European Association of CCP Clearing Houses

19th February 2015

EACH response – ESMA consultation paper 'Technical Standards under the CSD Regulation' – ESMA/2014/1563

1. Introduction

The European Association of CCP Clearing Houses (EACH) represents the interests of CCPs in Europe since 1992. EACH currently has 20 members from 16 different European countries. EACH is registered in the European Union Transparency Register with number 36897011311-96.

EACH welcomes the opportunity to provide input in the development of the CSDR technical standards.

2. Response to specific questions

Q2 - Do you agree with the cases when matching would not be necessary, as specified under Article 3(2) of the draft RTS? Should other cases be included? Please provide details and evidence for any proposed case.

Clarification of the meaning of 'already matched' (section 2.1 paragraph 12)

EACH believes that the term 'already matched' under section 2.1 paragraph 12 is potentially misleading. We describe below the most common cases of how a CCP passes on instructions to a CSD:

1. **A transaction 'pre-matched' at the CCP**: The term means that two instructions are 'pre-matched' at the CCP level (leg 1 against leg 2), but it is the CSD that officially matches the instruction for settlement purposes.
2. **Two legs of the transaction send to one or two CSDs**: In the circumstances where the above case 1 is not possible (i.e. for intra-CSD settlement to be completed in one CSD or inter-CSD settlement in two CSDs) it would be the responsibility of the CCP to ensure that both legs provided to one or two CSDs are fitting together even if the subsequent matching phase is performed at the CSD for settlement purposes.
3. **The case of interoperable CCPs**: This case should be dealt with separately. In the case of interoperable CCPs, no 'pre-matching' takes place at the CCP level. When interoperable CCPs need to settle instructions (CCP1 against CCP2), they will privilege the approach whereby the matching is required to ensure that one CCP does not impose to the other the content of the matching fields. It would once again be the CSD that officially matches the instruction for settlement purposes.

In light of the different interpretations above, EACH believes that CCPs should not be required to send 'already matched' settlement instructions to CSDs, as required under Article 3(2) of

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the RTS. The RTS should rather be consistent with the principle that matching for settlement purposes shall be performed at the CSD level not at the level of the CCP.

In order to address this situation, EACH proposes the following modifications to the RTS:

Article 3
Details of the CSD procedures facilitating settlement and details of the measures to be established by CSDs to encourage and incentivise the timely settlement of transactions

(…)

2. A CSD shall match settlement instructions prior to settlement, based on the instructions sent by participants, except in the following circumstances:

(a) The settlement instructions received by the CSD are already matched by trading venues or other entities such as CCPs;

(b) FoP instructions which consist of transfers of financial instruments between different accounts opened in the name of the same participant.

~~CSDs shall require that CCPs send already matched settlement instructions into the securities settlement system operated by a CSD, unless letter b) of subparagraph 1 applies.~~

(2) new: Settlement instructions between interoperating CCPs shall be sent matched by one of the CCPs, where this has been agreed between them, otherwise each CCP shall send an unmatched settlement instruction with the CSD performing the matching.

(…)

Q4 - What are your views on the proposed draft RTS included in Chapter II of Annex I?

EACH believes that the "trade date" should not be one of the standardised matching fields for all settlement instructions. Instructions which are the result of netting by a CCP may not be linked to a single trade as the instruction may be the result of the netting of multiple trades. This is an issue particularly for CCPs using the Continuous Net Settlement (CNS) model. We suggest that ESMA only requires the completion of the field 'trade date' where applicable.

Q6 - What are your views on the proposed draft RTS related to the penalty mechanism? Do you agree that when CSDs use a common settlement infrastructure, the procedures for cash penalties should be jointly managed?

Clarification of the role of CCPs in the calculation of cash penalties

EACH believes that the CCPs do not need to be involved in the penalty mechanism. EACH believes that the suggested wording of article 9 could result in a complex and inefficient way of dealing with cash penalties, and would therefore unnecessarily increase costs for some CCPs, clearing members and CSDs. The position is consistent with the fact that there is no authority under Article 7(2) of the CSD Regulation to require a CCP to administer the penalty

mechanism. This article only refers to CSDs having procedures in place to "facilitate the penalty process", therefore does not impose any requirements on CCPs.

For CCPs operating under the Trade-date-netting model instructions are still in the CSDs after ISD and therefore they have all the information required for the calculation of the penalties on cleared transactions. The CSD is therefore able to collect and redistribute penalties directly from clearing members which are also settlement participants in the CSD. In case where the clearing member is not a participant of the CSD, penalties can be collected by its settlement agent who will pass penalties on to the clearing member according to their contractual relationship, without the need of involving the CCP.

For CCPs which operate a continuous net settlement (CNS) model instructions are deleted on or after ISD. In this case, the CSD will be able to calculate penalties on the basis of the cancellation instructions received from the CCP.

In any case, the calculating CSD should primarily be responsible for the redistribution of the collected penalties. Alternative arrangements may be discussed between the CCPs and the CSDs.

Q7 - What are your views on the proposed draft RTS related to the buy-in process? In particular, what are your views on applying partial settlement at the end of the extension period? Do you consider that the partialling of the settlement instruction would impact the rights and obligations of the participants? What do you think about the proposed approach for limiting multiple buy-in and the timing for the participant to provide the information to the CSD?

Partial settlement (Article 11.5)

EACH believes that the partialling functionality of the CSD is an efficient tool that positively contributes to increase the settlement efficiency. This functionality should be applied throughout the extension period, not only at the end of it. We would request ESMA to clarify that 'partialling' under Article 3(7) means 'unilateral partialling', i.e. the delivering party can instigate the partial delivery without matching required by the receiving party in each case. Nevertheless, Article 7 paragraph 11 of CSDR should be taken into account. In case of CCPs it must be the sole decision of the CCP to apply partialling as a receiving participant.

Under the current draft of Article 11(6), the partialling functionality offered by the CSD is mandatory at the end of the extension period; as a result, there should be no financial instruments available to deliver in the failing participant's account, contrary to what paragraph 5 states. It follows that the CCP should be able to buy-in the full amount due to be delivered.

To this effect, we propose that ESMA deletes paragraph 5 in Article 11.

Article 11
Details of operation of the appropriate buy-in process
(…)
~~**5. Except when the settlement instruction is on hold in which case the buy-in shall be performed for the full instruction, the buy-in shall only relate to the financial instruments that are not available in the failing participant's account with the CSD. The**~~

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~~**CSD shall reserve the relevant financial instruments available in the failing participant's account for the settlement of that instruction.**~~
(…)

Timeframes to deliver (Article 11.7)

We believe that paragraph 7 of Article 11 includes a drafting error and the reference to article 9 should be a reference to Article 12, which sets out the timeframes to deliver the financial instrument subject to the buy-in.

Article 11
(…)
7. Where the buy-in is partially successful, the receiving participant shall accept the bought-in securities. The settlement instruction shall be deemed executed for the delivered part. For the residual amount of financial instruments, the receiving participant shall choose to defer the buy-in or to receive the cash compensation. The receiving participant can defer the buy-in only once for a period equal to the timeframe established under Article ~~**9**~~***12***.
(…)

Buy-in deferral (Article 11.8)

EACH believes it is important that the CCP, as the executing party of the buy-in for cleared transactions, and in line with the exemption awarded to them under article 7.11 of the level 1 text is in control of all the steps of the buy-in process, including the choice to defer the buy-in or perform the cash compensation.

In order to address the above issue we suggest the following amendment to paragraph 8 of Article 11:

Article 11
(…)
8. Where the buy-in fails, the receiving participant shall choose to defer the buy-in or to receive the cash compensation by the end of the business day following the receipt of the notice sent by the CSD~~**, CCP,**~~ or trading venue. In the absence of response within that timeframe, the cash compensation shall be paid.

Q8 - What are your views on the proposed draft RTS related to the buy-in timeframe and extension period?

EACH appreciates that both the extension periods and the timeframes to deliver the financial instruments take into account the liquidity of the specific financial instrument. We appreciate that the notion of liquidity is currently considered under the level 2 measures of MiFID II. It should be a priority of policy makers to develop a clear definition of liquidity and also ensure that there is a consistent understanding of such definition across market participants, CCPs, trading venues and CSDs. Otherwise, there could be inconsistency across a chain of transactions, for example where a specific instrument may be bought in on a liquid basis at the beginning of a chain and on an illiquid basis at the end of the same chain.

In addition, EACH believes that the RTS as they currently stand would prevent the use of the buy-in agent model, which provides a secure and efficient way of dealing with buy-ins. Under the buy-in agent model, there is no guaranteed delivery within specific timeframes. The rationale for this practice is to allow the buy-in agent to buy securities in the market (that ensures the fairer prices) where the delivery of securities is subject to the standard settlement period.

In order to ensure the continuation of the buy-in agent model, EACH proposes the following changes to Article 12:

Article 12
Timeframe to deliver the financial instruments

1. Shares or bonds, including those shares cleared by a CCP or those shares or bonds that are SME growth market instruments, shall be available for settlement ~~**and delivered**~~ to the receiving participant within:

(a) 4 business days after the end of the extension period where the bonds or shares are considered to have a liquid market, in accordance with point (a) of Article 2(1)(17) or point (b) of Article 2(1)(17), respectively, of Regulation (EU) No 600/2014;

(b) 7 business days after the end of the extension period where the bonds or shares are not considered to have a liquid market, in accordance with point (a) of Article 2(1)(17) or point (b) of Article 2(1)(17), respectively, of Regulation (EU) No 600/2014.

Q9 - What are your views on the proposed draft RTS related to the type of operations and their timeframe that render buy-in ineffective?

EACH would like to point out that the partial exemption for repos set out in the level 1 text of the CSD Regulation will have a significant impact on the netting process. CCP will be required to differentiate between transaction subject to buy-in and those not subject to buy-in with reduced netting efficiency as a result.

As noted in the EACH response to the previous ESMA discussion paper neither the level 1 text nor the draft RTS specifically address settlement with regards to triparty settlement systems (such as those supported by Euro-clear Bank, Clearstream Frankfurt, Clearstream International or Euroclear UK & Ireland's Delivery by Value (DBV) and Term DBV products). We suggest ESMA confirms that settlements relating to repurchase transactions in triparty environments are excluded from the scope of the CSDR settlement discipline regime. The settlement of Triparty products is substantially different from standard delivery-versus-payment (DVP) transactions, and is based on an ongoing obligation (from the start to end date of a trade) to support mark-to-market transactions initiated by the triparty provider, and the automatic return of collateral at the end date of a trade. We believe that the buy-in process for triparty products should be deemed to be ineffective because the buy-in of collateral would not be sufficient to support the efficient settlement of triparty transactions on an ongoing basis (especially in relation to mark-to-market transactions, which take place on an a daily basis).

We therefore suggest that ESMA adds the following amendment in a recital or as an additional paragraph to Article 14 of the RTS:

New recital or Article 14.4 new
The buy-in process for triparty products should be deemed to be ineffective because the buy-in of collateral would not be sufficient to support the ongoing obligation of the triparty provider to mark-to-market transactions during the life of a trade and the automatic return of collateral at the end date of that trade.

Q10 - What are your views on the proposed draft RTS related to the calculation of the cash compensation?

EACH supports ESMA's explanation in paragraph 30 in the preamble of the consultation to allow the cash compensation to be based on a pre-agreed price or on a pre-agreed method to determine such price.

This approach should allow the CCPs to determine the reference price for the calculation of the cash compensation at their discretion in accordance with their rules. In the case of cleared transactions, a single failed settlement instruction may be the net of many trades from many trade sources. In addition, due to the multilateral netting by a CCP it is also likely that the net consideration of the selling party does not match that of the buying party (i.e. the equivalent 'trade price' is different on each side of the fail). Therefore, it is important that the CCPs can determine the price for the cash compensation according to a pre-agreed method included in their rules.

In order to ensure that ESMA's reference to the 'pre-agree method' is clearly reflected in the draft rules in Article 15, we propose the following amendment:

Article 15
Calculation of the cash compensation

The cash compensation shall be determined as follows:

(a) Where the participants pre-agreed the price ***or a method to calculate such price*** to ***settle*** the cash compensation, the difference between the pre-agreed price and the price set for the failed transaction shall determine the cash compensation;

(b) Where the participants have not pre-agreed a price ***or a method to calculate such price***, the cash compensation shall be determined by the difference between the price determined by the buy-in agent by reference to the closing price of the relevant trading venue on the day before the payment of the cash compensation and the price set for the failed transaction.
(...)

Q11 - What are your views on the proposed draft RTS related to the conditions for a participant to consistently and systematically fail?

We would like to ask ESMA to confirm that CSDs are responsible for determining the calculation under Article 16 of the RTS to identify systematically failing participants. We

understand that CSDs are able to do so on the basis of the reports on settlement fails under Article 5 of the RTS. This ensures that the calculation captures the overall settlement fail rate of a participant across all its transactions.

There are important points in respect to the suspension of failing participants which we would like to make:

- Participants which systematically fail should be identified on the basis of a specific category of financial instrument settled on the relevant securities settlement system.
- ESMA and relevant competent authorities should recognise that any suspension by a CSD should not automatically trigger any action by a CCP. The CCP should determine with its competent authority the course of action to be taken against one or more systemic failing participants in order to minimise the impact of a potential suspension on the market activity.
- Any suspension should only be applied to future trades not yet registered by the CCP and should not be applied to existing trades or future trades that have been already registered at the point of the suspension to avoid any impact on the operations of the CCP and the relevant clearing member.
- The suspension should be for a fixed period at the discretion of the CCP in accordance with its rulebook.

Q13 What are your views on the proposed draft RTS related to anti-avoidance rules for cash penalties and buy-in?

EACH acknowledges that a netting model such as Continuous Net Settlement (CNS) is not discriminated by ESMA's standards. Nevertheless, EACH would request for clarification whether the following understanding is correct: According to the anti-circumvention rules set forth in Article 19 of draft RTS on settlement discipline a CCP is entitled to use netting models such as CNS in which bilateral cancellation is also performed for already sent but not settled settlement instructions.

Q14 - Do you agree that 18 months would be an appropriate timeframe for the implementation of the settlement discipline regime under CSDR? If not, what would be an appropriate timeframe in your opinion? Please provide concrete data and evidence justifying a phase-in for the settlement discipline measures and supporting your proposals.

We support ESMA's proposal to implement the settlement discipline 18 months following publication on the RTS in the OJ for the following reasons:

- It is important for stakeholders to understand the new requirements and allow time, as well as budget, for the implementation of system changes and amendments to the respective rulebooks.
- The implementation of the rules on settlement discipline will require coordination among CSDs and their participants, including CCPs and trading venues.
- Due to the implementation of T2S CSDs are unlikely to have the resources to be able to implement the rules on settlement discipline at the same time
- Until the complete implementation of the T2S project some fails are likely to occur because of settlement infrastructure's issues, not intentionally (e.g. based on a decision by a dealer to not make a delivery). Therefore, the phased in implementation is essential to prevent market disruption.

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