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Response

to the

Consultation Document:

Central Securities Depositories (CSDs) and the Harmonisation of certain Aspects of Securities Settlement in the European Union

of

the Internal Market and Services Directorate General of the European Commission

13 January 2011

1 March 2011

Deutsche Börse Group Interest Representative Register ID: 20884001341- 42

A. Introduction

Clearstream Banking AG, Frankfurt and Clearstream Banking S.A., Luxembourg (jointly referred to as Clearstream) appreciate the opportunity to comment on the public consultation on Central Securities Depositories (CSDs) and on the harmonisation of certain aspects of securities settlement in the European Union.
As a wholly owned subsidiary of Deutsche Börse Group, Clearstream is one of the world's leading suppliers of post-trading services including settlement, safekeeping, and administration of securities, Clearstream welcomes the objective of the consultation document to develop a proper regulatory framework for CSDs and to harmonise certain aspects of the securities settlement in the European Union.

CSDs have proven their resilience during the financial crisis, while playing a stabilising role on the financial markets. There were no problems stemming from any of the ancillary services offered by CSDs to the market. This has been a test for the European CSDs that has proven the appropriate implementation of sound and safe risk management procedures under the label of the CESR/ESCB set of recommendations and global best-practice standards.
It needs to be ensured that newly introduced rules and requirements do not affect the safety and efficiency of current European post-trading.

Such stability is also the result of the significant improvements achieved in the cross-border securities processing introduced by the European Code of Conduct for Clearing and Settlement. Recent studies show that the prices for cross-border processing have decreased (e.g. Oxera 2009), while several innovative private sector initiatives (e.g. Link Up Markets) have improved the access of CSDs, and reduced the fees for cross-border settlement in Europe.

The innovation and constant reinventing by this industry, should be acknowledged, the European Commission should avoid scoping or creating an exhaustive list of ancillary services that would leave no room for product and services innovation.
Going forward, cross-border securities services should be made possible in those areas where restrictions apply today, and should be strengthened to reach the objectives the Commission aims. Moreover, the regulation of companies offering CSD services needs to be adequate and particularly not over burdensome for the sake of preserving growth in an industry which is a success story for Europe.

Summary of key concerns on the proposed regulation:

- It needs to be ensured that there is no restriction / no limitation of current CSD services, allowing CSDs to continue providing their services according to the markets needs. Especially with regard to the full range of securities lending services, which assure both settlement efficiency and market liquidity.
- It needs to be ensured that the scope of the potential special purpose banking license for CSDs is consistent with (the revised and tailored) rules of the CRD, as well as MiFID and the PSD.

- Access to Central Bank liquidity needs to be guaranteed for CSDs, at least when offering banking services.
- The terminology of the Code of Conduct on access and interoperability definitions should be followed.
- Account separation and disclosure to competent authorities of costs and revenue for each unbundled services should not be part of the regulation.
- The accurate risk definitions and risk mitigation mechanisms of the CESR/ESCB recommendations should be applied.
- It needs to be ensured that CSDs have full control on outsourced tasks. The rules set out in MiFID should be applied without exemptions. The nature and risks associated with outsourcing remains the same for the CSD, regardless of the identity or the objectives (public or not) followed by the insourcer.
- Double regulation needs to be avoided, as well as overly burdensome rules.

We elaborate on the specific questions raised in the consultation paper by the European Commission in more detail below.

Information about the respondent

Name and address of the respondent:

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The second part of the consultation paper has been answered from the Deutsche Börse Group perspective, as it does not exclusively address CSD-related topics and some questions affect other Deutsche Börse Group entities (trading venues and CCPs) as well.

Field of activity of the respondent:

The settlement of market transactions and the custody of securities are Clearstream's most important fields of activity. In this environment Clearstream provides two fundamental services:

- International Central Securities Depository (ICSD): As an ICSD it has, over a period of over 40 years, developed a strong position in the international fixed income market. It handles the clearing, settlement and safekeeping of Eurobonds and offers its customers the possibility to use Clearstream Banking as a single point of access for the settlement and custody of internationally traded bonds and equities across 50 markets.
- Central Securities Depository (CSD) for German domestic securities.

Part 1: Appropriate regulatory framework for CSDs

1. SCOPE AND DEFINITIONS

1. What is your opinion on a functional definition of CSDs?

We appreciate that a functional approach is followed which allows that "same business, same rules" is applied and thus obtains a level playing field. We assume this will be of particular importance close to the launch of TARGET2-Securities, where enhanced competition within the settlement layer of the post-trading industry is to be expected.

Particular effort should be undertaken to apply the functional approach consistently throughout the whole new legislation, and to avoid double-regulation (especially with regard to the CRD).
The benefits of a low-risk activity should be encompassed with more adapted risk-mitigation rules. We therefore see room for the future CSD legislation, to either carve-out the areas in which it can be overruled by other regulation with respect to business which is already covered under these regulations (e.g. CRD), or lay down a precise map of areas where full scope of the other regulation cannot apply (i.e. special purpose banking license).

2. What is your opinion on the scope of the possible legislation and providing for any exemptions (such as for central banks, government debt management offices, transfer agents for UCITS, registrars, account operators)?

Any exemption should be well balanced (e.g. based on objective criteria) and should not lead to an unlevelled playing field. Future legislation should not lead to a situation in which only service providers (CSDs as defined in this legislation) will be subject to rules designed to improve the safety of post-trading activities, whilst other providers will be exempted from the scope of the legislation.

- Central Banks operating CSD-like services should only be exempted if they operate these services in relation to their core-functions (financial stability and monetary policy). In other areas we see potential for conflict of interests and/or supervision problems.
- CSDs owned by Central Banks (either through a minority or majority stake) should not qualify for an exemption.
- Emission allowances schemes should be classified under MiFID as financial instrument and therefore not be exempted.
- Registrars in Member States where the respective CSD (or SSS) does not assume liability for the integrity of an issue admitted to its holding system should

not be excluded from the scope of adequate legislation for the notary function they perform in comparable ways to CSDs. A full exemption might hinder the establishment of CSD links, as well as the eligibility of certain securities as Central Bank collateral within the EU.

In general terms, the more exceptions are granted to the scope of the future legislation, the more possibilities to bypass it.

3. What is your opinion on the above description of the core functions of a CSD?

In general it should be ensured that there is no restriction nor limitation of the current CSD functions, allowing CSDs to continue providing the full range of services the market requires under a new set of rules.

Notary Function
We suggest the following changes to the definition of the notary function based on our understanding of what being a "central register for an issue" is, and consistent with the exemptions stated in of section 1.1 (2) of the consultation document:

"Admission of securities of an issuer for the purpose of central referential recording, including book-entry credits on securities accounts and maintaining the integrity of the issue."

With respect to the remark concerning ICSDs, we would emphasise that the usage of a Common ~~Depository~~ Safe Keeper (CSK) for bonds under the structure of a New Global Note (NGN) should be an equivalent to the notary function, this since both ICSDs accept responsibility for the integrity of the issue by a trilateral agreement.

Central Safekeeping Function
As a general comment with regard to your description of the central safekeeping function, it should be noted that the safekeeping function is "vis-à-vis the issuer". In other terms the description should start as follows: "Vis-à-vis the issuer, this function is characterized by being the ~~central~~ account provider ~~for the entire market~~ …". Moreover, the term "for the entire market" is too vague, does not correspond to any function, hence should not be used in future reference.
In order to reflect properly the account providing and administration the term "central" should be deleted.

"Account providing and administration of financial instruments of a book entry system"

In order to avoid redundancies and to follow a clearer structure, we would suggest moving some functions currently listed as central safekeeping functions, such as:

corporate actions, tax and voting services, to the list of ancillary CSD services. Moreover, as a general rule we propose that only functions which have an impact on the holdings (e.g. mandatory distributions without options) should stay in section 1.3 (2).

Further considerations in relation to this topics can be found in our answer to question 6.

4. Which core functions should an entity perform at a minimum in order to be qualified as a CSD?

We expect that all "core functions" need to be covered. This is particularly true, as providing only one of the "core functions" could in no case qualify to be defined as a CSD.

5. Should the definition of securities settlement systems be reviewed?

No. We support the reference to the Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems (SFD) in which a clear separation of the relevant institutions designated as Securities Settlement Systems (SSS) is already in place. The Commission evaluated the SFD in 2005, following extensive consultation, resulting on the directive amendments of 2009 (Directive 2009/44/EC), which are readily and uniformly applied within the European Union.
We support a strong role of the Member State's competent authority, and contrary to what stated in the Consultation, we fail to see why would the designation by each Member State applied according to uniform rules under the SFD, not lead to uniform application of future CSD legislation.
The individual designation of SSS as defined in the SFD should remain in the capacity of each Member State.

General comments on section 1.3:

- Should reference be made to the ICSDs in future legal texts, we would suggest that the proper names "Euroclear Bank SA/NV" and "Clearstream Banking S.A., Luxembourg" be used.
- We propose that in future the terms "function" and "service" be used more consistently throughout reference documents.

6. What is your opinion of the above description of ancillary services of a CSD? Is the list above comprehensive? Do you see particular issues as to including one or several of them?

It should be ensured that there is no restriction nor limitation of the current CSD services, allowing CSDs to continue providing services according to the markets needs. Especially with regard to the full range of securities lending services, which assure both settlement efficiency and market liquidity.

In order to make good use of securities deposited with CSDs, to maintain financial market efficiency, as well as to limit naked short selling, generic securities lending should be allowed.

With regard to the lists of services which define the categories we point out that the level of detail of these lists and the process of maintaining the lists are unclear.
We emphasise that the ancillary services described should not be defined as "exhaustive" but flexible and leave room for product and service innovation. CSDs should be able to offer services as long as they are carefully managed and mitigated within a proper prudential framework (please also refer to our answers to sections 4.11 and 4.12 on credit risks).

We suggest to amend (2) "Banking type services facilitating securities settlement" with the additional example of services comprised: "…….provide cash accounts and accept cash deposits for its participants…..". This caption should also include fails lending as a principal.

We suggest to rename point "(3) Services facilitating the processing of corporate actions" to "(3) Services facilitating safekeeping and administrative functions". Moreover, additional services should be included like: voluntary corporate actions, tax services, proxy voting, collateral management etc. CSDs perform already today a very important function to enable the pledge or transfer of collateral to secure risk exposures resulting from financial transactions. Prominent examples include the triparty collateral management services for Central Banks (also within the scope of CCBM2), CCPs and bilateral arrangements. This trend will further accelerate with the upcoming regulatory requirements put in place for financial institutions and non-financial institutions. This includes generic securities lending as facilitator.

We suggest renaming point (4) as follows: "(4) Banking-type services facilitating safekeeping and administrative functions". In this section, additional services should be included like: generic securities lending as principal. As the Commission rightly states in section 4.3, it should be left to each CSD to decide if securities lending is to be organised as a central or bilateral model, and whether the CSDs themselves take a principal role, guarantor role or lending agent role. An equal access level and adequate risk control in a central model is better served when CSD hold a principal or guarantor role.

Finally, under point (5), the list of ancillary CSD services should be extended to cover order routing services for investment funds. This could be added as an additional example of other services provided to issuers: “A CSD may also provide services to UCITS by routing subscription and redemption orders to the fund”.

In this context we would like to point out that in any case double regulation should be avoided. This refers in particular to (2), (4) and (6). In particular clarification is needed whether (6) would imply a supervision under MiFID or a supervision under this regulation in line with MiFID provisions.

2. AUTHORISATION AND ONGOING SUPERVISION OF CSDS

7. According to you, could the abovementioned cases impact a future regime of authorisation and supervision? Yes? No? No opinion? Please explain why. Are there other cases which could have an influence on a future regime of authorisation and supervision?

Yes, the business cases identified would have an impact on the future regime of authorisation and supervision.

We support that authorisation and supervision be granted by the “local” or “home” Member State competent authority, while cross-border activity should follow the “home-host” principle.

For those CSDs which already have a banking license, the authorities involved, as mentioned in section 2.1, would need to be complemented with the banking supervisors. The future regime must therefore also clearly define a possible role for the banking authorities.

We also see room for clarification with respect to the inclusion of CSDs under the consolidated supervision of the CRD and the Financial Conglomerates Directive, and any potential supervision on a consolidated-basis over a group of CSDs.

The list of activities provided in section 2.2. includes very different situations which require careful evaluation. We therefore suggest separating these by supervision and authorisation relevant, as follows:

Business cases that have an impact on “supervision”:

- *The issuance of securities by an issuer from a different jurisdiction than the CSD;*
- *The opening of a branch or subsidiary by the CSD in another Member State; ~~the acquisition of an existing CSD in another Member State (group structures);~~*
- *The operation of a securities settlement system subject to the law of another jurisdiction than the CSD;*
- *Performing settlement through a common IT platform between CSDs of different Members States.*

With regard to the acquisition of an existing CSD in another Member State, it would be relevant to emphasise that this CSD would already be subject to supervision, before the acquisition, supervision which would continue after the acquisition. Therefore the intention to specifically include this item and to refer to group structures here is unnecessary.
We believe that a notification to the competent authority is sufficient for the above business cases, and no separate authorisation should be required.

Business cases that have an impact on "authorisation":

- *The operation of a securities settlement system subject to the law of another jurisdiction than the CSD;*

We disagree, that the participation of a CSD from a different jurisdiction to the settlement function operated by another CSD should be subject to authorisation or supervision. This scenario is currently referred to by the industry as "remote access" and reflects a normal situation among CSDs.

Furthermore, we disagree that the settlement in other currencies would require supervision or additional authorisation.

Finally for the case of supervision of a common IT-platform, please refer to our answer to question 40 in section 4.10.

8. What other elements should be submitted as part of the initial application procedure by a CSD?

In our view, the initial authorisation should focus on the services and on the eligibility of the CSD participants. We do not see an advantage in providing a list of financial instruments or a list of currencies.

9. According to you should the authorisation procedure of a CSD be distinct from the designation and notification procedure under Art. 10 of the SFD? Yes? No? No opinion? Please explain why.

Yes. The CSD authorisation procedure should indeed be distinct, but should follow the same rules because the designation of a SSS cannot include the CSD authorisation as not all of the applicable core functions might be performed.

10. What is your view on establishing a register for CSDs?

With the aim to increase transparency, we have no objections to establishing a register or list of CSDs on which the competent authority of the home Member State notifies such information on CSDs to ESMA.

11. What is your view on the above proposal for a temporary grandfathering rule for existing CSDs?

We strongly request an unlimited grandfathering clause for existing CSDs, as there should be no restriction for existing business to be maintained under the new legislation.
In case the grandfathering concept is intended to transition existing CSDs into the new framework of the CSD regulation, we believe that the ongoing supervision under the new rules will verify the level of compliance of existing CSDs.

12. According to you, does the above approach concerning capital requirements, suit the diversity of CSDs? Yes? No? No opinion? Please explain why.

We support the approach that CSDs who provide banking services be subject to distinct capital requirements according to the CRD and its national implementation rules.

CSDs that provide banking services should be subject to CRD rules in line with their banking license; other CSDs should be subject to a minimum capital requirement consistent with the nature of the risks they assume.

In line with the potential limitations of the services for CSDs (please refer to our response to question 6), CRD details for capital and other requirements need to be reviewed and adopted in order to reflect possible business limitation in line with the low risk profile business approach / special banking license as proposed in this paper. This is particularly true for the leverage ratio, which should not be applicable.

Once again, double regulation has to be avoided.

13. According to you, should the competent authorities have the above mentioned powers? Yes? No? No opinion? Please explain why.

We agree with most of the proposed supervision powers of the competent home authorities.
CSDs are currently subject to effective and regular supervision by the relevant supervisory bodies. This is true from a double optic, as prudential supervision along with Central Bank's oversight of the SSSs is the norm for CSDs in Europe.

We do not see the need for CSD's strategy to be reviewed by the competent authorities, as this would go against the CSD's autonomy and hinder innovation.
Clarification is required with regard to the understanding of the "measures to induce appropriate changes in the organisation and governance of a CSD". In any event, it has to be ensured that the business autonomy of CSDs is not restricted.

With respect to the term "regular" in the first bullet point of the list, we would ask for clarification that this does not mean more often than on an annual basis.

14. Would a special purpose banking license be appropriate for "banking type services"?

We see two options for the licensing of CSD's banking type services:

1. Either everything is covered in the CSD regulation, with direct reference to the CRD and/or MiFID
2. or CSDs are listed as a new sub-category within the CRD (special purpose banking license)

MiFID-like rules should apply to CSDs, but preferably by having the relevant sections stated within the CSD regulation and not by reference to MiFID itself.

Due to the targeted limitation for CSDs (core or ancillary services), a special purpose banking license would seem like a possible way forward. Should this solution be retained, access to Central Bank liquidity must be ensured for the proposed special purpose banking license or alternatively a license under the CSD regulation only.

Services which are already submitted to passporting under CRD or MiFID should not be subject to additional requirements, nor should be replaced by a special purpose banking license not being reflected within the existing EU regulation. Once more double regulation should be avoided in this context.

Clarification is needed that no additional license under the Payment Services Directive (PSD) is required.

15. Which of these three passporting options would you support? Full passporting? Limited passporting? Opt out regime? Please explain why.

We support a "full passporting" for the provision of services. A level playing field needs to be ensured.
We believe that the "opt out regime" could result in an unfair and protective ringfencing market in the Member State opting for such a regime.

3. ACCESS AND INTEROPERABILITY

We would like to provide some general comments with regard to the consultation's section 3.1.

To achieve consistency in terminology and a clear set of definitions regarding "Access" definitions we suggest to follow the Guidelines for Access and Interoperability of the Code of Conduct. These are the result of extensive discussion among the users, market infrastructures and the European Commission, and have proven their effectiveness in the recent years.

Excerpt of the "Access and Interoperability Guideline" of 28 June 2007 (in particular the parts referring to CSDs, full guidelines is available from the ECSDA website: https://www.ecsda.com/attachments/CoC/AccessInteroperabilityGuideline.pdf)

2.3 Access types and Interoperability

16. "Access" and "Interoperability" are used in the specific meaning of the Code, i.e. Access subject to the access conditions specified in paragraphs 23, 25-33 of the Code of Conduct and Interoperability subject to the Interoperability conditions specified in paragraphs 24, 34-36 of the Code of Conduct.

17. "Link" is a generic reference for any of the Access types and Interoperability described below.

18. The General Principles as defined in Chapter 2.4 - General Principles for Access and Interoperability, apply to all Links as detailed below, unless explicitly stated differently.

19. The following matrix describes the possible Links between the Trading Platforms and post-trading Organisations. It shows the possible type of Links per Requesting Organisation and Receiving Organisation. The types of relationship are specified in this chapter however each combination is further detailed in Chapter 3 - Access & Interoperability scenarios.

2.3.1 Access types

*20. **Standard Unilateral Access**: An Organisation (CCP or CSD where applicable) is a standard participant in another Organisation. This is hereafter referred to as "Standard Access".*

*21. **Customised Unilateral Access:** An Organisation (CCP or CSD where applicable) is a participant in another Organisation, but in addition certain parts of the service offering to the Requesting Organisation are customised. This is hereafter referred to as "Customised Access".*

*22. **Transaction Feed Access:** Access by an Organisation (CCP or CSD) to a transaction feed from another Organisation.*

2.3.2 Standard Access

23. Standard Access is a right.

24. Standard Access will be provided on the same terms and conditions as provided to any other standard participant of the Receiving Organisation.

25. Functions that are developed and made available to all standard participants or to be developed as part of the elimination of the Giovannini Barriers should be available through Standard Access. These functions should be made available to standard participants as part of the standard service level within the specific timescales.
26. Standard Access involves one Organisation opening an account in the other Organisation.

2.3.3 Customised Access

27. Customised Access is a conditional right subject to the conditions described below. Customised Access involves one Organisation opening an account in the other Organisation.
28. The Receiving Organisation will be requested to develop special functions for the Requesting Organisation. Provided the request is reasonable (in terms of e.g. scope, resources and timing), the Receiving Organisation should respond to the request in good faith. Where Customised Access implies excessive use of resources, it should be possible for a Receiving Organisation on an objective and impartial basis to limit the customisation.
29. Customisation will only benefit the Requesting Organisation(s) and will have no impact on the standard participants of the Receiving Organisation. Therefore it will be compensated by the Requesting Organisation on a cost-plus basis unless bilaterally agreed otherwise (see also Chapter 4 - Business Case).
30. Any customisation provided for one Organisation should also be made available to other Organisations upon request.
31. Requests that would lead to fundamental changes to the Receiving Organisation are beyond Customised Access.
32. Any customisation should always be aligned with international industry standards where applicable. This includes the elimination of the Giovannini Barriers, such as the Giovannini Barrier 1 protocol (GB1) and ECSA/ECSDA GB3 standards for the harmonisation in the processing of corporate events.
…

2.3.5 Interoperability

42. Interoperability means advanced forms of relationships where an Organisation is not generally connecting to existing standard service offerings of the other Organisations but where they agree to establish mutual solutions.

2.3.5.2 CSD to CSD Interoperability

46. Choice of settlement provider in line with Article 1 of the Code can be delivered by Standard and/or Customised Access between CSDs. Interoperability is not a requirement to deliver such choice of settlement provider; CSDs may however mutually agree to deliver such interoperability if they so choose.
47. Interoperability between CSDs, as defined in Chapter 3.8.3- Scenario: CSD to CSD – Interoperability, consists of fundamental changes to the Receiving CSD and will have an impact on the standard participants of the Receiving CSD. Interoperability between CSDs is a conditional right, subject to mutual agreement

based on the Business Cases of the Organisations concerned. Both CSDs have to evaluate, in particular, the impact on their participants and systems, which constitute part of the business case required by both.

3 Access & Interoperability Scenarios

58. The following scenarios illustrate the possible Links between the Organisations enhancing customers' choice under the framework of the Code of Conduct.

59. Organisations have the right to request Access or Customised Access to other Organisations, the right to request access to Transaction feeds, and the right to request Interoperability with other Organisations.

…

3.8 Scenario: CSD to CSD - Horizontal

93. In this scenario a CSD requests Standard or Customised Access to another CSD. Access between two CSDs can be seen as a first step for Interoperability, although it can deliver enough added value by itself to comply with market demands. Standard Access should permit a quick, simple setup of a Link between infrastructures to permit business objectives to be fulfilled, even though subsequent moves towards customisation or Interoperability could further facilitate or enhance the efficiency of the Link if desired.

94. Standard or Customised Access can deliver competition between settlement services providers, as well as a choice for participants.

95. The following requirements should be put in place before a CSD to CSD Link can be established:

• The rules and regulations of the Receiving CSD must allow other CSDs to become participant in the Receiving CSD.

• The regulations of the Receiving CSD should allow the use of nominee/omnibus accounts.

• The Receiving CSD should provide the Requesting CSD with all functionality made available to Receiving CSD's members.

3.8.1 Scenario: CSD to CSD - Standard Access - Horizontal

96. In this scenario Standard Access means that a CSD links to another CSD like any other standard participant.

97. The following principles should apply:

• The Receiving CSD opens account(s) for the Requesting CSD.

• Standard Service Documentation which is used as per any other member or participant defines the standard services provided by the receiver to the Requesting CSD.

• All securities eligible in the Receiving CSD should be made available to the Requesting CSD except in case there are any legal restrictions applicable which also apply to all the other participants in a similar manner.

3.8.2 Scenario: CSD to CSD - Customised Access

98. In this scenario Customised Access implies that the Receiving CSD will provide some specific services at the request of the other CSD. This customisation will only benefit the Requesting CSD and will have no impact on the standard participants of

the Receiving CSD. Therefore it will be compensated by the Requesting CSD on a cost-plus basis unless bilaterally agreed otherwise (see also Chapter 4 – Business Case).

99. Any developments which eliminate the Giovannini Barriers (or similar like ESFECSDA matching procedure or ISO standards) which are made available to participants of a CSD become part of the standard service offering and therefore do not constitute customisation.

100. If a Receiving CSD is requested to remove all or part of these barriers in advance of its current deadline and this is feasible, this may fall within customisation (See Chapter 2.3.3 - Customised Access), unless it is made available to all other participants within the same timeframe and used commonly by the participants.

3.8.3 Scenario: CSD to CSD – Interoperability

101. In this scenario CSD to CSD Interoperability will be established.

102. Interoperability between CSDs would be building on Access as previously described. Conditions that would make the difference between Customised Access and Interoperability are for example:

- *Similar technical features*
- *Similar cut-off times for corporate actions services*
- *Similar service level*
- *Where settlement occurs in batches, the batches are synchronised*
- *Common contingency procedures*
- *Negotiated fee schedule*

And any other changes that break the Receiving Party Principle are considered Interoperability.

103. The Interoperability agreement must always be based on the business case of the entities concerned (see Chapter 4 - Business Case) and on proper risk control. These business cases must take into account the market demand on all sides as well as the recovery and amortisation time horizon.

16. What is your opinion about granting a right for market participants to access the CSD of their choice?

We agree that access should be granted on a non-discriminatory basis.

17. What is your opinion on the abolition of restrictions of access between issuers and CSDs?

We agree to abolish the restrictions of access between issuers and CSDs.

18. According to you, should the removal of Barrier 9 be without prejudice to corporate law? Yes? No? No opinion? Please explain why.

The removal of Barrier 9 could be undertaken without prejudice to corporate law.

To prevent future ambiguity or misinterpretations, it should be clarified that "corporate law" is only a technical term. The law applicable for the "rights flowing from the securities" rules the relationship between the issuer and the investors irrespective whether the law in the respective Member States is of a “company law” (in respect to the shares), civil law (with respect to bonds) or of other nature (e.g. special laws on investment funds). This needs to be distinguished among the rules applicable to the "rights on the security" (deriving from the *lex cartae citae* principle or as reflected in dematerialised security holding structures in the PRIMA approach) which are relevant on one hand for the relation between CSD and issuer and on the other for the transfer of title or creation of security interests.

Having said this, we are of opinion that the above understanding of “corporate law” applicable to CSDs should be neutral in its effects, as (1) it should not prevent an issuer incorporated under the law of another State (Member States or non-EU jurisdiction) to set-up instruments under such CSD jurisdictions, (2) should not impose any corporate law changes to the issuer, and (3) corporate law should have the means to recognise a foreign instrument, without imposing changes for its registration with the CSD.

19. How could the integrity of an issue be ensured in the case of a split of an issue?

More than one CSD should be understood, as more that one “Issuer CSD”.

CSDs would not necessarily be able to comply with all the requirements in case of a split. Therefore the issuer (not the CSD) should have a role to play in this respect, to ensure that all requirements are met prior to offering a shift or split of an issue. Splitting issues should be avoided as much as possible from a practical business view point (see Question 2).

20. What is your opinion on granting a CSD access rights to other CSDs and what should their scope be?

In principle we agree with the proposed framework. Most of the named principles can be achieved via “standard access” as defined in the referenced “Access and Interoperability Guidelines of the Code of Conduct”. Access between CSDs can be delivered:

- By standard and/or customised access;
- In a direct or indirect (relayed) form.

Interoperability between CSDs is not a requirement to access an “Issuer CSD” as it represents an advanced form of “customised access”. Therefore, we would suggest changing the title of section 3.4. to “Access between CSDs” and adapt the entire section respectively by using the word “access” consistently instead of different terms used, such as “links”, “link arrangements” and “interoperability”.

We agree with the following framework for access between CSDs (provided that the above changes will be incorporated):

- Inter-CSD links should be submitted to a reinforced legal assessment, covering in particular the consistency of proprietary and guarantee law between the jurisdictions of each CSD (see section 4.1 below);
- Ensure that the regulatory framework of the "issuer CSD" does not prevent the "investor CSD" to open "omnibus accounts" in the books of "issuer CSD";
- Clearly define access arrangements (terminology between access arrangements, interoperability and links), in order to allow a CSD entering a link to assess and put in place procedures for potential sources of risks;
- In order to encourage competition, future legislation should provide rights of access for different arrangements. The question arises whether the "receiving" CSD should always be obliged to accept the access request from the "requesting" CSD and under what conditions could such an access request be refused? Access rights should also include principles of non-discrimination;
- Resolve any specific authorisation and/or supervision rules for different access arrangements (see section 2.6 above);
- Provide for requirements of cooperation between relevant authorities in assessing access arrangements (where applicable);
- Prohibit cherry picking arrangements as in the Code.

The following framework rules would require further clarification as indicated:

- All CSDs participating into an interoperable arrangement or a multilateral common settlement platform should use the same rules concerning the moment of entry of transfer orders and moment or irrevocability (see also section 4.2 below); In accordance with section 4.10 this implies that the CSDs have the responsibility to define these rules.
- Provisional transfers across the link should be prohibited, in order to avoid misinterpretation concerning the moment of entry of transfer orders and the moment of irrevocability. The term “provisional transfers” is understood in the sense of “conditional transfers”.
- Links between CSDs should not “increase liquidity risks” for their respective securities settlement systems; this statement should rather read “Links between CSDs do not create new risks”.
- Cover remuneration of access for different arrangements, i.e. should access be free or if not, how should it be remunerated?
  Services provided in the framework of a standard/customised access cannot be free of charge, and the price transparency principles as in 4.13 should apply.

We emphasise that the definitions of the Access and Interoperability Guidelines of the Code of Conduct should prevail.

In contrast the following framework rules should not be applied:

- "CSD securities account structures should be harmonised"; This is not a prerequisite for access between CSDs and it is not even required within the T2S scope.
- "Any credit extensions between CSDs should be further secured and subject to limits" (see section 4.11 and 4.12 below).
- Links between CSDs should permit intraday DvP settlement. This should not be obligatory, as it goes beyond standard access in some markets.

21. What is your opinion on a CCP's right of access to a CSD?

We understand that the right of access here refers to the customised access, as we have developed on our answer to question 20 above.

We believe that the described access is already common market practice. We see no reason why this should be further regulated.

22. What is your opinion on access conditions by trading venues to CSDs? Should MiFID be complemented and clarified? Should requirements be introduced for access by MTFs and regulated markets to CSDs? Under what conditions?

No further classification is needed.

23. According to you, should a CSD have a right to access transactions feeds? Yes? No? No opinion? Please explain why.

Yes. This right should be in form of a conditional access right, but it needs to be ensured that the decision to grant access is based on non-discriminatory requirements. Moreover, the negotiations normally include the trading venue and the CCP (both need to agree). Reconciliation services / split issues need to be considered. Therefore, the local CSD also needs to be included into the access arrangements. In general terms, such access should not increase complexity, hinder aspects of market efficiency, nor increase risks.

24. What kind of access rights would a CSD need to effectively compete with incumbent providers of CSD services? Should such access be defined in detail?

We believe that Standard/Customised Access are sufficient in this scenario. However, it might be necessary to establish arrangements with entities that might be exempt from the scope of this future legislation (please refer section 1.1. (2))

4. PRUDENTIAL RULES AND OTHER REQUIREMENTS FOR CSDS

The Consultation document elaborates on the risks to which SSSs and CSDs are subject. These risks and the definitions of these are described in the CPSS-IOSCO and the CESR-ESCB sets of recommendations. Considering the repercussions that the definitions of such risks involve for the market and its participants, these definitions are the result of a lengthy discussion and compromise building process. We notice that the Commission has modified the original definitions or introduced new ones (e.g.: investment risk). These changes alter the risks' definitions balance.

For the sake of consistency and to preserve the spirit of the CPSS-IOSCO or the CESR-ESCB sets of recommendations, only the original definitions' text should be applicable or referred to. Moreover the different types of risk described above are applicable in multiple safekeeping layers as well and not just with SSSs/CSDs. **Subsequently the functional nature of the CESR-ESCB Recommendations should prevail.**

In line with the above, and considering that "investment risk" is in fact contained in the definition of "liquidity risk" as it relates to the handling of cash, this additional definition is redundant and should therefore not be retained.

Moreover, the Consultation document also raises the prospect of a possible differentiation between SSSs and CSDs.
While it is true that not all SSS are CSDs, the contrary does not apply, as all CSDs are recognised are SSSs, which makes the recommendations applicable to all CSDs (both the CPSS-IOSCO and the CESR-ESCB) without differentiation.

25. Do you think that the legal framework applicable to the operations performed by CSDs needs to be further strengthened?

The current legal framework is sufficient and we see no need to extend the legal framework.

26. In particular should all settlement systems operated by CSDs be subject to an obligation of designation and notification?

Yes, SSSs operated by CSD currently fall under the scope of the SFD and are readily subject to an obligation of notification as SSS to the EU Commission.

27. What do you think of the general elements of these requirements, particularly with respect to the obligation for CSDs to facilitate securities lending and the obligation of counterparties to securities loans to put in place adequate risk controls?

While we recognise the importance of securities lending to achieve settlement efficiency, the consultation document currently foresees this service as an ancillary service. Hence it should not be an obligation for CSDs.

In line with the above, we suggest not to limit the securities lending services offered by CSDs to avoid settlement failures only (or in your own words, "Securities lending to tackle pre-settlement risk"). Securities lending services should rather be included in a wider definition (as we have developed in our answer to question 6, section 1.4), however still complying with rules on equal level of access and adequate risk controls.

Due attention should be brought to the proposed obligation on national legislators to "free securities lending facilities from any impediments" potentially contrary to the capital charge stemming from the CRD. This is in particular true, in those cases where the CSD falls within the scope of the CRD. We therefore ask for further clarification in this regard.

28. What do you think about the requirement for issuers to pass their securities through a CSD into a book entry form? If such an obligation were considered, which securities should it concern? Only listed securities? All securities with an ISIN code? Only equities? Eligibility approach?

We support the admission of duly created securities (under Company or Civil Law) or -where applicable - the creation of securities ("*unu actu*") through CSDs in mere book-entry form. It should be applied to all securities with an ISIN code and other existing national numbering standards.

29. What is your opinion with respect to grandfathering ?

We agree with the grandfathering clause proposed under section 4.4.

30. What do you think about the requirements above for DVP? Do you see any issues in respect of the different DVP models?

We agree with the proposed requirements and see no issues relating to the different DVP models.

31. What are your particular views on the grandfathering principle coupled with the requirement for the introduction of a guarantee fund?

To our knowledge, guarantee funds may exist as rare exception among few CSDs in Europe. The CSD's range of customers, and the particular low-risk sphere in which CSDs activities are developed, would see no benefit from the introduction of such a requirement.

32. What do you think about a preference of settlement in central bank money? Should such a preference be applied equally to all types of securities?

We support the usage of Central Bank money where appropriate. We strongly emphasize that the coexistence of central and commercial bank money should remain in place and that the use of central bank money should not be made mandatory. This should apply to all securities.

As earlier mentioned, it must be ensured that CSDs continue to have access to overnight Central Bank liquidity.

Furthermore, it has to be ensured that the trade counterparties chose the same cash settlement mechanism in case no requirements have been defined by trading venue or clearing house.

33. Do you think that the principles outlined above could be transposed in future legislation?

Yes, as long as it is ensured on a non-discriminatory basis. We emphasise on the necessity to preserve the coexistence of central and commercial bank money.

34. What is your opinion about the extent of the requirements that should be imposed when commercial bank money is used?

We agree with safe and sound principles for commercial bank money as they are already in place.

For non-Euro currencies a change in the last principle is required: as the payment system should not be required to be notified for all kind of cross-border transactions.

35. What do you think about the rules above?

We support the rules proposed under section 4.7.

36. Are further rules needed in order to ensure reconciliation and segregation?

We see no need for any further rules.

37. Do you think that these six basic principles cover sufficiently operational risks?

We generally agree with these basic principles, however some principles require clarifications:

- The requirement regarding business continuity and disaster recovery plans should be more specific. It should be requested, that the plans cover scenarios of workspace, IT, staff and supplier unavailability. Furthermore their effectiveness should be regularly tested. The requirement of a second site should either be deleted (because this could be one solution to implement a business continuity plan but other solutions could be possible as well) or be more specific (is a second data center required or backup workspace?).
- Moreover, the requirements to identify, monitor and mitigate the risks associated with its participants are vague and require clarification. We see no need to establish minimal requirements for those participants who are already regulated as banks or financial institutions.

38. What do you think about the eight principles above, particularly with respect to board composition and the need for a risk committee?

The governance principles introduced in the consultation document, suggest a fail of the existing CSDs governance, which we believe to be unwarranted. Governance arrangements existing today in the CSDs we operate, as to guarantee an appropriate level of expertise and interests/customers representation.

We therefore disagree with the obligation to introduce “Independent Board members” to the existing board structures of CSDs. Particularly institutions that have to apply the CRD already have strict governance rules to comply with. However the CRD rules focus on the quality of the board members and not on their

independence. Furthermore corporate laws of the Member States include already provisions for the selections of the members of the management board. We do not see any advantage of “Independent Board members” and recommend provisions similar to the ones applicable under the CRD or MiFID.

The company’s management board is fully responsible for the risk controls.
There is no need for a “risk committee” at CSDs, as they in general do not step in as a principal and therefore do not manage market risk. It is not appropriate for CSDs, simply because the nature of the risks faced by CSDs is very different from, and should not be compared to, the risks inherent in CCPs. Additionally, it is not clear how the participants to a risk committee would be chosen. In any case a risk committee can only act in an advisory function.

Finally, we want to emphasise that future rules should be applied at the group level (in case multiple CSDs are operated) and not at the level of legal entities.

39. According to you, should CSDs be subject to a principle of full responsibility and control on outsourced tasks? Yes? No? No opinion? Please explain why.

Yes, the CSD should have full control on outsourced tasks. There are already rules for outsourcing in MiFID (2006/73/EC). We strongly recommend applying these rules as currently described in MiFID and in its implementing measures. Once again, double regulation in the light of this requirement should be avoided.

Please note that outsourcing is not a matter of authorisation (as mentioned in section 4.10 (a) Principle of full control and responsibility by the CSD).

40. Should there be any other exemptions from the principle of responsibility and control of CSDs on outsourced tasks?

There should be no exemptions. The nature and risks associated with outsourcing remains the same for the CSD, regardless of the identity or the objectives (public or not) followed by the insourcer. Therefore the same outsourcing requirements (including the core necessity to link responsibility with control) should apply to CSDs also for projects like T2S. This means that CSDs should be able to control the conditions of sub-outsourcing, apply checks and controls, and keep the ultimate decision on any changes requests. Any other solution would create unacceptable liability exposures and corporate responsibility risks for the CSD, conflicting with the very requirement present throughout the consultation document to keep CSDs under low risk profile framework.

41. What is your opinion on the above prudential framework for risks directly incurred by CSDs?

The custody risk should not be addressed as a financial risk as it is an operational risk.

It needs to be ensured that:

- CSDs that offer banking type services (see section 1.4) have access to central bank liquidity.
- Liquid resources include committed credit lines and liquid securities.
- Credit to be provided in connection to the core and the ancillary services of CSDs.
- Security credits resulting from existing security lending services are properly classified as short term credits (as they are always recallable within 48 hours). This needs to be in line with the banking licences.
- Possibility to limit the type of credit granted to very short term up to 48 hours (48 hours are required to avoid settlement failures).
- Risk mitigation elements from the CESR/ESCB recommendations, should be taken into consideration.

The rules for CSDs to provide credit are inconsistent with the CRD (limiting the banking licence, see question 14).

42. What do you think about the principles above?

Please refer to question 41. It needs to be ensured that CSDs that offer banking type services (see section 1.4) have access to central bank liquidity.

43. What do you think about including these elements of the Code in legislation?

We disagree with the statement to include “account separation and disclosure to competent authorities of costs and revenues for each unbundled service” into the CSD legislation. The scope of the Code of Conduct was defined for cash equities only and not to be applicable to all financial instruments.

Due to the competitive nature of the business, the disclosure of confidential details about costs and revenues would raise strong concerns. Furthermore the specific account separation is not in line with existing accounting standards. The establishment of such separate financial accounts creates unreasonable additional costs to the CSD and its participants.

PART II: HARMONISATION OF CERTAIN ASPECTS OF SECURITIES SETTLEMENT IN THE EUROPEAN UNION

The second part of the consultation paper has been answered from the perspective of the Deutsche Börse Group (DBG) as it does not exclusively address CSD related topics and some questions affect other DBG entities (trading venues and CCPs) as well. Resulting from the understanding that harmonisation activities are seen as beneficial for the smooth and efficient processing at securities markets, DBG strongly supports harmonisation of post-trade processes.

44. According to you, is the above described harmonisation of key post trade processes important for the smooth functioning of cross-border investment? Yes? No? No opinion? If yes, please provide some practical examples where the functioning of the internal market is hampered by absence of harmonisation of key post trading processes. If no, please explain your reasoning.

We support further harmonisation of post-trade processes, especially in the area of settlement periods and settlement discipline regimes. This can be further described by cross-market activities of a market participant who sells shares originally bought in another market. Assuming that settlement periods in the "selling" market are shorter than those in the "buying" market, it is obvious that a timely delivery cannot be done. In addition, different incentives can be set by non-harmonized settlement discipline regimes, potentially resulting in a redirection of settlement flow from one to another market where such regimes are more rigid. Based on the above example an additional sell of the same securities in another market, executed later than the before mentioned sell, can, in case market discipline rules in this market are more rigid than in the first one, result in the redirection of the securities to fulfil the second sell instead of the first one. Hence, the first market and its participants are in a systematic disadvantage.
Nevertheless, these issues are already in discussion by market participants and the interim results of the related groups should be considered:

- Harmonization of Settlement Cycles Working Group originally founded on request of CESAME2
- Relevant Task Forces of the T2S project
- EGMI

45. Do you identify any other possible area where harmonisation of securities processing would be beneficial?

The remaining Giovannini Barriers relating to tax and legal aspects should be removed. DBG is also member of respective working groups to support this processes.

5. SETTLEMENT DISCIPLINE

46. According to you, is a common definition of settlement fails in the EU needed? Yes? No? No opinion? Please explain why. If yes, what should be the key elements of a definition?

DBG agrees to introduce a common definition on settlement failures. It maybe requires to consider two additional elements, (1) the definition of the moment in time where a fail occurs, and (2) a definition on the referring settlement location.
The first element can be done by introducing the end of the contractual/ intended settlement day as reference point. The second one should consider that settlement processing times may be different across settlement locations with respective impact on participants.

47. According to you, should future legislation promote measures to reduce settlement fails? Yes? No? No opinion? If yes, how could these measures look like? Who should be responsible for putting them in place? If no, please explain.

DBG agrees that settlement failures have to be minimised and that a Europe-wide harmonized model is beneficial for all market participants. In that regard consideration of trading venues as well as OTC related flow is required for ensuring a level playing field i.e. both should follow same.

The securities value chain consists of trading venues, CCPs (in most markets) and CSDs. In case of OTC transactions there is no trading venue and in most cases no CCP in place. Therefore it has to be carefully analysed which entity has the relevant information and is in the position to operate such settlement discipline regime.

DBG suggested defining the relevant securities and transactions types in scope of the legislation by a working group under lead of ESMA.

48. What do you think about promoting and harmonising these ex-ante measures via legislation?

DBG supports harmonisation of ex-ante measures. Clearstream already offers a variety of services that enable its customers for early matching and timely settlement (e.g. by real-time matching and immediately available status reporting and the consequent implementation of ESSF ECSDA matching standards).

49. What do you think about promoting and harmonising these ex-post measures via legislation?

DBG supports a Europe-wide harmonisation of settlement discipline regimes incl. buy-in, penalty as well as cash settlement. OTC flow is to be included in the to-be-defined regime to ensure a level playing field and to reduce spill over effects resulting from a fail originally initiated by an OTC transaction (see answer to question 47).
The considerations of the Harmonisation of Settlement Cycles Working Group should be taken into account in that regard.

We suggest setting up a working group under lead of ESMA for defining such harmonised settlement discipline regime; i.e. buy-in, penalty as well as cash settlement processes and the respective timings. An ESMA-coordinated approach is proposed to avoid (regulatory) arbitrage.

6. HARMONISATION OF SETTLEMENT PERIODS

50. According to you, is there a need for the harmonisation of settlement periods? Yes? No? No opinion? Please explain why

We believe that through a harmonisation of settlement cycles processes could be harmonised and, subsequently, risk could be reduced.
DBG agrees that for most securities a harmonised settlement cycle of T+2 should be the target, in order to reduce open positions and thereby risk exposures.

51. In what markets do you see the most urgent need for harmonisation? Please explain giving concrete examples

Harmonisation should be pursued across markets per product type.

52. What should be the length of a harmonised period? Please explain your reasoning

See answer 50. The harmonised T+2 cycle should serve as maximum period. Shorter cycles can be agreed.

53. What types of trading venues should be covered by a harmonisation? Please explain your reasoning

DBG proposes to harmonise the rules across trading venues; OTC activity should be in scope of the harmonisation.

54. What types of transactions should be covered by a harmonisation? Please explain your reasoning

In general all securites transactions, regardless whether agreed on a trading venue or OTC, should be in scope to ensure seamless interaction of the two spheres. Securities financing transactions, e.g. repo or securities lending, should be excluded.

55. What would be an appropriate time span for markets to adapt to a change? Please explain

The implementation should be within the next 2-3 years to minimise costs of adaptation for market participants and infrastructures. Nevertheless, it should take place before T2S is implemented.

7. SANCTIONS

56. According to you, how should the principles examined in the communication on sanctions apply in the CSD and securities settlement environment?

All institutions involved in the trading and post-trading value chain (investors, banks, market infrastructures, etc.) and not just the CSDs should be included in the sanctioning regimes.

We trust you would have found these comments useful and remain at your disposal for further discussion. Should you have any questions please do not hesitate to contact:

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