DEUTSCHE BÖRSE GROUP

EUROPEAN PARLIAMENT

COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

- PUBLIC CONSULTATION -

Questionnaire for the public consultation on enhancing the coherence of EU financial services legislation

The European Parliament's Economic and Monetary Affairs Committee is launching a public consultation on ways to further enhance the coherence of EU financial services legislation. Given the transition to a single rule book in financial services across the EU and the EU legislator's willingness to have "all financial markets, products and actors covered by regulation" it is increasingly important to ensure that legislation fits together seamlessly. The consultation will feed into a programme of reflection to determine future priorities for the remainder of this mandate and to inform the priorities for the incoming Parliament in 2014. All interested stakeholders, including academics and informed individuals, are invited to complete the Committee's questionnaire by 12 noon CET **on Friday 14 June and send it by e-mail to:** econ-secretariat@europarl.europa.eu. All responses to the questionnaire will be published, so please do not send any confidential material with your response. Please make sure you indicate the identity of the contributor. Anonymous contributions will not be taken into account.

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Main activity of organisation: Provision of financial markets infrastructures

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Preliminary Note

Deutsche Börse Group (DBG) organises and operates markets in financial instruments. As an integrated provider of financial services regarding trading, clearing and settlement of financial instruments, DBG is part of a multitude of legislative and administrative acts. Furthermore, DBG group companies cover the whole range of Financial Markets Infrastructure providers: Securities Settlement Systems, Central Counterparties, Central Securities Depositories as well as a Trade Repository. With a business model whose economic viability and competitiveness is largely driven by cost-intensive investments in leading-edge technology, DBG is reliant on a predictable regulatory environment which creates as little cross-border inefficiencies as possible. Therefore, it is in our vital interest to act in a regulatory landscape shaped by comprehensive and coherent legal principles and consistent rule application. DBG supports any regulatory efforts to improve the orderly functioning of markets, to enhance the resilience of single entities as well as systemic infrastructures and to promote growth and fair competition on a level playing field. **Financial legislation should be guided by the principles of a reduction of regulatory arbitrage between jurisdictions, the avoidance of double regulation, clear and coherent terminology as well as consistent rules across all dossiers.**

DBG welcomes the opportunity to contribute to the consultation on coherent financial services legislation initiated by European Parliament’s Economic and Monetary Affairs Committee (ECON). We support in general any measures to make legislation more coherent and to improve uniformity, simplicity and applicability of European financial law – for competent authorities as well as for providers, users and consumers of financial infrastructures, services and products.

Offerings of financial services across Europe have been shaped by a differentiation of business models, financial service providers and corporate structures; this development was accompanied by a functional and organisational (re-)integration along the complete value chain. Financial service legislation facilitates and responds to these developments in terms of rule-making and -implementation. The political motivation behind the resulting and persistently evolving framework is to meet and govern the legitimate expectations and interests of a heterogeneous field of actors. In this regard, the perception of legal inconsistency and incoherence might be – at least in parts – the result of a structural trade-off between a „one-size-fits-all“ approach – with a coherent, but eventually too rigid and unfair scope – and a more diversified approach fit to individual cases, but eventually with a more fragmented and complicated scope. Furthermore, missing coherence is also a consequence of different speed in the various areas of financial industry regulations, political compromise in last seconds, a missing overall single framework of definitions valid throughout the EEA (possibly implemented as an “omnibus II regulation”) as well as a lack of proper cross-referencing of rules in the various dossiers to the entities regulated in other dossiers. Any measures aiming at more coherence of financial services legislation (perceived as an increased uniformity in law-making and harmonisation of rule-application on an EU-wide level) should be balanced against a possible loss in accuracy of fit of legislative acts.

Some of the questions in the consultation document pertain to the institutional design of the legislative process in the European Union. Regarding the vertical and horizontal distribution of legislative competences between supranational, national and subnational actors and institutions, **DBG supports proposals of integrated and harmonized European legislation in order to reduce or avoid divergent rule-setting and -application in different Member States.**

QUESTIONS

1. *Are there specific areas of EU financial services legislation which contain overlapping requirements? If so, please provide references to the relevant legislation and explain the nature of the overlap, who is affected and the impact.*

Consistency and coherence between associated regulatory initiatives is required, as will be shown in different areas of on-going legislation:

The Commissions' proposal for the review of the Markets in Financial Instruments Directive (MiFID II)[1] entails an "upgrade" of the formerly ancillary service of safekeeping, administration of instruments for client, custody, cash/ collateral management to a full investment service (Annex I, Section A, MiFID II). In parallel, EU Commission has proposed a draft for Central Securities Depositories Regulation (CSD-R)[2] with the aim to establish a harmonized regulatory framework for European CSD business. These two proposals need to be coordinated in a way that no unintended consequences and double regulation of the CSD business will occur. Therefore, DBG welcomes that the respective services are considered properly by the European Parliament[3] as well as the Council and are defined as Ancillary Services (Annex I, Section B, MiFID II).

Furthermore, progress in improving coherence may be achieved by agreement upon a legally binding definition and interpretation of market making activities and institutions acting as market makers. An obligatory definition of market making could serve as a common point of reference and thus contribute to legal certainty for all market participants concerned as well as regulatory supervisors. It is therefore essential that there is a common understanding of market making as it is i.e. part of MiFID II, Short Selling Regulation (SSR)[4] and should be in context of a Financial Transaction Tax (FTT). In this respect, DBG welcomes the European regulation on short selling as it has led to a harmonization of diverging national rules. Once a common understanding has been agreed upon on European level, the calibration of a programme's criteria which depends on the market structure, market participants, and an asset's liquidity, should be left as much as possible to the discretion of the trading venue.

SSR includes a settlement discipline regime for shares with an exemption of all transactions that are not cleared by a Central Counterparty (CCP). This exemption encompasses over the counter-(OTC) transactions and all transactions on regulated markets that are not cleared by a CCP implying that a large portion of the market will be exempted from the legislation. We are concerned that new regulatory restrictions will be imposed on CCPs which already follow strict buy-in regime settlement requirements, whereas all transactions outside a CCP still have no consistent regimes to enforce high settlement efficiency. This regulatory imbalance might incentivise to perform transactions OTC or on platforms without CCP clearing; there may be incentives for platforms to move trade flows out of a CCP into non-guaranteed post-trade processes as well. Therefore DBG strongly supports that the regulatory loophole is planned to be closed in context of the on-going CSD Regulation.

DBG is also concerned about regulatory overlappings between European Market Infrastructure Regulation (EMIR)[5] and MiFID II regarding regulation of trading and clearing of OTC derivatives and CCPs. EMIR restricts interoperability arrangements for CCPs on cash securities. MiFID II as proposed by the Commission includes access arrangements for exchange traded derivatives. DBG welcomes that the EP Report on MiFID II in contrast strongly opposes this proposition, as it puts financial post-trade infrastructures at risk which are essential for systemic

[1] Proposal for Regulation COM(2011)652; Proposal for Directive COM(2011)656

[2] COM(2012)73

[3] Report A7-0306/2012

[4] Regulation (EU) No 236/2012

[5] COM(2010)484

viability and resilience of European markets and proved their robustness during the financial crisis. From a procedural perspective this is even more problematic as it alters the legal modes of operation even before they are fully implemented and acted upon.

Also in the area of CCP supervision, we see clear overlaps and contradictions between the EMIR rules and the banking framework set out in current CRD[6] as well as in the future CRD IV framework[7]. While EMIR allows member states to require a banking license for CCPs under CRD (EMIR recital 50) or expresses a banking license as an adequate tool to secure liquidity (EMIR recital 71), CRD IV is not mirroring this with dedicated requirements and rules for CCPs being also a credit institution. This leads to conflicting rules in the area of corporate governance, recovery and resolution regimes, uncertainty in the treatment of CCP business e.g. for the (future) leverage ratio and – remarkable to note – two completely different capital requirement rules even taking into account that the technical standard to EMIR article 16[8] is referring broadly to CRD rules for CCPs' capital requirements. Moreover, EMIR article 16 and the related technical standard are using CRD terminology (e.g. "counterparty credit risk") without clearly referring to CRD and even with unclear references to the legal consequences (CRD uses "counterparty credit risk" only for the trading book while the use in EMIR is unclear as a consequence of the references into CRD. The referencing structure is leading to a coverage of the "counterparty credit risk" as defined in EMIR article 2 (11) (a) as part of the credit risk (as defined in CRD) for positions in the banking book and (b) for any position a second time via the reference from the related EBA standard to Annex III CRD. This leads to unintended double treatment for banking book positions.). In addition, EMIR defined in article 16 the capital of a CCP while the related technical standard is using the banking framework with a total different capital definition (though the EMIR elements are the core elements for the banking framework as well).

We expect similar overlaps and inconsistencies with the CSD-R for CSDs operating (limited) banking activities. We would expect such limited banking activities leading to appropriately calibrated banking rules for such CSDs.

Also with regards to rules for consolidated supervision, we see the increasing risk for inconsistencies. While both the banking (CRD) and Insurance (Solvency II) framework have clear rules for intra-sectorial (i.e. inter-banking or inter-insurance) consolidated supervision, the ideas brought forward by EBA, EIOPA and ESMA in their joint response to the European Commission's Call for Advice on the Fundamental Review of the Financial Conglomerates Directive clearly impact intra-sectorial rules by means of imposing inter-sectorial requirements. More precisely: The possibilities to ask for "one" intermediate holding for sub-ordinated regulatory entities (possibly only in one sector) via means of the rules for financial conglomerates (i.e. within the scope of the Financial Conglomerate rules currently regulated in EU Directive 2002/87/EC as amended) is putting the intended measure at the wrong place thereby contradicting FICODs actual inter-sectorial scope of application.

We respect the need to persistently overhaul and improve the legal framework. However, rules need time to be developed, implemented, applied and evaluated. Changes of the legal framework should be based on thorough evaluations and grounded experiences. Otherwise, this creates legal uncertainty for all market participants and hinders the smooth and orderly functioning of the markets. Therefore, we propose to wait for the entering into force of EMIR provisions and to evaluate their impact before changing – in the course of the MiFID reviewing process – the legal base they are grounded on or the scope they refer to.

Similarly, the rapid changes in the banking framework (CRD: 2006, entering into force 2007 / 2008; CRD II: 2009, entering into force end of 2010; CRD III: 2010, entering into force 2011; CRD IV / CRR: 2013, entering into force 2014; revisions of CRD IV / CRR entering into force 2015 – 2019 (Liquidity, Leverage, most likely

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[6] Directive 2006/48/EC and directive 2006/49/EC

[7] Capital Requirements Directive (CRD): COM(2011)453; Capital Requirements Regulation (CRR): COM(2011)452; P7_TA-PROV(2013)0114

[8] Regulation (EU) 152/2013

Large Exposures, etc.)) which neither give a solid basis for mid- to long-term planning (also not for stable and reliable recovery plans), increase cost and uncertainty as well as make it increasingly difficult to commit to long term financing and funding. On top of that, impact of the various regulations on the industry and the economy as a whole cannot be assessed.

2. *Are there specific areas of EU financial services legislation in which activities/products/services which have an equivalent use or effect but a different form are regulated differently or not regulated at all? If so, please provide references to the relevant legislation and explain the nature of the difference, who is affected and the impact.*

DBG strongly supports the G20s commitment to strengthen core financial infrastructures as a vital contribution to fair, resilient and efficient financial markets. In a general sense, financial legislation should be guided by the principle "same business, same risk, same rules". We believe this level playing field-approach to be a necessary pre-condition for transparency and stability as well as competition and innovation.

DBG welcomes the EP's efforts to further improve the functioning of markets when reviewing the Markets in Financial Instruments Directive (MiFID)[9]. European legislators are aware of concerns regarding the fragmentation of markets and the dispersion of liquidity impeding fair competition, effective price-formation and investor protection. These developments appear to be unwelcome by-effects of MiFID due to differences in the legal classification and regulatory treatment of mainly equivalent financial activities and their form of execution. As a consequence, a significant and stable part of overall transactions is traded outside Regulated Markets and Multilateral Trading Facilities (MTF) in the OTC area and hence is waived from specific regulatory obligations. This may only be legitimate where these transactions differ materially from orders, which are executed on Regulated Markets or MTF. In our opinion, this exemption is only justified for large in scale orders with potentially strong price impacts.

As research by Gomber and Pierron (2010)[10] on OTC traded cash equities has shown, the necessary preconditions and motivation for granting these exemptions from regulatory requirements for OTC transactions – and treating different things differently – are questionable, to say the least. The study depicted that around 75 % of OTC equity orders are rather small and would not face market impact. Therefore, these orders could have been filled at the best bid and offer of a public order book. This evidence strengthens the assumption that a major part of OTC transactions is made to escape MiFID transparency rules. As these OTC trades are functionally equivalent to orders executed on regulated trading venues, there is no reason for materially and formally divergent regulation.

Transparency for all asset classes and trading venues as well as OTC-transactions are a necessary pre-condition for a well-functioning market. Therefore, a legally binding definition of OTC is required to differentiate between Regulated Markets, MTFs, Systematic Internalisers (SI) and OTC, which are all legitimate forms of trading. This classification would help to improve transparency, reduce market fragmentation and avoid new loopholes. We are confident that MiFID II legislation will contribute to this ends by improving transparency, a level playing field and investor protection.

However, even when supporting clear and transparent rules for all types of asset classes and in addition proper regulation of shadow banking, we do not see the excessive need to regulate any kind of financial transaction with extensive rules. While offers for money market transactions (e.g. Repo style business) exist on regulated markets and offer a wide range of advantages, this does not indicate the need to regulate any kind of this business. In the same vein, the regulation and supervision of transactions like securities lending needs to be carefully balanced as

[9] Directive 2004/39/EC

[10] Gomber/Pierron 2010: "MiFID: Spirit and Reality of a European Financial Markets Directive"; available at http://www.efinance.wiwi.uni-frankfurt.de/fileadmin/user_upload/dateien_abteilungen/abt_wi/Dateien_Professuren/Dateien_Professur_Gomber/MiFID_report_Final.pdf

neither all such transactions are in conjunction with short selling or speculative background nor do the majority of such transactions occur with non-financial counterparties. In addition, collateralisation of financial transactions /positions is one of the key elements of current regulatory initiatives. Making such transactions more burdensome – or in the context of the possible introduction of a financial transaction tax substantially more costly – would result in a further concentration of cash flows and interbank-financing to/via the central banks with all related negative consequences for the steering of the money volume, financing of the real economy/private households, increased inflation and low return on financial investments (which in turn reduces the income of pension and similar schemes).

3. *Do you consider that the way EU financial services legislation has been transposed or implemented has given rise to overlaps or incoherence? If so, please explain the issue and where it has arisen, giving specific examples of EU financial services legislation where applicable.*

In general, in a legislative process where competencies and resources are split between different actors in a multi-level framework, a certain degree of incoherence seems to be unavoidable. In order to reduce these incoherencies, it might be a reasonable step forward to cross-check for contradictions and overlaps in a on-going process across all levels of financial service legislation: law-making (Level 1), rule-interpreting and standard-setting (Level 2), rule-application (competent authorities in Member states), judicial evaluation.

Where leeway for transposition and implementation of EU law is granted and used by national authorities to preserve a certain degree of variability and flexibility in order to take into account regional/national peculiarities or certain public goods or services, this should be balanced against potential overlaps or incoherencies created thereby. Learning from our experience with non-harmonised European legislation, DBG strongly supports a consistent European framework to avoid regulatory arbitrage and to enable an efficient European financial market.

In particular we are concerned about the use of inhomogeneous terminology, terminology spread all over various dossiers including reference chains as well as contradicting terminology:

- Some terms are used with the intention of same content but with differing definitions, sometimes with only slightly different wording (mainly due to history and not reflecting actual developments) and consequently potential differing outcome, e.g. “financial sector entity” in CRR (article 4 (92) and “financial undertaking” in Solvency II (article 13 (25)) or “close link” in Solvency II (article 13 (17)) and in MiFID (article 4 (31)). Another example is “subsidiary” defined in MiFID (article 4 (29)), AIFMD (article 4 (1) lit ak) and CRD (article 4 (13))).

- Sometimes cross links do not match (e.g. Solvency II[11] refers in article 13 (25) lit. c) for the definition of investment firm AND financial institution to MiFID Article 4(1)(1) which only defines investment firms).

- Sometimes terms are defined in a similar manner but with slight variations on purpose (e.g. “parent undertaking” which is defined i.a. in Solvency II (article 13 (15)), MiFID (article 4 (28)) and CRD (article 4 (12)); “branch” which is defined i.a. in Solvency II (article 13 (11)) and CRD (article 4 (3))).

- Sometimes different wording is used but same content is meant (e.g. “supervisory authority” in Solvency II (article 13 (10)) but “competent authority” in CRD (article 4 (4)), EMIR (article 2 (13)) as well as MiFID (article 4 (22)) or “qualifying holding” defined in Solvency II (article 13 (21)), AIFMD (article 4 (1) ah), MiFID (article 4 (27)) and CRD (article 4 (10)) or “Asset Management Company” in FiCoD Article 2 (5) and “UCITS management company” in MiFID Article 4 (24))).

- Sometimes same terms are used but with completely different meaning (e.g. “leverage” which is defined

[11] Directive 2009/138/EC

i.a. in CRR (article 4 (86)) and AIFMD (article 4 (1) v) or "operational risk" defined in CRR (article 4(24)) as well as in Solvency II (article 13 (33))).

- Multiple definitions are made by cross-referencing to other dossiers.

- Sometimes terms are used with unclear and no explicit reference to other dossiers where it is nevertheless targeted to (e.g. EMIR article 16 in combination with the related technical standard requires to cover credit as well as counterparty credit risk. However, in CRD, where the capital requirements are taken from, the risk that a counterparty to a transaction defaults before the final settlement of the transaction's cash flows for positions outside the trading book is already included in the credit risk.).

- Sometimes translations of same terms in various dossiers are not the same (e.g. German terminology for "Central Counterparty": SFD[12] article 2 lit a) "Zentrale Verrechnungsstelle", EMIR Article 1 (1) "zentrale Gegenpartei", CRD Article 78 (4) "zentrale Gegenpartei").

- Sometimes definitions are duplicated within the same set of regulations (e.g.: CRD IV defines "ancillary services undertaking" in article 4 (2) lit. (a) while in General refering to the definitions of Article 4 CRR which already defines the "ancillary service undertaking" in its article 4 (89)).

- The term "group" is used in various regulations and directives, but it is not defined in-depth. As an example, it is used in Article 87 CRD IV but it is not defined in CRD IV or CRR. Contrary, EMIR is defining the term "group" in Article 2 (16). This definition defines a "group" as both either a statutory group with reference to the accounting directive (Article 1 and Article 2 of directive 83/349/EEC) or a regulatory group with reference to CRD (Article 3 (1) and Article 80 (7) and (8) CRD). We strongly support to use the EMIR definition, possibly enhanced by regulatory insurance groups, also for other financial services directives/regulations.

We recommend combining all necessary definitions in a single rule book on definitions as an EU regulation which is then referred to by the various dossiers. This keeps maintenance of definitions across dossiers more simple and avoids usage of undefined terms, with varying content etc.

More specifically, the proposed reference of article 4 (47) CRR related to the definition of "recognised exchanges" to a "list to be published by (ESMA) according to Article 47 of Directive 2004/39/EC" is not very helpful as article 47 MiFID only asks for a list of "regulated markets" which currently includes the market as well as the market operator but no "recognised exchange". Due to different national law with partially legal split between the exchange as such and the operator (while other countries do not have such a split), it seems to be necessary to include the market operator of a regulated market in the CRD definition of a "recognised exchange".

Article 4 (47) CRR is furthermore a good example for another problem of EU financial market regulations. The ESMA list referred to will only contain EU/EEA regulated markets but no markets outside EU/EEA. Therefore regulated markets outside EU/EEA which are subject to similar standards (e.g. USA, Canada, Australia, Switzerland, Japan to name only a few) are treated differently without a clear rational. It is therefore necessary to have a coherent treatment towards (regulated) entities with equal treatment in third countries (of course in principle based on mutual recognition).

Similarly, under CRD (including CRD IV/CRR) the treatment of exposures and the treatment of the same item as collateral should be harmonised. This is partially not the case:

[12] Securities Finality Directive 98/26/EC

- Exposures to regional governments etc. receive under certain conditions the same treatment as the central government (CRD, Annex VI, part 1 paragraph 9). While the same risk assessment is assumed for direct exposures, this is not true in case debt instruments are issued by those entities and these are taken as collateral. (Treatment unchanged in CRD IV)

- Exposures to central government and other "public" counterparties receive risk treatment depending on the rating of the counterparty. In case of debt financial instruments issued by such counterparties, this is true for the exposure view as well. However, for financial collateral the reference is intended to be on the instrument rating. Moreover, in case no instrument rating is available, such an instrument would not be eligible at all despite possible high quality ratings for the issuer. In that context also the wording of Annex VIII part 1 paragraph 8 lit b CRD (kept identical in CRR) is strange, as it refers to export credit agencies' ratings (country risk classifications) which are not attached to any instrument as such.

- Another formal issue arises with the treatment of non-qualified Central Counterparties (non-QCCPs) in respect to the capital requirements of CRD IV/CRR. In Article 102 (1) CRR it is stated that trade exposures and default fund contributions to all CCPs (qualifying and non-qualifying) shall be treated in accordance with Chapter 6, Section 9. While capital requirements for trade exposures to a qualified CCP (QCCP) are covered in Article 297 CRR (2% risk weight), capital requirements for trade exposures to non-QCCPs are referred back form Article 297 CRR to the application of the risk weights used for the standardised approach to credit risk set out in Article 102 CRR. This is creating a loop as Article 102 CRR would refer back to Article 297 CRR again. We anticipate that the reference in Article 297 (1) lit. (b) CRR should be referred to Chapter II to solve the loop. However, we read the rule as to refer for the risk weight of trade exposures to non-QCCPs to the relevant risk weight depending on the status of the counterparty as defined by Article 107 CRR.

- In addition a technical issue on the treatment of "other exposures" to non-QCCPs exists. In Article 102 (1) b CRR it is stated that other types of exposures to a non-QCCP shall be treated as exposures to a corporate. For certain businesses a company might operate as a CCP (based on the definion of Article 2(1) EMIR, which is also the basis for the definition of a CCP in CRR as defined in Article 4 (73) CRR) without falling under the requirement to be licensed or recognised under Article 14 or 25 EMIR. This is e.g. true for certain offerings of securities lending business: A company offering securities lending within a dedicated programm as principal towards all participants of that program on a matched principal broking principle to our understanding could be qualified as a CCP (for that business only). Regardless of the general business of that company (being a credit institution, investment firm, other corporate or a government agency) any credit risk resulting from trade exposure out of that business would have to be treated under the standardized approach (regardless of the general usage of an IRB approach or not) taking the counterparty classification as derived from Article 107 CRR into account. However, based on that fact all other exposures towards that company are to be treated based on Article 102 (1) lit (b) as exposure to a corporate either in IRB or under the Standardized approach regardless of the real type of that counterparty.

4. *How has the sequence in which EU financial services legislation has been developed impacted your organisation? Please identify the relevant legislation and, where applicable, specific provisions and explain the nature of the impact.*

The sequence of financial services legislation, which has come under close scrutiny since eruption of the financial crises, had and still has major impacts on DBG. DBG provides financial services along the whole value chain covering trading, clearing and settlement of financial instruments as well as the provision of data. Thus, DBG is

located on a point of intersection where the regulatory impact on financial market infrastructures, on institutional clients as well as institutional and retail market participants, and on products and processes culminates. This regulatory impact might occur directly – as DBG is covered by MiFID II/MiFIR[13], CRD IV/CRR, EMIR, CSD-R – as well as indirectly, when financial legislation aims at changing market participants' behaviour, for example by CRD IV/CRR, Solvency II, AIFM-D[14] or a Financial Transaction Tax[15]. These effects are even multiplied when legislative overhaul happens simultaneously in different areas of the regulatory landscape as could be observed in the previous years.

One crucial lesson from the financial crises should be to strengthen central financial infrastructures which offer transparent, resilient and fair services on a non-discriminatory basis. In order to do so, we would consider it a reasonable step ahead for European policy makers to take into account the culminating effects of simultaneous regulatory measures – especially, but not exclusively on market operators which face global competition with contestants from jurisdictions where the legal framework is not as ambitious and dense as it is in the European Union.

From an organisational aspect, the introduction of EMIR regulated CCPs – which follow national regulations – and the changes of CRD IV, which both affect CCPs operating also under the status as a credit institution, is a challenge. Transitional provisions in this respect for both the CCPs itself and their counterparties interact heavily and lack to some degree proper interlinkage.

5. *Are there areas of EU financial services where the difference between forms of regulation (non-binding Code of Conduct or Recommendation to Member States vs legislative proposals) has affected your activities?*

One of the guiding principles regarding the form of regulation should be to grant priority to voluntary solutions to be found by standardization of products and processes, codes of conduct and self-regulation among the financial services industry as well as organized consumers. In order to make such a competitive solution viable, we consider it a necessary precondition to deliver a coherent framework providing for resources and legal basis. If voluntary solutions do not come up with intended results, legislative action might be appropriate, but should avoid any unfair restrictions of a level playing field for competition.

6. *How do you think the coherence of EU financial services legislation could be further improved?*

   Please comment in particular on the extent to which the following would help to improve the coherence of future EU financial services legislation (please give examples to support your answer where possible):

   a) *a framework for legislative reviews or review clauses included in initial pieces of legislation which link to the reviews of other related legislation?*

   b) *a unified, legally binding code of financial services law?*

   c) *different arrangements within the EU institutions for the handling of legislative proposals (please specify)?*

   d) *other suggestions?*

a) DBG supports the creation of a process of conditioned reviewing between linked pieces of legislation. This procedure might contribute to a more coherent legal framework by „quasi-automatically" searching for – and

[13] Markets in Financial Instruments Regulation (MiFIR): COM(2011)652
[14] Alternative Investment Fund Managers Directive (AIFM-D): COM(2009)20
[15] COM(2013)71

possibly correcting – inconsistencies or contradictions. We propose to establish these process horizontally between Level 1 legislative acts as well as vertically between Level 1 and Level 2 legislative acts. As a system for legislative review might lead to more frequent overhauls of the legislative framework, it should be made clear that financial rules are applied consistently during these review periods in order to avoid legal uncertainty.

b) As it is not completely clear what is meant by a „unified, legally binding code of financial services law“, DBG prefers to comment rather tentatively on this issue. DBG supports the idea to establish or maintain consistent bodies of legislation for different financial market sectors (e.g. MiFID, CRD IV/CRR, Solvency II, AIFM-D, UCITS IV / V, CSD-R). If the intention of the proposal is to create „awareness“ among European law makers for legislative coherence by introducing mandatory principles to be applied and respected in every legislative act, this may be a reasonable approach. In this case, the scope of the „legally binding code“ should be clarified as well as the modes of implementation without restricting formal competencies of all institutions involved in the policy-making process.

7. *What practical steps could be taken to better ensure coherence between delegated acts and technical standards and the underlying "Level 1" text?*

A practical step to better ensure coherence between legislative acts (on Level 1) and delegated acts and technical standards (on level 2) may be to make sure for adequate deadlines in consultation procedures. For example, during implementation of MiFID II, ESMA will have to develop and calibrate around 70 technical standards and delegated acts for reasons of implementation. This task is not trivial; therefore prolonged deadlines might be helpful to provide that all stakeholders wishing to reply will have the opportunity regardless of their material and organisational resources.

Moreover, the high number of legal initiatives not only on EU/ESAs level but also with regards to national implementation and dedicated national law in various EU countries at the same time makes it practically impossible to follow up all these with appropriate quality and quantity. The high pace of change is therefore creating more than a challenge, and appropriate discussion, quality assurance by impacted entities and the general public cannot be guaranteed. Finally, implementation with the appropriate quality is questionable. In turn, we recommend to consider a more co-ordinated approach, a reduced number of parallel activities, a solid step by step implementation (level 1 – level 2 – national implementation) which sufficient time to discuss on each level as well as for implementation. Furthermore, the scope and complexity of the rule set has reached a dimension which is impossible to understand for any person. The level of granularity and complexity therefore urgently needs to be reduced and the rules should be principle based to the extent possible.

8. *Which area or specific change would you identify as the highest priority for the 2014-2019 mandate in terms of improving the coherence of EU legislation?*

We propose to review existing legislation aiming at coherent, consistent definitions of legal terms in all legislative acts and harmonised usage of technical terms. Main priority should be to clarify inconsistencies and cross-references between different directives and/or regulations and provide harmonised specifications to be delivered by European Supervisory Agencies.

Contrary, we urgently ask to stop the pace for on-going changes which hardly can be followed by the industry and the general public. The current pace and scope of change is impossible to be understood in its complexity and as regards implementation, market participants and supervisors are lacking adequate resource availabilities.

9. *Do you consider that the EU legislative process allows the active participation of all stakeholders in relation to financial services legislation? What, if any, suggestions do you have for how stakeholder participation could be enhanced?*

DBG considers the formal framework for consultation procedures to be well-functioning in general. We are not aware of serious restrictions to the active participation of all stakeholders resulting from the institutional framing of consultative as well as legislative processes between Council, European Commission and European Parliament.

However, as stated in our answer to question 7, the size, schedule and complexity of the current on-going initiatives do not allow to spend sufficient time on all topics.

10. *Do you consider that EU legislators give the same degree of consideration to all business models in the EU financial sector? Please explain your answer and state any suggestions you have for ensuring appropriate consideration of different business models in the development of EU financial services legislation.*

In our view, European law-makers should follow an approach which is neutral regarding different business models and therefore provide a level playing field. Where interventions in the legal framework are deemed to be appropriate, there should be in advance a thorough evaluation of intended and unintended consequences in order to avoid any distortions of market infrastructures. It is of particular importance to keep in mind that the regulatory environment has become and will certainly remain one of the key factors determining the viability of different business models. Therefore, DBG strongly supports any measures to balance and mitigate the regulatory burden both inside the EU as well as in a global perspective.

With intensive international competition between trading venues evolving, plans to introduce taxation of financial transactions in a sub-group of 11 EU Member States willing to cooperate on this issue will seriously harm the level playing field within the European Union as well as in a global perspective. Furthermore, the design of the Financial Transaction Tax (FTT) as currently proposed contradicts the policy objectives derived from the financial crises, as the FTT will stimulate the migration of financial transactions to less regulated and non-transparent markets outside the participating Member States. Hence, issues of systemic stability, transparency and cost contribution of the financial sector will not only remain unsolved, but will merely be detracted from the influence and control of supervisory authorities within the FTT jurisdiction. Furthermore, the FTT as currently discussed would not be in line with the principle of causation of the financial crises as the costs of taxation would have to be borne by small and medium enterprises via growing capital-raising costs. Savers and private households would also suffer financial losses as the tax would directly hit their retirement provision products. Policy objectives and regulatory aims aligned to the FTT cannot be achieved considering the institutional design as well as the legal scope of the current proposal.

Regarding the viability of different business models, the Commission's FTT proposal might lead to a non-neutral, disproportional and discriminatory approach. It will lead to disadvantages for companies from participating Member States towards non-participating Member States which can hardly be reversed, once order flow and market participants have been lost to other trading venues outside the FTT jurisdiction. We are concerned, that the introduction of a FTT and the accompanying cost effect might overrule other factors which are decisive for the competitiveness, viability and innovation of business models – such as fast, stable and secure order processing, highly competitive clearing and settlement infrastructures, innovative solutions in pre- and post-trade data provision and additional services. We seriously put into question if introducing new taxation of trading in financial instruments – regardless of politically deemed appropriate or not – should have an economic impact such strong, immediate and inevitable on business decisions.

Furthermore, financial services legislation should avoid regional imbalances of financial markets due to regulatory arbitrage. Misleading incentives for market participants might be created by delayed, premature or single-handed implementation of supervisory rules, as can be seen with divergent timelines regarding capital requirements for banks in the US and Europe. Regulatory arbitrage might also be the result, when rules and principles which are internationally agreed upon, will not be implemented simultaneously and consistently in all participating jurisdictions. Thus, legislative efforts should follow international regulatory standards.

In this context, DBG shares the concerns expressed by the Report of the OTC Derivatives Regulators Group to the G 20[16] as well as the Finance ministers of Brazil, France, Germany, Japan, Russia, South Africa, Switzerland and the UK as well as the European Commissioner for Internal Markets[17] regarding the fragmentation in regulation of cross-border OTC derivative transactions due to a lack of coordination. Cross-border rules should not be duplicative, not apply conflicting rules to the same entities and transactions or leave regulatory gaps. Where these principles are missing, this might form a major impediment to the execution and clearing of cross-border transactions essential for effective global risk management.

Regarding registration requirements for CCPs offering services in other jurisdictions, we strongly support the position taken by the aforementioned Finance Ministers: local requirements may be granted priority towards recognition of foreign rules due to the specific nature and systemic importance of a CCP's business model with its focus on risk mitigation.

[16] http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/130418_odrg-report-g20_en.pdf
[17] Available at: http://www.fsa.go.jp/en/news/2013/20130419.html