

**EUROPEAN SECURITIES SERVICES ASSOCIATION
LONDON INVESTMENT BANKING ASSOCIATION**

**RESPONSE TO CESR CONSULTATION PAPER (08-749) ON DRAFT RECOMMENDATIONS
FOR SECURITIES SETTLEMENT SYSTEMS AND CENTRAL COUNTERPARTIES**

On behalf of the members of the European Securities Services Forum (ESSF)¹ and the London Investment Banking Association (LIBA)² we would like to thank CESR for the opportunity to comment on the Consultation Paper (CP) on draft Recommendations for Securities Settlement Systems (RSSS) and Recommendations for Central Counterparties (RCCP). We would like to submit: general comments relating to the effectiveness and scope (addressee and activity) of all the RSSS and RCCP; specific comments relating to the content of certain Recommendations; and comments relating to the intended next steps for finalising the Recommendations.

GENERAL COMMENTS

Effectiveness of Recommendations

We note that the 3 June 2008 ECOFIN Council redefined the mandate of the ESCB/CESR Working Group (WG) so that it will develop non-binding recommendations addressed to public authorities that regulate/oversee the providers of post-trading services rather than standards addressed directly to those providers. The commitment of public authorities is limited to on a 'best efforts' basis and 'where appropriate' integrating the Recommendations into their assessment frameworks/practices. We are concerned that this change in status and direct addressees may undermine the ability of the Recommendations to improve and maintain the behaviour of the designers, owners and operators of the post trade institutions and functions covered.

While the Recommendations have in many areas been strengthened vis-à-vis the CPSS/IOSCO Recommendations on which they are based, this is not universally the case (see comments below on specific Recommendations). On this basis, we are concerned that the minimum harmonisation nature of the Recommendations may either encourage a race towards an unacceptable low common denominator or lead to further fragmentation of post-trade regulation.

As stated during the 09-12-09 Public Hearing, market users are concerned that the minimum nature of the Recommendations may encourage the perception that they represent an acceptable level of service and risk management and lead to a race to that still generally low common denominator. Alternatively, and as acknowledged by the WG at the Hearing, the minimum harmonisation nature of the Recommendations does not prevent individual Member States from imposing their own distinct and more stringent measures, which risks perpetuating the current regulatory fragmentation (recently evidenced by the 19-12-09 CESR Report). While we are encouraged by the WG assurances that the authorities would strive to avoid a race to the bottom or fragmentation at the top, the Recommendations remain voluntary and thus secondary to national considerations.

1 The European Securities Services Forum (ESSF) represents the interests of wholesale users of post-trade securities services acting as an agent of change providing solutions in the clearing, settlement and custody space to reduce costs and risks of market participants. It represents the views and positions of its members towards public sector authorities and central banks both at European and at national levels. The ESSF is an affiliate of the Securities Industry and Financial Markets Association (SIFMA) which brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA represents its members locally and globally.

2 The London Investment Banking Association (LIBA) is the principal trade association in the United Kingdom for firms which are active in the investment banking and securities industry. The Association represents the interests of its members on both domestic and international aspects of this business, and promotes their views to the authorities in the United Kingdom, the European Union, and elsewhere.

Moreover, while we welcome the detail provided in terms of criteria to be used when assessing compliance with the Recommendations, we believe that further clarification is required on the frequency and execution of such assessments. We recognise that these procedures will need to be agreed amongst the relevant public authorities once the Recommendations have been finalised, but would encourage the WG to ensure a consistent application across jurisdictions.

Scope – Application of Recommendations to T2S

The WG does not consider T2S (when built) to be an Securities Settlement System (SSS) or (International) Central Securities Depository ((I)CSD) but rather an entity to which SSSs/CSDs may chose to outsource certain SSS/CSD functions. On this basis T2S will not be subject to RSSS. The outsourcing SSSs/CSDs (i.e. their regulators/overseers as the direct addressees of the RSSS) will instead remain responsible for ensuring that all CSD/SSS functions including those outsourced to T2S are compliant with the RSSS. To counter the risk of regulatory differentiation between the multiple regulators/overseers of SSSs/CSDs participating in T2S, the CP sets out in RSSS-18 a requirement to cooperate and coordinate in such circumstances where multiple SSS/CSDs outsource to a single system. While the text of RSSS-18 is encouraging, we remain concerned as to the effectiveness of the Recommendations in general and RSSS-18 in particular.

Scope – Different Approach to Settlement cf. Clearing

With respect to settlement, the RSSS take an institutional approach, explicitly covering (I)CSDs and SSSs and excluding custodian banks. For clearing, the approach of the RCCP is functional, covering CCPs as well as 'guarantees arrangements' and 'clearing intermediaries' that are comparable to CCPs in terms of their significance, function and risk management tools. We are concerned that this differentiated approach may lead to uncertain and/or inconsistent results and suggest that the same approach be used for both sets of Recommendations.

COMMENTS RE SPECIFIC RECOMMENDATIONS

Reference in RSSS and RCCP to Buy-In Rules

We believe that RSSS-3 and RCCP-11 should include explicit references to market buy-in rules as an important method for reducing fail rates.

Reference in RSSS to Omnibus and Nominee Accounts

While recognising the continued existence of direct holding structures, we believe that RSSS-R6 and SSSR6 should be adapted to actively encourage the acceptance of indirect holding structures (omnibus and nominee accounts), concurring thus with Recommendation 13.b of the Legal Certainty Group.

Reference on RSSS and RCCP to Transparency Standards agreed under Code of Conduct

We suggest that RSSS-17 and RCCP-14 should incorporate reference to the price transparency and comparability measures agreed under the EU Code of Conduct for Clearing and Settlement.

Reference in RSSS to Settlement Finality

We refer to the ongoing discussions in the context of the T2S project on unilateral vs. bilateral cancellation and associated hold-and-release mechanisms, and suggest that RSSS-8 be reviewed and if necessary amended in light of the outcome of those discussions.

NEXT STEPS

Second Consultation on RCCP

We understand that the WG plan to amend the current draft RCCP in light of comments made at the Hearing or submitted in writing and (acknowledging the late addition of OTC clearing to scope of the RCCP) on this basis re-consult on the RCCP. We are of the general view that the typical complexity and heterogeneity and therefore illiquidity of OTC derivatives cf. exchange-traded derivatives may require a different approach to CCP risk management. On this basis the existing RCCP (drafted mainly with exchange-traded derivatives in mind) may not be entirely appropriate. We therefore look forward to the opportunity to comment on the next version of the RCCP.

Finalisation of Recommendations

We note that the WG expect to finalise and start applying the Recommendations by spring 2009. Nevertheless, the CP acknowledges that the Recommendations may as currently drafted not cover all relevant issues, including those arising from interdependencies between payment and settlement systems and from outsourcing of core functions. In the interests of time, we acknowledge the need to postpone these issues until after the finalisation of Recommendations in their current form. However, we note the WG have undertaken to subject the Recommendations to continual review and amendment as necessitated by changes in the surrounding legislative and operational environments.