Deutsche Börse's Response

to

CESR's Consultation Paper (Ref.: CESR / 04-261b)

CESR's Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments

Executive Summary

Deutsche Börse gladly takes the opportunity to respond to CESR's Consultation Paper about CESR's advice on possible implementing measures of the MiFID. As one of the leading securities trading system providers worldwide we believe that the implementing measures prepared by CESR will have a significant impact on future market structure and market efficiency. Against this background, we recognize the extensive work CESR has spent on this first draft for its advice. Nevertheless, we believe it is important to elaborate certain issues even more and take market particularities into account respectively. In particular this is true for the following issues:

- **Best execution:** Best execution is a key delivery in executing client orders to strengthen investor protection and market efficiency. However, a unique and closed definition for best execution is hardly achievable across investor groups and asset classes. Alternatively, we propose to ensure minimum standards in order execution quality in combination with the transparent and comparable publication of realized order execution quality to strengthen investor education and make best execution an operational delivery in daily business.

- **Pre-trade transparency for regulated markets / MTFs:** Pre-trade transparency is most important for market efficiency and price discovery. Nevertheless, the detailed requirements should not be overly prescriptive. An explicit list of market models should be avoided. This would restrict future market model innovations and competitiveness of European regulated markets. Furthermore existing and established mechanisms like partially closed auctions and the "Skontroführer" mechanism in the German market should not be changed in their substance. Under this perception, optimum instead of maximum transparency should be the guiding principle to allow for specific trading mechanisms for specific user groups and liquidity classes.

- **Post-trade transparency:** CESR should focus on implementing high quality guidelines and structures which facilitate the consolidation of reliable European market data. This should not, however, result in too detailed regulations in terms of single data fields. Data fields are dependent on different market models, and clearly could differ in the case of flexible OTC trades and standardized on-exchange trades. Additionally, CESR should not neglect cost/benefit relations in its decisions.

- **Transaction reporting:** Low cost provision for a future reporting obligation is essential. Therefore in the first place the harmonisation of formats for transaction reports at an Europe-wide level should be maximized as far as possible and secondly existing reporting channels should be integrated. Especially for remote members of a regulated market a single reporting obligation to the competent authority responsible for the regulated market should be kept.

In the following we would like to give our detailed comments to CESR's Consultation Paper. We would like to restrict ourselves to those provisions that are applicable to trading systems providers. We would like to give (a) general comments on the specific sections and (b) answers to the questions on consultation.

I) Comments on Section II - Intermediaries

1) Organisational requirements for investment firms (Article 13, Boxes 1 to 6)

We would like to draw CESR's attention to the fact that the organisational requirements for investment firms might become applicable to the operators of regulated markets through the application of Article 5.2. In contrast to MTFs operated by investment firms or the general investment firm business, operators of regulated markets can only provide restricted access to their services (i.e. see Article 42). There could be potentially severe consequences if CESR does not take the particular characteristics of market operators into account. For example, we consider the following provisions as not appropriate for market operators:

- Compliance function (Article 13.2, Box 1): Operators of regulated markets do not advise clients on the execution of their transactions. Consequently, conflicts of interest do not arise.
- Outsourcing (Article 13.5, Box 3): The application of this provision to operators of regulated markets should not lead to any inappropriate restriction of technical cooperation between regulated markets.
- Record-keeping obligation (Article 13.6, Box 4): Transactions that arrive at the market operator do not identify the underlying client. Therefore, record-keeping should be restricted to intermediaries who execute client orders.
- Safeguarding of clients assets (Article 13.7 and 13.8, Box 5): This provision only makes sense in the case of intermediaries.
- Conflicts of interest (Article 13.3 and 18, Box 6): See compliance function.

2) Best execution (Article 21)

a) General comments

In a market environment with increased investor choice for order execution and separated liquidity pools, the monitoring of service quality in order execution will strongly gain in importance.

Best execution as a post-trade concept to assess and monitor service quality in an ever changing market environment defines a central component to enable market forces working effectively and to ensure investor protection on a transparent and consistent basis. Its objective is to maximize investor's value in order execution subject to an orderly processing in trading and settlement.

Best execution is a key delivery in the process of client order execution. Investment firms are responsible for this key delivery whereas every part of the value chain in securities trading contributes to the result of order execution quality. Therefore, best execution is an important issue not only for investment firms but also for execution venues and marketplace operators.

There is no unique operational concept for best execution across investor groups, asset classes and order specifics. For this reason, a closed definition of best execution seems not only undesirable but also hard to achieve at all. An operational and effective approach towards best execution should rely on the principles of transparency, traceability and comparability.

To approach best execution in daily operational business, we propose to ensure minimum standards in order execution quality. The proposal for minimum quality standards consists of general criteria to assess the execution venues' abilities to achieve best possible results for the execution of client orders and individual criteria on the level of client orders.

General criteria are specific to the execution venue's business model and operational setup such as:

- Legal and regulatory framework
- Trading, clearing and settlement capabilities
- System reliability, business continuity and operational availability
- Fees, commissions and other explicit transaction costs; e.g. courtage in the German market
- Types of market participants

Individual criteria are order specific and refer either to the securities liquidity or the investor type, such as:

- Order type, size and limit
- Implicit transaction costs
- Type of market participant

On order level, individual criteria form a benchmark with regard to client order value determining the required minimum execution quality. The relative distance of realized execution quality to this benchmark shows how far quality improvement against the minimum level has been achieved. Documentation and publication informs investors on how much value has been added by superior execution quality, the more the better for investors' benefit.

Sustainable and comparable publication of execution service quality on the basis of such an operational best execution proposal will strongly improve investor education and strengthen market forces for quality in execution services over time. Both together will serve best investor protection and market efficiency.

Finally, we believe it is important to realize an EU-wide uniform application of best execution supervision in order to avoid regulatory arbitrage.

b) Questions

In the following we would like to respond to some of the questions asked in the document.

(1) Review requirements

Q.3 (page 75): What factors does your firm consider in selecting and reviewing venues?

As a trading venue provider Deutsche Börse wants to provide input to this question. Best execution as a guiding principle in client order execution implies to serve investors with lowest total costs in service provision. Total costs in order execution services include both explicit transaction costs as well as implicit transaction costs. Where best execution requires obtaining the best possible result for executing client orders, the comparison of total transaction costs for different trading venues serves as helpful guidance.

Q.6 (page 75): Do you take account of implicit costs such as market impact? Is the question of implicit costs only relevant to firms that act as portfolio managers?

Implicit transaction costs, such as market impact, delay and opportunity costs, are highly important in order execution services. They have a direct impact on an order's execution price and adversely affect investor's return on investment. In particular, for institutional investors and large order sizes, implicit transaction costs account for the major part of total transaction costs. But implicit transaction costs are also important to small and medium sized orders as they affect execution quality directly. For that reason, the question of implicit transaction costs is important to all types of market participants, investors, issuers, intermediaries and execution venues. This importance has been well recognized by market participants since some time and it will still grow in a future market environment with separated liquidity pools and the demand of investors for transparency in total transaction costs.

Q.9 (page 75): What data is available to carry out these reviews? If no data is available, are market solutions likely to provide it?

The commercial solution to deal with the issue of service quality in order execution is transaction cost analysis. There are several providers available as market solution with different services to analyse and document execution quality.

(2) Timing of venue assessment

Q.4 (page 77): Do venues make firms aware of material changes in their business?

Deutsche Börse regularly informs its market participants on any change in market organization either by electronic notification or member consultation. In addition, market participants take part in the consultation process before any material change in market structure or organization takes place.

II) Comments on section III - Markets

1) Pre-trade transparency requirements for regulated markets (Article 44) and MTFs (Article 29) (Box 12)

a) General comments: Overall view on transparency requirements

Deutsche Börse explicitly welcomes CESR's efforts to facilitate price discovery and investor protection by providing proposals for far-reaching pre-trade transparency requirements. The competitiveness of European market mechanisms for liquid shares and their ability to constantly increase market efficiency by reducing investors' transaction cost in terms of spread and market impact is highly positively correlated with the transparency of these market mechanisms. This is especially true for Deutsche Börse's cash market system Xetra that - right from its start - focused on highest transparency levels. This is achieved via the open order book market mechanism for liquid shares that displays limit orders to enable investors for the determination of prospective execution prices and the assessment of their implicit costs of trading.

In order to provide tailor-made execution services for a diverse intermediary and investor community and to be able to compete with new execution services, market providers are required to offer a multitude of market mechanisms with different levels of transparency and information provided to the market participants. Therefore, besides operating the Xetra open limit order book for high liquid stocks, DBAG has implemented further trading mechanisms: e.g. a hybrid (order and quote driven) model integrating specific liquidity providers (designated sponsors) into the open limit order book for liquid stocks; the integration of continuous trading and (opening, intraday and closing) call auctions that operate with a partially closed order book (see below); a call auction trading mechanism for less liquid stocks that also applies a partially closed order book; and a crossing mechanism for block trading that is based on a closed order book and applies a reference price mechanism referencing to the Xetra order book. Beyond providing these mechanisms on Xetra, Deutsche Börse also operates the floor of the Frankfurter Wertpapierbörse (FWB; Frankfurt Stock Exchange) that applies a specific transparency regime based on price indications that are provided by neutral market personnel.

While the mechanisms mentioned in [BOX 12, paragraph 1 to 3] address some fundamental mechanisms, they can not reflect the variety of mechanisms in European Markets – the above illustration of the diversity of mechanisms at Deutsche Börse alone gives a hint on the multitude of concrete mechanisms in Europe. Therefore, Deutsche Börse proposes not to describe a specific set of mechanisms but to more generally list basic principles – a framework that enables competent authorities to assess the compatibility of concrete mechanisms with the rules defined within the MiFID.

Restricting the set of mechanisms in a defined list would reduce competitiveness and flexibility of European regulated markets both relative to off-exchange execution mechanisms and also internationally, e.g. relative to US markets, where European market models are often referred as "best-of-breed" mechanisms.

These basic principles should be based on the concept of optimum instead of maximum transparency where investors are provided at least the information that allows assessing the

prices they will receive when submitting orders and the direction of the market based on an appropriate level of transparency that enables for specific market mechanism provisions for specific securities and investor groups.

Q. 12.1 (page 90:) Do consultees agree with the specific proposals as presented or would they like to see more general proposals?

The specific proposals to define pre-trade transparency requirements for market mechanisms on regulated markets [p.87, BOX 12, 1-3] potentially restricts future market mechanism innovation and product development opportunities. Any conclusive classification bears the risk to be incomplete in assessing existent market mechanisms as well as being unable to cover future developments. Therefore, we argue to avoid an explicit list of market mechanisms for regulatory purposes as a specific proposal but instead define more general principles that allow the competent authorities to assess market mechanisms concerning the ability to provide the appropriate level of transparency for the targeted investor groups.

b) Specific comments

Although we think that more general principles are required, we want to provide our input to the drafting provided by CESR on the specific market mechanisms in paragraph 1 to 3 [BOX 12, p. 87].

(1) Content of information

Deutsche Börse applies a so-called "partially closed order book" in auctions. In this model, the orders that participate in the auction are not shown but the indicative auction price, the indicative auction volume and any surplus at this indicative auction price are displayed. If the order book is not crossed, the best bid and the best ask with their volumes are displayed.

This level of transparency provides the necessary information to assess the potential outcome of the auction while offering reduced market impact and information leakage for participants with large orders – the partially closed auction is established since the introduction of Xetra and fully accepted by market participants. Furthermore, the ability to protect larger orders provides a level playing field with crossing systems. Empirical data concerning the share of auction executions in different classes of order volume relative to the overall executed volume show (see appendix 1) that a majority of large orders are executed within auctions where they gain protection against revelation.

In completely open auctions the incentive for investors to influence the auction results is increased due to the pre-defined schedule and the fact that immediacy of execution is suspended for the duration of the auction. Also, the existence of iceberg orders can be exploited: Since the total volume of an iceberg order is included in the auction volume calculation, participants receive an important information not available during continuous trading. It can be shown that participants can exploit this fact in an open order book environment in order to identify iceberg orders, and possibly even uncover their hidden volume (see example in appendix 2). This is not possible where the auction is partially closed.

Therefore, we recommend to also include partially closed order books for auctions as being eligible market mechanisms.

The definition of scope by physical location "floor" in [p.87, BOX 12, paragraph 3] restricts future market model improvements which replicate floor like functionalities on a fully electronic system. Therefore, it is essential to have a more general definition based on the market mechanism (market personnel or specialist market mechanism) instead.

The market mechanism of price determination assisted by market personnel (in document named "floor trading system") is based on the principle of *continuous auction trading*. All buy and sell market and limit orders are collected in the electronic order book, to which only the assigned market personnel authorised to determine prices in the respective security has access. For a general description on the concept of the "Skontroführer" market mechanism please refer to Appendix 3.

Prior to the price determination, the market personnel discloses an indicative price range (so called *"Taxe"*), which informs the market about the bid and ask prices based on the current order book status which forms a range within which the price next price can be determined.

This indicative price range is necessarily *not* "firm", since it is based on a "snapshot" of the momentary order book status, which can change continuously up to the moment of the actual price determination. Especially in case of less liquid stocks the possibility of displaying indicative prices allows market personnel to give investors guidance on potential prices without being exposed to trade at these indications in less liquid stocks in the case the order book is empty or only few orders (or orders with limits far away from current market conditions) are included.

Therefore, bids and offers referred to as quotes of the market personnel should not be recommended to be firm. This would also allow achieving a level playing field relative to systematic internalisiers that are only required to provide firm quotes for liquid stocks.

Q. 12.2 (page 90): Is the content of the pre-trade transparency information appropriate?

The proposed level of content for pre-trade transparency is appropriate as minimum requirement concerning the drafted elements in [p.87, BOX 12, paragraph 2] for liquid shares. Nevertheless, besides proposing more general principles, we recommend that

a) There should be a possibility for a partially closed order book in auction electronic trading.
b) There should be a more general definition of a market personnel / specialist market mechanism. It should not be based on the physical location.
c) Quotes of the market personnel / specialist (German "Taxen") should not be required to be firm (at least for less liquid stocks).
d) The principle of optimum transparency should be the guiding principle instead of requiring maximum transparency for all mechanisms.

(2) Depth of trading interests

Electronic order driven trading systems in European markets distribute their market depth based on the information requirements of market participants by way of displaying between 5 and 10 price levels. This level of market depth is provided continuously by broadcasting the information to trading participants and information vendors.

In Xetra the volumes at each price level are aggregated instead of displaying individual order sizes. Additionally the number of orders representing the displayed volume is shown. This level of market depth information proved to be sufficient as it displays the relevant sizes. Information beyond these order limits would only be relevant for traders whose orders would potentially sweep the order book and reach (in the case of level 10 information) the eleventh price level. Appendix 4 shows the order volumes that are covered up to level 10 for DAX 30 stocks and supports the assumption that the display of market depth beyond level 10 does not provide additional information. The order volumes that are displayed within the first ten levels cover roughly 10 times the average order volume in our market.

Full market depth is available as a static snapshot functionality, i.e. on request, and is used very seldom by trading participants in the Xetra trading system.

The continuous distribution of full market depth will require significant investments for data dissemination and trading system functionality for market infrastructure providers. Beyond that, market participants would have to increase their bandwidth in order to be able to receive these amounts of data which would lead to additional costs for any of these trading participants and/or the information vendors. Deutsche Börse estimates that the total infrastructure requirements and costs would add up to a double digit million Euro sum.

Q. 12.3 (page 90): Do consultees agree on the proposal regarding the depth of trading interest and access to pre-trade information?

As the value of pre-trade information on current trading interests decreases significantly with their distance from the inside market, the marginal economic benefit of additional levels of market depth distribution does not justify the marginal costs for implementation and operations both for marketplace operators and market participants.

Therefore, we propose to define a minimum requirement for the continuous display of market depth ('at least 5 limits with display of order volumes aggregated per limit or display of individual orders') for pre-trade information dissemination and leave the availability of full market depth to market demand.

Concerning access to pre-trade information it should be considered that the concept of equal access [paragraph 10] can not apply to market personnel as market personnel per definition needs order book insight in order to fulfill their duties.

(3) Exemptions from pre-trade transparency

Exemptions based on market model

Crossing systems are an established form of trading and represent a specific trading solution for specific market demands, i.e. the execution of block orders based on the price discovery mechanism of an open public limit order book. Although crossing systems are free-riding on the price discovery function of regulated markets, Deutsche Börse supports the waiver for "crossing systems" with view to a level playing field for specific trading mechanisms. Nevertheless, it should be made explicitly clear that crossing systems should only serve as trading mechanisms for block orders. Enabling other execution venues to use a completely closed order book based on this pre-trade transparency exemption would allow for undermining the intentions behind Level 1 regulation and for regulatory arbitrage.

It should be clarified that regulated markets/ MTFs themselves should be enabled to offer block trade crossing systems that reference to their own open limit order books - the current wording: "reference to that of another trading venue" might indicate that such a trading venue has to be located outside the RM or MTF.

Q. 12.4 (page 90): Do consultees agree on the proposed exemptions to pre-trade transparency? Are there other market models which should be exempted?

Q. 12.5: Do consultees support the waiver for "crossing systems" as defined in paragraph 13? Could pre-trade transparency have a negative impact on liquidity or create the potential for abuse behaviour?

To ensure a level playing field between all execution venues and to allow regulated markets and Multilateral Trading Facilities for future product development opportunities for reference price market mechanisms, the exemption "by reference to that of another trading venue" needs to include the option to reference own markets, i.e. the regulated market itself, equally to other trading venues. Therefore, we suggest to draft "by reference to another trading venue within or outside the regulated market or MTF". Furthermore, it should be clarified that the crossing system exemption does only apply to block trading systems where market impact protection justifies completely closed order books.

Exemptions based on order type

The definition of an iceberg-type order should be adapted. Iceberg-type orders are orders with quantities only partially visible in the order book. Such orders are characterized by their overall quantity, the peak quantity which characterizes the visible part of the order and the mandatory limit. Not only the visible part (peak) is available for execution as stated in [paragraph 14] – instead the full iceberg is available for execution if an order of a size bigger than the peak size meets the order book (if there are no other orders at the limit of the iceberg).

We explicitly support the exemption for iceberg-type orders and it should be clarified that this enables for the development of similar orders type designs in order to support further innovation.

Furthermore, Deutsche Börse recommends to exclude contingent order types like stop orders explicitly from pre-trade transparency as their revelation would allow other market participants to explicitly trigger these order types by voluntarily initiating the trigger event at the disadvantage of the participant that entered the order.

Large trades

The market impact method assesses liquidity by its ultimate value to investors, the ability to trade immediately and at lowest costs. Consequently, the market impact method defines block sizes transparently, objectively and consistently across time and traded instruments. The market impact method is closest to the basic objective why to define block sizes at all: The basic objective is to preserve block sizes from poor execution quality by waiving pre-trade transparency and allowing for delayed post-trade publication. The market impact method

quantifies average execution quality in terms of implicit trading costs with respect to the order size and therefore enables to derive minimum block sizes from maximum acceptable market impact costs in order execution.

Nevertheless, the market impact method requires some higher calculation effort in regular operations than the "average daily volume method". This additional calculation effort does not affect market participants as in all calculation alternatives, market participants finally will be informed about a specific threshold in terms of number of shares or euro volumes for a specific stock. The market impact method therefore allows to objectively define this threshold based on a clearly defined concept without adding any complexity in the operations of market participants.

Q. 12.7 (page 90): Do consultees have a preference for one of the options proposed for defining block size, are there other methods which should be evaluated?

Deutsche Börse regards the market impact method as best suited to identify block sizes.

2) Post-trade transparency requirements for regulated markets (Article 45) and MTFs (Article 30) and for investment firms (Article 28) (Box 13)

a) General comments: Overall view on post-trade transparency requirements

We welcome the approach chosen by CESR on the installation of a post-trade reporting concept taking into account the particularities of existing reporting systems as well as the need of a comprehensive approach. Consequently, we support CESR's advice that if a trade is done on a regulated market or MTF the publishing may happen according to their rules. Exchanges so far have proven that they provide market transparency in a very efficient and reliable way accessible to every interested party.

We furthermore would support any efforts by CESR to establish a systematic approach towards achieving reliable, complete and reliable post-trade transparency for Europe avoiding double reporting. In this context we would like to suggest a model of "Recommended Reporting Channels" which should fulfil minimum requirements to guarantee widely available and reliable data which can be easily consolidated.

The competent authority (or other institution to be defined) should provide a list of "recommended" proven reporting channels. By relying on such an official "recommendation list" a data consolidator should always be able to identify all potential reporting channels - essential in order to guarantee full transparency. This model would also contribute to the avoidance of double reporting. In order to qualify as a "Recommended Reporting Channel" the reporting channel must comply with minimum requirements (e.g. such as real-time monitoring) to guarantee reliable and complete data that can be easily consolidated.

It should be noted also that exclusive contracts between Vendors (Secondary Information Providers - SIP's) and MTF's (Primary Information Providers - PIP's) can act as a barrier regarding overall transparency. Therefore, it should be clarified that the reported data should not be maintained exclusively by one party. To the contrary, it should be made available to a broad spectrum of SIP's thus guaranteeing that complete transparency is available to all interested groups throughout Europe via different vendors.

Another important element of an effective post-trade reporting is continuous advertisement of all reportable securities to foster the complete reporting. Therefore, CESR should consider requesting regulated markets and MTF's to officially publish / provide an up-to-date and complete list of its securities traded and which are subject to trade reporting.

Additionally, it should be noted for the avoidance of doubt, that Central Counterparties (CCP's) operated by a regulated market do not hold the legal status of an investment firm, and therefore should not be obliged to trade reporting. This is essential also for the avoidance of double reporting.

In the overall discussion we realized that a couple of issues have not yet been addressed directly but which we consider being essential for trade reporting. First, who will be in charge of checking compliant behaviour of the trade reporting parties (including the quality of trade reports in terms of time and data input), and second, will there be any enforcing measures introduced for "late reports" to ensure compliant behaviour with regard to timely reporting. We would appreciate if CESR would bring this into the discussion with the market participants.

b) Specific Comments

(1) Content of post-trade information

The minimum content to be made public should contain (the last elements in addition to paragraph 21):

- Market identification
- ISIN
- Date and time of transaction
- Volume (number of shares)
- Price (could be auction price or last traded price as well depending on market model)
- Currency

We would like to address that we see slightly different data field requirements for standardized exchange trading compared to OTC Trading which tends to incorporate more flexible components in terms of "settlement due dates" or "currency traded in", only to name a few. Therefore, non-standardized trades potentially do require slightly more information fields being attached to every real-time trade compared to standardized trades to provide sensible information to the market.

In the case of standardized trades we deem it fully sufficient to disseminate redundant data (e.g. the standard currency for the respective security traded, or the trade date as they do not change over the day) once a day before trading has started, instead of re-sending it with every executed trade. It is this way that data dissemination is realized in a very efficient way without endangering data consolidation, using valuable line capacity for essential information only. Line capacity as well as information overflow are important topics/problems in the market data environment currently and will be even more in the future. We therefore would suggest that CESR concentrates on the overall goal that clear information is delivered to market participants (to base their investment decisions upon) but keep the definition of respective data fields to a very minimum at the same time differentiating between standard trades and more flexible OTC Trades.

With regard to price data Deutsche Börse disseminates this data as "last price" which encompasses the last auction price based on auctions as well as last traded price based on continuous trading thus reflecting fully at any time the current market price at the exchange. We would suggest keeping the definition of price as simple as possible to give more room to the different market models.

Aggregated Data

Deutsche Börse does disseminate aggregated data like opening price, closing price, maximum and minimum price during the sessions to name a few. We therefore appreciate CESR's request for aggregated data but, however, would suggest leaving aggregation to the discretion of the market forces. Current market information within the EU is still very different from each other (e.g. Germany's Kassakurs or LSE's mid-price for non-orderbook instruments) making aggregation difficult in some cases.

Q. 13.2 (page 95): Do consultees support the inclusion of "aggregated information" in paragraph 22 or should it be left for market forces to provide on the basis of the information disclosed under paragraph 21. If it is included what should the content be?

We are of the opinion that aggregation of information should be left at the discretion of the market. Germany has Kassakurs, which is unfamiliar outside of Germany, whereas the LSE has mid-price for non-order-book instruments.

Trade Publication

Market transparency can be achieved not only by "trade by trade" information but also by cumulated trade volumes for a single security at the same price at the same time, as it is currently disseminated by Deutsche Börse, whereby the traded volume and the price at a particular time are made transparent. E.g., Xetra shows the execution of one sell order of 50 shares against five buy orders with the volume of 10 shares each at the same price. In this case one trade with the volume of 50 is being disseminated instead of five trades with the volume of 10 each.

In this case "trade by trade" information could ultimately lead to an overflow of information, not only at peak times. Cumulated information which still fully reflects traded volume with respective price at one particular point in time also supports smaller vendors, thus guaranteeing that any interested party has access to data. Due to this, dissemination of other than trade by trade information should be allowed too.

Q. 13.1 (page 95): Do consultees support the method of post-trade transparency (trade by trade information), should some other method be chosen (which)?

Market transparency can be achieved not only by "trade by trade" information but also by cumulated trade volumes for a single security at the same price at the same time. Therefore and due to cost/benefit reasons, dissemination of cumulated trade information should be allowed as well.

(2) Arrangements to disclose post-trade information

Near-real time trade reporting

We strongly support CESR in its request for trade reporting to take place as close to real-time as possible (paragraph 24). However, would like to acknowledge that there might be trading venues (non-electronic) which will not be able to meet a one minute deadline.

The dissemination of post-trade information in real/time or near-real/time is technically achievable for on-exchange trades. For OTC trades, however, it should be considered that not all market participants, esp. the smaller firms, currently have the technical requirements and the staff to report the trade within 1-minute. We therefore suggest offering a wider reporting frame of 3 minutes after a transition period that might consider even more than 3 minutes.

Q. 13.5 (page 95): Do consultees agree on the method of defining the time limit in paragraph 24 and is the one minute limit capable of meeting the needs of occasional off-market trades?

We generally agree with a short time limit but acknowledge that some OTC trading venues might need slightly more flexibility initially. We therefore suggest that CESR considers a 3 minute time frame after a short transition period with an even slightly wider time frame which should apply for non-electronic trades on exchanges as well.

Q. 13.3 (page 95): Do consultees support the two week period for which the post-trade information should be available?

Investment firms are already obliged to keep trading data for legal reasons, there is no need to keep the data additionally. Additionally exchanges keep trading data for a certain period as well. Deutsche Börse e.g. keeps trade data for up to 6 months.

Active Trading Hours

With regard to paragraph 36, we fully support CESR's demand for transparency for the entire period of "active trading" takes place on- and off-exchange. However, we deem the term "actively trading" as not truly sufficient as it leaves a wide array of interpretation. We would suggest defining a more explicit time frame, e.g. a general "European Trade Reporting Time Frame" of less than 24 hours but well above the usual exchange trading hours. A trade which is done after closing of the reporting mechanism (e.g. 22 p.m. CET) could then be reported at the beginning of the next trading day before the next actual reporting session starts. A fixed time frame would likely not only be more cost-efficient but would as well provide a reliable time frame for all market participants.

Reliable Trade Data

We strongly support CESR in its demand for full reliability of trade data as stated in paragraph 27, 35 and 36. However, we feel that trade report obligations are not yet completely and clearly allocated still leaving uncertainties with the parties involved.

To remove potential doubts and to give a clear orientation to all parties involved we would like to suggest to CESR to address the responsibilities of the parties involved in more detail.

In general the party which is responsible for trade reporting should be responsible for the correct and timely input of the trade data. E.g., in each case the party submitting a trade report to a reporting mechanism should be responsible for ensuring that the trade is properly entered into the reporting mechanism according to time, accuracy and completeness by providing all the requested information specified in the MiFID / CESR advice, including any potential indicators, e.g. for delayed publication, other than market price etc. The reporting party must also ensure that double reporting is avoided, e.g. by choosing a single dedicated reporting channel at a time.
The party submitting the trade for reporting should choose a reporting channel which

guarantees secure as well as broad distribution of data so that the data is easily accessible and may be consolidated with data from other reporting channels.

Furthermore, with regard to paragraph 35 ("avoidance of double reporting") and for the avoidance of doubt we would like to point out that regulated markets operating a Central Counterparty (CCP) will only be able to guarantee single trade reporting in case the CCP will not be committed to trade report.

Q. 13.4 (page 95): Should some minor trades be excluded from publication (and if so, what should be the determining factor?)

There is no economic reason to exclude minor trades.

Harmonized European Securities Identifier

To make European data consolidation easier we strongly support the harmonization of the securities identifier.
Regarding the harmonized identifier there is no alternative to the ISIN code. ISIN is the only real industry standard. It is globally accepted, neutral and less expensive than any other security identifier. All other identifiers are proprietary. There are either discriminatory practices (e.g. Reuters RIC for non-customer) or expensive license-fees to be paid (SEDOL, US CUSIPS). ISIN is widely used within the EU, only UK is SEDOL based.

ISIN is based on the International Organization for Standardization's ISO Norm 6166 "Securities and Related Financial Instruments - International Securities Identification Numbering System". ISIN together with other already existing ISO codes (e.g. ISO 10383 "Securities and Related Financial Instruments - Codes for Exchanges and Market Identification") can cover all information required due to MiFID.

Q. 13.7 (page 96): Should the identifier of a security be harmonised and if so to what extent? What should be the applicable standard (ISIN code, other)?

To make European data consolidation easier we strongly support the harmonization of the securities identifier. Regarding the harmonized identifier there is no alternative to the ISIN code.

Q. 13.8 (page 96): Should more information be available on stock lending? If so, which should be the content? Are there other similar types of activities which should be covered?

We do not see any necessity to trade report either stock lending, nor option exercises or assignments. These equity turnovers do not contribute to the actual price discovery process as they are based on different business intentions compared to the usual cash equity trading.

(3) Deferred Publication of Transactions

With regard to deferred publication and especially with regard to paragraph 43 we would like to point out that any deferred publication time per security should be same the within Europe. Different delays within Europe otherwise could lead to market distortions and could potentially support those markets with the longest delay period.

To establish the respective liquidity for each security to be reported, we see no alternative to the Market Impact Method.

Initiate Collaboration within Europe

We strongly appreciate CESR's offer to initiate collaboration in the field of data dissemination. We would, however, trust in market forces to set up required and efficient technicalities by themselves as long as they are provided with clear and quality oriented regulations. It is the area of setting an efficient framework of appropriate regulatory quality standards where we most appreciate CESR's support.

Q. 13.9 (page 96): Should CESR initiate work, in collaboration with the industry and data publishers, to determine how best to ensure that post-trade transparency data be disseminated on a pan- European basis?

Deutsche Börse trusts market forces to set up efficient data publication solutions within Europe based upon strong regulatory quality standards.

3) Admission of financial instruments to trading (Article 40) (Box 14)

Q. 14.1 (page 100): Do consultees agree on the requirements for admission to trading? Should more (qualitative and/or quantitative) criteria for admission to regulated markets be specified in the level 2 measures? If yes which?

We appreciate the light-handed approach CESR has adopted regarding the conditions on fair and orderly trading. However, we would like to warn that excessive regulation of admission of financial instruments would endanger the level playing-field among trading venues.

Q. 14.2 (page 100): Do consultees agree on the role proposed for RMs in order to ensure that the issuers fulfil their disclosure requirements?

With two objections, we concur with CESR on the role of market operators in the process of admission to trading. First, market operators should not be obliged to assume a quasi-authoritative role in verifying that conditions for prospectus exemptions have been met. Second, we see no basis for obliging market operators to provide links to issuers' prospectuses on their websites.

III) Comments on Section IV – Cooperation and enforcement

1) Transaction Reporting (Article 25)

a) General comments

We welcome CESR's emphasis on the need to avoid additional costs for market participants. It is therefore important to verify the extent to which existing transaction reporting systems may be used for fulfilling MiFID requirements. In addition, we believe it is of utmost importance to reduce the complexity of transaction reports. The formats should therefore be harmonised at a Europe-wide level and potential synergies with trade reporting systems should be realised.

b) Specific comments

(1) Methods and arrangements for reporting financial transactions (Box 15)

In paragraph 3, CESR foresees the possibility of a waiver of the obligation to report directly by investment firms, as provided for in Article 25.5. From the perspective of the operator of a regulated market, we support this possibility. It will help to reduce costs for investment firms. Nevertheless, we would like to draw CESR's attention to the problem of remote members without a branch in the Member State in which the regulated market is authorised. Reporting to the competent authority responsible for the regulated market will allow simple technical solutions in these cases (enabling straight-through processing, see also our comments regarding Box 19).

Q. 15.1 (page 104): Should competent authorities be able to waive the requirement for investment firms to report transactions in electronic format? Should such an exemption be limited to exceptional cases, and what cases would those be in your view?

Electronic formats for transaction reports should be given priority. Nevertheless, in very exceptional cases, exemptions should be allowed.

Q. 15.3 (page 105): To what extent should CESR investigate the possibility for future convergence between national reporting systems? What are the advantages and disadvantages of harmonising at EU level the conditions (including format and standards) with which all the reporting methods and arrangements have to comply in order to be approved, instead of, as proposed by CESR, harmonising the conditions at a national level? What impact might harmonisation have on existing national reporting channels, national monitoring systems and on the industry?

Against the background of growing cross-border business harmonisation, the highest degree of convergence at EU level is necessity. Only then will low-cost provision of the respective services by reporting channels be possible.

Q. 15.4 (page 105): Do you agree with the set of the general minimum conditions suggested? If you do not agree, what other general conditions would be more appropriate in your view? In particular, taking into consideration the responsibilities of investment firms on the one hand and third parties and other reporting channels, on the other, do you think that CESR should include the requirement of a standard-level agreement between an investment firm and a reporting channel in the list of general minimum conditions, or would this be better addressed at Level 3? What is your view on the border line as to the responsibilities for reporting if done by a third party acting on behalf of an investment firm or by a reporting channel?

We agree with the set of the general minimum conditions suggested.

(2) Criteria for assessing liquidity in order to determine the most relevant market for financial instruments in terms of liquidity (Box 16)

We feel it would be helpful if the context surrounding the stipulation of the most relevant market could be clarified in the advice presented by CESR. The objective is merely to determine the competent authority to which transaction reports should be submitted, and not to define the most liquid market by means of some sort of liquidity beauty contest.

Q. 16.1 (page 110): Do you agree with the approach to use proxies as suggested above? If you do not agree, what other approach would be more appropriate in your view?

In any case, CESR should use a pragmatic approach and avoid measures that cement the responsibilities of authorities that are based on the initial activities of issuers and do not reflect the fact that trading activities might change over the time.

(3) Minimum content and common standard / format of transaction reports

Q. 17.5 (page 113): What are the advantages/disadvantages of requiring the field "client identification code" in transaction reports, bearing in mind the objectives of transaction reporting? What are your views on making the client/customer identification field mandatory in transaction reports? What are your views on the idea to promote a pan-European code for client/customer identification? Do you see any legal impediment to the introduction of such a code in your Member State?

Given that standardisation in this area is extremely difficult (also in relation to third countries), we recommend not integrating the "client identification code" field in transaction reports.

2) Cooperation and exchange of information (Article 58) (Box 19)

a) General comments

Within the integrated single market, the problem arises that in certain cases, several authorities could be potential addressees for transaction reports. It might be the authority responsible for the supervision of the investment firm in its home country (CA), or it might be the authority responsible for the supervision of the regulated market (CAR) – these authorities differ in the case of remote members (without a branch in the Member State where the regulated market is based).

In our opinion, the MiFID does not provide a clear solution for this problem:

- Article 25.3 uses only the term "competent authority" and does not expressly say competent authority "of the home Member State of the investment firm"
- The home Member State principle according to the MiFID is applicable for investment firms (Article 4.1 no. 20a) as well as for regulated markets (Article 4.1 no. 20b)

Although current practice is for remote members to report to the CAR (by using the waiver integrated in the ISD 1993), the MiFID could be interpreted differently. Since this will lead to significant changes to established processes that will involve costs, we would like to draw CESR's attention to the following interests of the players involved:

- Investment firms: Investment firms would have to change established reporting methods; this could increase complexity and costs.[1]
- Regulated markets: Transaction reporting on behalf of remote members would become impractical because the regulated market would have to comply with up to 25 potentially different specific national requirements and address the reports to many different authorities. Low-cost services provision demands the installation of processes that are as simple as possible.
- CA: Administration cost and complexity would rise because investment firms' home authority will not generally be the CA of the most relevant market in terms of liquidity. Hence, nearly every report on remote transactions received would have to be transformed and distributed to 25 national CAs.
- CAR (where the trade took place): Administration cost and complexity could rise because the procedures to integrate the data forwarded by other CAs with existing databases and algorithms could become complex; at the same time, market surveillance (insider control) might become more difficult, since the CAR would not necessarily receive all reports on transactions in its home market (or at the most less detailed reports), and surveillance of the entire national market would therefore be hindered.

To find a practical solution that reflects the legal background provided by MiFID, we recommend adopting or at least examining the following options:

[1] For the German market alone, each of the 340 EU members of Xetra and Eurex would be affected by the costs of reorganisation.

- Reporting methods would be simplified by allowing regulated markets, as reporting providers, to report to the CAR, which would forward the reports to the home authority of the investment firm (based on a common processes developed in Level 3 of the comitology procedure).
- If arrangements are put in place by a regulated market in a Member State allowing the waiver of the obligation to report directly by investment firms, as provided for in Article 25.5, responsibility for transmission of transaction reports – independent of responsibility for the reliability of contents as such that stays with the reporting entity – would pass to the regulated market. In this case, the CAR would be the appropriate addressee for the transaction reports of the remote members.

b) Specific comments

Execution of requests for cooperation and exchange of information

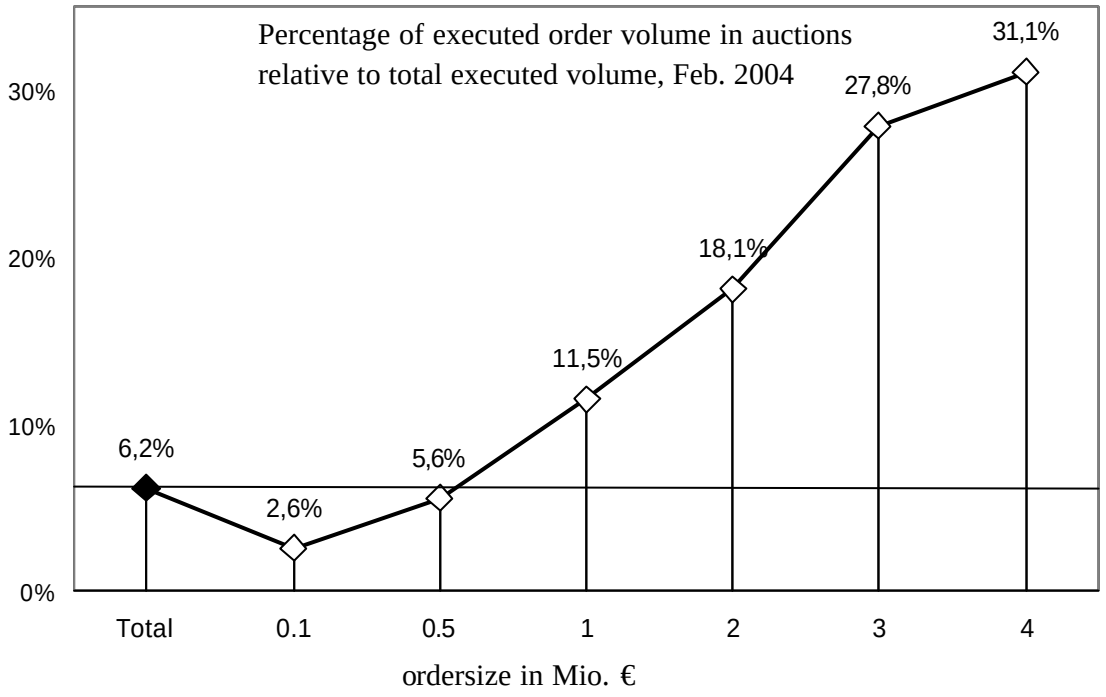
Q19.3: What other issues, if any, should CESR take into account when responding to the Mandate concerning the "exchange of transaction reports between competent authorities designated as contact points"?

The exchange of transaction reports between authorities should not become overly complex. For remote members, a single reporting obligation to the CAR with subsequent distribution between authorities would be more efficient than reporting to the CA.

Frankfurt/Main, October 4, 2004

Appendix 1

Xetra share of order executions in auctions (value)



Appendix 2

Example for "fishing" icebergs in an open auction environment

Bid Volume	Limit	Limit	Ask Volume
1000 peak	201	202	1000
100	200	204	3000
900	199		

iceberg

10000	201		

Displayed Auction Volume: 0
Best Bid 201; Best Ask 202

Entering and immediate withdrawal of a limit order at 201 with a volume of e.g. 15000 allows to exactly figure out the total volume of the iceberg.

Volume	Limit	Limit	Volume
1000 peak	201	201	15000
100	200	202	1000
900	199	204	3000

iceberg

10000	201		

Displayed Auction Volume: 11000
Auction Price: 201

Appendix 3

Principles of Skontroführer Market Model

The discussion surrounding the future measures for implementing the Markets in Financial Instruments Directive (MiFiD) has made it clear that there is evidently a considerable need for clarification regarding the market model of "closed order book trading" by market members acting as market personnel (so called "Skontroführer") authorised for price determination in a specific security. The guiding principles as well as the technical procedures of this market model which has been long established in Germany and especially predominates in floor trading are thus described and explained below.

General Characteristics

The market model of closed order book price determination is based on the principle of continuous auction trading. All buy and sell market and limit orders are first collected in the electronic order book, to which only the assigned market personnel authorised to determine prices in the respective security has access. In performing this function, the personnel is bound to the strictest neutrality and is under the constant and closely scrutinised supervision of the independent Trading Surveillance Office ("Handelsüberwachungsstelle" or "HüSt" for short) at the respective stock exchange.

Operational Procedure

Phase I – Order Placement
Orders can be placed either verbally (on the floor or by telephone) as well as electronically through the exchange's order routing system, thus avoiding any discrimination in the way that orders are placed. An order entrusted to a bank by an investor who is not admitted to trading on the stock exchange is immediately electronically entered in the order book. Floor traders who place verbal orders with the market personnel, which are then entered into the order book by the market personnel via the exchange's computer system, are therefore not put in any type of privileged position.

Phase II – Market Information
Prior to the actual price determination, the market personnel discloses an indicative price range (so called "Taxe"), which informs the market about the bid and ask prices based on the current order book status, between which the price can be determined. This indicative price range is necessarily not "firm", since it is based on a "snapshot" of the momentary order book status, which can change continuously up until the time of the actual price determination.

As opposed to displaying a theoretical equilibrium price, the investor is informed indirectly, via the spread of the indicative price range, as to how the buy and sell orders are distributed in the order book. With the entry of the indicative price range into the exchange's computer system, the information is immediately displayed and accessible to all investors.

Based on the information provided by the indicative price range, all investors, regardless of whether or not they are admitted to trading on the exchange, can therefore react and if need

be, (re-)adjust their orders in due time, in accordance with the liquidity in the respective security, before the price is determined. On the other hand, for an investor just coming to the market, the indicative price range serves as a basis for deciding whether to place his or her order with the market personnel at a specific exchange or whether to place it in the electronic trading system alternatively.

Traditionally and in accordance with the stock exchange regulatory framework, the market personnel is obliged to submit a binding offer on the basis of the order book status by open outcry to the traders on the floor or in response to an enquiry from a market member. The market personnel can and generally will refrain from doing so if there is no apparent demand for this on the floor.

Given the major structural changes taking place in floor trading, which practically no longer exists in the strict sense of the word, the offer by open outcry has for all practical purposes entirely lost its importance. Its original function of generating liquidity has been very largely replaced by the combination of the electronically published indicative price range and electronic order routing.

Against the setting of today's modern stock exchange infrastructure, the offer by open outcry is no longer a constitutive element of the market model. Today, an estimated 99% of all exchange prices are determined without offers being made beforehand by open outcry.

Phase III - Price Determination

For the purpose of actually determining the price, the market personnel "locks" the order book, in other words, no more buy and sell orders are accepted. The price is then determined, based on all the buy and sell orders currently represented in the order book at this time.

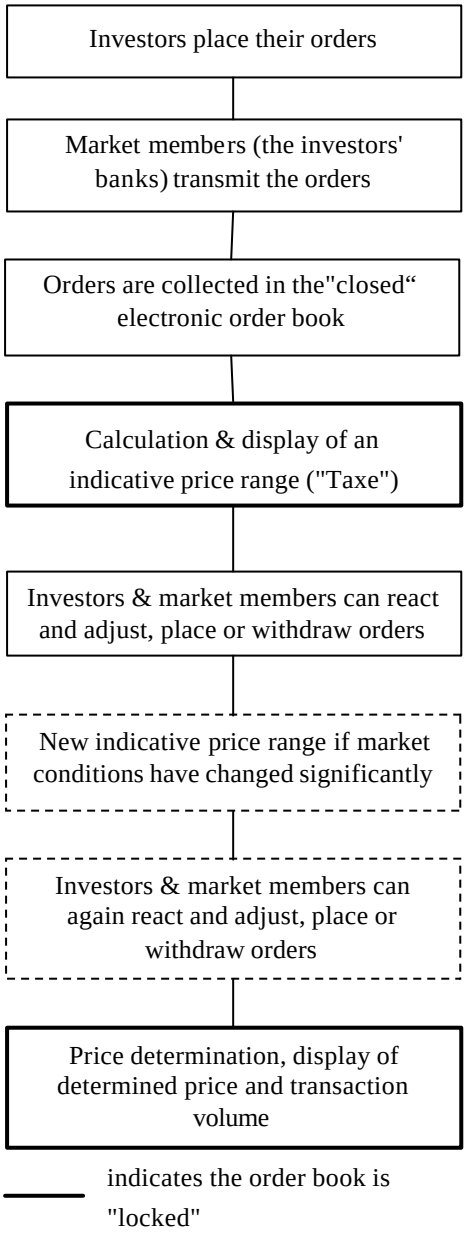
The fundamental rule of price determination is the principle of "maximum execution", i.e. the price to be determined is that which will allow the greatest turnover of shares with the least carryover of unexecuted trades. If, on the basis of this principle, there is more than one possible price, the principle of greatest possible price continuity requires that the price determined should be the one that is the closest to the price that was last determined.

Example:

Volume	Buy (Bid)	Pricing	Sell (Ask)	Volume
(50)	104		106	(200)
(50)	103		104	(150)
(100)	102	102	102	(100)
(50)	101		101	(50)
(50)	100		100	(50)
(100)	98			

Each price that is determined is published together with the number of shares traded via the exchange's computer system and thus accessible to all investors.

Technical sequence:



Equal Treatment of All Orders and Market Personnel Neutrality

It is a characteristic of auction-based price determination that all buy and sell orders, including market orders with no price limit, are executed at the one price regardless of when they were placed and the size of the order. This distinguishes the system from market maker systems as well as from forms of electronic trading where orders are executed according to a price/time prioritisation. As opposed to a conventional market maker system, where the market maker pockets the bid-ask spread, thus leading to an inherent conflict of interests between investors – who are interested in the spread being as narrow as possible – and the market maker, who ceteris paribus strives for a wide spread, the market personnel acts as a neutral agent between the buying and selling side and thus guarantees equal and neutral treatment of all placed orders. In return, the market personnel receives a volume-based brokerage fee (so called "Courtage") from the seller and the buyer.

Market personnel acting as "Liquidity Providers"

In addition to the actual price determination, market personnel are also increasingly assuming the function of "liquidity providers" by voluntarily self dealing ("Selbsteintritt"), "absorbing" the carryovers on the buy or sell side that can still exist upon application of the maximum execution principle. As liquidity providers the market personnel supports the market particularly in less liquid securities by increasing the marketability and negotiability of the securities and reducing the risk of costly partial executions.

The market personnel's act of self dealing is governed by a set of rules that again commit him or her to strict neutrality and prevent investors from being placed at a disadvantage by the market personnel's self-dealing interests. In particular, the brokering activities must take priority and the self-dealing may not have an accentuating effect on price developments. All transactions or trades that a market personnel voluntarily executes in the course of self-dealing are also subject to the constant and closely scrutinised supervision of the competent Trading Surveillance Office at the respective stock exchange.

Benefits of Closed Order Book Price Determination

While the market model of closed order book price determination shares the general

characteristic of all auction systems by granting all investors a due response time in the pre-auction phase, the closed order book offers additional benefits, making it attractive in particular but not solely to retail investors, especially in trading less liquid shares:

While in an open order book environment the "costs" of market impact can be anticipated by investors, the attempt to drive the price in a specific direction incorporates a much higher risk when prices are determined on the basis of a closed order book.

As a result, the closed order book "protects" the orders of investors and increases their willingness to place both orders with wider limits[2] and market orders[3] alike, thus ceteris paribus increasing liquidity in a specific security. In addition it facilitates and enhances the willingness of the market personnel to act as a liquidity provider, since the amount of market risk he/she "absorbs" in the course of voluntary self-dealing won't be disclosed to the market, preventing other market participants from "playing" against his or her account under one-directional market conditions.

In accordance with these characteristics, it is not surprising that academic research seems to affirm the positive impact of closed order book price determination on market integrity. In fact, a recent global empirical analysis by Aitken/Siow[4] even comes to the conclusion that the closed order book market model on the Frankfurt Floor offers the comparably best protection against price manipulation since the uncertainty about the trading volume required to optain a desired market impact detracts market participants from manipulative behaviour.

[2] The closed order book mitigates the *"free trading option"* problem: In an open order book environment, limit orders can be viewed as providing the market with a free put (call) option to sell (buy) shares whenever new information arrives at the market which justifies a price lower (higher) than the stated limit.

[3] Especially in less liquid markets when a market order can not be executed instantly, an open order book could generate a *"second mover advantage"* for somebody placing a price-setting limit order which would enable him or her to extract value from the market order.

[4] Michael Aitken, Audris Siow. Ranking World Equity Markets on the Basis of Market Efficiency and Integrity, November 2003

Appendix 4

Xetra: Euro volume of first 10 levels / 03.08. - 06.08.2004

ISIN	Name	Segment	depth	Average cumulated volume for 10 levels (bid) [€]	Average cumulated volume for 10 levels (ask) [€]
DE0005557508	DT.TELEKOM AG NA	DAX	10	6.597.768	5.615.433
DE0006231004	INFINEON TECH.AG NA O.N.	DAX	10	2.530.659	3.160.803
DE0007236101	SIEMENS AG NA	DAX	10	2.447.468	1.856.953
DE0005140008	DEUTSCHE BANK AG NA O.N.	DAX	10	2.347.556	2.017.879
DE0007100000	DAIMLERCHRYSLER AG NA O.N	DAX	10	2.130.401	2.017.108
DE0005151005	BASF AG O.N.	DAX	10	2.048.622	2.128.537
DE0007037129	RWE AG ST O.N.	DAX	10	1.980.559	1.535.996
DE0005752000	BAYER AG O.N.	DAX	10	1.724.466	1.243.385
DE0007614406	E.ON AG O.N.	DAX	10	1.543.263	1.594.546
DE0007164600	SAP AG ST O.N.	DAX	10	1.540.658	1.470.285
DE0008404005	ALLIANZ AG VNA O.N.	DAX	10	1.461.198	1.432.534
DE0005190003	BAY.MOTOREN WERKE AG ST	DAX	10	1.395.587	1.440.044
DE0007257503	METRO AG ST O.N.	DAX	10	1.312.209	786.397
DE0008022005	BAY.HYPO-VEREINSBK.O.N.	DAX	10	1.277.719	1.160.455
DE0008232125	LUFTHANSA AG VNA O.N.	DAX	10	1.228.403	1.586.651
DE0005552004	DEUTSCHE POST AG NA O.N.	DAX	10	1.182.955	1.037.254
DE0007500001	THYSSENKRUPP AG O.N.	DAX	10	1.129.487	1.221.037
DE0008032004	COMMERZBANK AG O.N.	DAX	10	1.121.868	1.154.509
DE0008430026	MUENCH.RUECKVERS.VNA O.N.	DAX	10	1.063.779	1.031.382
DE0007664005	VOLKSWAGEN AG ST O.N.	DAX	10	1.029.868	1.039.283
DE0005439004	CONTINENTAL AG O.N.	DAX	10	1.011.878	852.906
DE0006483001	LINDE AG O.N.	DAX	10	968.532	755.881
DE0006952005	TUI AG O.N.	DAX	10	877.209	863.772
DE0005003404	ADIDAS-SALOMON AG O.N.	DAX	10	776.407	761.620
DE0005810055	DEUTSCHE BOERSE NA O.N.	DAX	10	747.642	1.004.088
DE0007600801	ALTANA AG O.N.	DAX	10	747.193	1.579.400
DE0006048432	HENKEL KGAA VZO O.N.	DAX	10	664.934	703.541
DE0005785802	FRESEN.MED.CARE AG O.N.	DAX	10	597.335	467.974
DE0007172009	SCHERING AG O.N.	DAX	10	582.361	882.294
DE0005937007	MAN AG ST O.N.	DAX	10	567.946	569.413