Option 2 because we fear that it most likely may result in business disruption and uneven regulatory prohibition. Analysing periodically the median daily lifetime of (intra-day) orders which have been modified or cancelled to then determine the median, and those market participants that fall below the median is quite a complex procedure. Especially the cutback to liquid instruments according to Article 2(1)(17) of MiFIR is a major drawback as HF trading can occur in every instrument, independent from the liquidity categorization of MiFIR, being a technology and the technology offered by venues (system/connection) is seldom different from instrument to instrument. Further, the usage of averages causes issues, because participants that might want to circumvent rules can always cease to trade for a few days, or slow down trading, rearrange their business or somehow otherwise play with stats by not making markets if the median rises too high in the context. Option 2's methodology will spur orders far away from the best bid/offer, thereby increase the number of orders to be canceled in emergency situations and will allow that the behavior of a big market participant can have influence on the status of other trading participants.

<ESMA\_QUESTION\_170>





**Q171: Do you agree with the above assessment? If not, please elaborate.**

<ESMA\_QUESTION\_171>

With regard to derivatives:

Deutsche Börse Group does not agree with the above assessment and believe this concept needs to be more granular. The boundary between HFT and automated trading (AT) as conceptualized by ESMA is troubling and has the potential to severely limit or stifle innovation. A participant may have different strategic algorithms based on venue and instrument, each of which may or may not be considered HFT depending upon its interaction with a market.

To give background, algorithmic trading uses software to generate trade opportunities which are then either entered manually or automated. Automation allows algorithmic strategies the ability to operate as quickly or slowly as machines are capable of operating. Hence, depending upon the market, the mathematical formulae, and other technical inputs, an automated strategy may operate slowly, over hours or days; or quickly, in milliseconds or faster. A firm may maintain both HFT and slower AT strategies and each should be governed by the applicable regulatory regime. To the point that a member shall be considered as HFT across Europe if it qualifies at a single venue, that might reduce the activity of members on different venues in Europe, because it most probably increases regulatory burdens and costs but also increases complexity of the business structure. Being classified as HFT at a venue does not automatically imply being HFT at another venue, because this other venue might not even offer the same connectivity or technicality to perform HF trading.

Having said this, we would like to point out that while we believe that setting the HFT status on a member level might be feasible, we want to be absolutely clear in our position that investment firms registered as HFT on one venue can under no circumstances be registered as such automatically on other venues. The HFT status needs to be verified for each venue separately, especially across different legal jurisdictions.

<ESMA\_QUESTION\_171>

## **5.2. Direct electronic access (DEA)**

**Q172: Do you consider it necessary to clarify the definitions of DEA, DMA and SA provided in MiFID? In what area would further clarification be required and how would you clarify that?**

<ESMA\_QUESTION\_172>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_172>

**Q173: Is there any other activity that should be covered by the term “DEA”, other than DMA and SA? In particular, should AOR be considered within the DEA definition?**

<ESMA\_QUESTION\_173>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_173>

**Q174: Do you consider that electronic order transmission systems through shared connectivity arrangements should be included within the scope of DEA?**

<ESMA\_QUESTION\_174>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_174>



**Q175: Are you aware of any order transmission systems through shared arrangements which would provide an equivalent type of access as the one provided by DEA arrangements?**

<ESMA\_QUESTION\_175>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_175>

## 6. Requirements applying on and to trading venues

### 6.1. SME Growth Markets

**Q176: Do you support assessing the percentage of issuers on the basis of number of issuers only? If not, what approach would you suggest?**

<ESMA\_QUESTION\_176>

Deutsche Börse Group generally supports assessing the percentage of issuers on the basis of number of issuers only.

<ESMA\_QUESTION\_176>

**Q177: Which of the three different options described in the draft technical advice box above for assessing whether an SME-GM meets the criterion of having at least fifty per cent of SME issuers would you prefer?**

<ESMA\_QUESTION\_177>

Deutsche Börse Group supports the most flexible approach as displayed under point 7 in the draft technical advice box and in our view we prefer that at least 50 per cent of the issuers admitted to trading on the SME-GM on that day are SMEs. The handling of the case that a SME-GM falls below (or above) the 50 per cent threshold should also be considered as flexible as possible. Sufficient certainty to operators of SME-GMs and companies should have top priority. The market operator should retain key powers which serve to ensure the integrity of the market, that is to say the market operator should make the final decision to allow admission and to refuse an application posing risks to market integrity or impose special conditions.

<ESMA\_QUESTION\_177>

**Q178: Do you agree with the approach described above (in the box Error! Reference source not found.), that only falling below the qualifying 50% threshold for a number of three consecutive years could lead to deregistration as a SME-GM or should the period be limited to two years?**

<ESMA\_QUESTION\_178>

Deutsche Börse Group recommends a period of three consecutive years of falling below the threshold before deregistering a market as SME-GM.

<ESMA\_QUESTION\_178>

**Q179: Should an SME-GM which falls below the 50% threshold in one calendar year be required to disclose that fact to the market?**

<ESMA\_QUESTION\_179>

If an SME-GM does not meet the qualifying 50 per cent threshold, Deutsche Börse Group recommends not disclosing that fact to the market as this may deter SMEs from joining the market.

<ESMA\_QUESTION\_179>

**Q180: Which of the alternatives described above on how to deal with non-equity issuers for the purposes of the “at least 50% criterion” do you consider the most appropriate? Please give reasons for your answer.**

<ESMA\_QUESTION\_180>

Deutsche Börse Group considers the proposal as displayed under 9.iii a to be the most appropriate. Non-equity issuers should be considered as SMEs if the overall nominal value of the debt securities issued by the issuer does not exceed 200,000 000 EUR. This rule would have its equivalence in the current practice.  
<ESMA\_QUESTION\_180>

**Q181: Do you agree that an SME-GM should be able to operate under the models described above, and that the choice of model should be left to the discretion of the operator (under the supervision of its NCA)?**

<ESMA\_QUESTION\_181>

Deutsche Börse Group believes that the applicant has to fulfil the initial and ongoing requirements. Ongoing requirements should not be conferred upon the advisors. Nevertheless advisors could support the issuer to fulfil these ongoing requirements.

<ESMA\_QUESTION\_181>

**Q182: Do you agree that an SME-GM should establish and operate a regime which its NCA has assessed to be effective in ensuring that its issuers are “appropriate”?**

<ESMA\_QUESTION\_182>

Deutsche Börse Group agrees that an SME-GM should establish and operate a regime which its NCA has assessed to be effective in ensuring that its issuers are ‘appropriate’.

<ESMA\_QUESTION\_182>

**Q183: Do you agree with the factors to which a NCA should have regard when assessing if an SME-GM’s regulatory regime is effective?**

<ESMA\_QUESTION\_183>

Deutsche Börse Group agrees with the factors to which a NCA should have regard when assessing if an SME-GM’s regulatory regime is effective.

<ESMA\_QUESTION\_183>

**Q184: Do you think that there should be an appropriateness test for an SME-GM issuer’s management and board in order to confirm that they fulfil the responsibilities of a publicly quoted company?**

<ESMA\_QUESTION\_184>

Deutsche Börse Group agrees that there should be an appropriateness test for an SME-GM issuer’s management and board in order to confirm that they fulfil the responsibilities of a publicly quoted company.

<ESMA\_QUESTION\_184>

**Q185: Do you think that there should be an appropriateness test for an SME-GM issuer’s systems and controls in order to confirm that they provide a reasonable basis for it to comply with its continuing obligations under the rules of the market?**

<ESMA\_QUESTION\_185>

Deutsche Börse Group generally supports the idea of an appropriateness test for an SME-GM issuer’s systems and controls in order to confirm that they provide a reasonable basis for it to comply with its continuing obligations under the rules of the market.

<ESMA\_QUESTION\_185>

**Q186: Do you agree with Error! Reference source not found., Error! Reference source not found. or Error! Reference source not found. Error! Reference source not found.?**

<ESMA\_QUESTION\_186>

Deutsche Börse Group believes that the Regulation should remain silent on the adequacy of working capital as we believe that this question should remain in the responsibility of the auditors/accountants in charge.



<ESMA\_QUESTION\_186>

**Q187: Are there any other criteria that should be set for the initial and on-going admission of financial instruments of issuers to SME-GMs?**

<ESMA\_QUESTION\_187>

Deutsche Börse Group is not aware of any other criteria that should be set for the initial and on-going admission of financial instruments of issuers to SME-GMs.

<ESMA\_QUESTION\_187>

**Q188: Should the SME-GM regime apply a general principle that an admission document should contain sufficient information for an investor to make an informed assessment of the financial position and prospects of the issuer and the rights attaching to its securities?**

<ESMA\_QUESTION\_188>

Deutsche Börse Group welcomes the general idea of a prospectus requirement for the admission to the SME-GM. However, we also support the requirement of a prospectus even without a public offer being made as the information about the issuer and the financial instruments should generally be of the same content. Furthermore, the approval of the aforementioned prospectus shall solely remain a responsibility of the NCA to ensure the consistency of the prospectus. We do not support the view that the Regulation requires an SME-GM to make arrangements for an appropriate review of an admission document, designed to ensure that the information it contains is complete.

<ESMA\_QUESTION\_188>

**Q189: Do you agree that SME-GMs should be able to take either a ‘top down’ or a ‘bottom up’ approach to their admission documents where a Prospectus is not required?**

<ESMA\_QUESTION\_189>

From the background that Deutsche Börse Group believes that the approval of the aforementioned admission documents shall solely remain a responsibility of the competent authority to ensure the consistency of such admission documents we are not in the position to comment on questions as to what approach regarding the disclosure of information by the issuer should be used.

<ESMA\_QUESTION\_189>

**Q190: Do you think that MiFID II should specify the detailed disclosures, or categories of disclosure, that the rules of a SME-GM would need to require, in order for admission documents prepared in accordance with those rules to comply with Article 33(3)(c) of MiFID II? Or do you think this should be the responsibility of the individual market, under the supervision of its NCA?**

<ESMA\_QUESTION\_190>

From the background that Deutsche Börse Group believes that the approval of the aforementioned admission documents shall solely remain a responsibility of the competent authority we are not in the position to comment on questions as to what approach regarding disclosure of information should be used.

<ESMA\_QUESTION\_190>

**Q191: If you consider that detailed disclosure requirements should be set at a MiFID level, which specific disclosures would be essential to the proper information of investors? Which elements (if any) of the proportionate schedules set out in Regulation 486/2012 should be dis-applied or modified, in order for an admission document to meet the objectives of the SME-GM framework (as long as there is no public offer requiring that a Prospectus will be drafted under the rules of the Prospectus Directive)?**

<ESMA\_QUESTION\_191>

From the background that Deutsche Börse Group believes that the approval of the aforementioned admission documents shall solely remain a responsibility of the competent authority we are not in the position to comment on questions as to which specific disclosures should be essential.



<ESMA\_QUESTION\_191>

**Q192: Should the future Level 2 Regulation require an SME-GM to make arrangements for an appropriate review of an admission document, designed to ensure that the information it contains is complete?**

<ESMA\_QUESTION\_192>

From the background that Deutsche Börse Group believes that the approval of the aforementioned admission documents shall solely remain a responsibility of the competent authority we are not in the position to comment on questions as to what arrangement for an appropriate review of an admission document should be designed to ensure that the information it contains is complete.

<ESMA\_QUESTION\_192>

**Q193: Do you agree with this initial assessment by ESMA?**

<ESMA\_QUESTION\_193>

Deutsche Börse Group agrees with this initial assessment by ESMA.

<ESMA\_QUESTION\_193>

**Q194: In your view which reports should be included in the on-going periodic financial reporting by an issuer whose financial instruments are admitted to trading on an SME-GM?**

<ESMA\_QUESTION\_194>

Deutsche Börse Group prefers the following: Issuers should publish annual reports within six months after the end of each financial year and half-yearly financial statement within three months after the end of the first six months of each financial year. SMEs should transfer and publish the annual reports and half-yearly financial statements.

<ESMA\_QUESTION\_194>

**Q195: How and by which means should SME-GMs ensure that the reporting obligations are fulfilled by the issuers?**

<ESMA\_QUESTION\_195>

Deutsche Börse Group thinks that the SME-GM will supervise the reporting obligations in regards to their sufficiency and consistency according to the existing practices and rules.

<ESMA\_QUESTION\_195>

**Q196: Do you think that the more generous deadlines proposed for making reports public above (in the Box above, paragraph Error! Reference source not found.) are suitable, or should the deadlines imposed under the rules of the Transparency Directive also apply to issuers on SME-GMs?**

<ESMA\_QUESTION\_196>

Deutsche Börse Group prefers sufficiency and consistency of the reporting obligations according to the existing practices and rules.

<ESMA\_QUESTION\_196>

**Q197: Do you agree with this assessment that the MiFID II framework should not impose any additional requirements/additional relief to those envisaged by MAR?**

<ESMA\_QUESTION\_197>

Deutsche Börse Group agrees with this approach.

<ESMA\_QUESTION\_197>

**Q198: What is your view on the possible requirements for the dissemination and storage of information?**



<ESMA\_QUESTION\_198>

Deutsche Börse Group is of the opinion that dissemination and storage of information are welcomed.

<ESMA\_QUESTION\_198>

**Q199: How and by which means should trading venues ensure that the dissemination and storage requirements are fulfilled by the issuers and which of the options described above do you prefer?**

<ESMA\_QUESTION\_199>

Deutsche Börse Group prefers the dissemination and storage to be fulfilled according to the existing practices and rules. Issuers should deliver information to the operator of the SME-GM which is in charge of public dissemination (via dedicated website).

<ESMA\_QUESTION\_199>

**Q200: How long should the information be stored from your point of view? Do you agree with the proposed period of 5 years or would you prefer a different one (e.g., 3 years)?**

<ESMA\_QUESTION\_200>

Deutsche Börse Group prefers storage of information for the period of three years.

<ESMA\_QUESTION\_200>

**Q201: Do you agree with this assessment that the MiFID II framework should not impose any additional requirements to those presented in MAR?**

<ESMA\_QUESTION\_201>

Deutsche Börse Group agrees that the MiFID II framework should not impose any additional requirements to those presented in MAR.

<ESMA\_QUESTION\_201>

## 6.2. Suspension and removal of financial instruments from trading

**Q202: Do you agree that an approach based on a non-exhaustive list of examples provides an appropriate balance between facilitating a consistent application of the exception, while allowing appropriate judgements to be made on a case by case basis?**

<ESMA\_QUESTION\_202>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_202>

**Q203: Do you agree that NCAs would also need to consider the criteria described in paragraph Error! Reference source not found. Error! Reference source not found. and Error! Reference source not found., when making an assessment of relevant costs or risks?**

<ESMA\_QUESTION\_203>

Yes, Deutsche Börse Group agrees.

<ESMA\_QUESTION\_203>

**Q204: Which specific circumstances would you include in the list? Do you agree with the proposed examples?**

<ESMA\_QUESTION\_204>

Deutsche Börse Group proposes to include circumstances in which a take-over bid is made public and the take-over bid is close to the actual price (e.g. <+20%); then a suspension would have a negative impact on market participants that want to react on this information and want to be invested.



<ESMA\_QUESTION\_204>

### **6.3. Substantial importance of a trading venue in a host Member State**

**Q205: Do you consider that the criteria established by Article 16 of MiFID Implementing Regulation remain appropriate for regulated markets?**

<ESMA\_QUESTION\_205>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_205>

**Q206: Do you agree with the additional criteria for establishing the substantial importance in the cases of MTFs and OTFs?**

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

### **6.4. Monitoring of compliance – information requirements for trading venues**

**Q207: Which circumstances would you include in this list? Do you agree with the circumstances described in the draft technical advice? What other circumstances do you think should be included in the list?**

<ESMA\_QUESTION\_207>  
Yes, Deutsche Börse Group considers that the mentioned circumstances are sufficient enough regarding the requirements described in 6.4. The listing of additional circumstances is not necessary.  
<ESMA\_QUESTION\_207>

### **6.5. Monitoring of compliance with the rules of the trading venue - determining circumstances that trigger the requirement to inform about conduct that may indicate abusive behaviour**

**Q208: Do you support the approach suggested by ESMA?**

<ESMA\_QUESTION\_208>  
Yes, Deutsche Börse Group fundamentally supports the approach suggested by ESMA.  
<ESMA\_QUESTION\_208>

**Q209: Is there any limitation to the ability of the operator of several trading venues to identify a potentially abusive conduct affecting related financial instruments?**

<ESMA\_QUESTION\_209>



Deutsche Börse Group considers that cross market, cross platform and cross venue surveillance strongly depends on technical resources such as surveillance- and documentation systems and software. ESMA should not underestimate that purely collecting all relevant trading data of several trading venues operated by one operator is not efficient enough to conduct a cross-market surveillance. In fact the data and relevant systems for surveillance must be capable to deal with several market models, trading conditions and matching processes as well as various forms of data processing, data semantic and data storing.

<ESMA\_QUESTION\_209>

**Q210: What can be the implications for trading venues to make use of all information publicly available to complement their internal analysis of the potential abusive conduct to report such as managers' dealings or major shareholders' notifications)? Are there other public sources of information that could be useful for this purpose?**

<ESMA\_QUESTION\_210>

Deutsche Börse Group considers that respective data must be available and integrated in the internal surveillance tools and -processes. This integration process could have material impact on costs and budget. There should be a clear reference within the proposed guideline to the principle of proportionality.

<ESMA\_QUESTION\_210>

**Q211: Do you agree that the signals listed in the Annex contained in the draft advice constitute appropriate indicators to be considered by operators of trading venues? Do you see other signals that could be relevant to include in the list?**

<ESMA\_QUESTION\_211>

Fundamentally, Deutsche Börse Group agrees that the signals listed in the Annex contained in the draft advice constitute appropriate indicators to be considered. However, according to the extremely high numbers of trading data and possible expected electronic alerts generated by the respective surveillance tools a second level of analysis should be mentioned within the guidelines e.g. comparison of statistically expected trading behavior versus actual detected trading behavior of a member, registered trader or algorithm. This would reduce the expected high number of 'suspicious' trading alerts. Moreover, this 'statistical' approach, as a second level of surveillance, would create a more intelligent way to scope with the expected extremely high numbers of data and (electronic) generated surveillance alerts.

<ESMA\_QUESTION\_211>

**Q212: Do you consider that front running should be considered in relation to the duty for operators of trading venues to report possible abusive conduct? If so, what could be the possible signal(s) to include in the list?**

<ESMA\_QUESTION\_212>

Yes, Deutsche Börse Group believes 'front running' (trading in front of a (huge) client order) should be considered in the duty for operators of trading venues to report possible abusive conduct. However, a prerequisite for monitoring 'front running' is a) a clear European wide definition, which all trading venues must comply with and b) trading venues must be able to distinguish within their trading data between 'proprietary' and 'agency' ('client') trading. A respective marker (flag) must be available on each order.

<ESMA\_QUESTION\_212>

## 7. Commodity derivatives

### 7.1. Financial instruments definition - specifying Section C 6, 7 and 10 of Annex I of MiFID II

**Q213: Do you agree with ESMA’s approach on specifying contracts that “must” be physically settled and contracts that “can” be physically settled?**

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

**Q214: Which oil products in your view should be caught by the definition of C6 energy derivatives contracts and therefore be within the scope of the exemption? Please give reasons for your view stating, in particular, any practical repercussions of including or excluding products from the scope.**

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

**Q215: Do you agree with ESMA’s approach on specifying contracts that must be physically settled?**

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

**Q216: How do operational netting arrangements in power and gas markets work in practice? Please describe such arrangements in detail. In particular, please describe the type and timing of the actions taken by the various parties in the process, and the discretion over those actions that the parties have.**

<ESMA\_QUESTION\_216>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_216>

**Q217: Please provide concrete examples of contracts that must be physically settled for power, natural gas, coal and oil. Please describe the contracts in detail and identify on which platforms they are traded at the moment.**

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

**Q218: How do you understand and how would you describe the concepts of “force majeure” and “other bona fide inability to settle” in this context?**

<ESMA\_QUESTION\_218>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_218>



**Q219: Do you agree that Article 38 of Regulation (EC) No 1287/2006 has worked well in practice and elements of it should be preserved? If not, which elements in your view require amendments?**

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

**Q220: Do you agree that the definition of spot contract in paragraph 2 of Article 38 of Regulation (EC) 1287/2006 is still valid and should become part of the future implementing measures for MiFID II? If not, what changes would you propose?**

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

**Q221: Do you agree that the definition of a contract for commercial purposes in paragraph 4 of Article 38 of Regulation (EC) 1287/2006 is still valid and should become part of the future implementing measures for MiFID II? If not, what changes would you propose? What other contracts, in your view, should be listed among those to be considered for commercial purposes?**

<ESMA\_QUESTION\_221>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_221>

**Q222: Do you agree that the future Delegated Act should not refer to clearing as a condition for determining whether an instrument qualifies as a commodity derivative under Section C 7 of Annex I?**

<ESMA\_QUESTION\_222>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_222>

**Q223: Do you agree that standardisation of a contract as expressed in Article 38(1) Letter c of Regulation (EC) No 1287/2006 remains an important indicator for classifying financial instruments and therefore should be maintained?**

<ESMA\_QUESTION\_223>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_223>

**Q224: Do you agree with the proposal to maintain the alternatives for trading contracts in Article 38(1)(a) of Regulation (EC) No 1287/2006 taking into account the emergence of the OTF as a MiFID trading venue in the future Delegated Act?**

<ESMA\_QUESTION\_224>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_224>

**Q225: Do you agree that the existing provision in Article 38(3) of Regulation (EC) No 1287/2006 for determining whether derivative contracts within the scope of Section C(10) of Annex I should be classified as financial instruments should be updated as necessary but overall be maintained? If not, which elements in your view require amendments?**

<ESMA\_QUESTION\_225>  
TYPE YOUR TEXT HERE



<ESMA\_QUESTION\_225>

**Q226: Do you agree that the list of contracts in Article 39 of Regulation (EC) No 1287/2006 should be maintained? If not, which type of contracts should be added or which ones should be deleted?**

<ESMA\_QUESTION\_226>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_226>

**Q227: What is your view with regard to adding as an additional type of derivative contract those relating to actuarial statistics?**

<ESMA\_QUESTION\_227>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_227>

**Q228: What do you understand by the terms “reason of default or other termination event” and how does this differ from “except in the case of force majeure, default or other bona fide inability to perform”?**

<ESMA\_QUESTION\_228>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_228>

## 7.2. Position reporting thresholds

**Q229: Do you agree with the proposed threshold for the number of position holders? If not, please state your preferred thresholds and the reason why.**

<ESMA\_QUESTION\_229>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_229>

**Q230: Do you agree with the proposed minimum threshold level for the open interest criteria for the publication of reports? If not, please state your preferred alternative for the definition of this threshold and explain the reasons why this would be more appropriate.**

<ESMA\_QUESTION\_230>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_230>

**Q231: Do you agree with the proposed timeframes for publication once activity on a trading venue either reaches or no longer reaches the two thresholds?**

<ESMA\_QUESTION\_231>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_231>

## 7.3. Position management powers of ESMA



**Q232: Do you agree that the listed factors and criteria allow ESMA to determine the existence of a threat to the stability of the (whole or part of the) financial system in the EU?**

<ESMA\_QUESTION\_232>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_232>

**Q233: What other factors and criteria should be taken into account?**

<ESMA\_QUESTION\_233>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_233>

**Q234: Do you agree with ESMA's definition of a market fulfilling its economic function?**

<ESMA\_QUESTION\_234>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_234>

**Q235: Do you agree that the listed factors and criteria allow ESMA to adequately determine the existence of a threat to the orderly functioning and integrity of financial markets or commodity derivative market so as to justify position management intervention by ESMA?**

<ESMA\_QUESTION\_235>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_235>

**Q236: What other factors and criteria should be taken into account?**

<ESMA\_QUESTION\_236>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_236>

**Q237: Do you consider that the above factors sufficiently take account of “the degree to which positions are used to hedge positions in physical commodities or commodity contracts and the degree to which prices in underlying markets are set by reference to the prices of commodity derivatives”? If not, what further factors would you propose?**

<ESMA\_QUESTION\_237>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_237>

**Q238: Do you agree that the listed factors and criteria allow ESMA to determine the appropriate reduction of a position or exposure entered into via a derivative?**

<ESMA\_QUESTION\_238>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_238>

**Q239: What other factors and criteria should be taken into account?**

<ESMA\_QUESTION\_239>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_239>



**Q240: Do you agree that some factors are more important than others in determining what an “appropriate reduction of a position” is within a given market? If yes, which are the most important factors for ESMA to consider?**

<ESMA\_QUESTION\_240>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_240>

**Q241: Do you agree that the listed factors and criteria allow ESMA to adequately determine the situations where a risk of regulatory arbitrage could arise from the exercise of position management powers by ESMA?**

<ESMA\_QUESTION\_241>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_241>

**Q242: What other criteria and factors should be taken into account?**

<ESMA\_QUESTION\_242>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_242>

**Q243: If regulatory arbitrage may arise from inconsistent approaches to interrelated markets, what is the best way of identifying such links and correlations?**

<ESMA\_QUESTION\_243>  
TYPE YOUR TEXT HERE  
<ESMA\_QUESTION\_243>

## 8. Portfolio compression

### **Q244: What are your views on the proposed approach for legal documentation and portfolio compression criteria?**

<ESMA\_QUESTION\_244>

In principle, Deutsche Börse Group would like to clarify that portfolio compression is only sensible for certain OTC derivatives, like swaps. The rules cannot apply to exchange traded derivatives which are already addressed by ‘netting’ concepts within the CCP environment. Thus, in the following, the feedback provided below is focusing on swaps and not on exchange traded derivatives.

Regarding legal documentation, point 6 mentions partial terminations and terminations as possible post trade events in a compression run. We would like to clarify, whether this means that increases for individual trades are explicitly excluded as possible post trade event in a compression run, even if the notional over all trades submitted for a compression run does not increase? Furthermore, in legal documentation, at points 6 and 7, it is mentioned that the relationship between the participant(s) to compression and the service provider are to be defined. Should the role of a CCP be mentioned as well?

Moreover, in legal documentation under point 7, ‘amend or terminate compressed transaction’; we would suggest a slightly different wording as the amendment or termination is applied to a transaction which has been submitted for compression by the participant and for which the service provider (in the unwind proposal) suggests the amendment or termination. We would only consider the transaction or portfolio “compressed” once the post trade event (partial termination, termination) related to a compression unwind proposal has been applied. E.g. “amend or terminate a trade that has been submitted for compression”.

Regarding criteria for compression, under point 8, we suggest to define ‘notional value’ and in general align the terminology with ISDA and/or BIS. Also, stronger wording should be considered under the following: ‘It is therefore important [...]’ instead of ‘important’ we suggest to use ‘mandatory’ in this case as the risk parameter set by the participant are to be considered.

In addition, under the title of criteria for compression point 9, the minimum requirement for risk tolerances that participants should be able to submit to the service provider are listed. Certain points are raised, which we would like ESMA to clarify. From ESMA’s perspective would the ‘limit to counterparty risk’ also be required for CCP cleared transactions (taking into consideration that for cleared transactions the counterparty is always the CCP)? Also for the risk categories mentioned here, how are these defined? E.g. how should the ‘cash payment tolerance’ and the ‘limit to market risk’ be defined or measured? In order to generate no discrimination of any acceptable existing market standards, the paragraph should probably ensure that these standards are all covered either by having a very high level description (requiring submission of risk tolerances in general) or by having a comprehensive list of all feasible and acceptable tolerance sets.

Moreover under point 11, regarding the unwind proposal minimum requirement, could it be sufficient to only provide a unique trade identifier, identification of the counterparty (which in case of cleared trades would always be the CCP and the respective participant) and the suggested changes to the notional? We assume that the participants who have submitted the risk tolerances will also need to check the implications of an unwind proposal (i.e. check if the change in risk is within their tolerance).

Under point 13 we would like to clarify, does the wording ‘[...] to obtain an updated rehearsal unwind considering such adjustment’ suggest that the rehearsal unwind is updated before the final unwind proposal is created or is the updated rehearsal the final one, also mentioned in point 15? If the former is meant, this would indicate that three unwind proposals are created (rehearsal, update rehearsal, live). We understand that the motivation for the rehearsal is to give participants the possibility to adjust their toler-

ances in order to create a better outcome. The motivation for the live proposal takes into account the changes to the tolerances and trades. What is the motivation for an updated rehearsal proposal? Would any actions be taken between the creation of the update and the creation of the live proposal?

<ESMA\_QUESTION\_244>

**Q245: What are your views on the approach proposed by ESMA with regard to information to be published by the compression service provider related to the volume of transactions and the timing when they were concluded?**

<ESMA\_QUESTION\_245>

In principle, Deutsche Börse Group would like to clarify that portfolio compression is only sensible for certain OTC derivatives, like swaps. The rules cannot apply to exchange traded derivatives which are already addressed by 'netting' concepts within the CCP environment. Thus, in the following, the feedback provided below is focusing on swaps and not on exchange traded derivatives.

Regarding the information to be published under point 17, it is probably necessary to check with potential service providers how 'as close to real-time as is technically possible' can be defined or what the range of tolerance is. Under point 18 is 'notional amount' equal to "notional value"? Similar to our comment to point 8 we suggest using ISDA or BIS terminology, in order to minimize impact on practices, due to different terminology. Under point 19, we assume that for the respective service providers some more information as to the definition of 'product type' and 'type of participants' is required. We agree that the value should be expressed in notional amount as MTM varies over time and depends on counterparty valuation approach.

Under point 22, it is asked for an adequate time of conclusion to be reported by the service provider of compression. From our point of view this should be a time after the live proposal has been created and all involved parties agreed to accept it, otherwise there is no guarantee that the compression run is accepted and processed as suggested in the proposal. An assumption could be that the compression run is considered legally binding once all required approvals/acceptance confirmations are granted. Hence the reported time could be the time of the last required approval or the time when the service provider declares to all parties that the compression run is legally binding. The time of implementation of (partial) terminations would in this solution not be of relevance. In addition to the point in time, the time zone will need to be defined in order to have a consistent reporting.

Apart from the questions raised so far, we would like for ESMA to shed light on a further aspect. We understand that 'bilateral compression' in this consultation refers to compression that is agreed between two counterparties without a third party provider and 'multilateral compression' refers to compression offered by a third party provider to two or more participants. In this sense does the reporting requirement only refer to 'multilateral compression'? This question is being raised as the terminology ('bilateral' and 'multilateral compression') sometimes is used with a different meaning in the market.

<ESMA\_QUESTION\_245>