Deutsche Börse Group

Review of the Markets in Financial Instruments Directive

Questionnaire on MiFID/MiFIR 2 by Markus Ferber MEP

The questionnaire takes as its starting point the Commission's proposals for MiFID/MiFIR 2 of 20 October 2011 (COM(2011)0652 and COM(2011)0656).

All interested stakeholders are invited to complete the questionnaire. You are invited to answer the following questions and to provide any detailed comments on specific Articles in the table below. Responses which are not provided in this format may not be reviewed.

Respondents to this questionnaire should be aware that responses may be published.

Please send your answers to econ-secretariat@europarl.europa.eu **by 13 January 2012.**

Theme	**Question**	**Answers**
Scope	1) Are the exemptions proposed in Directive Articles 2 and 3 appropriate? Are there ways in which more could be done to exempt corporate end users?	Deutsche Börse Group (DBG) welcomes exemptions for certain activities of intermediaries are limited under Article 3(1) of the MiFID II draft, since a comparable level of investor protection needs to be ensured. This means that the MiFID rules need to be applied for all these activities. Related to Article 2 (1) (i) we want to point out that CRD (Directive 2006/48/EC or its successor CRD IV) currently does not define "banking services". More general, the exception for Credit Institutions not being investment firms under MiFID as outlined in recital 25 (recasted recital 18 of current MiFID) and Article 1 (2), is not properly manifested in the definition of investment firm in the directive itself (Article 4 (1) in conjunction with article 2 (1) 1 of MiFIR). We want to point out, that also the licensing for credit institutions to perform

		investment services is somehow unclear between CRD (completely allowed without any limitation – see annex I of CRD) and MiFID (explicit allowance indicated under CRD rules see recital 25) As CCPs or CSDs (which are in the future regulated under EMIR or CSD Regulation respectively) might perform investment services as part of their business, a clear regulation in both parts of the rules (MiFID on one hand side and CSD Regulation / EMIR on the other) similar to the rules related to Credit Institutions is needed. For CSDs we feel that they should be exempt for MiFID and their rules should be completely set in CSD Regulation. For CCPs performing investment services, just specific rules should apply (exactly the same handling as for Credit Institutions). That would imply passporting of investment services for CCPs via EMIR and not via MiFID.
	2) Is it appropriate to include emission allowances and structured deposits and have they been included in an appropriate way?	DBG supports the inclusion of emission allowances. Emission allowances have aspects of both administrative grants or licences and of private property, and different conclusions as to their legal classification have been reached in a number of Member States. This obviously raises concerns in cross-border transactions or custody chains. Emission allowances are generally not considered as financial instruments for the purpose of MiFID I. It is worth noting that derivatives on emission allowances are within the scope of MiFID I. The reality of carbon trading is that emission allowances are traded as financial instruments on and off exchange, e.g. emission allowance distribution in the context of EU auctioning. The integrity of the European carbon market would benefit from a legislative recognition of the fact that emission allowances are handled as financial instruments and that carbon market participants can

		expect their holding to be afforded the same level of organisational safeguards and investor protection on their emission allowances transactions and holding as they enjoy on their emission derivatives. Also the uncertainty of regulation of emission allowances still leads to missed opportunities in the EU ETS as potential traders, especially from the US, are not sure if they are legally enabled to trade emissions allowances. Finally, as a financial instrument emissions allowances would be regulated under the financial directive for collaterals, which could also enable clearing houses to offer using emission rights as collateral, which would benefit liquidity in this market segment. Irrespective of how the final scope of MiFID exemptions will look like when MiFID II gets finally adopted, the benefits of financial markets regulation for emissions spot markets will only fully materialise if those provisions are consequently tailored to the specifics of the emissions market. This applies in particular to the (fundamental) data transparency requirements, the market abuse regime as well as the supervision of the market. Given that there are strong interrelations between carbon and energy markets (e.g. high price correlation), we suggest that the specific EUA rules should be in line with energy spot market regulation as well as the existing expertise of energy regulators in the carbon market.
	3) Are any further adjustments needed to reflect the inclusion of custody and safekeeping as a core service?	MiFID draft text entails an "upgrade" of the formerly ancillary service of safekeeping, administration of instruments for client, custody, cash/collateral management to a full investment service. In parallel, the EU Commission is working on a proposal for CSD Regulation with the aim to establish a harmonized

		regulatory framework for European CSD business. These two proposals need to be coordinated so that no unintended consequences and double regulation of the CSD business takes place. As stated above (question 1), CSDs should be regulated with regard to investment services in CSD Regulation only and should not be classified as investment firms under MiFID.
	4) Is it appropriate to regulate third country access to EU markets and, if so, what principles should be followed and what precedents should inform the approach and why?	We support the idea of introducing a third country regime in MiFID based on the principle of exemptive relief for equivalent jurisdictions as this would provide for regulatory certainty and avoid loopholes for regulatory arbitrage. We also think that such a regime should be closely aligned with principles of third country access to EU capital markets in the context of EMIR. To ensure a level playing field reciprocity needs to be included.
Corporate governance	5) What changes, if any, are needed to the new requirements on corporate governance for investment firms and trading venues in Directive Articles 9 and 48 and for data service providers in Directive Article 65 to ensure that they are proportionate and effective, and why?	Concerning the requirements on corporate governance in MiFID draft the Commission has already made corresponding proposals in the draft CRD IV, which builds on the Commission's Green Paper of 2 June 2010 (COM 2010) (286 final). For market participants that fall under the scope of different regulations: (forthcoming) CRD IV, MiFID II, EMIR and CSD Regulation, it must be ensured that they are subject to a single corporate governance regime. Any inconsistencies that may result from the rules on the management body in CRD IV, plus the EBA standards based on it, in MiFID II, plus the ESMA standards based on it and other requirements (e.g. from EMIR or the CSD Regulation) have to be avoided. This also applies to the definitions in article 4. In addition, the term "group" in Article 9 (1) lit. a and 48 (1) lit a is not defined and – different to CRD – there is no regulatory term to potentially rely on. In general – also for CRD purposes –

		we nevertheless belief, the limitation should be put in place on the statutory group as applicable for commercial / accounting terms. We therefore propose to use harmonised in all legislations the following expression: "Executive or non-executive directorships held within undertakings being either (i) included in the same consolidated supervision or (ii) included in the consolidated accounts under applicable accounting standards shall count as one single directorship." There danger that the different sets of rules may have contradictory regulatory thrusts. As regards the regulatory proposals in CRD IV, we should also like to point out that the requirements set under these fail to take sufficient account of the different management models (including the German two-tier board system) and legal forms of companies.
Organisation of markets and trading	6) Is the Organised Trading Facility category appropriately defined and differentiated from other trading venues and from systematic internalisers in the proposal? If not, what changes are needed and why?	The ultimate goal of MiFID should be that all trading venues arranging or facilitating trades need to comply with MiFID market rules. Ideally, the existing MiFID trading venue categories should cover all market places. If that is not possible, the introduction of OTFs for certain asset classes may be a sensible way forward, including firm and enforceable thresholds for conversion of OTFs into MTFs. The new OTF category is not required for trading of equities, because such a category would open new loopholes due to discretions and discrimination. Current Broker Crossing Networks should either be classified as MTFs or SIs, as they represent the same trading functionality.

		OTFs could serve as an important vehicle to shift trading in standardized OTC derivatives onto organized forms of trading. DBG supports that OTFs will be required to provide transparency, not be allowed to execute against proprietary trading and must meet other requirements other venues are obliged to meet. Nevertheless it would be fatal if MiFID would establish a framework where there is limited incentive to be classified as an MTF since there is a more flexible business model approach for being classified as an OTF (notably discretionary execution and discriminatory access for clients). The latter is acceptable for a certain period of time when certain asset classes need to take account of liquidity, attraction of new participants, or maturation of a market model. But proposals as they stand would provide for a systematic incentive to set up a business as an OTF rather than a MTF. Therefore, in order to preserve market integrity and a level playing field, OTFs should be required to convert into a MTF status after the market has reached a given market share in a given financial instrument. This would undercut a systematic incentive for the market to gravitate towards the OTF business model with less objective and neutral execution and choice available to investors, but rather to provide for a market structure that is designed to support evolution of markets towards more robust market infrastructure such as RMs and MTFs.
	7) How should OTC trading be defined? Will the proposals, including the new OTF category, lead to the channelling of trades which are currently OTC onto organised venues and,	There is no clear and enforceable definition of OTC in the current MiFID proposal and in MiFID I. Clarity will be beneficial for the market and will fix a majority of current issues.

	if so, which type of venue?	However, the OTF category is not an acceptable answer to OTC (cf. comment to question 6). DBG believes that the definition included in MiFID I (Recital 53) and MiFIR (Recital 18) addresses the most relevant aspects of OTC: *It is not the intention of this Regulation to require the application of pre-trade transparency rules to transactions carried out on an OTC basis, the characteristics of which include that they are ad-hoc and irregular and are carried out with wholesale counterparties and are part of a business relationship which is itself characterised by dealings above standard market size, and where the deals are carried out outside the systems usually used by the firm concerned for its business as a systematic internaliser.* It needs to be ensured only OTC transactions following this definition are allowed to be executed OTC. Therefore we would suggest including the definition of OTC in Article 2 of MiFIR (to achieve legal certainty).
	8) How appropriately do the specific requirements related to algorithmic trading, direct electronic access and co-location in Directive Articles 17, 19, 20 and 51 address the risks involved?	Most of the measures proposed in the MiFID review are reasonable with respect to improving the risk controls and the safeguards for electronic trading. The MiFID review proposal requires investment firms and platform operators engaging in or permitting algorithmic trading to have in place effective systems and controls to ensure systems resilience and sufficient capacity. Firms engaging in algorithmic trading would be required to provide a description of the nature of their trading strategies to their supervisory authorities on an annual basis. Finally, firms

		providing direct electronic access to a trading venue would be required to have in place systems to ensure a proper assessment and review of the persons using that service together with effective risk management controls. The main concern of DBG lies with the market making obligation for algorithmic trading strategies (article 17.3 MiFID). DBG is concerned that its implications have not been fully considered. It would require all firms using trading algorithms to be present in the market all day long, regardless of market conditions. This would require such firms to be exposed to market risk on a continuous basis, whether they were willing to bear that risk or not. Not all algorithmic traders engage in liquidity provisioning strategies (e.g. statistical arbitrage or algorithms for handling institutional client order flow). The new rules include more than the ones that market makers have to fulfil today. Even the most advanced market makers cannot guarantee to provide liquidity all the time. The consequence could be that liquidity which is currently provided on the EU's regulated market would be diverted to similar markets outside the EU where such requirements do not exist. This would be to the detriment of the other users of EU regulated markets, who would find it more difficult to use products traded on the EU regulated markets as risk management tools. Instead of enforcing market making obligations to high frequency trading companies, it would make more sense to think

		about a new definition of modern market making to capture for significant changes through increased use of technology. However, it should be to the venues themselves to define an appropriate set of requirements and obligations. HFTs that are engaged in liquidity provisioning will thereby get the opportunity to sign up for those programs. Overall, it needs to be ensured that there is no overregulation. Unsubstantiated regulation of algorithmic and high frequency trading could adversely affect the liquidity of trading venues and their innovations. Moreover, it could impair trading venues by pushing trading further towards less regulated platforms. We want to remind that many issues on high frequency and algorithmic trading are already addressed within ESMA's Guidelines on systems and controls in a highly automated trading environment for trading platforms, investment firms and competent authorities that will become effective on 1 of May 2012. It might be necessary to align these with MiFID II when it will be implemented. In that case rules for investment firms not being exempted from MiFID would co-exist in MiFID and ESMA's guidelines. However, a duplication of rules and obligations should be avoided.
	9) How appropriately do the requirements on resilience, contingency arrangements and business continuity arrangements in Directive Articles 18, 19, 20 and 51 address the risks involved?	DBG supports most of these requirements. In some areas clarification is required: The MiFID proposal (Articles 19.4, 20.4, 51.2) envisages temporary trading halts (interruptions) due to significant price movements, "on that market or a related market". The possibility exists that trading halts should be coordinated. DBG is against

		coordinated trading halts, because trading venues are not technically or by regulatory means (e.g. trade through rule) interlinked to other trading venues and local trading halts are based on local order book conditions. Implementing minimum requirements instead of harmonization will make the European market microstructure more resilient, because it will foster innovation and prevent monoculture trading ecosystems. Therefore, local market information should only lead to local trading interruptions. The MiFID proposal envisages (Art. 53) trading suspensions for RMs. Where this is due to the non-disclosure of information about the issuer, other markets (RM, MTF, and OTF) should also suspend trading. Same rule applies for MTF (Art. 32) if the issuer has consented to the trading of its instruments at this specific MTF (Art. 18.5). This means, that any MTF – no matter how insignificant – that suspends trading on its own platform will trigger a global suspension of the instrument. DBG welcomes a coordinated approach in trading suspensions, as its cause is related to the fundamental value of the instrument, and therefore of global nature. DBG is in favour of a discretionary decision taken by the management of the Regulated Market where the share has been admitted to trading. This treatment is due to the special relationship between issuer and listing segment which includes standardized corporate disclosure obligations. Therefore, global sourced information should only lead to global suspensions and be enforced only through the decision of the management board of the Regulated Market where the securities have been admitted to trading.

		The operators of most regulated markets already have measures in place that ensure stability of systems and efficiency of price formation. DBG for example has the possibility to limit the number of messages submitted by single market participants (this ensures that the systems cannot slow down). Moreover, DBG has the option to introduce fees that could reduce the number of transactions (excessive usage fee). We think that some requirements go too far, as Article 51.3 included "to limit the ratio of unexecuted orders". Such calibration should be left to the operator of the markets. We would recommend regulating tick sizes in case the current industry approach that has been taken will not achieve a harmonised tick size agreement.
	10) How appropriate are the requirements for investment firms to keep records of all trades on own account as well as for execution of client orders, and why?	DBG supports these requirements. We nevertheless want to point out, that record keeping of trades should not exceed a periods for five years.
	11) What is your view of the requirement in Title V of the Regulation for specified derivatives to be traded on organised venues and are there any adjustments needed to make the requirement practical to apply?	We welcome the EU Commission’s reflection of the G20 recommendations in a European setting, namely facilitating OTC derivatives into central market infrastructures. These infrastructures like exchange trading and central counterparty (CCP) clearing serve financial markets, the economy and the public as a whole. These robust and resilient central market infrastructures serving the public are at risk though, because the OTC derivatives market suffers from a lack in transparency. The market structure in OTC derivatives markets is under pressure, as no true competition is possible, due to the inflated use of OTC derivatives in an opaque fashion. G20 discussions resulted in the goal to move OTC derivatives onto robust exchange infratsructures, safeguarding the effective

		handling of resilient trading and clearing. Notably, with increasing standardisation, systemic risk should decrease. The first phase reflects the state where derivatives should be so far developed to show at least the market maturity to be electronically captured, ideally affirmed/confirmed. In the second phase derivatives are more actively exchanged and develop into more organised traded and cleared markets. In the third phase, the derivatives markets liquidity pools usually are mature enough to be facilitated by central trading and clearing market infrastructures serving effective market processes and market stability. As a result, the higher the degree of standardisation the higher the likelihood that these products can be facilitated by central clearing and trading infrastructures and the lower the degree of systemic risk will be. Our analysis of major OTC derivative asset classes concluded that those products, responsible for at least 95% of the OTC volume, do not require further product standardisation in order to be electronically eligible and therefore could be served at least by Trade Repositories and in most cases also by CCP clearing. In addition, many of those products could and also should be served by transparent, non-discretionary electronic trading venues, as they are actively traded. The definition of actively traded needs to be product /instrument specific, and is mainly a function of total volume and transaction frequency across all markets as well as the number of involved parties. Accordingly, clear, transparent and verifiable targets for the dimensions electronically confirmed, electronically traded and CCP cleared need to be defined. In addition, the topic of liquidity and clearing eligibility of products is also discussed in the context of EMIR.

		Frequently, there are two arguments used for trading OTC derivatives, namely the demand for bespoke products by customers and the need to trade large in scale transactions OTC, in order to reduce market impact. While we can see the arguments, we have come to the conclusion that the main reason for other products not moving to a more transparent environment is the vested interest of the involved parties.. The biggest driver for the vested interest is the higher profit margin for the sell-side in OTC arranged products. At the same time, their counterpart, the buy-side, is too fragmented and too much dependent on the sell-side in order to change the way business is dealt with[1]. Furthermore, there are situations where both parties have a mutual interest in non-transparency, as they are concerned that a potential market impact can arise, before complex transactions have been completed. These concerns should be addressed by measures such as the large in scale waiver, already applied under MiFID for equities markets. Taking lessons from the study by Gomber and Pierron (2010) regarding OTC cash equities, it has been depicted that the large in scale argument for OTC transactions is dubious. Gomber and Pierron proved that actually 75% of the equity orders could have been filled at the best bid and offer of a public order book. Hence, we would raise similar doubts for this argument regarding OTC derivatives. The sell-side interest for high-profit margins from non-standardised/ non-commoditised products is totally comprehensible as in general businesses often seek to increase

[1] Gomber, P. and Pierron, A. (2010). 'MiFID - Spirit and Reality of a European Financial Markets Directive', Celent Research Report, p. 56-57.

		their profits through bespoke products and services resulting from innovation. However, in derivatives and financial products in general, this interest needs to be balanced with the greater good of reducing systemic risk for the financial industry and the society overall. To elaborate further, the products targeted and described above, and defined according to our view to be in scope for electronic services and increased transparency, are no innovation anymore. These products already exist for a long time and are kept away from transparent markets as long as possible, for the economic considerations mentioned above. In many cases, previously OTC bilateral arranged products developed over time into arranged trades within an electronic environment. Examples include Dividend Index Future trading at Eurex, electronic CDS and CDS index trading at Creditex or other Inter-Dealer Brokers, clearing of CDS and CDS indices by various clearing houses or the clearing of interest rate swaps by LCH. We have outlined that the degree of standardisation per asset class is already a reality in most cases, but organised trading is not taking off due to vested interest. With regards to standardisation and exchange trading of OTC derivatives, CESR implies an industry led initiative. We fully agree on CESR's position that in case that those targets will not be met through industry initiatives regulatory intervention is necessary. We believe ESMA should establish a clear roadmap for enforcing and implementing clear rules regarding more organised trading of OTC derivatives.
	12) Will SME gain a better access to capital market through the introduction of an MTF SME growth market as foreseen in Article 35 of the Directive?	No. The main issue of the SME Market segment is the limited liquidity and the small number of investors. The MiFID proposal aims at introducing an appropriate infrastructure for SMEs. This

		misses the point, as the infrastructure already exists, and SME companies already have the choice between different market segments within the current market structure according to their transparency needs and capabilities. Introducing an official EU „SME Growth Market“ might reduce this choice and distort the existing competition in this field. This might be the case when already existing growth markets fall short of fulfilling the future requirements, thereby failing to obtain the official EU label.
	13) Are the provisions on non-discriminatory access to market infrastructure and to benchmarks in Title VI sufficient to provide for effective competition between providers? If not, what else is needed and why? Do the proposals fit appropriately with EMIR?	We do not agree on the rules on providing access to market infrastructure. We believe that the potential consequences of these provisions with respect to risk, market fragmentation and the competitiveness of EU markets are not yet known. These rules have not been discussed in the public consultation, are recently being discussed in context of EMIR and require a detailed analysis and harmonisation. The proposed rules on access to financial infrastructure (articles 28 and 29 MiFIR) will significantly impact existing market structures in listed derivatives markets in Europe. Trading and clearing of listed derivatives is inseparable interlinked. This ensures that the risks of any product traded are certain to be appropriately managed: • For example, Eurex Clearing provides its clearing members with a stop button which enables them to stop the trading activity of their customers, which are the trading members of Eurex, anytime. • Another example is Eurex Clearing facilitating the integrity of the Eurex trading venue as well as Eurex Clearing itself by providing the clearing members with

		an the 3-Level Advanced Risk Protection methodology which allows clearing members to define ex-ante various risk limits for their customers (the trading members of Eurex) at which they either get notified, or orders will be slowed down or the trading activity will be halted. The legislative proposal also drives interconnectedness and promotes fragmentation of systemically important market infrastructures such as CCPs thereby introducing new risks in the listed derivatives sector. This fragmentation can have negative effects regarding oversight and risk management and increase systemic risk. Moreover, we want to emphasize that it needs to be ensured that access to CCPs does not lead to an increase of costs for the users of the infrastructures (e.g. by the contribution to the clearing funds or by increased capital requirements of the CCPs based on Basel III rules). Finally, it needs to be ensured that innovation is not affected negatively. In some cases listed derivatives are developed by the trading venue and the CCP. It needs to be ensured that investments made are not at risk (no free riding on product innovation). We want to emphasize that there is no similar consideration outside the EU for changing the existing market structure of listed derivatives. It needs to be considered that these markets are global markets. Their regulation is in focus of the G20 recommendations: In the context of access by venues of execution to CCPs, the Dodd-Frank Act (section 723) focuses exclusively on OTC derivatives (“swaps”). Changes in MiFIR contemplated in the EU therefore introduces a competitive disadvantage for EU infrastructure vis-à-vis infrastructure domiciled outside the EU (such as the Chicago Mercantile

		Exchange or Hong Kong Stock Exchange). The access to licence benchmarks addressed in Art. 30 MiFIR is a question regarding intellectual property rights. Competition law recognizes the pro-competitive and beneficial effects of intellectual property rights (including trademarks with regard to indices). Indices contain a number of intellectual properties rights (based on copy rights, database protection and trademarks). Index licensing is required to protect these rights. It needs to be emphasized that there is already significant competition in index licensing (Russell, DOW, S&P, FTSE, DAX, etc). Today, the index market is already highly competitive. The financial market participants can choose between various providers for the same investment topic. While index methodologies might differ, correlations for indices for specified markets are very high which allows substitution. Operators of derivatives exchanges and CCPs have licenses for indices and compete effectively (there is a wide basis available already). The success of an index depends on the provider that needs to create the critical mass for making it tradeable. Pooling of liquidity in one product improves market efficiency. During financial shocks market participants to move towards liquid products as they offer critical size for entry/exit of markets with a high resiliency. In a fragmented market the resiliency/sustainability would not be given anymore as market impact would be much more significant increasing risk and costs for investors. In addition, while explicit trading costs seem to decrease due to competition the implicit costs (e.g. execution costs) tend to increase. Latter, however, is generally the larger

		part of the total transaction costs. Motivation to create new indices (innovation) depends highly on the potential of commercial benefits. The development process requires thorough analysis and the willingness of market participants to bring in their input. Without protection the motivation to innovate is significantly reduced. A good example is the creation of dividend indices. They were developed in joint efforts from the investment community, the exchange and the index provider over the course of approx. 6 months. The listed index derivatives on dividends captured most of the previously existing OTC market and offer an effective risk management tool for dividend exposure. Again, there is no similar consideration outside the EU for changing the existing market structure of listed derivatives. The changes in MiFIR contemplated in the EU therefore introduces a competitive disadvantage for EU infrastructure vis-à-vis infrastructure domiciled outside the EU.
	14) What is your view of the powers to impose position limits, alternative arrangements with equivalent effect or manage positions in relation to commodity derivatives or the underlying commodity? Are there any changes which could make the requirements easier to apply or less onerous in practice? Are there alternative approaches to protecting producers and consumers which could be considered as well or instead?	Setting position limits can be reasonable measure in order to avoid "cornering" of derivatives with physical delivery (front-month only). However, setting position limits is a sensible thing, as there is a probability that some market participants may shift trading to less regulated and less transparent markets. Position limits generally only make sense for products that already have developed reasonable liquidity in their relevant derivative (mature markets) and are physically delivered. In order not to harm the market participants from the underlying market (in the case of agricultural products this would e.g. be farmers, food producers, mills etc.) by the introduction of position limits this user group should be excluded from position limits (e.g. by a Bona-fide hedger rule).

Investor protection	15) Are the new requirements in Directive Article 24 on independent advice and on portfolio management sufficient to protect investors from conflicts of interest in the provision of such services?	No comment.
	16) How appropriate is the proposal in Directive Article 25 on which products are complex and which are non-complex products, and why?	Key to the differentiating between complex products and non-complex product is the response to the question: How transparent are the risks resulting from a product to the targeted investor? That implies that the line between complex and non-complex products differs significantly by customer type, with retail investors being those where non-complex product should be very transparent and obvious. Unfortunately in reality one of the most difficult risks for retail investors to understand is the bilateral credit risk resulting from bank products such as certificates which expose the retail customer to the banks credit risk. Accordingly, no product which implies bilateral counterparty risk to retail investors should be classified as non-complex.
	17) What if any changes are needed to the scope of the best execution requirements in Directive Article 27 or to the supporting requirements on execution quality to ensure that best execution is achieved for clients without undue cost?	DBG supports Directive Article 27.
	18) Are the protections available to eligible counterparties, professional clients and retail clients appropriately differentiated?	No comment.
	19) Are any adjustments needed to the powers in the Regulation on product intervention to ensure appropriate protection of investors and market integrity without unduly damaging financial markets?	No comment.

Transparency	20) Are any adjustments needed to the pre-trade transparency requirements for shares, depositary receipts, ETFs, certificates and similar in Regulation Articles 3, 4 and 13 to make them workable in practice? If so what changes are needed and why?	DBG welcomes the increased transparency requirements. DBG sees regulatory requirement for transparency as the current lack of transparency leads to market failure and welfare losses. Tailor-made pre- and post-trade transparency for all asset classes and trading venues (RMs, MTFs and OTFs) as well as OTC are a necessary pre-condition for a well-functioning market: • It needs to be ensured that no loopholes arise. A definition of OTC trading is only included in Rec. 18 MiFIR (see also question 7). • Transparency in OTC equity markets needs to be improved. However, we would like to point out that MiFID I required pre-trade transparency to be made available down to the maximum level of 5, which we would support as being more than sufficient. Furthermore, we would recommend to have a formal definition of “making public” in order to provide full clarity and rule out any loopholes in the future regulation.
	21) Are any changes needed to the pre-trade transparency requirements in Regulation Articles 7, 8, 17 for all organised trading venues for bonds, structured products, emission allowances and derivatives to ensure they are appropriate to the different instruments? Which instruments are the highest priority for the introduction of pre-trade transparency requirements and why?	DBG welcomes the increased transparency requirements. DBG sees regulatory requirement for transparency as the current lack of transparency leads to market failure and welfare losses. Tailor-made pre- and post-trade transparency for all asset classes and trading venues (RMs, MTFs, and OTFs) as well as OTC are a necessary pre-condition for a well-functioning market: • The vast majority of trading in bonds and derivatives takes place OTC. The lack of transparency in these markets leads to an asymmetry of information, discrimination of small investors, but also of large institutional investors, as the experience during the financial crisis has shown.

		• Pre- and post-trade transparency in all asset classes is essential for the functioning of the central counterparty (CCP) as intended by EMIR. The trend in clearing goes towards real-time risk management as already offered by Eurex Clearing AG. Real-time post-trade transparency is necessary to fulfil real-time risk management. Pre-trade transparency and liquid markets are further necessary prerequisites for the central clearing. In respect to the last question: The more liquid instruments are, the easier it is to have pre-trade transparency. Accordingly in all products/instruments covered by regulated markets and MTFs there should be pre-trade transparency across all venues (same applies for SIs), with the exception of large in scale transaction which should not account for more than 5% of total volume. In other words, the regulation should avoid the current situation that some market places compete with regulated markets and MTF purely by providing a less transparent environment to the benefit of special user group. In less liquid instruments it can be sometimes sensible to start with post-trade transparency and extend it later on to pre-trade transparency as the product grows. Regarding Art. 7 (2) we would like to point out that providing access to the publication arrangements operated by RMs, MTFs and OTFs requires technical adaptions and investments. Though several reporting service providers have evolved since the introduction of MiFID I, MiFIR should abstain from mandating these investments to all organised trading venues.

		Furthermore, we would like to point out that MiFID I required pre-trade transparency to be made available down to the maximum level of 5, which we would support as being more than sufficient. As well in the context of expanding transparency into other asset classes, level 5 should be regarded as a maximum depth.
	22) Are the pre-trade transparency requirements in Regulation Articles 7, 8 and 17 for trading venues for bonds, structured products, emission allowances and derivatives appropriate? How can there be appropriate calibration for each instrument? Will these proposals ensure the correct level of transparency?	See answer to question 21.
	23) Are the envisaged waivers from pre-trade transparency requirements for trading venues appropriate and why?	Exemptions from pre-trade transparency (waivers) should be more restrictive. Waivers should be based entirely on the large-in-scale basis. Providing waivers based on specific market models opens a substantial loophole that again large segments of the market place are waived from any transparency requirements and de facto OTC (even though they register as OTF).
	24) What is your view on the data service provider provisions (Articles 61 - 68 in MiFID), Consolidated Tape Provider (CTPs), Approved Reporting Mechanism (ARMs), Authorised Publication Authorities (APAs)?	DBG welcomes and strongly supports the decentral data consolidation solution wisely chosen by the EU Commission. DBG welcomes as well the introduction of the APA regime and is supportive of most of the defined details regarding APAs within the Directive. However, in terms of efficiency a 6 month time lag between the submission of an application and the granting of the application seems to be quite long. We therefore would suggest to reduce this period to a maximum of 3 months. Regarding Art. 66 (3) we would recommend that APAs should

		either be required to provide back-up facilities or to be set-up in a way, where the operated infrastructure itself is providing significant fail-over procedures and redundancies in the overall processes, the way Regulated Markets usually operate. However, APAs will not be in the position to solely improve on OTC data quality. Whereas reporting rules for RMs and MTFs are clear and extensive, investment firms lack regulatory clarity as to what, when, how and to whom to report, especially in a cross-border EU market. Due to unclear rules regarding which one of the participating partners in a trade has to publish the trade details and/or which trades have to be published, OTC post-trade data is either being published multiple times, or not published at all, resulting in unreliable OTC market data. In order to increase the quality and reliability of OTC post-trade transparency, harmonized OTC trade publication rules are of utmost importance and should be introduced at a Pan-EU level. Therefore, a further delegated act should be envisaged which will target to set up a clear pan-European, harmonized set of reporting rules for firms reporting OTC trades. Regarding the introduction of a CTP regime, we are concerned that a strong regulation of Market Data Consolidators will likely be contra-productive to an efficient market led solution of data consolidation as the additional regulatory burden might act as an entry barrier to Market Data Vendors to provide such services. Data consolidation is one of the main activities of Market Data Vendors and Independent Service Providers since decades. Germany has been a fragmented market well before the

		introduction of MiFID I (without any OTC transparency though). Nevertheless, Market Data Vendors had achieved perfect data consolidation as all published data was of best quality, reliable and in real-time (no deferred publication of some trades only as specified in Art. 10 MiFIR). Since the introduction of MiFID I the main problem regarding data consolidation has been and still is the relatively bad quality of OTC data versus market data provided by RMs and MTFs.
	25) What changes if any are needed to the post-trade transparency requirements by trading venues and investment firms to ensure that market participants can access timely, reliable information at reasonable cost, and that competent authorities receive the right data?	Please refer to our answers of question 24. Furthermore, a meaningful and usable market data consolidation requires the same quality of market data in terms of reliability and timeliness. Any deferred publication will obviously distort streaming (real-time) market data and make it difficult to use for market participants. For a meaningful comparison of trades across various venues, it would be sensible to see all data at one point in time. Deferred publication is always detrimental to a sensible and meaningful consolidated view (at least in real-time), as it will only reflect the full picture at one point in time when the maximum delay has been reached (currently 3 days after a certain trade qualifying for deferred publication). Competent Authorities need access ideally to historical post-trade data for the yearly definition of standard market size. This data is currently being provided to CAs by RMs for the asset class of shares which are traded on their respective markets. The original intention of MiFID I was, however, that all trades within the EU should be incorporated in such a calculation. Consolidated Data is (though not in reliable quality due to OTC data short-comings) and will be available from Market Data

		Vendors and in future as well from CTPs. Regarding reasonable cost of market data, we like to point out that RMs already provide data to the public at more than reasonable costs in absolute terms. RMs offer data a various data license fees, including special fees for retail customers as well as data fees for post-trade data only. Fifteen minutes delayed data can be accessed at not exchange data fees being levied. It seems like these facts are systematically neglected in the various discussions regarding market data license fees by market participants.
Horizontal issues	26) How could better use be made of the European Supervisory Authorities, including the Joint Committee, in developing and implementing MiFID/MiFIR 2?	No comment.
	27) Are any changes needed to the proposal to ensure that competent authorities can supervise the requirements effectively, efficiently and proportionately?	No comment.
	28) What are the key interactions with other EU financial services legislation that need to be considered in developing MiFID/MiFIR 2?	There are interlinkages between CSD Regulation, CRD and EMIR that require consideration. Double regulation needs to be avoided (e.g. for CCPs or CSDs). Issues that need careful analysis are: governance (see question 5), title transfer collateral arrangements (harmonisation of MiFID and EMIR required, see details below referring to Art. 16.10 MiFID), reciprocity of third country access (harmonisation of MiFID and EMIR), access to market infrastructures (harmonisation of MiFIR and EMIR). Furthermore, definitions, passporting rules and authorisation need to be aligned between CRD and MiFID (see question 1)
	29) Which, if any, interactions with similar requirements in	No comment.

	major jurisdictions outside the EU need to be borne in mind and why?	
	30) Is the sanctions regime foreseen in Articles 73-78 of the Directive effective, proportionate and dissuasive?	No comment.
	31) Is there an appropriate balance between Level 1 and Level 2 measures within MIFID/MIFIR 2?	No comment.

Detailed comments on specific articles of the draft Directive

Article number	**Comments**
Recital 25:	There is no process foreseen in CRD or MiFID for Credit Institutions to request authorisation for certain investment services. This recital exempts credit institutions from any authorisation under MiFID (no clear reference in the text itself, see comment on article 2.1 MiFIR below). In CRD IV the following rules apply: A unique authorisation process according to article 9; there is no additional authorisation foreseen for the extension of services. Annex I in conjunction with article 33 clearly includes the investment services as defined in MiFID in the authorisation of the credit institutions. No services specific provisions are foreseen. In total, the second sentence of the recital does not have a rule implanting it. In order to secure this, we propose to add a sentence 2 to paragraph 3 of article 1 of MiFID (see below).
Recital 79:	The current CRD proposal does not propose any rule for regulated markets and we do not think CRD IV is the right place to deal with appropriate capitalisation of regulated markets. As such, this should be either regulated in MiFID / MiFIR itself or – which would be our preference – should be delegated to national discretion. We therefore strongly recommend to take out this recital which already has a long history without any consequence so far. Currently the rule is article 50 (f) of MiFID.
Article 1.3:	CCPs regulated under EMIR and performing investment services as defined in MiFID should be treated the same like credit institutions. The following sentence should be added in order to reach : "Credit institutions and CCPs wishing to provide investment services or activities need to inform their competent authorities being responsible for their authorisation accordingly and need to deliver proof on the compliance with the provisions of the articles defined in sentence 1."
Article 5.1:	As also article 5 puts the performance of any investment service or activity under the need of authorisation under MiFID, this need

	to be excluded for credit institutions, CCPs and CSDs "… on a professional basis not performed by a credit institution or a CCP (or a CSD) be subject …"
Article 5.5a:	Recital 14 defines matched principle broking (back to back trading). A consequent definition in article 5 is missing. We propose to add after paragraph 5 in article 5 the following: "(5a) 'matched principle broking' means dealing on own account by executing orders from different clients by matching them on a matched principal basis (back to back trading). Matched principal broking is regarded as acting as principal and covers both the execution of orders on behalf of clients and dealing on own account."
Article 8 (a):	In order to avoid unnecessary national discretion and to have a single rule book to the extent possible, we propose to take out the last half sentence to have an automatism for authorisation withdrawal by elapsing of time only. The authority still has the possibility to withdraw but need to take into account the circumstances.
Article 16.10:	The MiFID proposal forbids title transfer collateral arrangements with retail clients. At the same time, the European Market Infrastructure Regulation (EMIR) adopts a more flexible approach in this regard. Title transfer collateral arrangements should be allowed in each case. Such collateral arrangements should be allowed when dealing with retail clients as well as with professional clients. Traditional and developed legal means of security provision should not be prohibited in general. The described ownership disputes can be prevented more efficiently by enhanced operational standards. Retail clients could be informed and protected by way of mandatory specific written warnings. In important business areas pledge constructs are the only alternative to title transfer collateral arrangements. National pledging laws across Europe are not harmonised. Therefore a pledge construct is difficult to be used for across Europe business solution. Title transfer collateral arrangements seem to be currently the only stable way of protected systems to offer European standard solutions. As a solution, a reference to Article 37.5a of EMIR should be included in MiFIR.
Article 17.3:	It requires all firms using trading algorithms to be present in the market all day long, regardless of market conditions. This requires such firms to be exposed to market risk on a continuous basis, whether they were willing to bear that risk or not. Not all algorithmic traders engage in liquidity provisioning strategies (e.g. statistical arbitrage or algorithms for handling institutional client order flow).The new rules include more than the ones that market makers have to fulfil today. Even the most advanced market makers cannot guarantee to provide liquidity all the time. The consequence could be that liquidity which is currently provided on the EU's regulated market would be diverted to similar markets outside the EU where such requirements do not exist. This would be to the detriment of the other users of EU regulated markets, who would find it more difficult to use products traded on the EU regulated markets as risk management tools. Instead of enforcing market making obligations to high frequency trading companies, it would rather make more sense to think about a new definition of modern market making to capture for significant changes through increased use of technology. However, it should be to the venues themselves to define an appropriate set of requirements and obligations. HFTs that are engaged in

	liquidity provisioning will thereby get the opportunity to sign up for those programs. Overall, it needs to be ensured that there is not overregulation. Unsubstantiated regulation of algorithmic and high frequency trading could adversely affect the liquidity of trading venues and their innovation. Moreover, it could impair trading venues by pushing trading further towards less regulated platforms. We want to remind that many issues on high frequency and algorithmic trading are already addressed within ESMA'sGuidelines on systems and controls in a highly automated trading environment for trading platforms, investment firms and competent authorities that will become effective on 1 of May 2012. It might be necessary to align these with MiFID II when it will be implemented. In that case rules for investment firms not being exempted from MiFID would co-exist in MiFID and ESMA's guidelines. However, a duplication of rules and obligations should be avoided...
Articles 19.4, 20.4, 51.2:	The MiFID proposal envisages temporary trading halts (interruptions) due to significant price movements, "on that market or a related market". The possibility exists that trading halts should be coordinated. DBG is against coordinated trading halts, because trading interruptions are not interlinked to other trading venues as they are based on local order book conditions. Implementing minimum requirements instead of harmonization will make the European market microstructure more resilient because it will foster innovation and prevent monoculture trading ecosystems. Therefore, local market information should only lead to local trading interruptions.
Article 18.5, 32, 52:	The MiFID proposal envisages (Art. 53) trading suspensions for RMs. Where this is due to the non-disclosure of information about the issuer, other markets (RM, MTF, and OTF) should also suspend trading. Same rule applies for MTF (Art. 32) if the issuer has consented to the trading of its instruments at this specific MTF (Art 18.5). This means, that any MTF – no matter how insignificant – that suspends trading on its own platform will trigger a global suspension of the instrument. DBG welcomes a coordinated approach in trading suspensions, as its cause is related to the fundamental value of the instrument, and therefore of global nature. DBG is in favour of a discretionary decision taken by the management of the Regulated Market where the share has been admitted to trading. This treatment is due to the special relationship between issuer and listing segment which includes standardized corporate disclosure obligations. Therefore, global sourced information should only lead to global suspensions and be enforced only through the decision of the management board of the Regulated Market where the securities have been admitted to trading.
Article 36.1 and 37.1:	Passporting of investment services for credit institutions is already regulated in article 33 in conjunction with Annex I of CRD. Therefore the reference to Credit institutions should be taken out.
Article 58:	Depending on national law, the regulated market and its operator are either the same entity or two different units. In order to have also the operator clearly identified and to cross link to article 4(47) CRD (CRR in the future), the operator should be explicitly listed in the ESMA list (which currently is the case already).

Article 98:	The previous references are not only replaced by reference to MiFID but – depending to subject – also to MiFIR (or alternatively). This need to be phrased properly.
Detailed comments on specific articles of the draft Regulation	
Article number	**Comments**
Article 1.2:	Credit institutions are not authorised under MiFID (see above). Reference should be made to Credit institutions and CCPs related to article 1 (3) MiFID.
Article 2.1 (1):	Definition should clearly exclude credit institutions, CCPs and CSDs (see above). According to recital 25 (see above), credit institutions do not require authorisation under MiFID. The definition of investment firms should explicitly exclude credit institutions as defined in directive 2006/48/EC (and CSDs according to CSD-Regulation) "investment firm' means any legal person other than a credit institution, a CCP (or a CSD) …" A definition for CCPs is missing so far.
Article 2:	Overlap with article 4 MiFID need to be cleaned up (e.g. management body)
Articles 28 and 29:	The potential consequences of these provisions with respect to risk, market fragmentation and the competitiveness of EU markets are not yet known. These rules have not been discussed in the public consultation, are recently being discussed in context of EMIR and require a detailed analysis and harmonisation (see question 13).
Article 30:	The access to licence benchmarks addressed in Art. 30 MiFIR is a question regarding intellectual property rights. Competition law recognizes the pro-competitive and beneficial effects of intellectual property rights (see question 13).

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