



European Securities and
Markets Authority

Reply form for the Technical Standards under the CSD Regulation





European Securities and
Markets Authority

Date: 18 December 2014



Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - Technical Standards under the CSD Regulation, published on the ESMA website.

Instructions

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

- i. use this form and send your responses in **Word format**;
- ii. do not remove the tags of type <ESMA_QUESTION_TS_CSDR_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
- iii. if you do not have a response to a question, do not delete it and leave the text "TYPE YOUR TEXT HERE" between the tags.

Responses are most helpful:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. describe any alternatives that ESMA should consider

Naming protocol:

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA_TA_CSDR_NAMEOFCOMPANY_NAMEOFDOCUMENT.

E.g. if the respondent were ESMA, the name of the reply form would be ES-MA_TS_CSDR_AIXX_REPLYFORM or ESMA_CE_TS_CSDR_AIXX_ANNEX1

Responses must reach us by **19 February 2015**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input/Consultations'.

Publication of responses

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Disclaimer'.



General information about respondent

Are you representing an association?	No
Activity:	Central Securities Depository
Country/Region	Europe

Q1: Do you think the proposed timeframes for allocations and confirmations under Article 2 of the RTS on Settlement Discipline are adequate?

If not, what would be feasible timeframes in your opinion?

Please provide details and arguments in case you envisage any technical difficulties in complying with the proposed timeframes.

<ESMA_QUESTION_TS_CSDR_1>

The responses provided in this document convey the views and opinions of the Deutsche Börse Group, and more specifically of: Clearstream Banking Luxembourg S.A., Clearstream Banking Frankfurt AG, and LuxCSD S.A. jointly referred hereafter as “Clearstream”.

Clearstream is not an investment firm authorised pursuant to Article 5 of Directive 2014/65/EU, hence not in a position to provide judgement on these standards.

Having said the above, we nevertheless bolster that Clearstream processes any settlement instructions immediately upon receipt from its clients on an automated STP (whenever possible) basis to facilitate efficient timely settlement.

<ESMA_QUESTION_TS_CSDR_1>

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.

<ESMA_QUESTION_TS_CSDR_2>

Manual intervention reporting (Annex I Article 3.1)

Mandating the immediate reporting of “any types of manual interventions” would go beyond the mandate given to ESMA under the level-1 Regulation. Manual interventions are often part of the operational, risk management and/or compliance measures in place to ensure efficient settlement.

In the majority of cases, manual intervention is actually used to enhance and/or repair instructions to enable settlement and not to prevent it. Hence manual interventions should not be demonised, and any possible reporting should be further rationalised.

The proposed text under Annex I Article 3.1 is therefore too ambiguous, and would lead to the daily production of lengthy data reports, possibly including hundreds of individual settlement instructions, for all categories currently considered as “manual intervention”. While STP automation is the norm, there are many different reasons why there could be manual interventions, which in most cases have a positive effect to the settlement efficiency of the SSS and that do not alter the settlement instructions received. Such as:

- the screening of transactions for Anti-Money Laundering (AML) and international sanctions’ compliance purposes that are applied to the securities settlement instructions may result in a slight delay in the feed to the SSS according to the RTS,
- In the future T2S platform, in some instances, manual intervention will also be required (e.g. for blocking of transactions, collateralisation services or static data updates),

- securities that are returned after settlement (via CSD links) and have to be booked back to the customer's account – such operational handling should not be considered as relevant for this article,
- other types of manual or even general intervention on customer instructions can also be in the case of recycling instructions due to corporate actions and ISIN changes.

These manual processes are aimed at supporting the day-to-day processing of the CSD services and do not lead to a delay of the settlement. In fact, this service is aimed at improving the settlement efficiency of the settlement system operated by the CSD.

With regards to the reporting requirement linked to the occurrence of manual interventions, it cannot be in the interest of the competent authority to receive all this data. We believe the competent authority should rather be interested in “types” or “clusters” of manual intervention data falling into the category of “manually changed/repared data” and decide accordingly whether to look closer into such selected clusters. ESMA should define such clusters and provide a role to the competent authority to implement/request them for its own market, in line with Annex I Article 3.1.a and b.

We suggest the following redrafting proposal to the Annex I delegated regulation proposal: (page 115 of the consultation paper)

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

1. A CSD shall process settlement instructions on an automated basis.

*A CSD shall report **any selected** types of manual intervention ~~to~~ **by** the competent authority **without any delay within a reasonable timeframe**, covering at least:*

*(a) with regard to a received settlement instruction, the action of **substantially** delaying and/or modifying the feed to the securities settlement system, including **any substantial** modification of the received settlement instruction outside of the existing automated procedures;*

*(b) with regard to the processing in the settlement engine, any kind of **abnormal** intervention outside of the automated processes, including the management of **substantial** IT incidents;*

If the competent authority considers that the type of manual intervention is not appropriate for the smooth functioning of the securities settlement system, the CSD shall not to use such type of manual intervention in the future.

Mandatory matching and mandatory matching-fields (Annex I Article 3.2 and Article 3.3)

Matching is a prerequisite for an efficient settlement process as it may reveal inconsistencies between settlement instructions from both counterparties. Matching between CSD participants is widely used and a generally accepted step in the settlement of a transaction.

Mandating the use of certain matching fields would go beyond the mandate given to ESMA under the level-1 Regulation, and is unlikely to bring substantial benefits in terms of reducing the level of settlement fails but could on the contrary lead to an increase of unmatched instructions and lower settlement efficiency levels.

In addition, elevating matching fields' requirements to Regulatory Technical Standard (RTS or TS) level would create inflexibility to any future changes. As these fields could only be changed through a legislative process, such a decision would remove flexibility to the overall settlement process by preventing quick adaptation of matching requirements to market needs.

While matching settlement instructions is the norm, under Article 3.2 of Annex I, ESMA proposes only two circumstances in which settlement instructions might not be matched. These circumstances should not be limited to only two possible cases, as this would not take into account other possible cases applicable to each market, for which the competent authority shall have a say.

We suggest the following redrafting proposal to the Annex I delegated regulation proposal: (page 115 of the consultation paper)

Article 3.2

(...) ADD NEW TEXT

(c) and any additional circumstances and conditions determined or approved by the Competent Authority

Furthermore, CSDs should be allowed to continue to require matching of e.g. any kind of FoP transaction for the benefit of maintaining services that may already exist today in its local market, in order to reduce technical complexity and development cost.

With regards to the cases when matching would not be necessary, considering that:

- the limitations within the settlement environment (e.g. its limited availability within T2S),
- the expectable development of the market (i.e. the number of inter-CSD settlements will presumably increase resulting from the introduction of T2S),
- the special role of CCPs (i.e. being buyer to each seller and seller to each buyer),
- the interrelated costs resulting from the intra-CCP re-alignments, and
- the issue which will presumably arise with settlement efficiency (resulting from an increasing number of re-alignment deliveries across CSDs).

the ESMA requirement that CCPs must always process its settlement instructions as “already matched” should be further clarified

We suggest the following redrafting proposal to the Annex I delegated regulation proposal: (page 115 of the consultation paper)

Article 3.2

(...) For intra-CSD settlement instruction (specified in point f) of Article 4(2)) CSDs shall require that CCPs send already matched settlement instructions into the securities settlement system operated by a CSD which technically supports such functionality, unless letter b) of subparagraph 1 applies.

~~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.~~

Further clarity is required, under Article 3.2 on whether the tolerance level of a maximum of EUR 25.-- (or equivalent) also applies to instructions that settle (in EUR or non-EUR currency) with a non-EU CSD via a link arrangement. This clarification requirement is specifically relevant for the CSDs' settlement, as the non-EU domestic's markets tolerance levels – to which the EU CSD may be subject to as a participant – could deviate from the ones defined in these TS.

With regards to the mandatory use of specific matching fields under Annex I Article 3.3, we are of the opinion that prescribing matching fields throughout the EU will have the following consequences:

- Mandatory use of specific matching fields is unlikely to bring substantial benefits in terms of reducing the level of settlement fails. Instead, the increase of the number of mandatory matching fields (like trade date or transaction type) could even lead to an increase of unmatched instructions and fails
- In addition, the act of elevating matching field's requirements to TS level would build inflexibility to any future changes. As these fields could only be changed through a legislative process, removing flexibility to the overall settlement process. Finally, but not least, we believe such a requirement would go beyond the mandate given to ESMA under the level-1 Regulation.

Regarding Article 3.3, Clearstream is of the view that the field "Transaction Type" is currently not widely used in the various European securities settlement systems, but that its adoption could benefit markets if thought carefully. As a matter of fact the T2S settlement platform will mandate its use in settlement instructions, for record keeping but not for matching purposes. Such an approach could be sufficient if ESMA considers this for the CSD's record keeping requirement and for future reporting on securities financing transactions.

Should ESMA believe that having this additional field used as matching criteria will add value to the functioning of securities settlement in Europe, it should consider that the introduction of this element requires a harmonized usage of the field and a general agreement amongst market participants (e.g. market practice). Indeed, the introduction of such a new matching requirement will likely impact negatively settlement efficiency across Europe in the short-term, as systems and back-office teams will demand adaptation and transition to source and report the correct information. In order to achieve harmonization and standardisation, it seems necessary that changes in the ISO standards are required which, at the minimum, would require 24 months of discussion and implementation.

We would like to draw ESMA's attention that if it were to introduce such a new field and mechanism, that would imply technical changes at CSD level and participants, which will translate into significant development costs for the industry. Not only entities in the remit of the CSD-R will be impacted but all CSD participants without exception, including some other market infrastructures like CCPs will need to adapt too. We request ESMA to give careful consideration to (the benefits associated to) the introduction of this additional matching requirement in light of the considerable costs (time, investment, efficiency) that such a measure will impose to the market.

<ESMA_QUESTION_TS_CSDR_2>

Q3: What are your views on the proposed approach under Article 3(11) of the draft RTS included in Chapter II of Annex I?

Do you think that the 0.5% settlement fails threshold (i.e. 99.5% settlement efficiency rate) is adequate? If not, what would be an adequate threshold? Please provide details and arguments.

Do you think that the 2,5 billion EUR/year in terms of the value of settlement fails for a securities settlement system operated by a CSD is adequate? If not, what would be an adequate threshold? Please provide details and arguments.

<ESMA_QUESTION_TS_CSDR_3>

The proposed level-2 RTS by ESMA are exceptionally prescriptive and unnecessarily impose on CSDs heavy technical functionalities for their systems, without considering that the objectives of the CSD-R could be achieved without the need to imposing technical blueprints for the CSDs



systems and by letting the market to decide on the most effective and appropriate tools to prevent settlement fails in the EU.

Having said this, we welcome the concept of flexibility introduced by ESMA through the thresholds in Annex I Article.3.11. This flexibility should however be further revised in order to allow it to come into practice. Currently the combination of both thresholds, namely “not (to) exceed EUR 2.5 billion and below 0.5%” makes attaining and maintaining this exemption almost impossible for any EU CSD.

In addition, the proposed timeframe for the implementation of the services defined under Articles 3.5 to 7 of three months in case of non-compliance with the thresholds is extremely short. Considering the development and testing efforts linked to these services, and also in context of the T2S preparation work, 3 months are definitely not achievable for CSDs and their participants, considering that the introduction of crucial system functionalities is dependent on the implementation effort that includes an adequate build and diligent testing phase and therefore may easily take at least 12 to 18 months.

On top of this, these exception provisions contradict with Article 11.6 on buy-ins which prescribes the application of partial settlement.

In order to make this flexibility effective, we suggest the following changes that would allow flexibility to come into practise:

- to decouple the proposed thresholds, hence only taking into account either “counter value” or “settlement efficiency”,
- to lower the settlement efficiency target to 90%,
- to increase the counter value to 5 billion EUR, and
- to extend the implementation timeframe from 3 months to 12 months.

<ESMA_QUESTION_TS_CSDR_3>

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

<ESMA_QUESTION_TS_CSDR_4>

Our concerns in relation to the proposed draft RTS included in Chapter II of Annex I, have been developed in our answers to Q2 and Q3.

In this regard, we would also like to mention that we also largely share the concerns raised in relation to the proposed draft RTS included in Chapter II of Annex I, in the response document of our association ECSDA. and especially support that CSDs shall offer recycling and bilateral cancellation mechanisms.

In addition to the above comments, clarification from ESMA is especially required regarding the international reach and implications of extending settlement discipline requirements to the non-EU markets, as in several cases compliance with CSD-R RTS seems not to take into account its global outreach. For example:

- When defining mandatory matching fields, ESMA does not clarify whether these apply to any transaction (e.g. including non-EU cross-border) or only those between CSDs incorporated in the EU and therefore subject to the CSD-R rules This is important to clarify, as it may be the case that for transactions with other markets (Asian countries as an example) other matching requirements will exist for these markets that may not be compliant/compatible with these RTSs.

- The same question applies for the hold/ release mechanism, bilateral cancellation requirements and partial settlement requirements. For those CSDs active in other markets through the establishment of links, it is unclear whether these CSDs have to effectively apply these RTSs to all the different markets transactions or only to those settling in EU regulated markets.
- The same question applies for the provision of settlement allegments, match status and number of settlement cycles, which again are dependent of the domestic market rules, which may be outside EU legislation’s reach.
- Also, the usage of T2S terms could be misleading if not incorrect as the CSD-R also applies to CSDs outside T2S (e.g. requirement for "already matched" transactions by CCPs could cause major impacts on CCPs; please also refer to our response to Question 2).

We therefore ask ESMA to duly clarify these cross-border aspects, taking into account how imposing settlement discipline requirements abroad, could negatively impact CSDs cross-border presence in the future.

<ESMA_QUESTION_TS_CSDR_4>

Q5: What are your views on the proposed draft RTS on the monitoring of settlement fails as included in Section 1 of Chapter III of Annex I?

<ESMA_QUESTION_TS_CSDR_5>

The monitoring of settlement fails as included in Section 1 of Chapter III of Annex I, imposes obligations on the CSDs that require to identify, monitor and report information to which they may not have access to, and thereafter imposing reports on settlement fails which are not consistent with existing ISO standards.

To make such requirements workable, we believe it is in general terms important, that any new requirement imposed to CSDs should as a minimum be based on information CSDs may have reasonable access and request it in formats which are compatible to existing standards. Otherwise such requirements are likely to fail being implemented.

In addition, we largely share the concerns raised in relation to the proposed draft RTS included in Section I of Chapter III of Annex I, in the response document of our association ECSDA.

In relation to the required information on buy-ins, as set out in Article 4.1 of the RTS, we would like to point out that this information is in most cases not currently available to CSDs. Most CSDs are not aware of the buy-in process and its outcome, especially in the cases set out in Article 7.10.a and b of CSD R level-1 text. And if an instruction is settled or cancelled, the CSD typically cannot know if this is the result of a successful buy-in, or because securities were finally delivered, or because cash compensation was agreed.

Despite the requirement at level-1 under Article 10 of CSD R, we strongly believe that CSDs should not be required to be involved in the buy-in process.

As a result, CSDs will not (and should not) have access to all the information listed under Article 4.1.b., and therefore suggest to require CSDs only to report the information on buy-ins “where available”.

Article 4.2.b. requires information about the portion of cash or securities that might be missing on the participant side (on a single transaction level) and this in order to perform the transaction settlement. This is impossible to provide by the CSD, despite reasonable amounts of information that is available internally at CSDs about its participant, however the participants’ underlying customer position cannot be normally identified by the CSD.



Should the CSDs have an eventual role in this process at all, then, it would be reasonable to consider reporting failed settlements at ISIN level, or other ISO existing standard, which would in its turn avoid triggering also the discussion on the form a harmonized instrument classification for such reporting.

Article 4.2.e requires monitoring several types of transactions, however here unless the CSD is provided by the participant with the listed information; it is not possible for the CSD to differentiate between lending, repo or other collateral management transactions from other "regular" OTC transactions.

Under Article 4.3, ESMA aims to facilitate the monitoring of settlement fails and asks for a market-wide working flow across trading venues, central counterparties and security settlement systems to blacklist the top ten participants with the highest rates of settlement fails. Besides the initial European and national data protection considerations that such a requirement raises, we believe that ESMA is missing further precisions on how would such a working flow among market infrastructures be structured. ESMA should go into the details on how exactly should this rating be determined, on which criteria, and this based on the information available. Moreover, it is important to address whether it should be the trading, clearing or settlement level that should be reflected in the monitoring flow. Additionally, the communication tools to inform these participants have to be structured and should not contradict with other legal obligations.

ESMA should also consider that the "highest fail rate" is not necessarily an appropriate indicator as it ignores the absolute number of underlying settlement transactions, especially when it is based on CSD participant single account level.

Finally, it is unclear to us, what is meant by "machine readable format" under Article 5.5 of Annex I. In our view the information should be sent electronically and its format should be agreed between the CSD and its competent authority. In general the format considered for such reporting transmissions tend to be spreadsheets files, such as an Excel file or a similar. The term "machine readable format" could be understood as a paper delivery that might be used for OCR lecture or other. Considering we doubt this is what ESMA is aiming for, the requirement should be further clarified.

<ESMA_QUESTION_TS_CSDR_5>

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?

<ESMA_QUESTION_TS_CSDR_6>

Before addressing the core of the Q6, we would like ESMA to consider what the legal qualification of the penalties should be. This is required since the application of penalties would, under the current proposal, be triggered irrespective of the existence of a "real damage" suffered by the receiving party.

Clarification by ESMA on how to qualify this measure is important at national level to pair off the future RTS requirement with the existing civil or criminal law instances ("*Vertragsstrafe*" under German law, or "*clause penale*" under Luxembourg/French law). These underlying legal concepts are not addressed by the CSD-R and may differ from country to country and/or may be subject to different local conditions, or may even readily foresee a penalty.

Questions such as: shall this penalty be applicable in all cases, or how to proceed if there has been no damage suffered by the receiving party, or a benefit instead, should all be addressed. In addition, penalty schemes could be lethal for a defaulting party who may already be sanctioned

by a non-delivery clause agreed at the level of the contract with the receiving party. Ultimately, this measure could offer the possibility of fraud or undue enrichment of the receiving party (such as by way of possible cum-ex schemes structured by some creative participants) to get advantage of those “sanctions”.

Settlement discipline measures will apply to all transactions in financial instruments that are admitted to trading. However CSDs cannot singlehandedly assess in all situations if a given financial instrument is “admitted to trading”. We believe it should be ESMA’s role to develop and maintain a publicly available database of all financial instruments admitted to trading (complete with the ISINs), accessible to any impacted parties (CSDs, CSD participants, trading parties etc.). We emphasize the fact that only a single source could allow for the harmonised implementation of measures regulated under CSD-R.

Furthermore, settlement discipline measures should avoid the introduction of rules for regulated markets only, as this would put a competitive advantage on settlement internalisers, who would then benefit from being excluded from the settlement discipline measures altogether. The ESMA RTS should avoid creating an unlevelled playing field in this regard. Level-1 rules on Settlement Discipline are aimed for the entire securities market; level-2 should hence avoid the introduction of rules for regulated markets only:

- Content of reporting to ESMA (e.g. settlement fails) should apply for CSDs and settlement internalisers
- Settlement discipline mechanisms should apply for CSDs, CCPs and settlement internalisers
- All failed settlement, which was intended to be settled for trading members of one and the same trading venue, must be reported to the trading venue. This should be independently of the fact, that the settlement system is an SSS or an internal settlement system. This will allow introducing sanctions for all parties causing fails in settlement.

For CCPs and CSDs, there should also be a harmonised cash penalty regime, with the same penalty conditions applying for cleared or uncleared securities’ trades. In general terms, like for any other transaction, a one-to-one relation between the penalty paid by failing party and received by the suffering party shall be applied by CSDs even in case of transaction chains.

Article 7.5 introduces the notion of “dedicated cash account” for the penalties collection; however it remains unclear whether the CSD will be allowed to collect all fines in a single dedicated cash account or whether this is calling for a special segregation by participant. ESMA should also take into consideration that some CSDs do not hold cash accounts, such as LuxCSD for instance.

We believe that ESMA is referring by “dedicated account” to a technical account established to collect and redistribute penalties from and to all their participants.

*We therefore suggest the following redrafting proposal to the Annex I delegated regulation proposal:
(page 123 of the consultation paper)*

Article 7 - The collection of cash penalties

*[...] 5. The CSD shall collect the payment of penalties in a separate **dedicated** cash account, **exclusively used for the purpose of collecting and paying penalty amounts.***

It is our understanding, based on the level-1 text that ESMA only refers to T2S in terms of a “jointly managed” penalty system, i.e. the CSDs interoperable links outside of T2S being out of scope of this requirement, as there is no obvious benefit for these specific links and such a joint development would not be achievable in a timeframe below 24 months.

*We therefore suggest the following redrafting proposal to the Article 7 of Annex I delegated regulation proposal:
(page 123 of the consultation paper)*

Article 7 - The collection of cash penalties

*[...] 6. **In case of interoperable links and** CSDs that use a common settlement infrastructure, including in the circumstances referred to in paragraph 5 of Article 30 of Regulation (EU) No 909/2014, the procedures for cash penalties shall be jointly managed by the involved CSDs. The arrangement between the involved CSDs or the framework referred to in Article 30(5) of Regulation (EU) No 909/2014 shall establish the modalities for the collection and distribution of cash penalties in accordance with the provisions of Regulation (EU) No 909/2014 and this Regulation*

For the purpose of further corroborating our above statements, we are including a cost and implementation times’ estimation for the developing the settlement discipline measures as a separate confidential enclosure.

Related to the concepts introduced under Article 9 for the application of the penalty mechanism when a CCP is involved as a participant, we are concerned about the imbalance this requirement introduces when paying out / collecting penalties at CSD and CCP respectively. In the case a settlement is late between two clearing members of a CCP, this delay should not be impacting the CSD at all. However, in case the settlement is failing due to only one leg at the CCP level, there will be two open ends (one in the CCP and one in the CSD) for which the CSD and (with opposite sign) the CCP are the direct counterparties. This situation creates a cross-FMI risk and does not make sense from a risk mitigating perspective, reason why it needs to be adjusted.

As such, Article 9 should regulate the following only: (a) late settlement penalties within the CCP and (b) realignment of settlement penalties between a CCP and a CSD in case the settlement takes place in a CSD involving the CCP and consequently any underlying Clearing members of the CCP.

As for other measures proposed by ESMA (e.g. buy-in), we observe that any cash penalty mechanism can only work and should therefore only apply when the two settlement counterparties make use of the same CSD or of two different CSDs (via a standard, bespoke or interoperable link), located in the European Union. ESMA should recognize that settlement fails on a link involving a CSD established outside the European Union should be out of scope, and will be governed by other bilateral agreements or legal provisions that define the conduct of those links.

<ESMA_QUESTION_TS_CSDR_6>

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?

<ESMA_QUESTION_TS_CSDR_7>

Generally on the buy-in process, given our inherent low risk profile, CSDs should not be involved in the execution of buy-ins (or the buy-in process as a whole) which is primarily the responsibility of CCPs and/or the involved trading parties. The proposed responsibility in the RTS for CSDs to be actively involved in the buy-ins process will inevitably result in new liabilities for the CSD, legal risk and increase its overall risk profile. Further, the role and legal set-up of the "buy in-agent" as well as "buy-in by auction" are not clear. If the aim is that the CSD shall not take any additional credit risk exposure, then the RTS have to determine who will take the additional risk instead.

We are of the view that ESMA's proposal contradicts the level-1 text objectives that clearly state that the CSD's only responsibility in relation to buy-ins process is to include a buy-in obligation in its internal rules. This opinion is fully shared by our association ECSDA, which we fully endorse along with the arguments raised.

Hence the RTS proposed text clearly deviates from this understanding of the level-1 text by which a CSD shall not be involved in the initiation or execution of a buy-in, whilst according to ESMA's proposal, CSDs would be in charge of:

- o sending notifications,
- o provide CCPs, trading venues with CSD settlement information,
- o identifying transactions (incl. chains) subject (or not) to buy-in,
- o collecting, contesting and processing further details on transactions that are not part of the initial settlement instruction of the CSD participant,
- o track respective buy-in timeframes and extension periods depending on instrument
- o triggering buy-ins,
- o appointing buy-in agents,
- o cancelling/ partialling customer instructions without explicit customer instruction,
- o monitoring and processing cash compensations (tbc.)

The proposed RTS under Articles 11 to 13 impose totally new obligations on CSD, such as:

- CSDs are required to have access to detailed information on buy-ins, and to be able to identify buy-ins from other securities deliveries, which in most cases cannot be done today;
- CSDs are expected in some cases to appoint a buy-in agent, which is not a responsibility currently entrusted to CSDs;
- CSDs are also expected to perform "consistency tests" on the instructions they receive in order to prevent multiple buy-ins, and we have serious doubts that they are even possible.

On the proposed RTS themselves, we have the following considerations:

As the settlement parties may differ from the actual trading parties, it is important in our view, to leave the actual buy-in initiation in the responsibility of the suffering party rather than forcing a buy-in via a CSD, which would again significantly raise the risk profile of the CSD.

We welcome the concept of flexibility introduced by ESMA through the appointment of a buy-in agent in Annex I Article.11.3. This flexibility should however be further enhanced in order to allow it to come into practice.

To avoid legal risk stemming from the fact that the trading layer obligation is independent from the settlement, Article 11 should be interpreted in a way that the CSD can contractually exclude itself from the initiation of a buy-in and delegate this task to its participant. This approach would leave to the discretion of (or mandated by) the suffering participant to trigger the buy-in (in case no CCP is involved).

Considering that underlying agreements between the parties (which can be enforceable under civil law) may also coexist with the above requirements, ESMA should clarify how should CSDs or local markets proceed in the case of conflict situations between the underlying contract and the CSD Regulation.

Buy-in at trading venue level is feasible only for transactions not cleared by a CCP. In this regard, Article 7.10.a requires a trading venue to include in its internal rules and obligations for its members and its participants to apply the measures referred to in Article 7.3 to 7.8. Therefore, pursuant to Article 7.10.a the responsibility to execute the buy-in (in accordance with the rules to be adopted by the trading venue) rests with the participants and it may be an option but should not be mandatory for the trading venue to appoint a buy-in agent (or even execute the buy-in) as foreseen in Article 11.3.

Article 11.4.b requires CSDs to provide notice on the buy-in result, in line with the above comments; this would not be possible as the CSD is not part of the buy-in initiation and execution process. A role for the buy-in agent should be considered in this regard as well, since we believe this to be an issue as we are of the view that the CSD-R level-1 text assigns no mandate to cover such parties.

As a general guiding principle for FMIs, a CSD shall not dispose of customer positions without a proper and clearly sanctioned customer command/instruction. Article 11 clearly opposes this guiding principle by which Article 11.5. requires the CSD to block its customers' securities for partial settlement. However, unless so specified by the CSD participant, it is not possible for the CSD to determine whether securities are actually available for settlement of a specific transaction or not, as positions may belong to another customer of the CSD participant that is not the failing party. The application of Article 11.6 is therefore not possible and as earlier stated, it also contradicts Article 3.11.

In conjunction with Article 3.4, it should be clarified that the cancellation of a bought-in instruction must be triggered and bilaterally confirmed by the two CSD participants involved. Again, the CSD shall not perform any cancellation or other form of movement in its customer's account without a corresponding confirmed customer instruction.

Article 11.9 should introduce more clarity with regards to the obligation of who will pay the cash compensation (cash collection and distribution process), which is not currently properly assessed. In other words, clarity is required on who is doing "what", "when" and "on whose behalf" a buy-in would be performed. As well as, in which situations would it be deemed that a buy-in is not possible.

Article 11.10 is rather unclear about how the failing participant should identify the failing participants in the chain, to provide “some information on the instructions linked to the failed transaction” to the CSD and how a CSD should identify pending receipts especially in the case of cross-CSD transactions. Most particularly for those cases in which the transaction would take place among cross-CSDs which do not have contractual relations in place. On those situations, how shall a CSD test the consistency of the requested information, what shall exactly be checked, on which basis and how often? These are open questions which would also need to be clarified in full detail.

Further reasons that justify an alternative model to be developed by ESMA jointly with the industry stakeholders are that trading counterparties will need to amend existing agreements and industry rules in order to include the mandatory buy-in requirement imposed by the CSD-R, and to ensure that the settlement agents they use and which act as CSD participants comply with CSDs' internal rules. We expect that CSD participants will have to include provisions on mandatory buy-ins in their agreements with clients. Also, where no CCP is involved, the prejudiced receiver/buyer will initiate the buy-in and issue notices (with information on the extension period, quantity and timing, etc.) through the chain of settlement intermediaries up until the CSD for reporting purposes. It will also be important that, as soon as the buy-in or cash compensation is executed, parties should instruct the cancellation of the outstanding failing settlement instructions through their agents and provide the CSD with a final confirmation that the buy-in process is completed.

For more detailed explanations on how an alternative buy-in model could work, we would like to refer to the separate ICMA/ ERC response to this same Question 7 of the ESMA Consultation Paper.

<ESMA_QUESTION_TS_CSDR_7>

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

<ESMA_QUESTION_TS_CSDR_8>

We refer to the comments made by our association ECSDA in relation to the draft RTS related to the buy-in timeframe and extension period, which we fully endorse.

Similarly to what we stated in our answer to Q4, We believe it should be ESMA's role to develop and maintain a publicly available database of all those instruments falling under the definition of "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. This list should be made available (complete with the ISINs), so that any impacted parties will be in a position to meet the requirements of the Annex I Article 13 provisions. We emphasize the fact that only a single source could allow for the harmonised implementation of measures by all CSDs regulated under CSD-R.

We also note that the Article 13 introduces different timeframes for cleared and non-cleared transactions. We believe this differentiation in treatment would lead to the unintended consequence to create unlevelled-playing field considerations. Moreover, we would like to point out that the proposed buy-in timeframe would not be adapted for the less-(and low-)liquid instruments.

Having said the above, we are of the view that no differentiation of extension period should be applicable between liquid and less liquid instruments, should that distinction be possible. The introduction of different instrument types in function of their liquidity profile will in itself creates frictions and errors that will exacerbate the overall problem. And the different cycles will make the process for the intermediaries unnecessary complex and expensive.



<ESMA_QUESTION_TS_CSDR_8>

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

<ESMA_QUESTION_TS_CSDR_9>

We refer to the comments made by our association ECSDA in relation to the draft RTS related to the type of operations and their timeframe that render buy-in ineffective, which we fully endorse.

Moreover, Article 14 stipulates circumstances in which no buy-in shall take place. For CSDs, these circumstances will rarely be identifiable since there is normally no link existing between a sale and purchase instruction that contain independent Intended Settlement Dates (ISDs). Similar to the concerns raised in our answer to Q7 above, we are once more of the opinion that a CSD shall not be able to initiate buy-ins.

<ESMA_QUESTION_TS_CSDR_9>

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

<ESMA_QUESTION_TS_CSDR_10>

We refer to the comments made by our association ECSDA in relation to the calculation of the cash compensation, which we fully endorse.

In addition, we believe ESMA should provide further guidance and instructions for instances where there would be no buy-in agent available for the respective instrument or no source of any reference price available, which is not unlikely in case of illiquid securities.

<ESMA_QUESTION_TS_CSDR_10>

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

<ESMA_QUESTION_TS_CSDR_11>

We refer to the comments made by our association ECSDA in relation to the conditions for a participant to consistently and systematically fail, which we fully endorse.

We also believe that these rules might be ill-adapted to a specific range of customers existing in all CSDs, such as “low volume customers” or “customers being active in exotic markets/segments”.

ESMA might want to consider an exemption for “low transaction volume CSD participant accounts” from application of the sanctions set in Article 16. This could be expressed by excluding accounts with e.g. < 1,000 settlement transactions/month.

*We therefore suggest the following redrafting proposal to the Annex I delegated regulation proposal:
(page 130 of the consultation paper)*

Article 16 - Conditions under which a participant is deemed to consistently and systematically fail to deliver the financial instruments

*1. A participant shall be deemed to consistently and systematically fail to deliver the financial instruments when its settlement efficiency rate is **25% 40%** lower than the settlement efficiency rate determined for the securities settlement system over a number of days that exceeds 10% of*

the number of days when the participant is active in the securities settlement system, over a 12 months period.

2. In calculating the percentage referred to in paragraph 1, both the value and the volume of settlement fails shall be considered. Where either the percentage in volume or in value terms is lower than the one indicated in paragraph 1, the participant shall be deemed to consistently and systematically fail to deliver the financial instruments.

3. Participant accounts with fewer than 1,000 settlement transactions per month, shall be excluded for calculating the percentage referred to in paragraph 1.

We are pleased to note that ESMA does not give any guidance on the consequences of consistently and systematically failing. We welcome the removal of the previously alluded suspension of a participant, which we believe should be left to the discretion of the competent authority, based on the information provided under Article 16 and prior to weighting and assessing the possible consequences of a suspension for systemic risk.

<ESMA_QUESTION_TS_CSDR_11>

Q12: What are your views on the proposed draft RTS related to the settlement information for CCPs and trading venues?

<ESMA_QUESTION_TS_CSDR_12>

Further to what is mentioned in our response to the Question 2 above; It should be taken into account that trades can be matched at different levels to increase the settlement efficiency, such as at central counterparties, who take into account multilateral relationships when stepping in as a party to each transaction for its Clearing Members.

More specifically on Article 17, we refer to the comments made by our association ECSDA in relation to the settlement information for CCPs and trading venues, which we fully endorse.

In addition, according to Article 17.1.d and f, unless specified by the CSD participant, it is not possible for the CSD to decide whether securities are actually available for settlement for a specific transaction or not as the position may belong to another customer of the CSD participant that is not the failing party.

Also in Article 17.1.e.v, it must be specified who will pay the cash compensation (cash collection and distribution process) and the reporting steps to the CSD.

Generally, CSD will be legally authorised to debit directly the failing delivering participant's cash account with the corresponding cash amount, and transfer the money to the suffering party.

Please also note that the provisions under Article 17.1.f are a duplicate of 17.1.d.

<ESMA_QUESTION_TS_CSDR_12>

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

<ESMA_QUESTION_TS_CSDR_13>

In addition to the concerns raised in our answer to Q7, we are of the opinion that anti-avoidance rules for cash penalties and buy-in (as the entire application of the buy-in rules) should be harmonised across on-exchange and off-exchange business, including internalized settlement, and not only apply to regulated markets, to avoid any possible rule arbitration.

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 Continuous Net Settlement CNS in which bilateral cancellation is also performed for already sent but not settled settlement instructions.



The redistribution of penalties by CCPs will be based on the CSDs reporting and are then allocated to the relevant Clearing Members which are the legal counterparty of the CCP.

<ESMA_QUESTION_TS_CSDR_13>

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.

<ESMA_QUESTION_TS_CSDR_14>

While we subscribe to the adoption of a new harmonised Settlement Discipline regime across Europe, some concerns exist with regards to the significant changes to the overall CSDs operations the current proposals will entail, and most particularly with regards to its proposed implementation timing. Sufficient time shall indeed be considered for CSDs, CCPs, trading venues and their participants to discuss, consult, develop, negotiate and implement the set-up of the system, its specifications and adaptations of instructions and related applications.

No European CSD will be capable to implement at the same point in time the most radical change in the structure of European CSDs to date, which is the outsourcing of its settlement operation to the ECB's T2S system, along with the introduction of "yet to be defined" future settlement discipline measures introduced by the CSD-R RTSs. The same concerns apply to CSD participants who will have to undertake heavy adaptation works to be ready for T2S migration and will therefore struggle to manage at the same time the changes imposed by CSD-R.

CSDs will be likely to fail meeting the requirements on settlement discipline at the time they will have to present their new "authorisation procedures" and are extremely concerned about the possibility that these settlement discipline measures would make their new authorisation impossible to process. The current timelines proposed in the CSD-R are clearly conflicting with T2S timelines and should be adjusted for the benefit of the smooth operation of the markets.

We appreciate ESMA's proposal to defer application of the settlement discipline regime to come into effect 18 months following the publication of the RTS in the official journal. However we cannot judge whether this 18 months' timeframe is appropriate especially as Article 7.6 stipulates a jointly managed procedure for cash penalties for those CSDs that would use a common settlement infrastructure, such as in the case of T2S.

As mentioned in our answer to Q6, we are concerned about the development efforts and timeframe necessary to achieve these common procedures for T2S, as this would require all the involved entities to develop a separate assessment, the result of which could lead to the need to extend the implementation timeframe.

From an operational point of view the T2S resources are still allocated to set up regulatory required features. In order to align the T2S systems with the new requirements in CSD-R, the implementation of the new settlement regime functionalities must take place in the T2S system under development.

Finally, it is very important to keep in mind that the timing of the implementation of settlement discipline measures is closely linked to the implementation of record keeping requirements, as set out in the separate technical standards on CSD authorisation. Therefore, the implementation timeline of record keeping requirements must be aligned with the timeline for penalties and buy-ins. As a minimum, the CSD records linked to the settlement discipline framework need to be decoupled from other records as they will not be practically "implementable" until the entry into

force of the settlement discipline provisions, i.e. ideally at least 27 months after publication of the technical standards.

For the purpose of further corroborating our above statements, we are including an estimation of the cost and expected implementation times for developing the settlement discipline measures as a separate confidential enclosure.

<ESMA_QUESTION_TS_CSDR_14>

Q15: What are your views on the proposed draft RTS on CSD authorisation (Chapter II of Annex II) and draft ITS on CSD authorisation (Chapter I of Annex VI)?

<ESMA_QUESTION_TS_CSDR_15>

We refer to the comments made by our association ECSDA in relation to the proposed draft RTS on CSD authorisation (Chapter II of Annex II) and draft ITS on CSD authorisation (Chapter I of Annex VI), which we fully endorse.

Article 2 of the Annex II makes reference of the “legal status of a CSD”, most likely referring to what kind of company or legal form is the CSD incorporated in. The term is unclear and should be further explained.

*We would therefore suggest amending Article 2 of the Annex II draft RTS as follows:
(page 159 and 160 of the consultation paper)*

Article 2 - Identification and legal status of a CSD

*1. An application for authorisation of a CSD shall identify the applicant and the **services activities** that it intends to carry out.*

[...] 2. The application for authorisation of a CSD shall in particular contain the following information:

*[...] (m) where applicable, the list of any services that the CSD is providing or intends to provide under Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments **which are not expressly listed in Sections A and B of the Annex to Regulation (EU) No 909/2014**”;*

*[...] (o) the currency or currencies it processes, or intends to process, **irrespective of whether cash is settled on a central bank account, a CSD account, or an account at a designated credit institution**;*

*We would therefore suggest amending Article 3 of the Annex II draft RTS as follows:
(page 160 and 161 of the consultation paper)*

Article 3 - Policies and procedures required under this Regulation

1. Where an applicant CSD is required to provide information regarding its policies or procedures under this Regulation, it shall ensure that the policies or procedures contain or are accompanied by each of the following items:

*(a) an indication of the **persons department** responsible for the approval and maintenance of the policies and procedures;*

*(b) a description of how compliance with the policies and procedures will be ensured and monitored, and the person **or department** responsible for compliance in that regard;*

*(c) a description of the **type of** measures to adopt in the event of a breach of policies and procedures.*

[...] 2. An application for authorisation shall contain the procedures or a description of the procedures in place for employees to report internally actual or potential infringements for reporting to the competent authority any material breach of policies or procedures of a CSD, in particular when such infringement may result in a breach of the conditions for initial authorisation, as well as in any infringement of Regulation (EU) No 909/2014 in accordance with Article 65 of Regulation (EU) No 909/2014.

Information for groups

We recognise the efforts made by ESMA to accommodate the different corporate group structures existing among CSDs in the RTS.

However in a two-tier structure like e.g. the one prevailing in Germany, the supervisory board (upper tier) is not responsible for the day to day operations. As such, the supervisory board is not supposed to sign the CSD application form as this will be the sole authority of the executive board (lower tier). Accordingly, the senior management and management body in this case should be understood twice as the executive board, and as such the application will need to be signed by two members of the executive board. This needs to be further clarified, so that the situation of two-tier structure CSDs will be fully in line with the requirements set under Article 2.1 of the Annex VI. (See also item 136 of the ESMA consultation text)

Article 4.1.b. sets the requirement to provide the composition of the parent undertaking or group of undertakings. We assume that ESMA aims to obtain information on the parent company and other relevant group entities (such as other CSDs or credit institutions) rather than on all the possible entities part of the group. We therefore suggest amendments hereunder in this direction.

We would therefore suggest amending Article 4 of the Annex II draft RTS as follows: (page 161 of the consultation paper)

Article 4 - Information for groups

1. Where an applicant CSD is part of a group of undertakings **which includes** other CSDs and credit institutions referred to in Title IV of Regulation (EU) No 909/2014, the application for authorisation shall contain the following items:

(a) policies and procedures specifying how the organisational requirements apply to the group and to the different entities of the group, from the perspective of the interaction with the applicant CSD;

(b) information on the composition of the senior management, management body and shareholders of the parent undertaking **or any other CSD and credit institutions belonging to the same** group of undertakings;

(c) services as well as key individuals other than senior management that are shared by the group.

2. Where the applicant CSD has a parent undertaking, the application for authorisation shall additionally:

(a) identify the legal address of its parent undertaking;

(b) indicate whether the parent undertaking is authorised or registered and subject to supervision, and when this is the case, state any relevant reference number and the name of the competent authority or authorities.

3. Where the applicant CSD offers, or plans to offer, through an undertaking within its group, ~~or through an undertaking with which the applicant CSD has an agreement~~, ancillary services permitted under section B of the Annex to Regulation (EU) No 909/2014, the application for authorisation as CSD shall contain a description of the respective ancillary services.

(...)

In this particular Article 4.1.b, ESMA refers to certain management functions of “group of undertakings”. There is no common understanding in previous legal documents of such “group of undertakings”, therefore reference to this concept should be removed and the requirement clarified with commonly used terminology.

Financial resources and International Accounting Standards (IAS)

Mandating the reporting of CSD financial statements under international accounting standards for non-publicly traded companies, such as the CSDs, would go beyond the Regulation (EC) 1606/2002 requirements and beyond the mandate given to ESMA under the level-1 Regulation. Article 5.1.a and b include a reference to specific accounting standards and financial reporting standards, we believe that the RTS should not impose additional financial reporting standards on CSDs, besides from the existing accounting ones used by CSDs and agreed by the competent authority of the CSD.

Moreover, on the resolution plan – if existent – this is generally prepared by the national resolution authority and may not to be necessarily disclosed to the CSD. This might be different in all jurisdictions, as the minimum requirement is to disclose some elements like a “key summary”. This is the case in the provisions of the Directive 2014/59/EU (Bank Recovery and Resolution Directive (BRRD)), under Article 10 (and especially paragraph 1 of that article) and under the German law on recovery and resolution of banks (under §§ 40 and especially paragraph 5). Consequently, the CSD cannot be made accountable to hand in the resolution plan established and maintained for it as it does not necessarily be in possession of such plan.

*We would therefore suggest amending Article 5 of the Annex II draft RTS as follows:
(page 162 of the consultation paper)*

Article 5 - Financial reports, business plans, recovery plans and resolution plans

1. An application for authorisation of a CSD shall contain the following financial and business information about the applicant CSD:

(a) a complete set of financial statements, ~~prepared in conformity with Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards~~, for the preceding three years;

(b) financial reports including the statutory audit report on the annual and consolidated financial statements, ~~within the meaning of Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts~~, for the preceding three years,

[...] 5. The application shall also include:

[No changes to point (a)]

~~(b) the resolution plan established and maintained for the CSD so as to ensure continuity of at least its core functions, having regard to the size, systemic importance, nature, scale and complexity of the activities of the CSD concerned.~~

(b) any information deemed necessary to ensure that the resolution plan established and maintained by the resolution authority ensures the continuity of at least the CSD core functions, having regard to the size, systemic importance, nature, scale and complexity of the activities of the CSD concerned."

Business plans

Article 5.1.d. of the draft RTS includes a requirement for CSDs to include in its application for authorisation a business plan contemplating different business scenarios for the CSD services, for a three years period. Considering that requirement is addressed to existing and future CSDs

seeking to obtain a license under the new franchise, as a form of grandfathering for the existing CSDs, we believe that such a requirement should only be imposed for new CSD looking for initial authorisation, as this draft RTS would otherwise impose an additional requirement, which is not likely to provide any important new elements to the competent authority who readily knows the business plans of existing CSD(s) under its supervision.

We would therefore suggest amending Article 5.1.d. of the Annex II draft RTS as follows:

Article 5 - Financial reports, business plans, recovery plans and resolution plans

1. An application for authorisation of a CSD shall contain the following financial and business information about the applicant CSD:

(...)

*(d) **newly established CSDs should provide** a business plan, including a financial plan and an estimated budget, contemplating different business scenarios for the CSD services, over a minimum of three years reference period.*

Corporate governance

Risk management procedures are not part of the overall "corporate governance" we therefore recommend deleting Article 8.1.b accordingly.

*We would therefore suggest amending Article 8 of the Annex II draft RTS as follows:
(page 164 of the consultation paper)*

Article 8 - Corporate governance

1. An application for authorisation of a CSD shall contain in accordance with Article 26 of Regulation (EU) No 909/2014 and the respective RTS:

[No changes to (a)]

[...] ~~(b) the processes to identify, manage, monitor and report the risks to which the applicant CSD is or might be exposed.~~

We refer to the comments made by our association ECSDA in relation to Articles 10, 11 and 14 of the Annex II, which we fully endorse.

Transparency requirements

We are of the opinion that the RTS requirement under Annex II Article 18.1 is clearly beyond the level-1 requirements. Article 34 of the CSD Regulation requires CSDs to "publicly disclose the prices and fees associated with the core services listed in Section A of the Annex". Hence under level-1 regulation CSDs are only required to disclose to the competent authority "the cost and revenue of the ancillary services provided as a whole". The different treatment of core and ancillary services under Article 34 aims to avoid competitive distortions, and is the result of a political compromise of the EU legislator that recognises that other market actors other than CSDs also provide services listed in Section B or C of the Annex, without these being subject to such transparency requirements.

While we support the introduction of harmonised transparency measures (as originally agreed on 18 Dec 2013), we also believe that ancillary services are provided by CSDs in a different mode as core services, and in a highly competitive environment. This should follow a fair, reasonable and non-discriminatory approach and be in compliance with existing national and European antitrust laws.

In this context we draw your attention to Neelie Kroes, former Commissioner for Competition Policy, statement on the DG Competition's opinion on price transparency for market infrastructures: ... "We have called for price transparency so participants can understand ex-ante the likely cost of the operations they require, so they can choose to only purchase the services they need. It does not mean that they need to know the cost of their competitors' operations as well. Uncertainty over the fees charged to competitors enables customers to drive a harder bargain, and get a deal which takes into account the overall value, present and future, of their business to the service provider. This incentive must not be weakened." We believe the current wording of Article 8 of Annex II is in fact going against this aim.

*We would therefore suggest amending Article 8 of the Annex II draft RTS as follows:
(page 164 of the consultation paper)*

Article 18 - Transparency

*1. An application for authorisation of a CSD shall contain relevant documents regarding pricing policy, including any existing discounts and rebates and conditions to benefit from such reductions for each core **and ancillary** services that are to be disclosed in accordance with Article 34 of Regulation (EU) No 909/2014.*

2. The applicant CSD shall provide the competent authority with a description of methods used in order to make the information available for clients and prospective clients, including a copy of the fee structure and the evidence that the CSD services are unbundled.

3. The applicant CSD shall also provide the competent authority with information on the costs and revenues of ancillary services provided by the CSD, taken as a whole."

*For the same reason, Recital (8) of the Annex II draft RTS should be amended as follows:
(page 155 of the consultation paper)*

*(8) The fees associated with the services provided by CSDs are important information which should form part of the application for authorisation of a CSD in order to enable the competent authorities to verify whether they **comply with the conditions set under Regulation (EU) No 909/2014 are proportionate, non-discriminatory and unbundled.***

Book entry form

We would like to draw ESMA's attention to the comments made in the Executive Summary section (page 4 second paragraph) which lists under the "reasons for publication", that the "CSDR introduces an obligation to represent all transferable securities in book entry form and to record these in CSDs before trading them on regulated markets".

We welcome ESMA's interpretation of CSD Regulation requiring eligibility and recording of securities prior to any trading on regulated markets. Such pre-trade recording removes indeed the risk of settlement failure for trades concluded on regulated markets due to the post-trade discovery of non-eligibility and non-transferability of such securities.

Clearstream is however aware of different interpretations of CSD Regulation for this specific topic. The clarification brought by ESMA, should therefore rectify the incorrect interpretation by some market players who might have read the level-1 text, specifically Article 3.2 "Book-entry form" of CSD-R as allowing transactions on a trading venue prior to the recording of such securities in book entry form in a CSD. According to their interpretation of CSD-R, it is sufficient if securities are recorded in a CSD on or before the intended settlement date.

We are fully in line with the arguments raised by ECSDA in relation to the proposed deletion of Article 20 of the Annex II on "book entry form", for the same reasons raised by our association.

We would therefore suggest amending Article 20 of the Annex II draft RTS as follows:

Article 20

Book-entry form

An application for authorisation of a CSD shall contain information that demonstrates that the applicant CSD is capable to comply with Article 3 of Regulation (EU) No 909/2014. (...)

Portability

The concept of portability is only known in the CCPs sphere of activities, hence possibly coming from the EMIR RTS structure. However this concept is not per se applicable for CSDs, who in the case of withdrawal of its authorisation would have the obligation to close all pending settlement transactions in its customers' accounts, for them to decide transferring such account holdings to the alternative CSD of its choice.

Also in relation to Article 27, ESMA introduces a difference between the understanding of "clients" and "participants", to avoid any room for misunderstandings we would propose to embrace the term "participants" exclusively.

Having said the above, and as suggested by our association, we believe that the rationale of Article 27 under Annex II could be achieved by simply referring to the "transfer of participants and clients' assets", in line with the level-1 terminology.

We would therefore suggest amending Article 27 of the Annex II draft RTS as follows:
(page 172 of the consultation paper)

Article 27 – Portability Transfer of participants assets in case of a withdrawal of authorisation

An application for authorisation of a CSD shall contain the procedure put in place by the applicant CSD in accordance with Article 20(5) of Regulation (EU) No 909/2014, ensuring the timely and orderly settlement and transfer of the assets of ~~clients and~~ participants to another CSD of their choice in the event of a withdrawal of authorisation of the applicant CSD.

Outsourcing contracts

We find the mandatory requirement to hand in (all) outsourcing contracts regardless of its materiality as an overloading requirement both for the requesting CSD as for the competent authority. As such, only material contract with significant importance should be included to the application form and any other outsourcing agreement may be delivered to the competent authority based on an individual ad-hoc request.

We are fully in line with the arguments raised by ECSDA in relation to the proposed amendment for Article 30 and 33 of the Annex II, for the same reasons raised by our association.

We would therefore suggest amending Article 30 of the Annex II draft RTS as follows:
(page 173 of the consultation paper)

Article 30 - Operational risks

[...] 2. An application for authorisation of a CSD shall also contain the information on ~~material~~ the outsourcing agreements referred to in Article 30 of Regulation (EU) No 909/2014, entered into by the applicant CSD in accordance with Article 30 of Regulation (EU) No 909/2014, together with the methods employed to monitor the service level of the outsourced functions and a copy of the contracts governing such arrangements.

We would therefore suggest amending Article 33 of the Annex II draft RTS as follows:
(page 174 of the consultation paper)

Article 33 - CSD Services

An application for authorisation of a CSD shall include ~~a detailed descriptions and procedures to be applied in the case of the~~ services that the CSD provides or intends to provide covering the following:

CSD links

Excessive or double regulatory requirements need to be avoided. The requirements for CSD links are set out in Article 48 of the level-1 text and should cover all major aspects sufficiently. In our view, this is necessary not only to avoid burdensome rules and requirements that will not be able to be implemented, but also to avoid the application of conflicting standards for CSDs. This is most particularly true for the cross-border links they operate. Assessing all potential sources of risks in the context of CSD links falls within this context as is neither realistic nor achievable.

We would therefore suggest amending Article 34 of the Annex II draft RTS as follows:
(page 175 of the consultation paper)

Article 34 - CSD Links

1. Where the applicant CSD has established or intends to establish a link, the application for authorisation shall contain the following information:

(a) procedures regarding the identification, assessment, monitoring and management of all **material potential** sources of risk for the applicant CSD and for its participants arising from the link arrangement, including an assessment of the **relevant** insolvency law **applicable**, and the appropriate measures put in place to mitigate them; [...]

Standard forms and templates for the application

Article 1.5 of Annex VI of the ITS, states that CSDs can be required by their competent authority to provide translations of their (entire) application documents in other languages.

We suggest considering a comparable approach to what the EMIR RTS currently allows for the application for authorisation documents for CCPs, which does not prescribe translations of documents. Such translations are extremely costly to produce for CSDs.

Relevant authorities involved in the authorisation process of the CSD, should agree to a single common language to be used for the application process, and inform the CSD which language should be used for the application before to the start of the authorisation completion process.

We would therefore suggest amending Article 1.5 of the Annex VI draft ITS as follows:
(page 260 of the consultation paper)

Article 1 - Standard forms and templates for the application

(...)

5. Information shall be submitted in the language indicated by the competent authority **in conformity with the relevant authorities' consensus. The competent authority may request the CSD to submit the same information in more than one language.**

Q16: What are your views on the proposed draft RTS on CSD review and evaluation (Chapter III of Annex II) and draft ITS (Chapter II of Annex VI)?

<ESMA_QUESTION_TS_CSDR_16>

Similar to the comments raised in our response to ESMA's discussion paper of May 2014, we are still of the opinion that the currently proposed annual CSD review and evaluation are adding an overly formal and burdensome procedure which should be avoided.

We refer to the comments made by our association ECSDA in relation to the proposed draft RTS on CSD review and evaluation (Chapter III of Annex II) and draft ITS (Chapter II of Annex VI), which we fully endorse.

While we fully understand that the CSD relevant authorities should have increased all necessary tools to implement their ongoing supervision, we also note that CSDs readily have the obligation under CSD-R Article 16 §3 to "inform competent authorities without undue delay of any material changes affecting the conditions for authorisation". Moreover, RTS should also acknowledge that there is already an efficient ongoing supervisory regime in place, which will not be enhanced by requiring yearly additional extensive ad-hoc reviews. In order to keep the review procedure as efficient as possible, for the CSD as well as for the competent authority, an overly formal and burdensome additional annual review procedure should thus be avoided.

Avoiding the duplication of information should be the norm. As well as making efficient use of the information already provided by the CSD to the competent authority. Any review exercise to be implemented should rely as much as possible on information already provided by the CSD. CSDs should only be required to provide additional information where those are not yet available to the competent authority. Examples of this can be found in the several reports to be provided under the CSD-R and RTS requirements, the yearly self-assessments and disclosure against the CPMI-IOSCO Principles for Financial Market Infrastructures, which already should cover most of the information required for the review.

Focusing on relevant updates only would also considerably facilitate the work for competent authorities and thus contribute to the efficiency of the supervision process. We support ESMA's intention to focus on the quality of the documentation rather than on the quantity and that "only relevant documents should be provided". This principle should be clearly reflected in the draft technical standards.

In conjunction with the above, we refer to the comments made by our association ECSDA in relation related to the access to data by the competent authority (Article 38), documents that have been materially modified (Article 40), information relating to periodic events (Article 41) and statistical data (Article 42), which we fully endorse.

Access to data by the competent authority

We would therefore suggest amending Article 38 of the Annex II draft RTS as follows: (page 177 of the consultation paper)

Article 38 - Access to data by the competent authority

1. For the purpose of the review and evaluation as referred to in Article 22(7) of Regulation (EU) No 909/2014, a CSD shall provide the information as defined in this chapter ~~together with a self-assessment on the CSD's activities overall compliance with the provisions of Regulation (EU) No 909/2014 during the review period~~, and any other information as requested by the competent authority.

We also note that the combination of the requirements set under Article 37 on material changes, and Article 39 on “reporting material changes” seem to be duplicating themselves, and hence creating an unnecessary reporting overload.

While we can understand the need for timely information on material changes being provided to the competent authority, we fail to see the need for an additional yearly report summarising “material changes” and a “self-assessment against Article 37”, we therefore propose to delete entirely Article 39 as we cannot see the need for both in parallel.

The competent authority is in the position by analysing the information received under Articles 37 and 38 and other ongoing information to perform its tasks without forcing the CSD to summarize what it has already delivered throughout the year.

We would therefore suggest deleting Article 39 of the Annex II:
(page 177 of the consultation paper)

~~**Article 39 – Report on material changes introduced to the arrangements, strategies, processes and mechanisms implemented by a CSD**~~

(delete)

Documents that have been materially modified

We would therefore suggest amending Article 40 of the Annex II draft RTS as follows:
(page 177 and 178 of the consultation paper)

Article 40 - Documents submitted in the application for authorisation that have been materially modified

A CSD shall provide all documents submitted to the competent authority in the application for authorisation which have been **materially** modified in the review period.

Information relating to periodic events

It is unclear to us what the understanding of “management accounts report” as requested under Article 41.1.b should be. We assume ESMA is requesting CSDs to send the most recent annual accounts / financial statements including any management report if required under the accounting standards in place at national-level, and / or any interim financial statements (if available). However, “management accounts report” is not a common term in financial aspects, and further precision should be provided in this regard should ESMA expect any additional information on top of what listed above.

Mandating the immediate reporting of “any” operational incident as required under Article 41.1.k as well for “any” internal control performed in the review period as required under Article 41.o. seems to be overstressing the information needs of the competent authority. For such information being relevant for the authorities, we should rather be aiming for “material” incidents only and for the internal control performed to avoid that the report would include any check on any instruction, the competent authority should receive “summarised information on key internal controls performed and the internal control framework” instead.

Similar to our answer to Q2, we do not see any benefit to the provision of a summary on manual interventions as requested under Article 41.1.l. As earlier mentioned, we believe the competent authority should rather be interested in “types” or “clusters” of manual intervention data falling into the “manually changed/repared data” and decide accordingly whether to look closer into such selected clusters. The requirement to provide an additional summary report should be further weighted against these and other arguments readily provided in our response to Q2.

Further on Articles 41.1.m and n, we fail to grasp the material difference in the requirements laid out in these two paragraphs; we are proposing changes to the RTS text hereunder to introduce further clarity in this regard.

Finally the requirement to provide a “business operations report” under Article 41.1.r is not precise enough to be implementable. Further information should be specified in the RTS, such as a “business operations report outlining business activities, processed volumes and key performance figures”.

We would therefore suggest amending Article 41 of the Annex II draft RTS as follows: (page 178 and 179 of the consultation paper)

Article 41 - Information relating to periodic events

1. For each review and evaluation, the CSD shall provide to the competent authority, **where relevant**:

[...] (e) information on any pending judicial, administrative, arbitration or any other litigation proceedings, particularly as regards tax and insolvency matters, that the CSD ~~may be~~ **is** party to, and which may incur significant financial or reputational costs;

(f) information on any pending judicial, administrative, arbitration or any other litigation proceedings, irrespective of their type, that a member of the management body or a member of the senior management ~~may be~~ **is** party to and that may have an adverse impact upon the CSD;

[...] (h) information on any **formal** complaints received by the CSD in the review period, specifying the nature of the complaint, the handling of the complaint and date when the complaint was resolved;

[...] (j) information on any **material** changes affecting any links of the CSD, including the mechanisms and procedures used for settlement;

[...] (k) information on **any** operational incidents that occurred in the review period and affected the smooth functioning of any core services provided;

[...] (m) information on **all new** cases of identified conflicts of interest that occurred in the review period, including the way in which they were managed;

(n) information on measures taken to address the identified technical incidents ~~and conflicts of interest~~ as well as the results thereof;

[...] (r) **relevant** business operations report concerning the review period;

[...] (t) information on any **material** changes to the recovery plan, including the identification of the CSD's critical services, results of stress scenarios and recovery triggers, as well as the CSD recovery tools.

[...] ~~(u) information on any changes to the resolution plan established and maintained for the CSD so as to ensure continuity of at least its core functions, having regard to the size, systemic importance, nature, scale and complexity of the activities of the CSD concerned, and any relevant resolution plan established in accordance with Directive 2014/59/EU;~~

(u) in cases where the competent authority is also the resolution authority of the CSD, any information deemed necessary to ensure that the resolution plan established and maintained by the resolution authority ensures the continuity of at least the CSD core functions, having regard to the size, systemic importance, nature, scale and complexity of the activities of the CSD concerned, including any relevant resolution plan established in accordance with Directive 2014/59/EU;

Statistical data

We note that the requested to provide information under Article 42.1.j is unclear. The “value of activities” can be calculated either transaction-wise or position-wise, this should be clarified

further. Moreover, the reference to “categories of institutions” should also be considered in relation to either transactions or positions held. Hence, the RTS should require either “categories of instruments” or “categories of counterparties”, but in its current form it is unclear what information should be provided to build on the statistical data requirements.

We would therefore suggest amending Article 42 of the Annex II draft RTS as follows: (page 180 and 181 of the consultation paper)

Article 42 - Statistical data to be delivered for each review and evaluation

1. For the purpose of the review and evaluation, the CSD shall provide the following statistical data to the competent authority covering the review period, **if and when applicable**:

[No changes to (a)]

(b) a list of ~~issuers and a list of~~ securities issues **maintained settled** by the CSD, including information on ~~the issuers' country of incorporation, highlighting~~ those **securities for which whom** the CSD provides notary services;

(c) **where available**, nominal **and or** market value of the securities maintained in each securities settlement system operated by the CSD in total and divided as follows:

(i) by asset class (as specified in point d) of Article 4(2) of Regulation (EU) No ... [RTS on settlement discipline];

~~(ii) by country of incorporation of the participant;~~

~~(iii) by country of incorporation of the issuer;~~

(d) **where available**, nominal **and or** market value of the securities centrally maintained in each securities settlement system operated by the CSD, divided as follows:

(i) by asset class;

~~(ii) by country of incorporation of the participant;~~

~~(iii) by country of incorporation of the issuer.~~

(e) **where available**, number, nominal value and market value of settlement instructions settled in each securities settlement system operated by the CSD in total and divided as follows:

(i) by asset class;

~~(ii) by country of the incorporation of the participant;~~

~~(iii) by country of incorporation of the issuer;~~

[...]

New definitions and new CSD service's distinctions

We also have noted that ESMA introduces under Article 42 within the requirements to provide statistical data to be delivered for each review and evaluation, an artificial distinction between several possible roles of the CSDs which are not recognised in the level-1 legislation and which lead to confusion.

We object to the introduction via the level-2 rules of a differentiation of the CSD services, not envisaged nor expected under the level-1 text.

The level-2 text introduces: a) new CSD definitions (such as the term of investor CSD or issuer CSD and respective definitions), b) new specific roles for the CSDs (by using terms such as “centrally maintained securities” in contrast to “maintained securities”), and new services (such as the “settlement service from an issuer perspective” versus the “settlement service from a participant’s perspective”). These newly introduced distinctions should be removed, as contrary to the level-1 text and the overall aim of the legislator.

Reference of the use of these new definitions, terminology and newly introduced distinctions between the CSD services are listed hereafter, for its removal from the future in the RTS and TA:

- Definition TS document Annex III Art 1 on page 203
TS document Annex IV on page 242
- Reference TS document on para. 312 (page 89)
TS document on para. 319 (page 90)
TS document Annex III Art 10 on page 215
TS document Annex IV end of Art 6 (page 252)
TS document Annex VII Table 2 (page 313)
TA document on para. 81 (page 21)
TA document on para. 84 (page 22)
TA document on para. 85 (page 22)
- Reference to the distinction between "central maintenance services" vs "maintenance services"
TS document Art 42.1 (c) and (d) (page 180)
ITS document Annex VI Table 3 line 2, 3 and 4 (page 291)
ITS document Annex VI Table 3 line 10 (page 298)
TA document on para. 81 (page 21)
TA box on page 21+22
TA document on para. 84 (page 22)
TA document on para. 85 (page 22)
- Reference to the distinction between "settlement service – issuer’s perspective" vs "settlement service – participant’s perspective"
TA box on page 27+28
- <ESMA_QUESTION_TS_CSDR_16>

Q17: What are your views on the proposed draft ITS on cooperation arrangements as included in Chapter III of Annex VI?

<ESMA_QUESTION_TS_CSDR_17>

CSDs are not best placed to comment on the proposed draft ITS on cooperation arrangements and requirements regarding the cooperation between authorities of the home and of the host Member States. The freedom for CSDs to provide services in other Member State (or CSD passport) and the cooperation between authorities, are clearly stated under Article 23 and 24 of the level-1 text.

As such, authorised CSDs may provide services throughout the Union, including through setting up a branch (Article 23.1), and when a CSD has set up a branch in another Member State, the authorities of the home and host Member States shall cooperate closely (Article 24.1). However newly introduced nuances in the concept of “substantial importance” are fissuring this agreed principle.

Our answers to Q19 of the RTS consultation and Q6 of the TA consultation might provide some guidance to the striking concerns that have been identified around these cooperation arrangements.

In a nutshell we are pointing to the fears that the RTS and the latest version of the CSD-R level-1 text will be introducing an unofficial and unsanctioned form of “colleges” for the supervision of the CSDs, due to the combination of 3 factors:

- The CSD-R level-1 text on “substantial importance” was modified between the trilogue compromise version approved in COREPER, and the version published. The difference in the text refers to the elimination of a reference that cooperation arrangements would be applicable only to “CSD that has established a branch” as opposed to the “the activities of a CSD”, such a minor change has significant impact to the scope of cooperation

to be put in place in case of systemic importance, and is contrary to the spirit of the trilogue compromise found among legislators on 18 Dec 2013 (please refer to the specific text hereunder)).

- The thresholds introduced under the draft TA standards, regarding the identification of a CSD “substantial importance”,
- The approach regarding the determination of the most relevant settlement currencies under Article 48 and 49 of the RTS set in Annex II.

Despite the very sophisticated authorisation and supervision process readily existing in the level-1 text, the combination of the above factors and thresholds is likely to lead to de facto “colleges” of supervisors and overseers for CSD, a factor that was consciously avoided by the legislators as a lesson learned from the implementation of EMIR.

CSDs would certainly not benefit from the creation via the back door of colleges. We believe the above elements are contrary to the spirit of the level-1 text as originally agreed on 18 Dec 2013.

(for the ease reference)

Text of CSD-R approved by COREPER:

*CSD-R Art 24.4 (...) When, taking into account the situation of the securities markets in the host Member State, the activities of a CSD **that has established a branch** have become of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State, the home and host competent and relevant authorities shall establish cooperation arrangements for the supervision of the activities of that CSD in the host Member State.*

Text of CSD-R published:

CSD-R Art 24.4 (...) When, taking into account the situation of the securities markets in the host Member State, the activities of a CSD___have become of substantial importance for the functioning of the securities markets and the protection of the investors in that host Member State, the competent authority of the home Member State and of the host Member State and the relevant authorities of the home Member State and of the host Member State shall establish cooperation arrangements for the supervision of the activities of that CSD in the host Member State.

<ESMA_QUESTION_TS_CSDR_17>

Q18: What are your views on the proposed draft RTS on CSD recognition (Chapter IV of Annex II)?

<ESMA_QUESTION_TS_CSDR_18>

In order to ensure a level playing field is maintained in the context of third country CSDs, and most particularly with regards to CSD recognition when applicable, identical requirements shall apply to EU and third country CSDs, including reporting and statistical data provision.

While we agree that the principle of non-discrimination should apply, it needs to be stressed that recognition by ESMA should not be granted when the same kind of treatment will not be given to EU-CSDs when they are active outside of the EU. In other words, while a non-EU CSD would only be under the obligation to fulfil the EU requirements to be recognised, an EU CSD aiming to provide services in that country may be under more severe requirements or even excluded from providing services all together. As a result, without equivalence provisions, an EU-CSDs may be subject to competitive disadvantages that may permit non EU-CSDs to offer more competitive pricing and services to EU participants who would be tented to rely then on non EU-CSD's services.

In this context it should be noted that whilst such non-EU CSD would be subject to recognition of ESMA and there would be cooperation with the national regulator, the EU competent and relevant authorities have no means themselves to impose regulatory measures to ensure compliance with the CSD Regulation. An important impact on the safety and efficiency to cross-border settlement could not be immediately dealt with by the EU authorities.

For this reason, additional requirements to meet equivalence, such as at least the legal and factual possibility for the EU-CSDs to provide services in the non-EU CSD home-country and the assurance of enforceable regulatory measures for EU authorities should be imposed as a requirement for recognition.

ESMA seems to recognise these same goals under paragraph 155 of exposition of motives of the present consultation when it says that “that equivalence will be a pre-requisite for EU recognition and as part of the equivalence process the European Commission will need to assess whether the third country has an effective equivalent system for the recognition of CSDs authorised under third country legal regimes.” However, we cannot reconcile how this “equivalence pre-requisite” translates into the text of the RTS at all.

Moreover, while we acknowledge that the currently proposed requirements for the recognition procedure now include a self-assessment requirement under Article 47.4, this exercise seems to be designed as a one off static exercise. It is our understanding that once a third country CSD is recognised, through the procedure under Article 47, there will be no follow-up arrangements or requirements to ensure that ongoing supervisory equivalence is also applied. It will have to be considered how this can be turned into a more dynamic approach that ensures continued equivalence.

We would therefore suggest amending Article 47 of the Annex II draft RTS as follows:
(page 183 of the consultation paper)

Article 47 - Content of the application

1. An application for recognition shall be submitted to ESMA in accordance with the form included in Annex I.
2. Without prejudice of the previous paragraph:
 - (a) an application for recognition shall be provided in an instrument which stores information in a durable medium as defined in Article 2(1)(m) of Directive 2009/65/EC of the European Parliament and of the Council¹⁵;
 - (b) the applicant shall give a unique reference number to each document; and
 - (c) the applicant shall provide a reason if the information is not submitted.
3. The application for recognition shall also include an assurance letter from the third country authority certifying that the applicant CSD is duly authorised, supervised and compliant in that third country.
4. The applicant CSD shall include a self-assessment by the applicant CSD regarding its compliance with the third country rules which are equivalent to Regulation No (EU) No 909/2014 and relevant Commission Delegated Regulations.
- 5. Once recognised in accordance with Regulation (EU) No 909/2014, the recognised CSD shall provide to ESMA information about any material changes to the conditions under which the recognition has been granted in line with Article 37 and 38 of this Commission Delegated Regulation (EU) No .../2015**

Q19: What are your views on the proposed approach regarding the determination of the most relevant currencies?

<ESMA_QUESTION_TS_CSDR_19>

The proposed approach regarding the determination of the most relevant currencies raises some concerns. It is our understanding that, “the central banks of the Union issuing the most relevant currencies in which settlement take place” combined with the 5% threshold, will in fact design a unique role for the UK regulator based on the significant role the Pound Sterling plays in European financial markets. And this despite the very sophisticated authorisation and supervision process readily existing in the level-1 text.

Also with regards to the “the central banks of the Union issuing the most relevant currencies in which settlement take place”, raises the question of who should be considered as the central bank of issue of the Euro. Should this be understood as the role of the ECB or the role of the relevant National Central bank of the country in which the CSD is legally incorporated. ESMA might want to consider shedding some light to this question.

Another unforeseen consequence of the above approach combined with the Technical Advice measures aimed to determine the “significant importance of CSDs”, is likely to be the creation of “supervisory colleges” for CSDs (and this despite the fact that the level-1 text does not foresee it for duly justified reasons). The different voting procedures and majority definitions provided in the current draft RTS are likely to create a situation in which the competent national authority will not remain as the key decision maker

<ESMA_QUESTION_TS_CSDR_19>

Q20: What are your views on the proposed draft RTS on banking type of ancillary services (Chapter VI of Annex II) and draft ITS on banking type of ancillary services (Chapter IV of Annex VI)?

<ESMA_QUESTION_TS_CSDR_20>

While we essentially subscribe to the proposed draft RTS on banking type of ancillary services, these level-2 measures should be fully consistent and compatible with existing international standards and market practises, this to allow a smooth transition into the Europe-wide settlement harmonisation projects. Having said this, in the lack of knowing the content of the future EBA technical standards on this same banking type of ancillary services, we are obliged to assess these ESMA technical standards in isolation since the corresponding technical standards from EBA are still missing.

Based on the above mentioned caveat, we should point out that there is currently no existing framework imposing or implementing the capital surcharge referred under Article 54.3.d of the CSD-R text. This capital surcharge will only be valid once the authorisation under CSD-R is granted and a respective surcharge is properly implemented in the Member State of incorporation of the CSD. More importantly, it is not the duty of the CSD itself to impose such surcharge, the evidence of law should be known by the competent authority receiving the application and the CSD can only demonstrate its approach and ability to fulfil it. We therefore propose to remove the provisions set in Article 50.1.e. and Article 50.3.j.

Further on Article 50.1.g, we believe the proposed RTS most likely contains by error similar requirements than those specified under Article 50.1.h, which are related to the programme of operations which should be segregated. This duplication should be addressed.

Moreover, regarding the requirement to provide the resolution plan under the Bank Recovery and Resolution Directive (BRRD), we would like to raise once more the same concerns as identi-

fied in our answer to Q15, by which such resolution plan should not necessarily be in the possession of the CSD. Only the “summary received from the resolution authority”, and only if received, could be delivered by the CSD under these requirements.

Further clarity should be provided with regards to the requirement under Article 50.1.h.iii.a. of the Annex II, which requires an “analysis” of the IT organisation and risk. We believe ESMA is implicitly requesting to obtain a description or an overview of the IT organisation and its risk. A rephrasing in this regard would provide further clarity, and this is also true with regards to Article 50.3.m.i.

With regards to the forms attached to the RTS, we have the following comments:

- In case the CSD intends to provide itself the banking type of ancillary services and applies for this together with the CSD application form, as such, we do not understand why on page 193 the requirements under lines 1 – 4 and 6 are needed as they are already in the CSD application itself.
- Furthermore, lines 5 – 6 should only be completed in case different from the CSD application as such. The requirements set under Article 54.3.d of the CSD-Regulation, will only be applicable to those CSDs that would have been authorised under the new procedure. This is therefore incompatible with the requirement in item 9 to provide such a date to be fixed by the regulation on the date of granting its authorisation and having such requirements in place under national law.
- In case the CSD want to appoint a third party under Article 54.2.b of the CSD-Regulation for the operations of the banking type of ancillary services together with its own application as CSD, the same objections to items 8 as for item 9 above apply.
- While we agree to the Annex II fields in principle, we nevertheless kindly ask to consider moving item 5 (which relates to the CSD itself) in the CSD application of Annex I instead.
- Documents in section A of Annex II seem to be unrelated to the documents under section B. As such, we fail to understand the rationale for the following items in section B (first template):
 - item 1) and 4)
 - item 2) may be obsolete in case the CSD is applying to provide the banking type of ancillary services itself.
 - Item 5) is irrelevant in the case the application is handed in together with the general application as CSD.
 - items 10) and 12 (a) we refer to our comments above.
- Similarly, for the second template in section B of the Annex II we have the following comments:
 - Items 1) seems to be obsolete in combination with the information readily provided in section A.
 - Item 2) is to be read as related to the CSD (see item 7) for the credit institution), however this is not clear and nevertheless irrelevant as this should be available in any case already (and especially if done at the same time as the CSD application itself).
 - Item 5) may be obsolete in case done at the same time as CSD application itself. For item 16 (a) see our comments above.

- Finally, we are pleased to see no requirements for the resolution plan is asked, which should remain unchanged.

With regards to the specific proposals on Chapter VI of Annex II and Chapter IV of Annex VI, we refer to the comments made by our association ECSDA in relation to these draft RTS which we fully endorse.

We would therefore suggest amending Article 50 of the Annex II draft RTS as follows: (page 185 to 188 of the consultation paper)

Article 50 - Authorisation to provide banking-type ancillary services

1. A CSD shall ensure its application for the authorisation referred to in point (a) of Article 54(2) of Regulation (EU) No 909/2014 contains at least the following information [...]

~~(e) evidence, which may include articles of incorporation, legal documentation, financial statements, audit, risk-committee reports, that the capital surcharge referred to in point (d) of Article 54(3) of Regulation (EU) No 909/2014 is imposed on the CSD;~~

~~(g) the resolution plan established in accordance with Directive 2014/59/EU; a programme of operations which as a minimum: [...]~~

~~[...] (h) a formal written commitment that: [...] (iii)~~

~~[...] d. the relevant arrangements with third parties involved in the cash transfer process, such as arrangements covering the outsourced functions and the existing interoperable links;~~

~~[...]~~

3. An application for authorisation of a CSD referred to in point (b) of Article 54(2) of Regulation (EU) No 909/2014 shall contain at least the following information [...]

~~(j) evidence which may include articles of incorporation, legal documentation, financial statements, audit, risk-committee reports, or other evidence, that the capital surcharge referred to in point (e) of Article 54(4) of Regulation (EU) No 909/2014 is imposed on the designated credit institution in addition to the requirements imposed according to Regulation (EU) No 575/2013;~~

~~(m) detailed information concerning the structural organisation of the relations between the CSD and the designated credit institution, including in particular information concerning:~~

~~[...] (v) the service level agreement establishing the details of functions to be outsourced by the CSD to the designated credit institution or from the designated credit institution to the CSD and any evidence that demonstrates compliance with the outsourcing requirements set out in Article 301 of Regulation (EU) No 909/2014;~~

<ESMA_QUESTION_TS_CSDR_20>

Q21: What are your views on the proposed draft RTS on CSD participations (Chapter II of Annex III)?

<ESMA_QUESTION_TS_CSDR_21>

We would like to draw your attention to the same concerns readily raised towards the end of our answer to Q16 with regards to the new definitions for “investor CSD and “issuer CSD” as well as to the use of distinctions between the CSD services as "central maintenance services" vs "maintenance services" and “settlement service from an issuer perspective" versus the "settlement service from a participant’s perspective".

Considering Article 1 of Annex III precisely introduces the definition of “issuer CSD” and in line with our comments that such a definition establishes an artificial distinction between several possible roles and services of the CSDs which are not recognised in the level-1 legislation,

which will lead to pointless confusion, we list once more here after the areas in which such references are made, for its removal:

- Definition TS document Annex III Art 1 on page 203
 TS document Annex IV on page 242
- Reference TS document on para. 312 (page 89)
 TS document on para. 319 (page 90)
 TS document Annex III Art 10 on page 215
 TS document Annex IV end of Art 6 (page 252)
 TS document Annex VII Table 2 (page 313)
 TA document on para. 81 (page 21)
 TA document on para. 84 (page 22)
 TA document on para. 85 (page 22)
- Reference to the distinction between "central maintenance services" vs "maintenance services"
 TS document Art 42.1 (c) and (d) (page 180)
 ITS document Annex VI Table 3 line 2, 3 and 4 (page 291)
 ITS document Annex VI Table 3 line 10 (page 298)
 TA document on para. 81 (page 21)
 TA box on page 21+22
 TA document on para. 84 (page 22)
 TA document on para. 85 (page 22)
- Reference to the distinction between "settlement service – issuer's perspective" vs "settlement service – participant's perspective"
 TA box on page 27+28

We also refer you to similar concerns and comments made by our association ECSDA in relation to these draft RTS, which we fully endorse.

We would therefore suggest amending Article 1 of the Annex III draft RTS as follows:
 (page 203 of the consultation paper)

Article 1 – Definitions

For the purposes of this Regulation, the following definitions shall apply:

~~**(a) 'issuer CSD' means a CSD which provides the core service referred to in point 1 of Section A of the Annex to Regulation (EU) No 909/2014 for a securities issue.**~~

[no changes to (b)]

*(c) 'double-entry accounting' means that for each credit entry made on an **securities** account maintained by the CSD, there is a corresponding debit entry on another **securities** account maintained by the CSD.*

CSD participations

With regards to the CSD participations, it is clearly in the public interest to limit CSDs' exposures to investment losses of all kinds that could deplete the capital available to absorb losses. However, restricting participation to specific sectors does not seem a particularly useful or efficient means of mitigating those risks.

Moreover, we disagree with the requirement for the CSD to provide an independent risk analysis on its participations. This is putting an undue burden on CSDs especially in such cases with low participation values and/or related to companies offering services ancillary to CSD activities. We believe at least a waiver in this same optic should be considered by ESMA under recital (2) of the RTS in Annex III and under Article 2.1.d of the Annex III.

In general terms, we note that CSDs with banking licenses fall subject to capital adequacy standards relating both to credit exposure and to operating risk. Moreover these same CSDs are readily subject to increased capital requirements under the CSD-R for its ancillary banking services provision. It would be therefore appropriate to exempt such institutions from the restrictions proposed in Article 2.1.b

It is unclear under Article 2.1.b.iii, how a loss sharing or recovery and resolution mechanism of a legal person in which a CSD intends to participate can be measured (in order to fully capitalise against such requirement) in case the obligation is unlimited. Either further clarification is included in this regard, or the requirement should be removed.

Further on the participation requirements, ESMA should take into account the cases in which CSDs are required when using some infrastructures such as SWIFT, to acquire shares in such infrastructures if their volumes of transactions reach certain thresholds. As this participation is mandatory in order to use the said infrastructure, such situations should also be foreseen in the RTS, as CSDs should be allowed to have such participations without fulfilling all of the criteria mentioned in Article 2.1.

(You might want to consider renumbering Article 2.1, as there are no further paragraphs in Article 2).

With regards to the CSD participations we also refer you to the similar concerns and comments made by our association ECSDA in relation to these draft RTS, which we fully endorse.

We would therefore suggest amending Article 2 of the Annex III draft RTS as follows: (page 204 and 205 of the consultation paper)

Article 2 - Criteria for the participations of a CSD

1. A CSD may have a new or keep an existing participation only in a legal person other than those providing the services listed in Sections A and B of the Annex of Regulation (EU) No 909/2014 if each of the following conditions is fulfilled:

[..] (b) the CSD fully capitalises, through financial resources that fulfil the criteria as set under Article 46 of Regulation (EU) No 909/2014, the risks resulting from any:

*[...] (iii) loss sharing agreements or recovery or resolution mechanism of the legal person in which a CSD intends to participate **to the extent known or reasonably foreseeable.***

*(c) the entity in which the CSD holds a participation is providing complementary services related to the core or ancillary services offered by ~~the~~ a CSD, including **for instance**, services offered **such as***

*(i) **organised trade execution and arranging of trades,***

*(ii) **provision of clearing,***

*(iii) **collection and maintenance of data.***

~~(i) central counterparties (CCPs) authorised or recognised under Regulation (EU) No 648/2012 (EMIR);~~

~~(ii) regulated markets and MTFs subject to Directive 2004/39/EC (MiFID); or~~

~~(iii) trade repositories registered or recognised under Regulation (EU) No 648/2012 (EMIR).~~

Q22: What are your views on the proposed draft RTS on CSD risk monitoring tools (Chapter III of Annex III)?

<ESMA_QUESTION_TS_CSDR_22>

We generally agree to the draft RTS on CSD risk monitoring tools. Governance arrangements, risk management and internal control mechanisms, as well as operational structure and conflicts of interest appropriately reflect sound and prudent management of the CSD. Having said this, any standards should bear in mind that the responsibilities of the management body as well as conflict of interests rules may already (at least partially) be dealt with by national corporate and regulatory law and/or even EU law (CRD IV- for CSDs holding a banking license). Any conflict or duplicity with such other law(s) has the potential to create legal uncertainty and any rules should therefore take into account national/EU law that already deals with the same topic.

We kindly ask ESMA to elaborate further with regards to its understanding of the “internal control function” referred to in Article 5.4 of the Annex III, as these functions are not specified.

We also note that some flexibility is needed in relation to the requirement set with regards to the dedicated functions. Furthermore, we believe that there may be internal control functions at different levels of the organisation.

While we can clearly match the requirement to have a Chief Risk Officer, a Chief Compliance Officer and a Chief Auditor (but not the audit function in its entirety) to either report to the senior management, or be part of, the senior management. Considering the arguments raised in our answer to Q15 with regards to the two-tier structure countries, we disagree to the requirement to establish a reporting line to the management body, which in our view is better adapted to any corporate structure (either one- or two- tier structures), and which is in essence not substantially different from ESMA’s proposal.

Having said the above, we however disagree to have (all) the internal control functions having a mandatory reporting to the senior management or even the management body.

Related to Article 7.7 we consider a period of at least every 3 years to be more in line with general practice and as being appropriate. We therefore kindly ask to change the current proposal in that direction.

<ESMA_QUESTION_TS_CSDR_22>

Q23: What are your views on the proposed draft RTS on CSD record keeping (Chapter IV of Annex III) and draft ITS on CSD record keeping (Annex VII)?

<ESMA_QUESTION_TS_CSDR_23>

Record keeping is clearly a major concern for CSDs. While the technical standards aim should be to promote CSD’s stability throughout the EU, the proposed technical standards for record-keeping go largely beyond this goal and the level-1 text goals. ESMA should weight the massive costs these proposed standards will impose on CSDs in relation to the benefits they may provide.

As mentioned under our answers to Q14, it is very important to keep in mind that the timing of the implementation of the recordkeeping measures is closely linked to the implementation of settlement discipline requirements. Therefore, the implementation timeline of record keeping requirements must be fully aligned with the timeline ultimately agreed for penalties and buy-ins. As a minimum, the CSD records linked to the recordkeeping requirements need to be decoupled from other requirements for records as they will not be practically “implementable” until the entry into force of the settlement discipline provisions, i.e. ideally at least 27 months after publication of the technical standards.

For the purpose of further corroborating our above statements, we are including an estimation of the cost and expected implementation times for the developing the recordkeeping measures as a separate confidential enclosure.

Recordkeeping and ISO standards

Firstly, as mentioned in our answer to Q5, we note that several RTS, such as the ones related to recordkeeping, aim to impose obligations on the CSDs that require identifying, monitoring and reporting information to which we may not have access to, and thereafter imposing report obligations which are not consistent with existing ISO standards. Specifically on recordkeeping we are concerned that some of the codes being proposed by ESMA are not compatible with any ISO standards, and therefore clearly are against the spirit of the level-1 legislation, specifically Article 35 CSD-R. Such requirements could possibly hinder ongoing and future harmonising global market's initiatives.

We refer to the comments made by our association ECSDA in relation to the proposed draft RTS on recordkeeping, which we fully endorse.

Recordkeeping and business continuity records

Moreover on recordkeeping, the requirement to maintain accurate records should be dissociated from the business continuity records requirements. The scope and usage of these being different, same rules could not be used for both. It is our understanding that the provisions are readily rationalising the recordkeeping requirements only to securities records in which the CSD maintains holdings. The recordkeeping requirements are hence only applicable "where applicable and available".

Moreover, despite our comments and sustaining arguments in the previous discussion paper, the proposed technical standards still requires a direct data feed to the competent authority. We continue to believe that this requirement is not linked to the level-1 text on recordkeeping, which purpose is for CSDs to provide information that demonstrates its compliance with the CSD Regulation.

That said, we recognise that there might be cases where a need is identified for some competent authorities to have access to certain information that is not part of regular recordkeeping. In such cases, competent authorities should retain the possibility to request CSDs to keep and provide such information, but such requests will typically have a different justification and other purposes than assessing the CSD Regulation compliance.

Once again it is important to mention that CSDs may not always have all the data required available, this is particularly true for several requirements under Article 10, which cannot be provided if not directly from the issuer. Some specific problematic attributes can be mentioned here for Article 10, such as: (e) country of issue, (g) issuers' securities account identifiers, (h) issuers' cash accounts identifiers, (i) identifier of settlement banks used by each issuer.

Most particularly, the requirement of this Article will be extremely difficult to implement for "old securities" for which no such historical records would be available.

We refer to the comments made by our association ECSDA in relation to the proposed draft RTS on recordkeeping and business continuity records, which we fully endorse.

We would therefore suggest amending Article 8 of the Annex III draft RTS as follows:
(page 212 of the consultation paper)

Article 8 - General Requirements

1. A CSD shall maintain full and accurate records of all its activities. Such records shall be readily accessible, **including for business continuity purposes**, and shall include the records specified in this Regulation.
~~[...]CSD shall provide the competent authority with a direct data feed to transactions, settlement instructions, and position records, when requested by the competent authority, provided that the CSD is given sufficient time to implement the necessary facility to respond to such a request.~~

Legal Entity Identifiers (LEI)

LEI identifiers are generally not currently in use at CSD level, as their implementation has been limited so far to OTC derivatives markets, where CSDs are typically not involved. Imposing the compulsory use of LEI would require mandating changes to the universal messaging tools developed by SWIFT (not by CSDs). It is our interpretation that such a requirement would also exceed the level-1 mandate under CSD-R Article 29.

Moreover the wider use of LEI would go beyond the level of influence of CSDs and into the area of the underlying party requirements, a dimension that CSDs do not control. In order for CSDs to enforce this obligation in the future, it would in fact require a market-wide ISO review.

Generally, the proposed conversion from BIC to LEI is feasible, but also such conversion is limited to the sphere of information the CSD may have access to, hence not feasible to some of the fields required.

We would like to remind the fact that LEI identifiers are not currently in use at CSD level, and their implementation has been limited so far to OTC derivatives markets, where CSDs are typically not involved. Imposing the use of LEIs for the purpose of recordkeeping is unlikely to bring any substantial benefits. As mentioned earlier, CSD recordkeeping requirements should not result in regulators transforming CSDs into trade repositories.

The LEI is currently in the process of being approved in many world-wide jurisdictions and there will be countries in which the LEI will not be adopted it, hence a mandatory use outside the EU (or G20 countries in general) might not be possible.

Imposing the compulsory use of LEI would also require costly changes to current CSD systems and would also increase costs for CSD participants (who would subsequently be required to adapt their systems as well) and ultimately to the investors themselves. Such a requirement would also exceed the level-1 mandate under CSD-R Article 29. It is one thing to be asked to add the LEI to our records going forward, but it would be impossible to add this information to CSDs' historic records, and this should also be acknowledged in the RTS.

Without denying the benefits linked to the use of LEIs in terms of harmonisation, we believe that the CSD-R technical standards on recordkeeping are clearly not the right place to promote their use. More analysis is needed, and a gradual implementation of LEIs outside derivatives markets should be coordinated at global level, rather than imposed on EU CSDs only via binding regulation.

In addition to the comments raised above, we refer you to the additional concerns raised by our association ECSDA, specifically on disaster recovery recordkeeping requirements, records on buy-in and timing of record-keeping, which we fully endorse.

<ESMA_QUESTION_TS_CSDR_23>

Q24: What are your views on the types of records to be retained by CSDs in relation to ancillary services as included in the Annex to the draft RTS on CSD Requirements (Annex III)? Please provide examples regarding the formats of the records to be retained by CSDs in relation to ancillary services.

<ESMA_QUESTION_TS_CSDR_25>

While supportive of the level-1 aims to standardise the records to be kept by CSDs for the ancillary services it provides, we are concerned that the proposals under Article 11.1 and its Annex will not be either available or feasible to provide (as highlighted in our answer to Q5).

The specific services subject to these recordkeeping requirements are listed in a non-exhaustive fashion under Annex B of the level-1 text. By making this list of services non-exhaustive, the legislator recognised the fact that these services will be evolving over time and that these will need to adapt to the local market specificities. A role for the competent authority should be also granted in allowing them to adapt such a list of records based on the local market specificities and the CSD.

The response from our association ECSDA provides examples of those situations in which information would not be available to the CSDs and highlights several concerns and proposals for amendments to which we fully subscribe.

We would therefore suggest amending Article 11 of the Annex III draft RTS as follows: (page 216 and 217 of the consultation paper)

Article 11 - Ancillary Services Records

*1. A CSD shall keep **at least** the types of records specified under the Annex **where available for, depending on** each of the ancillary services provided by a CSD in accordance with Section B and C of the Annex to Regulation (EU) No 909/2014. [...]*

<ESMA_QUESTION_TS_CSDR_25>

Q25: What are your views on the proposed draft RTS on reconciliation measures included in Chapter V of Annex III?

<ESMA_QUESTION_TS_CSDR_25>

CSDs reconciliation

ESMA aims to determine how to tackle problems resulting from reconciliation breaches on corporate actions' processing. Here it should be ensured that any possible ESMA new standards on corporate actions reconciliation should be as a minimum compatible with the existing processes (such as the work by the Corporate Actions Joint Working Group (CAJWG) an associative effort for the dismantling of Giovannini Barrier 3).

CSDs are the principal predicants with regards to the importance of solid reconciliation procedures for the notary services it provides. Hence while supporting the spirit of the law behind Chapter V of the Annex III, we are concerned by the unintended consequences that the approach taken by ESMA will have and disagree on some major aspects proposed by these technical standards.

Firstly, we draw once more your attention to the arguments raised in our answer to Q16 specifically on deviation from the level-1 text by the introduction of an artificial distinction between the concepts of "Centrally maintained securities" and "maintained securities",

We would therefore suggest amending Article 14 of the Annex III draft RTS as follows:
(page 219 of the consultation paper)

Article 14 – General reconciliation measures

1. A CSD shall perform the verification measures referred to in Article 37(1) of Regulation (EU) No 909/2014 for each securities issue **centrally** maintained by the CSD.

The CSD shall also compare the previous end-of-day balance with all the settlements made during the day and the current end-of-day balance for each securities issue maintained by the CSD.

Also on the reconciliation measures proposed, while we agree that ensuring the integrity of the issue is an essential role of CSDs, we believe that the proposed suspension of an issue due to reconciliation concerns is an excessive measure which could generate more market disruption leading to more settlement fails, than the protection it aims to deliver. The cure should not be worse than the disease, i.e.: such a suspension measure would create further financial risks for the CSD and the Issuers, and might even have repercussions on the price-setting dynamics of the market.

ESMA should take into account that CSDs through their constant monitoring and reconciliation of issued nominal amount (including validation on issues for up-to amounts), shares or units of certificated securities with total amount of respective book-entry credits in the central holding and settlement system, and including reconciliation of vaults vs entries in settlement system for physical securities, ensure the integrity of the issue.

We refer to the comments made by our association ECSDA in relation to the proposed draft RTS on reconciliation measures, which we fully endorse.

We would therefore suggest amending Article 17 of the Annex III draft RTS as follows:
(page 221 of the consultation paper)

Article 17 - Problems related to reconciliation

[...] **2.** *Where the reconciliation process reveals an undue creation or deletion of securities, the CSD **shall may** suspend the securities issue for settlement until the undue creation or deletion of securities has been remedied.*

In the event of suspension of the settlement referred to in the first subparagraph, the CSD shall inform without undue delay its participants and its competent authority and relevant authorities.

Double-entry accounting

Additional internal reconciliation requirements such as the one foreseen under the double-entry accounting defined under Article 1 of the Annex III would possibly also be an excessive measure. Please refer to the amendment proposal suggested with regards to “double entry accounting” principle as detailed in our answer to Q21.

<ESMA_QUESTION_TS_CSDR_25>

Q26: Do you believe that the proposed reconciliation measures where other entities are involved in the reconciliation process for a certain securities issue within the meaning of Article 37(2) of CSDR are adequate? Please explain if you think that any of the proposed measures would not be applicable in the case of a specific entity. Please provide examples of any additional measures that would be relevant in the case of specific entities.

<ESMA_QUESTION_TS_CSDR_26>

We fully share the concerns raised by our association ECSDA, with regards to Article 16 of the draft RTS which appears to be impossible to implement unless its scope is duly adjusted.

We refer to the comments and proposed amendments made by our association ECSDA in relation to Article 16 of Annex III on reconciliation measures, which we fully endorse.

<ESMA_QUESTION_TS_CSDR_26>

Q27: What are your views on the proposed reconciliation measures for corporate actions under Article 15 of the draft RTS included in Chapter V of Annex III?

<ESMA_QUESTION_TS_CSDR_27>

Considering the level of integrated controls to secure the integrity of the issue, no additional analysis on costs and benefits on an additional internal reconciliation process for corporate actions processing has been performed.

What is essential for corporate actions processing, is that the external reconciliation has been performed and in case of reconciliation break, the difference is to be investigated and solved urgently, in order to have the same baseline for starting the corporate actions processing. This once more speaks against the suspension measure proposed in the RTS. This pre-corporate action processing reconciliation is covered with the regular, daily reconciliation process that Clearstream and LuxCSD perform for all their securities holdings and the respective agents and depositories. The resulting proceeds from corporate actions are reconciled as well before being distributed to the entitled account holders.

We fully share the concerns raised by our association ECSDA, with regards to Article 15 on the reconciliation measures for corporate actions, to which we fully adhere.

<ESMA_QUESTION_TS_CSDR_27>

Q28: What are your views on the proposed draft RTS on CSD operational risks included in Chapter VI of Annex III?

<ESMA_QUESTION_TS_CSDR_28>

We refer to the comments raised by our association ECSDA with regards to the points addressed in Q28, which we fully endorse.

With regard to Section 4 “Business Continuity” we would like to make the following additional comments:

- We suggest rewording Article 28.2 to clarify that elements (a) to (e) are “required” under a CSD’s business continuity policy. The current wording reads such as the policy document should include those elements, which are typically documented separately.

- We believe that Article 29.2, which lists 5 detailed steps to perform a business impact analysis, is too prescriptive. We suggest to re-word Article 29.2 in more general lines or to remove it. In comparison, the equivalent Article 18 of the EMIR RTS does include such a detailed provision. It is not apparent why the RTS for CSDs and CCPs should differ on this specific subject.
- Article 30.1 requires business continuity arrangements to be based on disaster scenarios. We believe that plans and arrangements should be based on impact, i.e. the unavailability of critical resources, rather than on the multiple root causes.
- Article 30.2 states that the recovery time objective of two hours does not apply in case of cyber-attacks. We appreciate this exclusion, as in deed the nature of such incidents could protract the recovery time. However, it is not apparent how the recovery time objective of 12 hours was established and it contradicts the statement in the same paragraph that the CSD should determine the appropriate recovery time in such cases. We therefore suggest removing the reference to a maximum of 12 hours.
- Article 31.c requires CSDs to involve external parties to participate in testing of its BCM arrangements. However, CSDs have limited means to enforce participation, unless this could be contractually agreed or enforced by regulation (to be clarified how to enforce participation of external providers which are not subject to same / similar regulations as the CSDs). Further, this requirement would generate multiple multi-lateral tests each year. It would appear to be more practical, efficient and effective, if industry-wide tests would be organized by regulators or market associations, as it readily happens in some jurisdictions. Alternatively, this could be taken over by common infrastructure resources such as T2S.

While we agree on the general guidelines on outsourcing proposed by ESMA. For those CSDs which are part of a larger Group, a group perspective needs also to be taken into consideration. In this regards, we have to raise our concerns to some of the obligations requiring to provide an “analysis of alternative” service providers. Dedicated operations also require dedicated service providers, and alternatives are not always available, or if so, only to a limited degree. The requirement to produce such analysis may also have the unintended consequence to create public interest for such service offering. We consequently oppose to such an extreme obligation as laid down in Article 27.9.g of the RTS.

We also see massive difficulties in meeting the provisions set under Article 20.5. Providers such as Central Banks, SWIFT, T2S, and others would fall through the back door into the scope of these provisions, and therefore suggest deleting or reformulating the provision.

Further, we are concerned about the foreseeable difficulties to fulfil the conditions set in Article 21.2. Beside critical service providers like Central Banks, SWIFT and T2S, many other companies servicing Group-entities, such as dedicated IT companies', etc. will subject to such operational risk requirements. Furthermore, we cannot see the benefit for the CSD in just receiving the information on the provider as such, without also receiving further insight on the details as well. In this regard, we would rather see the need to properly analyse all underlying risks and monitor the relationship in an appropriate manner. We therefore propose to remove the article entirely.

We would therefore suggest amending Article 21 of the Annex III draft RTS as follows:
(page 223 of the consultation paper)

Article 21 - Operational risks that may be posed by other CSDs or other market infrastructures

1. A CSD shall ensure that its systems and communication arrangements with other CSDs or other financial market infrastructures are reliable and secure and designed in order to minimise operational risk.

2. A CSD shall ensure that any arrangements that it enters into with other CSDs or a financial market infrastructure ensures that:

~~(a) there are appropriate arrangements for that infrastructure to disclose to the CSD any critical service provider on which it relies;~~

(b) the governance arrangements and change management processes in the other CSD or other financial market infrastructure do not inhibit the smooth functioning of the CSD, including on its risk-management arrangements or non-discriminatory access conditions.

<ESMA_QUESTION_TS_CSDR_28>

Q29: What are your views on the proposed draft RTS on CSD investment policy (Chapter VII of Annex III)?

<ESMA_QUESTION_TS_CSDR_29>

High creditworthy securities issued by the issuers as proposed are issued to a substantial degree with maturities well beyond the 2 years period. This is due to the current regulatory trend to tighten regulations for financial market intermediaries; the demand for such papers has increased while (due to the macro economic situation) the offer is decreasing. As such securities have liquid markets regardless of their maturity, we cannot agree to the proposed threshold of average 2 years remaining maturities. We rather would accept maximum 10 years maturities and maximum average remaining maturities of 5 years as this would allow an appropriate investment with the low risk which anyhow characterises the CSDs risk profile.

Interest rate hedging by CSDs is not undertaken for the sake of securing higher treasury returns, but for the sake of reducing the (interest rate) risk. This situation is much different from the CCPs which need liquidity to cover day-to-day operations and which are included themselves in the default waterfall by the required own contribution to the default funds. CSDs invest their own funds in securities in order to have a reserve to cover potential operational or financial losses and to be prepared for recovery should the case arise. As such, the investments are rather long-term and not needed for the day-to-day operations. The completely different risk set up between CCPs and CSDs should be taken into account when ESMA will be finalising the investment policy rules. Along that chain of risk minimising reasoning, the categories of permitted derivative fields should be enhanced in order to allow other derivatives for hedging purposes, instead of decreased. Some markets do not allow for secure investments and the number of counterparties is limited. As such, excess funds need to be swapped into different markets in order to avoid concentration risks.

Besides the settlement rules imposed by the CSD-R are in general targeting for a T+2 settlement cycle. As such, the requirement for CSDs to have access to funds the next day (at the latest) is not harmonised with the newly introduced settlement cycle of the CSD-R itself. We therefore propose to change the approach in Article 35.5 on the timeframe for access to assets, by requiring to accessing and liquidating them latest the next business day in combination with receiving the related proceeds not later than T+2 after the liquidation.

We refer to the comments raised by our association ECSDA with regards to the points addressed in Q29, which we fully endorse.

We would therefore suggest amending Article 34 of the Annex III draft RTS as follows:
(page 232 of the consultation paper)

Article 34 - Highly liquid instruments with minimal market and credit risk

1. Financial instruments can be considered highly liquid financial instruments, bearing minimal credit and market risk under Article 46 of Regulation (EU) No 909/2014 if they are debt instruments meeting each of the following conditions:

(a) they are issued or explicitly guaranteed by:

(i) a **local or national** government;

[...] (c) the average time-to-maturity of the CSD's portfolio does not exceed ~~two~~ **five** years, and **no single investment has a time-to-maturity superior to eleven years**;

[...] 2. Derivative contracts can also be considered highly liquid financial investments, bearing minimal credit and market risk if they are entered into for the **following** purposes: ~~of (---)~~

Moreover on the Article 34.2 and 34.3 of the Annex III on the usage of derivatives, Clearstream proposes to amend the text as follows

Article 34 - Highly liquid instruments with minimal market and credit risk

(...)

2. Derivative contracts can also be considered highly liquid financial investments if they are entered into for the purpose of hedging **currency liquidity and counterparty** risk arising from the settlement in more than one currency in the securities settlement system operated by the CSD"

"3. Where derivative contracts are used in accordance with paragraph 2, their use shall be limited to derivative contracts in respect of which reliable price data is published on a regular basis and to the period of time necessary to reduce the **currency liquidity and counterparty** risk to which the CSD is exposed, and not for other purposes, notably realisation of profits"

We are of the opinion that the FX swap instruments play a crucial role in the liquidity and risk management of a CSD. This instrument is primarily used to (a) avoid large unsecured exposures with commercial banks by swapping funds into a currency where secured placement is possible, and (b) to convert available funds in another currency into a currency where funds are required to support the securities settlement efficiency of the CSD's customers.

Moreover on the Article 35.5 of the Annex III on the appropriate timeframe for access to assets, Clearstream proposes to amend the text as follows

Article 35 – Appropriate timeframe for access to assets

(...)

5. Where a CSD holds the securities with an authorised credit institution, it shall hold them in an individually segregated account in the books of a CSD, **where achievable**, and be capable of accessing **and generating liquidity through repo and/or** liquidating them within three **on-the** business day from **following** the day when ~~re~~ a decision **to generate liquidity and/or** liquidate the assets is taken.

We propose the above change, as are convinced that taking only into account securities sales is too restrictive. Another efficient way to consider avoiding further increases in liquidity risk is to generate liquidity through repo transactions. We also note that holding these assets in a segregated account at CSD level may not always be possible, due to legal, regulatory or operational constraints imposed by the local infrastructure to the CSD (e.g. some non-EU countries will not support this model). On this particular point, we want to stress that segregation does not auto-

matically translate into higher level of asset protection whereas it imposes additional set-up and operating costs to CSDs (which will be passed down the chain to participants and investors).

Finally, we furthermore disagree with the under Article 37, which sets an approach to limit concentration in such level of detail. In specific markets or regions, there may only be one infrastructure available in which to hold its financial assets, and very often it might well be the local CSD. In this same logic, taking the German example, all Bunds are ultimately held at the German CSD, as well as all Guilts are ultimately held at the British CSD, etc.

Furthermore this same argument is also valid beyond the FMI, for instance settlement in any given currency takes place in principle with a very limited number of cash correspondent banks, more so for lesser wide-spread currencies. As such, cash correspondent concentration is the natural consequence. Cash holding are very much dependent on the cash behaviour of clients and cannot be predicted accurately. As such, already CRD II (directive 2009/111/EU) took this into account when taking up a dedicated exception for the CSD business in Article 106 (2) c (now Article 390 (6) lit c of CRR – regulation (EU) No. 575/2013).

The banking rules are readily taking care to adapt its rules to the CSD business, in this same logic, the dedicated level-2 rules for the CSD-R should take this into account to the extent necessary.

<ESMA_QUESTION_TS_CSDR_29>

Q30: What are your views on the proposed draft RTS on access (Chapters I-III of Annex IV) and draft ITS on access (Annex VIII)?

<ESMA_QUESTION_TS_CSDR_30>

We would like to raise the following comments on the proposed draft RTS on access and ITS on access. With regards to the provisions which focus on access requests from CSDs towards a CCP, the following comments can be made:

A. Formal adjustments

The proposed draft RTS on access are currently not consistently reflecting the required provisions on the case in which a CSD requests access to a CCP. Except in:

Article 1: Definitions - b) 'requesting party' means one of the following entities, as appropriate: (...) "(iii) a CSD which requests access to the trading feed of a CCP;"

there is no further mentioning of a CCP as the party receiving a request, or furthermore how a CCP is supposed to analyse and implement such a request.

Chapter 2 deals exclusively with "Access to a CSD" – a CSD as the receiving party.

We recommend including a Chapter describing provisions "Access to a CCP" with a CCP as the receiving party.

The proposed draft ITS on access, however, in Chapter II, Article 2, 3. and 4., foresee procedures for the case that a CCP is a receiving party.

B. Assessment of necessary risks to be included

We agree to include the risk assessment as set out in Chapter II, Article 2.1., which comprises

- (a) the legal risks;
- (b) the financial risks;
- (c) the operational risks.

C. Adaptation of assessment of risks for a CCP

Although we generally agree to include an assessment of the risks as set out in Chapter II, Article 2.1., some of the considerations will not apply to the specifics of a CCP compared to those of a CSD.

Additionally, there are some considerations which need to be included from our point of view before accepting or refusing a request for access from a CSD to a CCP.

We deem the following paragraphs in Chapter II, Article 2 as also appropriate for a risk assessment of a CCP as receiving party in case a CSD requests access:

1. General provisions for a risk assessment
2. Legal risks: a), b), and c) (replace “securities settlement system” by “central counterparty system”)
- (3. Custody services – not applicable)
4. Legal risks assessment with competent authority
- (5. Access request from a CCP – not applicable)
6. Financial risks
7. Financial risks assessment with competent authority
8. Financial risks assessment with competent authority regarding fees
9. Financial risks assessment with competent authority regarding connectivity cost
10. Operational risks assessment: a) to e)
- (11. Custody services – not applicable)
12. Operational risks assessment with competent authority
13. Refusal provisions
14. Ongoing compliance provisions

Additionally to the risk assessment provisions set above, the process of accepting or refusing a request for access from a CSD to a CCP under the CSD Regulation and its level-2 measures, should not be in conflict to the existing EMIR requirements applicable to CCPs.

D. Refusal process

The provisions as set out in the draft RTS on access regarding Chapter III, Article 3, for the procedure for refusal of access are in our view generally applicable for CCPs as well.

E. Draft ITS on Access (Annex VIII)

We generally agree to the provisions as set out in the Draft ITS on Access (Annex VIII). Annex II – Template for the Response to the Request for Access should be updated in section IV. Risk analysis of the request for access, to reflect the additional requirements of a CCP as described in the preceding paragraph.

In addition to the above, regards to the provisions which focus on access requests from CSDs towards a Trading Venue, the following comments can be made:

- 1) Elements missing from a Trading Venue (TV) perspective: Is a harmonised Power of Attorney concept for participants across European markets would reduce operational complexity at the CCP / TV side and thus reduce costs for TVs.
- 2) Missing from a TV perspective: CSDs should also assess the risk, when evaluating the request of an issuer for recording its securities in the CSD combined with listing of the securities at a TV.
- 3) Access between CSD and other market infrastructure: TV access to CSD can be denied from CSD side only if TV imposes systemic risk on CSD.

<ESMA_QUESTION_TS_CSDR_30>

Q31: What are your views on the proposed draft RTS on CSD links as included in Chapter IV of Annex IV?

<ESMA_QUESTION_TS_CSDR_31>

We fully share the concerns raised by our association ECSDA, with regards to Article 4 of Annex IV of the draft RTS which could result in the termination of many links maintained by EU CSDs with non-EU CSDs.

We object to the requirement under Article 4.1.d. that mandates the publication of link agreements. The requirement is excessive, as it raises confidentiality, competition and data privacy concerns, which don't necessarily match with any tangible added-value for the CSD participants or the general public. The link agreements are bilateral agreements governed by corporate law, which are not only subject to confidentiality obligations between the parties but also describing technical and operational details which are, as such, not relevant to participants. Moreover, considering CSDs provide its services in a highly competitive environment, any future disclosure requirement should take a non-discriminatory approach and be in compliance with the existing national and European antitrust laws

For the purpose of providing information on the functions of its links, CSDs publish today handbooks and "link guides" which include all the relevant and useful information from a CSD participants' perspective. We therefore suggest that Article 4.1.d should rather refer to the CSD's documentation on links, such as handbooks and link guides.

Besides, Article 4.1.e falls short to provide enough clarity regarding the scope of the legal opinions referred to in the Article, elements such as its nature, the continuous monitoring of the legal changes applicable to in which the link is established, the periodicity or materiality needed for its renewal need to be specified.

Moreover, with regards to Article 4.1.f. when a CDS is not authorized to perform banking type ancillary services, would this entail that no DVP settlement could then take place. We fail to understand the reference under Chapter V of the proposed restriction for a requesting CSD not authorised for banking ancillary services to receive banking ancillary services from another CSD. We note to this effect, that in the specific case the linked CSD is a participant as any other participant in the receiving CSD. Why would the RTS limit the access of a linked CSD to services which are available to other participants. The requirement is hence creating a limited form of CSD participation to another CSD.

Further precision should be shed with regards to the understanding under Article 5.1.h of the term "At least an individually segregated account.

Moreover, most particularly in the context of third country intermediaries, it would be very helpful for ESMA to clarify what can be considered as "at least an individually segregated account...", as segregation can have different understanding according to different jurisdictions.

Further motivation should be provided on the requirement set in Article 4.2.i, to provide an annual review for all links. Considering that CSD links are likely to grow with time, such a yearly review should be rationalised and limited to those links for which a review is duly justified.

With regards to Article 4.3, we do not believe that CSDs that have an interoperable link must build and run a common IT interface and common communication structures for the transmission of instructions. Some CSDs already operate interoperable links today, based on a common set of procedures and agreed bilateral and secured transmission mechanisms (with appropriate contingency procedures) and it is unclear which benefits the adoption of common IT interfaces and communication structures would deliver in light of the very significant costs this would impose to the CSDs and their participants. Likewise, interoperable links operate today on the principle that settlement finality is achieved using equivalent rules concerning the moment of finality of transfers for the participants of the two systems, without necessarily having synchronisation of

the settlement batches. We question the benefits to adopt current mechanisms supporting interoperable links, knowing that associated costs would likely exceed any benefit for CSD participants. This is aligned with the level-1 text under, recital 54 and Article 48.8.

Under Article 5.2., it would be very helpful for ESMA to clarify that the specified requirement asking that the account with the CSD be opened in the name of the requesting CSD applies only for “operated links” and not links to CSDs that are using an intermediary (who in this case is the account owner at the CSD). As indicated earlier, the opening of an account in the name of the CSD may not always be allowed or supported by the local regulatory framework, so flexibility must be kept in the account structure to be chosen by the CSD.

Finally, with regards to the proposed reconciliation methods (Article 6), we refer to our comments made under Q25, and to the need to preserve a certain flexibility before the CSD decides to suspend securities settlement or corporate actions processing.

More generally on this RTS we refer to the comments made by our association ECSDA in relation to the proposed draft RTS on links, which we fully endorse.

We would therefore suggest amending Article 4 of the Annex IV draft RTS as follows: (page 248 and 249 of the consultation paper)

Article 4 - Conditions for the adequate protection of linked CSDs and of their participants

1. A CSD link shall be established and maintained under the following conditions:

[...]

*(d) The requesting CSD shall make the **operational terms and conditions** of the link **arrangement** available to its participants to enable the participants to assess and manage the risks involved.*

*(e) Before the establishment of a link with a third country CSD, the requesting CSD shall perform an initial verification of the local legislation applicable to the receiving CSD. In performing such a verification, the CSD shall ensure that the securities maintained in the securities settlement system operated by the receiving CSD benefit from a **legally sound** level of asset protection, **which must be documented and made available to the CSD participants if it deviates from the regime applicable in the case of the securities settlement system operated by the requesting CSD that has comparable effects to the one ensured by the regime applicable in the case of the securities settlement system operated by the requesting CSD.** The requesting CSD shall require legal opinions addressing at least the following issues:*

(i) the entitlement to the securities, including the law applicable to proprietary aspects, nature of the rights on the securities, permissibility of an attachment or freeze of the securities; and
(ii) the impact of insolvency proceedings on at least segregation, settlement finality, procedures and deadlines to claim the securities.

~~(f) A requesting CSD that is not authorised to provide banking-type ancillary services in accordance with Article 53 of Regulation (EU) No 909/2014 shall not receive banking-type of ancillary services from a receiving CSD authorised to provide banking-type ancillary services in accordance with Article 53 of Regulation (EU) No 909/2014, in relation to the settlement of the cash leg to be processed through the link~~

[No changes to (g)]

*(h) The requesting CSD shall be responsible for having conducted end-to-end tests with the receiving CSD before the link becomes operational. An emergency plan shall be established **as part of the business continuity plans of the respective CSDs** before the link becomes operational, covering at least the situation where the securities settlement systems of the linked CSDs malfunction or break down and the remedial actions in such events.*

(...)

3. In addition to the conditions referred to in paragraphs 1 and 2, an interoperable link shall be established and maintained under the following conditions:

(...)

(b) The linked CSDs shall establish **common procedures and transmission mechanisms to ensure a proper and secure transmission of instructions; a common IT interface for the transmission of instructions between themselves, and common communication structures.**

(c) In the case of an interoperable link allowing for DVP settlement, the linked CSDs shall **use equivalent rules concerning the moment of finality of transfers and reflect settlement results as soon as practicable in their books.**~~the settlement batches, where settlement occurs in batches.~~

(...)

<ESMA_QUESTION_TS_CSDR_31>

Q32: What are your views on the proposed draft RTS on internalised settlement (Annex V) and draft ITS on internalised settlement (Annex IX)?

<ESMA_QUESTION_TS_CSDR_32>

We assume that any settlement discipline measures as stipulated under Annex I apply evenly for settlement internalisers as to avoid the introduction of rules for regulated markets, only, as this would put a competitive advantage on settlement internalisers, who would then benefit from being excluded from the settlement discipline measures altogether. The ESMA RTS must avoid creating an unlevelled playing field in this regard.

<ESMA_QUESTION_TS_CSDR_32>