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Mr. Wim Moeliker
Post-Trading Expert Group
Committee of European Securities Regulators
11-13 Avenue de Friedland
75008, Paris
FRANCE

By email to: secretariat@cesr.eu

Dear Mr. Moeliker,

Re: Call for evidence on a formal request for technical advice on identification of regulatory arrangements for post-trading infrastructures

This is the response of European Central Counterparty Limited ("EuroCCP") to the request for evidence by the Post-Trading Expert Group regarding regulatory arrangements for post-trading infrastructures.

EuroCCP is a recognised clearing house regulated by the Financial Services Authority in the United Kingdom. EuroCCP has been established in order to provide central counterparty ("CCP") services to investment exchanges and multilateral trading facilities ("MTFs") operating across multiple jurisdictions in Europe. EuroCCP is the CCP for all trades effected on the MTF Turquoise which commenced operation in August 2008, and for the MTF SmartPool which will commence operation later this year. EuroCCP's settlement model provides for the settlement of trades through segregated sub-accounts held by its settlement agent, Citibank, at local Central Securities Depositories ("CSDs"). This "Settlement Agent Model" ensures that EuroCCP has timely and cost-effective access to the CSDs through an experienced intermediary in each of the jurisdictions in which EuroCCP operates.

During the course of our preparations for launch, we identified regulatory requirements relating to post-trade settlement arrangements in France, Germany and Italy that we consider to be relevant to the Post-Trading Expert Group's current area of focus. EuroCCP considers these regulatory requirements to present additional complications for clearing houses seeking to provide clearing and settlement services across the European Economic Area ("EEA"), in competition to locally established clearing houses.

These issues are set out below.

1. France and Germany: Requirements for central counterparties to have banking licences

Germany and France each maintain regulatory restrictions against the provision of clearing services in their local markets by firms that are not regulated credit institutions. These restrictions affect the ability of CCPs regulated in other EEA jurisdictions, but which are not credit institutions, to provide clearing services in France and Germany. These restrictions are summarised below.

- In France, under article L330-1 of the Monetary and Finance Code, any firm providing clearing and settlement services to an investment exchange domiciled in France must be an EEA-regulated credit institution with authorisation to provide such services in France.
- In Germany, under section 1, para. 1, sentence 2, no. 12 of the German Banking Act any entity acting as central counterparty pursuant to section 1, para. 31 of the German Banking Act conducts banking business, which requires it under section 1, para. 1, sentence 1 of the German Banking Act to be a credit institution.
- Furthermore in Germany, under the German Financial Supervisory Authority ("BaFin")'s "Notes regarding the licensing requirements pursuant to section 32, para. 1 of the German Banking Act in conjunction with section 1, para. 1 and 1a of the German Banking Act for conducting cross-border banking business and/or providing cross-border financial services as at April 2005", the provision of clearing services to participants based in Germany amounts to "conducting banking business in Germany". In order to provide such services, a CCP must obtain either a licence as a credit institution under the German Banking Act, or an exemption from the requirement to obtain such a licence. The practical implications of this restriction are, therefore, that:
 - Non-German CCPs may provide clearing services to German participants if they obtain a banking licence in Germany. This requirement adds to the implementation cost, lead time and running cost for providing the service.
 - Non-German CCPs may provide clearing services to German participants if they obtain an exemption from the requirement to obtain a banking licence in Germany. This requires the firm to demonstrate to BaFin that it is subject to an equivalent standard of regulation by its home state regulator as BaFin would apply to a German credit institution. This requirement adds to the implementation cost and lead time for providing the service.
 - Non-German CCPs who have neither a German banking licence nor an exemption can provide a clearing service to participants based in Germany only if requested by the German participant on the basis of its freedom to request banking services (*passive Dienstleistungsfreiheit*). However, if the non-German CCPs cannot market their services to these participants, there will be low awareness and therefore low demand for their service.

Each of these restrictions creates a regulatory obstacle to entry to the French and German markets for clearing services. This regulatory obstacle applies notwithstanding that a CCP may have the appropriate regulatory authorisation in its home state to provide clearing services.

2. Italy: Requirement for CCP direct account at Monte Titoli

Article 46(3) of the Italian Rules governing central depositories, settlement services, guarantee systems and related management companies as adopted by The Bank of Italy and Consob on 22 February 2008 prohibits participants in Italian settlement systems from settling trades on behalf of clearing houses. This prevents CCPs, such as EuroCCP, from employing in Italy the Settlement Agent Model, under which a local settlement intermediary will facilitate the settlement of trades on behalf of the CCP through a segregated account under the intermediary's membership at the local CSD. Instead, the CCP must have a direct membership and account at the Italian CSD, Monte Titoli, although this account may be operated on behalf of the CCP by its local settlement agent.

Italy is the only jurisdiction in the EEA in which we have encountered such a restriction against the use of the Settlement Agent Model. The consequence for CCPs that use the Settlement Agent Model elsewhere in the EEA is they must adopt a different settlement model for the Italian market. This results in additional operational testing, implementation and running costs for the CCPs. It also has the practical effect of allowing Monte Titoli to control the timing of the CCPs' ability to settle Italian securities, and hence the ability of the CCPs' MTF customers to trade Italian securities in competition with the Italian stock exchange Borsa Italiana (which is under the same ownership as Monte Titoli). Article 46(3) therefore presents a regulatory obstacle to entry to the Italian market for CCP clearing services that is not present in other EEA markets.

We consider that the regulatory restrictions in France, Germany and Italy ultimately increase the cost for investors in the securities markets. Where a CCP domiciled in an EEA state has satisfied its home state regulator that it meets that home state regulator's requirements for regulatory approval as a clearing house, there should arguably be no further requirement to obtain local licences or exemptions in the other EEA states in which the CCP wishes to provide clearing services. We consider that this is an important aspect of facilitating competition in the market for clearing houses, and the facilitation of cost-effective support of the new breed of pan-European MTFs which ultimately benefit investors.

It may be appropriate for regulators to share information regarding the supervision of any incoming clearing house: this could be achieved through the establishment of memoranda of understanding between each of the local regulators. However, given that the restrictions mentioned above are set out in local law, any harmonising action taken at the European level will need to be matched by amendments to the legal restrictions at the local level.

We hope you find these comments helpful.

Yours sincerely,



Diana Chan
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