

Necessary amendments and revisions to secondary market provisions in MiFID and MiFIR

Position paper prepared by the German Ministry of Finance

General remarks

The findings of the public consultation by the German Ministry of Finance one year after the implementation of MiFID/MiFIR, do not reveal a need for a comprehensive review of the secondary market provisions of MiFID II/MiFIR but do show a great deal of discontent with several requirements under the new regime and a desire for an early refit covering certain requirements.

Based on the consultation's findings, the German Ministry of Finance proposes a two-step approach to address these issues:

1. Near-term correction of minor, mainly technical deficiencies within the coming months and
2. and subsequent work by the European Commission on more fundamental and contentious issues, if necessary on the basis of further in-depth analysis and studies.

Ad. 1. Areas where amendments of secondary market provisions of MiFID/MiFIR are needed in the near term

MiFIR

- **Share trading obligation:** The scope of the share trading obligation is overly broad and leads to legal uncertainties and unintended consequences. The intended benefits and the shortcomings of the share trading obligation should be thoroughly analysed. On this basis the requirement should be recalibrated or repealed if necessary.
At least Art. 23 MiFIR should be modified to focus its application on shares that are listed in the EU. Shares listed in third countries should become subject to the share trading obligation only in very limited and clearly defined cases. In addition, equivalence decisions should be principle-based focusing on an overall assessment of the requirements in third countries.
- **Deferred post-trade publication of non-equity instruments:** Art. 21 (3) and (4) MiFIR grant to NCAs various options regarding deferred post-trade publication of non-equity instruments. As a result, the deferred post-trade publication regimes of non-equity instruments vary widely across the EU and lack consistency. The NCA options in Art. 21 MiFIR should therefore be harmonised so as to achieve greater consistency in deferred publication.
- **Access requirements:** The access requirements in Art. 35 and 36 MiFIR have not been applied yet for exchange-traded derivatives (ETDs). All National Competent Authorities (NCAs) concerned have made use of the temporary exemption provisions available. Given the global nature of competition between financial market infrastructures, forcing ETD infrastructures to implement regulatory requirements without proven concepts to ensure workability among interconnected entities raises severe risks to financial market stability and liquidity. Therefore, the potential benefit of access requirements should be carefully assessed against the risks for market infrastructures. On this basis, the requirements should be reshaped or rescinded if necessary. In any case the existing exemptions should be extended for another 30 months.

- **Exemptions for central banks:** Art. 1 (6) MiFIR exempts the members of the European System of Central Banks (ESCB) from pre-trade and post-trade transparency requirements where they act to pursue their monetary policy mandate. In practice, the delineation of exempted tasks and other, non-exempted tasks of central banks proves difficult. To facilitate such delineation, Art. 1 (6) MiFIR should refer to the tasks under Title IV of the ECB/ESCB Statute. In addition, the application of the transaction reporting requirement in Art. 26 MiFIR to trading venues as regards transactions involving ESCB members is not appropriate because central banks are not “firms” in the sense of Art. 26 (5) MiFIR. It should therefore be clarified that trading venues do not have to report transactions involving central banks.
- **Double volume cap:** Recent developments in equity markets show that the double volume cap, as currently calibrated, leads to a shifting of trading volumes from order-book trading towards auction-based trading, thereby calling into question the original purpose of the DVC mechanism to ensure price formation. Against this backdrop the DVC mechanism should be subject to a general re-assessment. At a minimum, the DVC thresholds should be reviewed on short notice.

MiFID

- **Position limits:** In general the current provisions on position limits work sufficiently well and lead to contain speculation in the area of commodity derivatives. But to the development and growth of new and illiquid contracts the requirements have proven to be a substantial barrier. Therefore, for such contracts the requirements should be reviewed with the aim of allowing nascent markets to develop niche and preventing contracts from being shifted to OTC trading or to third country venues.

Ad 2. Areas where amendments of secondary market provisions of MiFID/MiFIR are needed in the medium-term

MiFIR

- **Market structure/Systematic internalisers:**
In view of current developments, and to ensure a level playing field between different types of trading venues and systemic internalisers, the market structure should be subject to a comprehensive analysis including an assessment of the need to re-calibrate certain core features such as tick sizes, standard market sizes and OTC vs. trading venue thresholds.
- **Application of “traded on a trading venue” (ToTV) to OTC derivatives:** Transparency and transaction reporting requirements apply to financial instruments that are ToTV. While the ToTV concept is applied successfully to fully standardised instruments, its application to non-standardised OTC derivatives remains doubtful because these instruments are deemed to be ToTV when they share the same reference data details as ETD even though they may include additional terms that significantly alter the instrument but are not contained in the reference data. The application of ToTV to such OTC derivatives should therefore be re-assessed.
- **Improvement of the quality of reference data; golden source:** In order to improve the quality of reference data, further analysis is needed on the question of how to ensure the provision of accurate, reliable and timely reference data. The analysis should also explore ways to make FIRDS the golden source for reference data.

- **Alignment of financial instrument reference data reporting requirements:** Both Art. 4 of the Market Abuse Regulation (MAR) and Art. 27 MiFIR require trading venues to report reference data related to financial instruments. However, the requirements currently differ in a number of important respects such as the starting point for reporting (application for trading in MAR vs. admittance to trading/actual trading in MiFIR), reporting frequency (end-of-day under MiFIR vs. application for trading and end of trading under MAR) and application to systemic internalisers (yes under MiFIR, no under MAR). In order to ensure consistency in the reporting of reference data, both sets of requirements should be aligned.
- **Harmonisation of reporting regimes:** The transaction reporting regimes under MiFID/MiFIR, EMIR, SFTR, REMIT, the Short Selling Regulation and MAR should be subject to a comprehensive analysis with a view to harmonisation and to avoiding overlap and duplication. Similarly, existing and planned requirements regarding the use of identifiers such as LEI, ISIN, UTI and UPI should be re-assessed.
- **Commodity derivatives:** The application of MiFID/MiFIR core requirements to commodity derivatives raises a number of questions that should be analysed more closely:
 - **LIS and IL waivers:** Suitability of the calibration of large in scale (LIS) and illiquidity (IL) waivers from pre-trade transparency, notably for pre-arranged trades;
 - **Hedging exemption:** Suitability of the scope of application of the hedging exemption from position limits;
 - **Ancillary activity exemption:** Suitability of the calibration of the thresholds for making use of the ancillary activity exemption for persons dealing on own account in commodity derivatives and emission allowances;
 - **Emission allowances:** Suitability of equalizing the treatment of derivatives and emission allowances held under the Emissions Trading Directive (2003/87/EC). This would recognise the hedging character of such emission allowances and would allow to take them into account when calculating thresholds for the ancillary activity exemption.
- **Cost of market data:** The cost implications for access to and use of market data need to be analysed further with a view to (a) avoiding inappropriate pricing structures and (b) giving data providers an incentive to develop services that are innovative and meet market demands. Furthermore, it should be assessed whether competition authorities rather than financial supervisory authorities would be better suited for ensuring that pricing policies are set up on a “reasonable commercial basis”.
- **Proportionality:** An overall assessment of MiFID/MiFIR requirements needs to be conducted with a view to strengthening the principle of proportionality. For example, small operators of regulated markets with unsophisticated trading models might not need to be subject to sophisticated trading requirements targeted towards high-frequency or algorithmic trading, when such trading does not take place on those markets. Small non-profit organisations with limited trading activities should not be required to obtain a legal entity identifier (LEI).

MiFID

- **Consolidated tape providers (CTPs):** In view of the fact that there are currently no CTPs for equities and non-equities in the EU, it would be useful to conduct a thorough assessment of the effects of a lack of CTPs and the potential benefits of and a need for (a) recognising or

establishing a CTP for equities and possibly non-equities or (b) modifying the regulatory requirements for CTPs. Such an assessment should include an in-depth cost/benefit analysis of possible regulatory action.