

Deutsche Börse Group

Comments

on

Preliminary Draft Technical Advice
by CESR in Response to the Mandate
from the European Commission on
Access & Interoperability Arrangements

Frankfurt / Main, 20 January 2009

A. Introduction

Deutsche Börse Group appreciates the opportunity to comment on the draft technical advice published by CESR on 19 December 2008 (Ref CESR 08-870).

We welcome that the European Commission has invited CESR to advise on possible solutions to bridge potential differences in the current regulatory arrangements for post-trade infrastructures. This draft technical advice is an important first step toward this objective. It provides an informative overview of the current post-trade regulatory arrangements on a European country basis and identifies differences existing under different European regulatory frameworks. With a view to the current initiatives underway in the area of post-trade activities, such as the Code of Conduct, the abolition of the Giovannini-barriers, the ESCB-CESR Recommendations and others, this technical advice is an important step toward creation of an efficient environment for cross-border trading in Europe.

B. General Comments

We support CESR in its view that much remains to be done in removing existing obstacles across borders with the aim of creating a single market for post-trade services. Deutsche Börse Group also welcomes the conclusion that CESR deems it essential that progress in this area is not made at the expense of the safety and soundness of the infrastructures in the respective jurisdictions.

There are multiple approaches possible to work toward the removal of barriers and the facilitation of access and interoperability among clearing and settlement providers. As suggested in the draft technical advice, in cases where links are or will be established, securities regulators should be committed to facilitate these developments by agreeing on arrangements for the exchange of information and, if necessary, other cooperation arrangements among the national authorities involved, while respecting their respective domestic legal frameworks. Deutsche Börse Group agrees with this assessment, but would argue that even more could be done, especially in the area of clearing, as long as safety and soundness of infrastructures is ensured. One option is the realization of a homogenous and consistent European regulation for relevant entities. A second option could be providing a "passporting" arrangement for central counterparty clearinghouses. In any case, a prerequisite for either option would be securing the highest level of risk management standards.

As Deutsche Börse Group would be pleased to see further progress in the area of access and interoperability, especially for CCPs, it is encouraged by CESR's draft technical advice and remains optimistic that the advice will lead to tangible results in the near future facilitating the development of links to benefit European investors.

C. Specific Comments on the German Market

Given this mapping should be considered as a preliminary draft advice, we have outlined below in tracked changes suggestions with regard to the summary provided on the German market.

1. If a CCP from another jurisdiction wants to have access to a Regulated Market/MTF, located in your jurisdiction, for the provision of CCP services, what are the applicable regulatory requirements/arrangements (e.g. license, authorisation, local presence)?

GERMANY

The provision of CCP services is a banking service under the German Banking Act (KWG)¹:

A central counterparty under the KWG is defined as an (i) entity which interposes itself between buyer and seller in buying contracts in one or more financial markets; (ii) which serves as contractual partner of the buyer side and the seller side and (iii) which counterparty risk against all of its members is collateralized sufficiently.

Thus, in principle a German Banking licence is required. The licence granted by BaFin specifies which kind of services the entity can provide. If the CCP wants to provide additional services this may require an adequate licence. However, the requirements for granting this licence may be identical. But further requirements may arise if the entity wants to administrate individual deposits. The duties which arise of this requirement are in line with EU-banking regulation.

The requirements to obtain a banking licence are similar to any other banks. However, some requirements – e.g. the capital requirements – may differ depending on the services provided.

The requirement of having banking status to provide CCP-services is not harmonized under EU banking regulation. Therefore, a pass porting of an existing licence granted in another EU/EEA-Member is not possible.

According to section 2 (4) KWG BaFin can grant exemptions from obligations under the KWG on a individual basis, provided that the entity in question does not require supervision due to the nature of services provided.

With regard to cross border business, the requirements of such an exemption are set out – on a general basis – in the notes regarding the licensing requirements pursuant to section 32 (1) KWG in conjunction with section 1 (1) and (1a) of the KWG for conducting cross-border banking business and/or providing cross-border financial services² dated April 5th 2005.

¹ See section 1 (1) S. 2 No. 12 in conjunction with section 32 KWG

² available under
http://www.bafin.de/clin_109/nn_721228/SharedDocs/Veroeffentlichungen/EN/Service/Bulletins/mb_050400_crossborder_en.html?__nnn=true

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An exemption from the licensing requirements pursuant to section 2 (4) of the KWG can thus only be considered for cases in which BaFin deems that no need for supervision exists in connection with the conducting of banking and financial services business generally subject to supervision.

In general, this only applies if the company is effectively supervised in its home country by the competent authority/authorities in accordance with internationally recognized standards and the competent home country authority/authorities cooperates/cooperate satisfactorily with BaFin.

Additionally, the applicant company must submit a certificate from the competent authority/authorities of the home country confirming to BaFin that,

the foreign entity concerned has been granted a license for the banking operations and/or financial services that it intends to provide on a cross-border basis in Germany, the commencement of the intended cross-border services in Germany raises no supervisory concerns and if such concerns should arise in the future, these will be reported to BaFin.

The applicant company must also appoint a German receiving agent.

Given the systemic importance of infrastructures such as CCPs, BaFin intends to check specifically whether the entity in question is supervised in accordance with internationally recognized standards. As no harmonized and accepted international standards are in place yet, BaFin will require – as a policy decision – the following

Compliance with the relevant CPSS/IOSCO recommendations for CCPs or Securities Settlement Systems. The compliance may be confirmed by the home supervisor. In single cases other arrangements with the home supervisor may be developed.

Compliance with ESCB/CESR Recommendations for CCPs or Securities Settlement Systems, once the draft ESCB/CESR Recommendations have been finalised.

Regulation in place regarding following key principles of the KWG which is broadly comparable – given the specific risk profile of a CCP – to the KWG:

- Fit and properness of the management
- Soundness of the Owners
- Adequate capital
- Adequate liquidity
- Monitoring and limitation of credit exposure (if applicable to the CCP)
- Organisational duties and risk management (including reporting requirements)
- Notification duties and self control
- annual accounts and audit
- crisis measures by the supervisor

<p>3. If such CCP from another jurisdiction wanting to act as a CCP for a RM/MTF in your jurisdiction wants to become a participant in a local CCP in your jurisdiction, would there be regulatory requirements different from or additional to the one provided for under Q1? If so, please explain.</p>

GERMANY

If a CCP wants to provide CCP services to German customers according to the definition mentioned under Q 1, there is the need for a banking licence or an exemption as described above.

To become a General Clearing Member of a CCP, however, a licence or authorisation by BaFin is not needed, nevertheless such licence might be required by the respective CCP, as a banking regulation of a potential Clearing Member is a common measure to ensure that such Clearing Member maintains adequate capital and appropriate internal organization and risk management structures.

6. If such CSD from another jurisdiction wanting to act as a CSD for a RM/MTF in your jurisdiction wants to become a participant in a local CSD in your jurisdiction, would there be regulatory requirements different from or additional to the one provided for under Q4? If so, please explain.

GERMANY

If a CSD wants to provide CSD services to German Customers according to the definition mentioned under Q 3, there is the need for a banking licence as described above.

To become a participant of a CSD, however, a licence or authorisation by BaFin is not needed. Nevertheless such licence might be required by the respective CSD, as a banking regulation of a potential customer is a common measure to ensure that such customer maintains adequate capital and appropriate internal organization and risk management structures.

7. For each of the above situations, specified under Q1 – Q6; which are the other relevant authorities in your jurisdiction with regulatory/supervisory or oversight powers (e.g. competition authority, central bank, bank regulator, ministry of finance)?

GERMANY

Q1: Exchange Supervisory Authority/Stock Exchanges

The preconditions for giving clearing and settlement providers access to regulated markets and MTFs organized at the exchange by the operating entity (Freiverkehr) are defined by the German Exchange Act (BörsG). According to section 21 BörsG the Exchange Rules of the Exchange in question may provide for the connection of external clearing and settlement systems to the trading system of the exchange if:

The clearing and settlement system has the necessary technical facilities;

The operator of the system has met the necessary legal and technical requirements for the connection to the trading system;

The orderly and economically efficient clearing and settlement of exchange transactions is

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ensured.

In filling this frame, especially with respect to the orderly and economically efficient clearing and settlement, the Exchange Council of the Frankfurt Wertpapierbörse (FWB) has defined a draft catalogue of minimum requirements for Clearinghouses and CSDs requesting access to the FWB under the code of conduct.

This Draft i.a. includes requirements regarding

- Product spectrum
- Transactions types and member relationship
- Transaction efficiency
- Risk management
- Interoperability
- Fails management
- Operational requirements
- Governance

The preliminary version of this catalogue was received in April 2008 by the parties inquiring access under the Code of Conduct.

German securities Exchanges are administrative-law institutions with their own executive bodies (Board of Management, Exchange Council, Trading Surveillance Office, Disciplinary Committee). The Exchange Council is the common representative body of all market participants (banks, fund managers as well as other investors, lead brokers and listed companies) and is elected by them every three years. All executive bodies act in a sovereign capacity. This includes the power to apply coercive measures under administrative law.

According to Sec. 24b Paragraph 1 KWG companies which run a system in the sense of the Settlement Finality Directive have to notify the German Central Bank accordingly.

Other Exchanges may introduce different interpretations in these issues.

With regard to the access to MTFs not organized by the operating institution of the Exchange there are no requirements under the German Exchange Act.

Q2: Please refer to Q 1 above

Q3: If a CCP wants to become a member of another CCP in the meaning of a General Clearing Member, it has to fulfil the respective requirements under civil law. In case of the Eurex Clearing AG these are laid down in the Clearing Conditions.

Q 4: Exchange Supervisory Authority/Stock Exchange

The preconditions for giving clearing and settlement providers access to regulated markets and MTFs organized at the exchange by the operating entity (Freiverkehr) are defined by the German Exchange Act. According to section 21 German Exchange Act the Exchange Rules of

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the Exchange in question may provide for the connection of external clearing and settlement systems to the trading system of the exchange if:

The clearing and settlement system has the necessary technical facilities;
the operator of the system has met the necessary legal and technical requirements for the connection to the trading system;
The orderly and economically efficient clearing and settlement of exchange transactions is ensured.

The above mentioned Exchange Council of the FWB has set up a draft catalogue for providing CSD services, especially to fill the frame of orderly and economically efficient clearing and settlement. This catalogue i.a. includes requirements regarding:

- Product Spectrum
- Transaction Types
- Settlement Services
- Use of central bank money/ commercial money
- Compliance with German Custody Law

The German Custody Act ("DepotG") states that a CSD in that sense has to be a bank of status Wertpapiersammelbank. To obtain the status Wertpapiersammelbank it is necessary to receive recognition by the competent authority of the relevant State (Bundesland) where the Wertpapiersammelbank is seated. The competent authority may impose conditions on this recognition. However, no further explicit regulation is in place. For the time being it is assumed that an incoming CSD do not need to obtain the status of a Wertpapiersammelbank, but instead it is considered sufficient that the incoming CSD holds a collective safe custody account within a resident Wertpapiersammelbank to ensure the transfer of ownership on this account in favour of its customers.

Other Exchanges may introduce different interpretation on these issues.

With regard to the access to MTFs not organized by the operating institution of the Exchange there are no requirements under the German Exchange Act.

Q 5: Please refer to Q 4 above

Q 6: If a CSD wants to become a member of another CSD it has to fulfil the respective requirements. In case of the Clearstream Banking Frankfurt AG, they are laid down in the General Terms and Conditions.