

clear to trade



## **Eurex Clearing**

### **Response to**

Regulatory Technical Standards on the CSD  
Regulation

The Operation of the Buy-In Process

Frankfurt am Main, 05.08.2015

## **A. Introduction**

Eurex Clearing, Europe's leading clearing house, offers fully-automated, straight-through post-trade services for derivatives, equities, bonds and secured funding & financing. As a globally leading central counterparty (CCP), Eurex Clearing assures the safety and integrity of markets while providing innovation in risk management, clearing technology and client asset protection. Eurex Clearing provides fully-automated, straight-through post-trade services for derivatives, equities, bonds and secured funding & financing, as well as industry-leading risk management technologies.

As part of Eurex Group, Eurex Clearing acts as the CCP for Eurex, Eurex Bonds, Eurex Repo, the FWB® Frankfurter Wertpapierbörse (the Frankfurt Stock Exchange) - both Xetra® and floor - and the Irish Stock Exchange. Eurex Clearing serves more than 190 clearing members in 16 countries. Additionally, Eurex Clearing's national competent authority BaFin (Federal Financial Supervisory Authority) has approved its application as a clearing house in accordance with the European Market Infrastructure Regulation (EMIR).

Eurex Clearing has contributed to the market consultation and addressed the key comments on the draft legal text on the CSDR from a CCP point of view since we were first involved in late 2011. Hence, we welcome the opportunity to also comment on ESMA's Consultation Paper: "Regulatory Technical Standards on CSD Regulation - The Operation of the Buy-In process" which was issued in June 2015. We would like to take the opportunity to raise specific issues in respect to the draft rules in the Annex 2 on buy-ins for cleared trades. This is to reinforce some of the arguments made in the previous consultation response.

In section B of this document we respond to the consultation paper's questions if Eurex Clearing can add comments from a CCP perspective. Finally, section C of this document contains specific consideration to the issued draft provisions that we believe are relevant for Eurex Clearing as a CCP. As requested, we have included the specific question to which our responses refer, explained the reasons why a review of the draft provisions from a practitioner's point of view should be performed and suggested alternatives for ESMA to consider on the proposed text. We hope that ESMA will take these into account in the final RTS.

Eurex Group is owned by Deutsche Börse AG (Xetra: DB1).

## B. Responses to questions in the consultation paper

### Question 2

**Please indicate whether the assumption that the trading party has all the information required to apply the buy in would be correct, in particular in cases where the fail does not originate from the trading party, but would rather be due to a lack of securities held by one of the intermediaries within the chain.**

#### **Comments from Eurex Clearing:**

Neither trading venue members nor clearing members should perform the buy-in for transactions cleared by the CCP. The CSDR exclusively requires the CCP to execute a buy-in auction for cleared transactions. CCPs have at their disposal all the necessary information and should therefore perform the buy-in for these types of transactions.

We therefore suggest changing the current wording of Recital 4 (see also below) as follows: "For transactions cleared by a CCP clearing members are the parties to the transaction and therefore the parties that should be subject to the buy-in performed by the CCP."

## C. Detailed comments on draft provisions in Annex 2

### **Recitals**

*"(3) The buy-in process should provide for a way to address settlement fails without jeopardising the risk profile of CSDs, CCPs or trading venues. Buy-in should not imply any unnecessary risk taking by a CSD, a CCP or a trading venue. A CSD or a trading venue should therefore not perform the buy-in as counterparty on its own account."*

*"(4) The settlement of an instruction aims at ensuring the final settlement of a transaction concluded between trading parties. For transactions executed on a trading venue and cleared by a CCP, the trading venue members, the clearing members and the CCP are the parties to the transaction; for such transactions the buy-in should be performed by the CCP. The CCP has the relevant information to execute it. For transactions not executed on a trading venue nor cleared by a CCP, Either Option 1 and 2 (trading party)*

*the buy-in should be performed by the trading parties that concluded that transaction. The original parties are the ones with the relevant information on why the settlement failed and who the relevant counterparty responsible for it is.*

*Option 3 (Participant)*

*the CSD participants are the immediate parties to be identified by the CSD as being responsible for not delivering the relevant instruments. Therefore, in order to ensure*

*the efficiency of the buy-in process, the CSD participants should be responsible for the buy-in process affecting these transactions."*

### **Comments from Eurex Clearing:**

Neither trading venue members nor clearing members should perform the buy-in for transactions cleared by the CCP. CCPs have at their disposal all the necessary information and should therefore perform the buy-in.

### **Articles**

#### *"Article 12*

#### **General**

1. *The buy-in process shall be initiated at the end of the business day following the elapse of the extension period.*
2. *The buy-in process shall comprise the following elements:*
  - (a) *the notifications, as specified in Article 13;*
  - (b) *the appointment without undue delay of a buy-in agent, where relevant;*
  - (c) *the execution of the buy-in process through the acquisition of the securities by the buy-in agent or through an auction;*

*Either Option 1 and 2 (trading party)*

*(d) the completion of the buy-in process through the delivery to the receiving party by the buy-in agent or the entity executing the auction, of all or some of the bought-in securities and the payment of the cash compensation for the non-delivered securities to the receiving party by the failing party.*

*or Option 3 (participant)*

*(d) the completion of the buy-in process through the delivery to the receiving participant by the buy-in agent or the entity executing the auction, of all or some of the bought-in securities and the payment of the cash compensation for the non-delivered securities to the receiving participant by the failing participant. "*

### **Comments from Eurex Clearing:**

"The buy-in process shall be initiated at the end of the business day following the elapse of the extension period." In order to avoid misunderstandings we would suggest rephrasing: "The buy-in process shall be initiated at the end of the business day on which the extension period elapses." In practice the buy-in auction will start on the following business day and accordingly quotes will be collected in due course.

#### *"Article 13*

#### **Notifications**

1. *The notifications referred to in point (a) of Article 12(2) shall be served upon the following steps and contain the following information:*

- (a) without delay upon the initiation of the buy-in process, a notification specifying the settlement fail it relates to;*
  - (b) without delay upon the appointment of the buy-in agent, a notification specifying the date of the appointment and the name of the buy-in agent;*
  - (c) on the last business day of the buy-in process, a notification specifying the results of the buy-in process;*
  - (d) as the case may be, without delay, upon election of a choice made pursuant to Articles 15(1)(b) or (c), 15(2)(b) or (c) and 15(3)(b), a notification of such choice;*
  - (e) as the case may be, at the latest upon the last business day of the deferral period, a notification specifying the results of the deferred buy-in process.*
- 2. For transactions executed on a trading venue and not cleared by a CCP, the receiving party shall provide the relevant notifications referred to in paragraph 1 to the failing party and to the trading venue which shall transmit it to the CSD.*
- 3. For transactions cleared by a CCP, the CCP shall provide the notifications referred to in paragraph 1 to the failing clearing member and to the CSD."*

### **Comments from Eurex Clearing:**

For clarification reasons we propose the following clarification "(b) ... a notification specifying the date of the appointment and the name of the buy-in agent; in case the buy-in is not executed via a buy-in auction"

Moreover, we like to note that Article 13 para 3 is redundant from an operational point of view, i.e. "For transactions cleared by a CCP, the CCP shall provide the notifications referred to in paragraph 1 to the failing clearing member and to the CSD." The provision of additional information on the buy-in to the CSD is not necessary. The buy-in process for transactions cleared by a CCP is completely managed by the CCP and no further action is required from the CSD because the CSD will settle the settlement instruction(s) resulting from the buy-in auction based on existing processing. Such instructions are not different from a CSD point of view from other instructions received by a CCP. Therefore, there is no additional information requirement for the CSD in such a scenario.

#### *"Article 15*

#### ***Completion of the buy-in process***

- 1. For transactions executed on a trading venue but not cleared by a CCP:*
- (a) when the buy-in has been successful, the securities shall be delivered to the receiving party and the failing and receiving parties shall ensure that the settlement instruction is cancelled;*
  - (b) where the buy-in failed, the receiving party shall notify without delay to the trading venue and to the failing party whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing party shall pay to the receiving party the cash compensation;*
  - (c) where the buy-in results in a partial delivery of securities, the receiving party shall accept the bought-in securities. For the non-delivered securities, the receiving party shall notify without delay to the trading venue and to the failing party whether it prefers to defer the execution of the buy-in or to receive cash compensation. In the absence of*

*such notification, the failing party shall pay the cash compensation to the receiving party.*

*2. For transactions cleared by a CCP:*

*(a) where the buy-in has been successful, the securities shall be delivered to the receiving clearing member, and upon completion of the buy-in process, the CCP shall ensure that the settlement instruction is cancelled;*

*(b) where the buy-in failed, the CCP shall notify without delay to the failing clearing member whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing clearing member shall pay to the CCP the cash compensation, which the CCP shall pass to the receiving clearing member;*

*(c) where the buy-in results in partial delivery of securities, the receiving clearing member shall accept the bought-in securities. For the non-delivered securities, the receiving clearing member shall notify without delay to the CCP whether it prefers to defer the buy-in process or to receive the cash compensation. In the absence of such notification, the failing clearing member shall pay to the CCP the cash compensation, which the CCP shall pass to the receiving clearing member.*

*Either Option1 (trading party)*

*For transactions not executed on a trading venue nor cleared by a CCP:*

*(a) where the buy-in has been successful, the securities shall be delivered to the receiving party and the failing and receiving parties shall ensure that the settlement instruction is cancelled;*

*(b) where the buy-in failed, the receiving party shall notify to the failing party without delay whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing party shall pay to the receiving party the cash compensation;*

*(c) where the buy-in results in a partial delivery of securities, the receiving party shall accept the bought-in securities. For the non-delivered securities, the receiving party shall notify to the failing party without delay whether it prefers to defer the buy-in or to receive the cash compensation. In the absence of such notification, the failing party shall pay to the receiving party the cash compensation.*

*or Option 2 (trading party with the participant as a fall back)*

*For transactions not executed on a trading venue nor cleared by a CCP:*

*(a) where the buy-in has been successful, the securities shall be delivered to the receiving party and the failing and receiving parties shall ensure that the settlement instruction is cancelled;*

*(b) where the buy-in failed, the receiving party shall notify without delay to the failing party whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing party shall pay to the receiving party the cash compensation;*

*(c) where the buy-in results in a partial delivery of securities, the receiving party shall accept the bought-in securities. For the non-delivered securities, the receiving party shall notify to the failing party without delay whether it prefers to defer the buy-in or to receive the cash compensation;*

*(d) where the CSD does not receive the information referred to in Article 13(3)(c) on the results of the buy-in on the business day following the end of the buy-in process, it shall notify the failing participant of the absence of evidence that the buy-in process was performed;*

*(e) where the failing participant does not provide to the CSD the evidence that the buy-in process was performed or that the trading party is subject to an insolvency proceeding, within one business day following the notification referred to in the first subparagraph, the failing participant shall pay the cash compensation to the receiving participant. The CSD rules shall provide that the participant shall recover that amount from its client.*

*or Option 3 (participant)*

*For transactions not executed on a trading venue nor cleared by a CCP:*

*(a) where the buy-in has been successful, the securities shall be delivered to the receiving participant and the failing and receiving participants shall ensure that the original settlement instruction is cancelled;*

*(b) where the buy-in failed, the receiving participant shall notify without delay to the CSD whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing participant shall pay to the receiving participant the cash compensation;*

*(c) where the buy-in results in a partial delivery of securities, the receiving participant shall accept the bought-in securities. For the non-delivered securities, the receiving participant shall notify without delay to the CSD whether it prefers to defer the buy-in or to receive the cash compensation. In the absence of such notification, the failing participant shall pay to the receiving participant the cash compensation.*

*4. The buy-in is deemed to be impossible only when the relevant securities do not exist any longer as a result of the actions taken by the issuer of such securities. In such case, the receiving party or participant shall receive the cash compensation.*

*For transactions cleared by a CCP, the CCP shall transfer the received cash compensation to the receiving clearing member."*

### **Comments from Eurex Clearing:**

Regarding Article 15 para 2 b.) and c.), as highlighted underlined, we point out that for transactions cleared by a CCP neither there is a 1-1 relation between buy and sell transactions nor a dedicated assignment between deliveries to the CCP and receipts from the CCP. Price(s) used to calculate the cash compensation on the delivery instruction(s) to the CCP may differ from the price(s) of the delivery instruction(s) from CCP to the receiving party(ies). Such price differences may for example result from a mark-up to compensate potential financial loss, including corporate entitlements, funding and other operational costs, accrued interest, foreign exchange exposure and liquidity risk. As a consequence the cash compensation received cannot simply be passed to the receiving party.

We suggest the following rephrasing: ... "the failing clearing member shall pay to the CCP the cash compensation as requested by the CCP. The CCP will ensure that an

appropriate cash compensation considering price differences shall be transferred to the receiving party(ies) of the CCP."

**"Article 16**

**Partials**

*When the relevant securities are available in the account of the delivering participant, partial settlement offered by CSDs in accordance with Article 3(9) shall be applied from the last business day of the extension period, irrespective of any contractual choice made by the participants."*

**Comments from Eurex Clearing:**

The last sentence is not consistent with what has been stated under Recital 8.

*Recital 8*

*"Partial settlement should not apply to settlement instructions that have been put on hold by a participant, since this may indicate that the financial instruments in the account do not belong to the client for which the instruction has been entered into the system."*

In our opinion the sentence should be added also in Article 16.