Deutsche Börse Group´s positions on the European Commission´s legislatives proposal on the Data Governance Act

Deutsche Börse Group (DBG) appreciates the opportunity to respond to the "Have your Say"-procedure in the context of the Data Governance Act. We agree with the Commission's view that data is key for the digital transformation and the use of data will affect all EU citizens significantly.

DBG in its capacity as a financial market infrastructure (FMI) provider, including operations of regulated markets, uses modern IT and technological solutions to operate, and service the financial sector worldwide.

DBG's technologies are at the core of its operations, where they are used to operate organized regulated markets, are an integral part of the regulated services we provide. We ensure trust in markets and the efficient functioning of these markets; including but not limited to trading and market data, clearing, securities custody, provision of benchmarks, etc.

Digitalization and data, representing a new resource, are getting more and more important in the current and future economy. The digital economy depends on the possibility to use data for its development. We encourage the Commission's approach to enable the EU to become an attractive, secure and dynamic data-agile economy.

Broader availability of currently non-accessible and non-transparent data could be used to further enhance welfare by benefitting health, the environment, as well as public services to name just a few. However, greater availability of data may also contain risks such as cybersecurity risks, risks to the personal data of the individual and risks to the business model of data driven businesses. Personal data must be protected by any means.

Key issues

DBG welcomes the conditions of voluntariness for the re-use of data of public authorities (Art. 3 (3) 1): moreover, we appreciate that public authorities have a clear guidance how to make public data available for the general benefit, once they decide to provide access for re-use of data to interested parties via providers of data sharing services.

However, further clarification on definition of public bodies is needed, given Member States´ rules/definitions with regard to two-tier structures (Article 2 (12)): as we understand the second chapter of the proposal on DGA, it is based on the idea to increase general benefit through re-use data of public sector bodies. We support this aim and think that re-use of data from sectors like health, environment or public transport is very useful to realize this aim.

However, given that Member States define "bodies governed by public law" differently, the criteria mentioned Article 2 (12) a) - c) are not sufficient and could unintendedly raise uncertainty in some specific cases.

For example, within the financial industry, 'Regulated markets' have mostly a one-tier structure in most jurisdictions in the Union. Therefore, 'regulated markets' are generally not organized under public law, but as private law entities which have commercial character.

The German legislator, however, has pursued a special path. In Germany, 'regulated markets' are created in a two-tier structure. The 'market operator' is an entity distinct from the regulated market it operates. This "dualistic" approach is acknowledged in Art. 4(1)(18) of MiFID II: "'*market operator' means a person or persons who manages and/or operates the business of a regulated market and may be the regulated market itself*".

In this context, while market operators in Germany are organized as a private law companies having commercial character, the regulated markets are public sector entities ("Anstalt öffentlichen Rechts").

The public sector entity does not have commercial character – taken in isolation. However, the regulated market could not exist on its own but only a private sector market operator – having commercial character – can set up and operate regulated market.

For this reason, German 'regulated markets' must be considered as the entirety of market operators and the respective regulated markets when assessing whether the regulated market has commercial character.

Only by looking at both those tiers together, the assessment of the aspect of commercial

character will come to uniform conclusions for regulated markets throughout the Union. As a consequence, we propose the following change in order to clarify the definition of "bodies governed by public law" in Art. 2 (12) by the following amendment:

> *For the purposes of lit. (a), 'regulated markets' within the meaning of Article 4 (1) Number 21 of Directive 2014/65/EU of the European Parliament and of the Council shall be deemed to have commercial character as a whole, even in the case of a two-tier structured regulated market where the market operator but not the multilateral system operated and/or managed by it have commercial character.*

The DGA should feature a definition of data intermediaries: from our point of view, recital 22 will be helpful in interpreting the role of data intermediaries, however a clear definition in Article 2 is missing. Taking account of Art. 9 DGA, 'data intermediaries' could be defined as legal entities that provide services as defined in Art. 9 DGA.

However, such definition would be very wide and could potentially and unintentionally include other data driven businesses, e.g. the above-mentioned regulated markets, which are not in the intention of the DGA. Regulated markets are on the one hand obliged to disclose certain data and, on the other hand, provide additional data services to trading participants or third parties in connection with exchange data. The distribution of data by regulated markets is already in-depth regulated under MiFID II and MiFIR.

It is important to have a clear cut distinction between (financial-)sector specific rules (like MiFID II and MiFIR) and the DGA, we would ask, on the one hand, for a clear definition of the "data intermediaries" in Article 2 and also an exclusion of "regulated markets" in recital 22, which already contains exemptions for other providers.

On this background, we propose the following definition of 'data intermediaries' in Art 2:

> *'Data intermediaries' are legal entities that provide services as defined in Art. 9. 'Regulated markets' as defined in Article 4(1)(21) of Directive 2014/65/EU of the European Parliament and of the Council are not considered data intermediaries.*

In general provider of data sharing services in their role as trusted and neutral institutions should be able to provide additional services (Art. 9, Art 11): They should be allowed to use the data for additional purposes/service offerings than described in the article to offer more value to data users. Additional services should be possible, if provider of data sharing services fulfil certain requirements to stress that they are neutral and trusted and are able to establish mechanisms to ensure for example that "conflict of interest issues" are taken into account. As this would bring incentives to innovate services

and promote better offers for the users.

While we agree that the neutrality of data intermediary service providers is important in order to avoid any conflicts of interest from the beginning, we believe the notion of "structural separation" between the data sharing service and any other services provided needs to be clarified: e.g. it is common practice that data market places offer today analytical tools for companies to enrich/analyse their data alongside the possibility to share it then with other interested parties through the intermediation service.

If the provision of analytical tools as an "ad-on" service were to be prohibited under the proposal, existing intermediary service providers would be stripped away from possibilities to differentiate themselves from competitors by offering additional services and would consequently be restricted to become "sharing-only" intermediaries.

We are convinced that the necessary precondition for efficient data management is, in particular, the promotion of free and fair competition between all market players, in which companies can develop their own ideas and use databased applications, irrespective of their size. An appropriate balance must be struck between the legitimate interests of the data producer and the data user.

DGA and other sector-specific regulation (i.e. financial regulation) should not result in inconsistencies or open questions to which rules need to be followed: Parallel/double rules should be prevented. Although Article 1 addresses this topic, further clarity is needed which rule is more "specific". For already existing regulations, sector specific and others, it needs to be carefully assessed to determine which rules need to stay in place, which need amending and which should be developed into a broader rulebook, in order to avoid inconsistencies and double regulation.

European Data Innovation Board shall cooperate with the industry: The European Data Innovation Board can play a key role for the purposes of advising the European Commission on relevant (cross)-sectoral standards that can reduce technical barriers to data sharing in a time efficient way. To that end, we stress that the new European Data Innovation Board should closely cooperation with European and international standardisation bodies (see further details on the setup of the EDIB below) as well as representatives of the industry.