Deutsche Bank

Mr. Wim Moeliker
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Call for evidence on a formal request for technical advice on identification of regulatory arrangements for post-trading infrastructures - Ref.: CESR/08-643

Dear Mr. Moeliker,

With reference to the above-mentioned consultation process, please find below our comments.

We most certainly welcome the project in terms of providing transparency on the subject of relevant differences in national legal frameworks, which could have an impact on the feasibility of access requests under the Code of Conduct. However, such an analysis also needs to consider the view of the users and should not simply be limited to infrastructure providers and the legal framework in which they operate. Our reasoning behind this is that developments presently indicate that addressing the commercial obstacles is as important, or even more so, than the legal issues when attempting to introduce greater competition within the infrastructure space.

Further progress as regards the implementation of those access requests (links) for which there is clearly demonstrated user demand does thus not necessarily require regulatory intervention i.e. in addition to what has been proposed by the Legal Certainty Group (LCG), for instance. Rather, the efficiency of Europe's post-trade arrangements can be strengthened through competitive forces amongst incumbent providers.

Unfortunately, the results of the previous mapping exercise do not appear to have been published whereby we would welcome it if the market were to be given the opportunity to provide input in terms of any conclusions drawn. Nevertheless, it is our assumption that the focus of CESR's initiative was driven by examining access requests on the part of foreign infrastructure providers into a domestic market. However, we consider that this may not prove sufficient with a view to assessing the complexity surrounding such links.

We have therefore collected a number of practical examples where, from a user perspective, further improvements could be made, and where CESR could potentially play a role in addressing these.

- Practical challenges - cross-border access of users

Eurex (the derivatives exchange) is planning to launch UK-Stock options with physical settlement through Euroclear UK and Ireland (EUI, the local CSD). For this purpose, a new settlement account needs to be opened whereby EUI requires a legal opinion, even from existing members located outside the UK, which confirms that the respective member is legally allowed to follow EUI's rules and regulations. However, a legal opinion provided by a non-UK based lawyer is not acceptable to EUI - this would create both additional effort and costs for the application process.

- Spanish market practice

The regulatory framework in the Spanish securities market poses challenges with respect to setting up pan-European CCPs supporting alternative trading venues (MTFs). Iberclear (the Spanish CSD) uses a so-called Register Reference (RR) for settlement purposes. For sales of securities, a participant must ensure that the RRs linked to the securities they are selling are validated by Iberclear before settlement. This implies that OTC settlement is effectively made impossible and alternative trading venues cannot enter the market i.e. Spain is not "easily accessible" for competitive clearing as stipulated by the Code of Conduct.

- Beneficiary reporting for corporate actions

The dematerialisation process in Italy has led to a gradual decrease in the necessity for registration during settlement phases. Besides recognising the nominee concept (e.g. where the custodian is not considered to have legal title to the securities but can act on behalf of the beneficiary), by law (Art. 89 Decree Lgs n. 58 dated 24/2/98 of T.U.F. - Testo Unico della Finanza and by Art. 2421 of Civil Code), the issuing company is required to update the shareholder register with the beneficiary details within three business days of payment date for all corporate events. This creates additional work and costs since intermediaries have established a specific electronic platform in order to send to the issuing companies the requisite information, whereby (i) the link to the platform and the notification must be paid for by the intermediaries, (ii) the file must be prepared, verified and (iii) of course, exceptions must be managed by a specific team. Potentially removing suchlike specific national requirements would be required to improve the cost effectiveness of the post-trade market since this is an example which can not be resolved by competition on the infrastructure layer alone.

- German Risk Limitation Law

The so-called Risk Limitation Law was recently implemented in Germany. It provides issuers of registered shares the right to request the entry of the beneficial owner in the so-called share register. Up until now, registered shares are, in principle, treated as bearer shares from a settlement perspective whereby certain shareholders opt for a nominee entry. In future, a more costly sub-account structure per beneficial owner will need to be built, whereby this could be considered an undesirable registration process. We would propose that also CESR consider such aspects in its mapping exercise.

- Commercial obstacles - a UK example

In the UK, the London Stock Exchange (LSE) and the LCH.Clearnet Ltd (LCH) have agreed, in principle, to introduce competitive clearing for executions on the LSE. All development work was completed over a two year project whereby a few days prior to the live date, there were indications that the LSE was not going to allow the new entrant to receive a trade feed, thus preventing it from entering the market. The reason given was that LSE seemingly wished to undertake a strategic review of its position on competitive clearing. Seven months have now passed and the strategic review is ongoing. It has been stated openly that the LSE's desire to leverage its own clearing solutions, acquired as part of the "Borsa Italiana" deal, have influenced this delay and thus frustrated the introduction of competitive clearing desired by the market.

We trust that our comments will be viewed as a useful contribution to CESR's analysis and remain open for further dialogue if required.

Yours sincerely,

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