19 February 2015

ESMA

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FRANCE

*(submitted via ESMA website)*

**Re: BNY Mellon CSD response on the ESMA Technical Standards under the CSD Regulation (ESMA/2014/1563)**

**Introduction**

BNY Mellon CSD would like to thank the ESMA for the opportunity it is given to comment on the work undertaken by the ESMA with respect to the Technical Standards ESMA has been required to draft under the CSDR. We hope that our contribution will be helpful to the ESMA in understanding where and why BNY Mellon CSD is supportive of the ESMA proposed approach and where BNY Mellon CSD wants to draw the ESMA attention to concerns/point of attention.

**BNY Mellon CSD**

BNY Mellon CSD is a separate and fully-owned subsidiary of The Bank of New York Mellon Corporation, a company registered in Delaware, US as Non-banking Corporation. Its purpose is be authorised as a Central Securities Depository and also operate a Securities Settlement System specifically for supplying notary, settlement and safe keeping services, initially under commercial bank money and in the future offering central bank money settlement of transactions.

BNY Mellon CSD performs its activities of CSD under the Belgian legal framework, after its approval as a CSD under section 1.1 of Royal Decree no. 62 and the designation of the Securities Settlement System operated by BNY Mellon CSD under section 2, §5 of the Act of 28 April 1999 implementing 1998/26/EC Directive on Settlement Finality in payment and securities settlement systems. BNY Mellon CSD SA/NV was officially established in December 2012 and the first Royal Decree, that recognises BNY Mellon CSD as a Belgian CSD, was disclosed as well in December 2012.

**Our Approach to Responding to this Consultation**

The BNY Mellon group is submitting two separate responses to this Consultation Paper. This response focuses on issues that relate directly to BNY Mellon CSD as a CSD; there is a separate BNY Mellon response that focuses more on issues that relate to BNY Mellon as an intermediary.

BNY Mellon CSD is a member of the T2S Advisory Group, which has also submitted a response. BNY Mellon CSD has also contributed to the ECSDA response.

**Main High Level Comments**

BNY Mellon CSD makes the following general comments in regard to this consultation paper, as this supports the approach we have taken in responding to the specific questions asked by ESMA.

CSDR, both the level 1 text, and the more detailed level 2 implementing measures, are, by the nature of what they cover, of critical importance to BNY Mellon CSD.

BNY Mellon CSD believes that CSDR is absolutely necessary European legislation, both because it ensures common standards and requirements across all CSDs in Europe, and because it complements the T2S project.

A key aspect of CSDR and T2S is that both projects contribute to systemic stability and safety, and both projects also open up European securities markets, and allow issuers and investors access to a broader range of service providers.

BNY Mellon CSD believes that the CSDR aspects of market-opening, and of lowering barriers to new entrants, need to be fully realized in the level 2 implementing measures.

BNY Mellon CSD believes that several elements of the proposals are unnecessarily restrictive, would have the effect of limiting market access, and would have the effect of reducing the efficiency of the core service offering of CSDs.

In this context, BNY Mellon CSD notes in particular the proposals relating to the role of CSDs in the buy-in process.

**Responses to Specific Questions**

BNY Mellon is responding to ESMA using ESMA’s “Form to Reply” document, which we are submitting online. However, for convenience, our responses to questions are also contained in this document in **Annex 1** below.

BNY Mellon CSD looks forward to further engagement with the ESMA in regard to this Consultation Paper and any future consultation papers on this topic.

Chris Prior-Willeard

Chief Executive Officer

BNY Mellon CSD SA/NV

**ANNEX 1 – Responses to Specific Questions**

**Q2: Do you agree with the cases when matching would not be necessary, as specified under Article 3(2) of the draft RTS?**

**Should other cases be included? Please provide details and evidence for any proposed case.**

We understand from art. 3(2) of the draft RTS that matching would:

* be mandatory where the settlement instruction, i.e. transfer order, is **the result of “an instruction by a participant to transfer title to, or interest in, a security or securities by means of a book entry on a register, or otherwise**” (Art.2 (i) of Directive 98/26/EC, so-called Settlement Finality Directive);
* not be mandatory in the case of already matched instructions and of some FOP instructions.

BNY Mellon CSD agrees with this proposed approach, provided it is clear that instructions initiated **by the CSD** (e.g. distribution of shares as a result of corporate events) are not considered as “settlement instructions” under the draft RTS.

We would be concerned if Article 3(2) were read as prohibiting matching by a CSD in the case set out in sub b. It should be possible for CSDs to match such instructions if they are sent to the CSD as unmatched instructions.

**Q3: What are your views on the proposed approach under Article 3(11) of the draft RTS included in Chapter II of Annex I?**

**Do you think that the 0.5% settlement fails threshold (i.e. 99.5% settlement efficiency rate) is adequate? If not, what would be an adequate threshold? Please provide details and arguments.**

**Do you think that the 2,5 billion EUR/year in terms of the value of settlement fails for a securities settlement system operated by a CSD is adequate? If not, what would be an adequate threshold? Please provide details and arguments.**

BNY Mellon CSD is of the opinion that participants to CSDs should be given the possibility for hold/release and partialling mechanism, whatever the settlement efficiency is on the securities settlement system. We therefore consider thresholds as unnecessary.

Moreover, should ESMA consider further the ability for CSDs to apply thresholds for the purpose of hold/release and partialling mechanism, we would like to highlight the potential issue to be faced by participants: enabling for distinct regime could potentially be difficult to implement at CSDs’ participants level, since it will result, depending on the place of settlement, in different settlement rules to be applied by participants (T2S rules, CSD enabling hold/release or partialling versus CSD that don’t).

Regarding the possible exemption to recycling, BNY Mellon CSD is of the opinion that such an exemption would be counterproductive and therefore not allowed. As a result of such exemption, CSDs would have to cancel failed settlement instruction at the end of the settlement day and require participant to re-instruct. In addition, such a cancellation would make it difficult in case of corporate action scenario, where market claim on pending instruction would disappear.

As a result, we propose to remove art. 3(11), (12) and (13).

**Q4: What are your views on the proposed draft RTS included in Chapter II of Annex I?**

* Art. 3(1) - Automated processing

While BNY Mellon CSD fully supports the requirement to have automated settlement process, it would like to stress that such an automated process may be (partially) suspended in case of, for instance, contingency process being involved. The way the settlement process would be undertaken in such a scenario is described in the operational procedures of the relevant CSDs. We therefore suggest re-drafting art. 3(1) according to the below:

*“A CSD shall process settlement instructions on an automated basis, except in those circumstances that are covered in art.41 and art.45 (3) of regulation (EU) n° 909/2014 of 23 July 2014.”*

* Art. 3(1) - Reporting of manual interventions

With respect to the reporting of any type of manual intervention without any delay, BNY Mellon CSD would like to stress that:

* As per art. 6(5) of regulation (EU) n°909/2014 of 23 July 2014, ESMA was required to “develop draft regulatory technical standards to specify … the details of the procedures facilitating settlement referred to in paragraph 3”; we are of the opinion that imposing the CSDs to report, without any delay, on any manual intervention, will in no manner facilitate settlement.
* We find such a requirement unclear and subject to competent authority’s interpretation; for instance should “any type” be understood as each and every individual manual intervention, or should they be grouped? Regarding IT incidents, does ESMA expect reporting on each and every IT incident or should there be differentiation of the “critical” IT incidents in such a manner that they impact the level of settlement efficiency for a given period or the availability of the settlement engine?
* As ESMA’s proposal, CSDs will have the responsibility to report without any delay; for those CSDs that will be using the T2S platform, we would like to highlight that, in case of manual intervention in the settlement engine, and such information may be out of the control of the CSDs being using the T2S settlement engine. Does the ESMA intend to implement specific regimes regarding the deadline to report, the way CSDs will have to prevent such subsequent manual intervention, where the competent authority made a negative assessment? Or are the circumstances clear in which such a requirement would be appropriate?
* In its art. 3(1), last paragraph, ESMA would require competent authorities to consider appropriateness of manual intervention; given that CSDs would be required to report on any type of manual intervention, it would require the competent authority to make an assessment of the reporting made by the CSD. We find this assessment difficult to make because (i) number of assessment could be important and difficult to manage, (ii) proposed set of information to be reported could not be sufficient for the competent authority to make such a judgment (for instance context of the manual intervention – because of disruption at the communication process or settlement engine…).
* Regarding the periodicity of the reporting, we are of the opinion that the requirement to report without any delay is burdensome and we would suggest, if such a requirement would be further considered, to require such a reporting in the way and according to the periodicity as set out in art. 5(1) of the draft ANNEX I – Settlement discipline.

We therefore suggest either:

1. to remove the sub paragraph of art. (3)1 related to reporting of manual interventions, but leaving the reporting on manual intervention as set out in art. 41 (1) (l) of Annex II – Draft RTS on CSD authorization; or
2. at least, re-drafting art. 3(1), second paragraph, according to the below:

*“A CSD shall report manual interventions* ***that were critical to the settlement efficiency or settlement engine availability*** *to the competent authority, in a way and format agreed with its competent authority.*

*If the competent authority,* ***in coordination with the relevant CSD****, considers that the type of manual intervention is not appropriate for the smooth functioning of the securities settlement system, the CSD shall not to use such type of manual intervention in the future”.*

* Art. 3(3) – Mandatory matching fields

With respect to the requirement for participants to use a detailed list of mandatory matching fields, BNY Mellon CSD is of the opinion that the ESMA has underestimated the impact of such a requirement, both with respect to the requirements for technical implementation, and to the impact on the efficiency of the settlement engine, as an extra mandatory matching field will tend to reduce settlement efficiency.

For some of these proposed matching fields, new ISO codes will have to be created or others are not current agreed harmonized market practice. This is the case for instance for point (d) transaction type of art. 3(3) for those transactions further defined in art. 4(2), (e) that are related to OTC, collateral management, custody related and CCP-cleared.

This means that, in addition to time constraints for having those ISO codes agreed by the market, changes to ISO standards will require testing and implementation. It will also require both the allied CSDs and participants to adapt their systems, being the settlement engine participant’s settlement mechanisms. Risks should not be underestimated that, as a result of the need for the market to implement the technical development, it could impact the settlement efficiency as a whole (because of increase in unmatched for instance) and would therefore result in a totally contrary effect to the objectives pursued by the CSD Regulation.

Furthermore, it is our view that the information in the matching fields must be quoted using international open communication procedures and standards for reference data. CSD-proprietary codes for reference data should not be allowed for matching purposes.

BNY Mellon CSD would to bring ESMA’s attention on the need for further deadlines to be given in order for CSDs but also for the market as a whole to (i) agree, (ii) test and (iii) implement harmonized ISO standards.

* Art. 3(4) – Bilateral cancellation

BNY Mellon CSD agrees with the provision to offer participant bilateral cancellation facility. Nevertheless, we would like to stress that bilateral revocation should be required for matched instruction, while it would remain possible for participant to unilaterally cancel unmatched instructions. Moreover the CSD should be allowed to automatically cancel all unmatched instructions that remain pending for a certain number of days after their intended settlement date e.g. 30 calendar days after the intended settlement date all unmatched instructions will be cancelled automatically and the participant will be advised thereof.

We therefore propose this article to be redrafted as below:

*“A CSD shall offer its participants a bilateral cancellation facility that enables them to bilaterally revoke* ***matched*** *settlement instructions that form part of the same transaction.”*

* Art. 3(8) – Information on pending instructions

While BNY Mellon CSD fully supports the rationale of such a provision, i.e. to enable its participants to have up-to-date information on their pending settlement instruction, we are of the opinion that CSD participants should be offered such a possibility rather than making it mandatory.

The reasons for such an approach are: (i) making such a regime mandatory may not result in CSDs offering such a service for free and (ii) may result in too many allegements considered unnecessary for those participants that take action on “initial” allegement notices.

Therefore, we propose to redraft art. 3(8) accordingly, taking also into account the T2S context:

“*A CSD shall* ***offer*** *its participants* ***the possibility of being informed*** *about pending settlement instructions of counterparties at least within 1 hour after the first unsuccessful attempt to match the instructions* ***or*** *immediately if the first unsuccessful attempt to match happens in the 5 hours period before the cut-off of the intended settlement date.”*

* Art. 3(9) – Real–time access to instructions status

BNY Mellon agrees that CSDs should enable their participant to access in real-time information regarding their instructions. However, we want to draw ESMA attention to:

* Such real-time access should not be offered cost-free.
* Some of the proposed statuses are not ISO standard codes (for instance ISO standard codes do not exist for on hold and partially settled transactions).
* Information related to the buy-in mechanism is not available to CSDs, at a minimum where buy-ins are to be handled at CCP or trading venue level.
* Information with respect to the penalty is unclear; what would be expected to be available? Would it be the result of the calculation per failed settlement instruction, ie gross information, which in any case will be available not real-time but after the end of the ISD or the result of monthly net balance (and in such a circumstance what is the added value of having real time access) ? Does it need to distinguish between the penalties paid versus received?

We propose the ESMA to redraft this article according to the below:

*“A CSD shall enable its participants to have real-time access to the information regarding the intended settlement date and the status of their settlement instructions in the securities settlement system that the CSD operates, including per intended settlement date.”*

**Q5: What are your views on the proposed draft RTS on the monitoring of settlement fails as included in Section 1 of Chapter III of Annex I?**

* Art. 4(1) - System monitoring settlement fails

BNY Mellon CSD fully supports the need for CSDs to be able to identify and keep records of information related to settlement instruction that have been sent to it by its participants. Such a requirement is a key component of the set of information that should be available to its participants as well as for the purpose of retrieving information in case of disruption or request from a stakeholder.

Nevertheless, we are also of the opinion that:

1. The requirement to have information kept on the status of settlement instruction per intended settlement date under art. 4(1) should be clarified as it seems to us redundant in some way with art. 4(2), (a). What would be the difference between the identification of all settlement fails under (2), (a) and the implicit ability to have such information retrieved from the data collected in art. 4(1)?
2. The requirement to have record under art. 4(1) on “recycled settlement instructions” is to us irrelevant as (a) it is correspond either to pending settlement instructions on ISD or failed instructions that have not yet been settled or cancelled, (b) it does not correspond to an ISO code (therefore requiring development of fields as explained under questions 4 and 7;
3. The requirement made with respect to buy-in does not take into account the level of information that would be available to CSDs on this process.

As a result, we suggest art. 4(1) to be redrafted according to the below, as well as the relevant reporting field required under Annex I templates:

“*A system monitoring settlement fails shall enable a CSD to identify and to keep a record of information about the intended settlement date and the status of settlement instructions entered into the securities settlement system that it operates, covering at least the following including per intended settlement date:*

*(a)* ***~~matched settlement instructions that are not settled~~ pending instructions, which can still settle on the intended settlement date;***

***~~(b) settlement instructions that are not matched;~~***

***~~(c) settlement instructions on hold;~~***

*(b) partially settled settlement instructions, including the settled part and the missing part of either securities ~~or cash;~~*

***~~(e)~~(c)*** *failed settlement instructions,* ***which cannot settle anymore on the intended settlement date,*** *including,* ***where available,*** *information on: […]*

***~~(f) recycled settlement instructions;~~***

***~~(g)~~******(d)*** *cancelled settlement instructions****;, including information whether it is cancelled by the system or by the participant.***

***~~(h)~~ (e) fully*** *settled settlement instructions****.;***

***For each of the categories of settlement instructions above, the following information should be provided:***

***- whether an instruction is matched or not matched;***

***- whether an instruction can settle partially;***

***- whether an instruction is on hold;***

***- where relevant, what are the reasons for instruction being pending or failing.”***

* Art. 4(2) - System monitoring settlement fails

BNY Mellon CSD would like to draw ESMA’s attention to several issues:

1. The proposed reasons for failed instructions is to us incomplete and impossible to identify by the CSDs in some circumstances; for instance, failed settlement may be due to settlement restrictions (as under art. 4(2), (c)), the amount of cash that caused the settlement to fail is unknown to the CSD (as the cash account are maintained at the central bank), linkages, instructions sent after the deadline etc..;
2. The type of asset classes defined under (d) are not consistent with the classes defined for the purpose of the cash penalty rate or the buy-in rules;
3. The type of transactions defined under (e) should be aligned with ISO standards and T2S requirement;
4. We would like to understand which situations are envisaged to be captured by “(v) CCP cleared transactions, other than those under (i)—(iv) ?

As a result, we suggest art. 4(2) to be redrafted according to the below, as well as the relevant reporting field required under Annex I templates:

*“A system monitoring settlement fails shall allow a CSD to identify:*

*(a) …*

*(b)* ***the reason for the settlement fail, based on available information.***

*(c) any settlement restrictions.*

***(d)* *the relevant ISO type of asset classes required for the purpose of compliance with requirements under article [penalty rates] and article [buy-in rules] of this******Regulation.***

***(e) the place of trading and of clearing, where applicable;”***

**Q6: What are your views on the proposed draft RTS related to the penalty mechanism? Do you agree that when CSDs use a common settlement infrastructure, the procedures for cash penalties should be jointly managed?**

BNY Mellon CSD views the topic of the penalty mechanism of being of major importance.

As other parties will be responding in detail on this topic, BNY Mellon CSD is limiting itself to the following more technical remarks.

* Art. 7 – collection of cash penalties

BNY Mellon CSD is of the opinion that calculation as per art. 7(2) should encompass the end of the settlement day in all circumstance, without the need to distinguish between DVP or FOP so as to ensure consistency in the reference price to be used for calculation.

We therefore propose ESMA to redraft this article according to the below:

*“The penalty shall be calculated or applied on the failed settlement instructions* ***~~at the moment of the cut of time for DVP settlement instructions and~~*** *at the end of the settlement day* ***~~for FoP settlement instructions.”~~***

With respect to art. 7(5), BNY Mellon CSD would like to draw ESMA’s attention to the need to clarify the meaning of a dedicated cash account. It is our understanding that such a “dedicated” cash account would mean a technical account that CSDs would be required to open for the sole purpose of collecting and redistributing penalties from and to all their participants.

In addition, BNY Mellon CSD would like to get clarification from ESMA on how the cash to be deposited by the CSD on behalf of its failing participants would be handled in case of default by a failing participant, while such failing participant would have not transferred the necessary cash by the time it became insolvent, how the case would be collected in case a failing participant does not agree with the penalty applied, etc.

**Q7: What are your views on the proposed draft RTS related to the buy-in process?**

**In particular, what are your views on applying partial settlement at the end of the extension period? Do you consider that the partialling of the settlement instruction would impact the rights and obligations of the participants?**

**What do you think about the proposed approach for limiting multiple buy-in and the timing for the participant to provide the information to the CSD?**

BNY Mellon CSD views the topic of the buy-in process of being of major importance.

As other parties will be responding in detail on this topic, BNY Mellon CSD is limiting itself to some brief remarks.

BNY Mellon CSD would like to point out that art. 7 (10)(c) requires CSDs to include in their internal rules an obligation for their participants to be subject to measures referred to in paragraph 3 to 8 (buy-ins). CSD Regulation therefore does not require CSDs to execute the buy-in.

BNY Mellon CSD therefore fully disagrees with ESMA’s approach to involve CSDs as a potential component in the execution of the buy-in process and stresses that it is inconsistent with the level 1 Regulation.

Such an involvement would impose totally new obligations to CSDs, while most of them would be very difficult to impose or achieve. Obstacles to such a regime are, *inter alia*:

* the need to access detailed information on buy-ins, and to be able to identify buy-ins from other securities deliveries, which in most cases cannot be done today;
* “consistency tests” on the instructions CSDs receive in order to prevent multiple buy-ins seems to us very difficult to achieve;
* totally new communication flows will have to be implemented between CSDs and their participants (for the purpose of collecting trading information);
* several proposed reporting obligations are not supported by ISO standards; they will thus take time to be implemented.

**Q9: What are your views on the proposed draft RTS related to the type of operations and their timeframe that render buy-in ineffective?**

BNY Mellon CSD is of the opinion that requirements imposed by art.14 will require CSDs to implement very costly and time-consuming IT developments as they will have to identify, in their own systems, operations composed of several transactions, often requiring additional functionalities to be built. In case transactions are linked, this information needs to come from the counterparties of the underlying trade and be populated in the settlement instructions by the respective CSD participants for CSDs to be able to identify such links.

We are in agreement with ECSDA’s view that it will be very difficult, if not impossible, for CSDs to have information on the terms of the repo or whether the instruction is the first or the second leg of the repo. In addition, while we agree that ISO messages could accommodate the inclusion of the necessary information, such an implementation would require coordination and implementation at industry level.

Further, we would like to draw ESMA’s attention to the impossibility for CSDs on T2S to comply with such a requirement since such functionality will not be available in T2S.

**Q11: What are your views on the proposed draft RTS related to the conditions for a participant to consistently and systematically fail?**

BNY Mellon CSD would like to draw ESMA’s attention to the need to ensure comparable methodology is implemented across CSDs. Moreover, we are of the opinion that settlement efficiency will have to be further defined (per account, per family, per group, etc.).

**Q12: What are your views on the proposed draft RTS related to the settlement information for CCPs and trading venues?**

BNY Mellon CSD is uncertain about the process which will enable CSDs to provide trading venue with information related to the status of failed settlement as CSDs might not be in a position to identify the trading venue where the transaction that gave rise to the settlement instruction took place (mainly where there instructions are not the result of a direct trade feed between the trading venue and the CSD).

**Q14: Do you agree that 18 months would be an appropriate timeframe for the implementation of the settlement discipline regime under CSDR? If not, what would be an appropriate timeframe in your opinion? Please provide concrete data and evidence justifying a phase-in for the settlement discipline measures and supporting your proposals.**

Given CSDs and their participants will be involved in T2S migration during the coming months and years, given the IT developments and impact assessment phase that the settlement discipline regime will require, BNY Mellon CSD is of the opinion that CSDs, participants and other infrastructures should be given a period of at least a 24 months for the implementation of the settlement discipline regime and the reporting obligations attached to it, especially because the CSD’s participants will have to make significant changes to their systems as well, such an implementation will requires more consultation and education with a wide population of CSDs and CSD participants.

**Q15: What are your views on the proposed draft RTS on CSD authorisation (Chapter II of Annex II) and draft ITS on CSD authorisation (Chapter I of Annex VI)?**

* Art.3 – Policies & procedures

BNY Mellon CSD would like to clarify on two specific aspects of that provision and get confirmation from ESMA on our interpretation:

1. Where ESMA proposes that a description of how compliance will be ensured and of measures in event of breach, it is our understanding that CSDs should be enabled to have such descriptions included in broader generic policies and/or procedures. Making such a requirement applicable per individual policy or procedure would require a complete review of existing policies and procedures that are available today.
2. Also, we are of the opinion that the requirements on the designation, within the policies or procedures, of the person responsible for compliance is burdensome and we would rather propose to have a business line/department identified rather than a “person”. This is mainly driven by practical considerations, for instance in case of resignation, organizational changes… , so that updates of policies and procedures are maintained at a reasonable level.

BNY Mellon CSD therefore proposes art. 3(1)(b) & (c) to be redrafted according to the below:

*“Where an applicant CSD is required to provide information regarding its policies or procedures under this Regulation, it shall ensure that the policies or procedures contain or are accompanied by each of the following items:*

*(a) an indication of the persons responsible for the approval and maintenance of the policies and procedures;*

*(b) a description of how compliance with the policies and procedures will be ensured and monitored, and the ~~person~~ department/business line responsible for compliance in that regard;*

*(c) a description of the measures to adopt in the event of a breach of policies and procedure;*

*With the possibility under (b) and (c) for the CSD to have these descriptions included in a separate policy or procedure.”*

* Art. 4 – Information for groups

BNY Mellon CSD would like to stress that art.4 is subject to misinterpretations in its current version.

Under art. 4(1)(b), it is our understanding that the competent authority should be given with information on the management and shareholders of the parent undertaking or, where such shareholders are composed by several entities, information on the management and shareholders of that group of undertakings.

In parallel, we would like to raise ESMA’s attention on the below.

In its art. 2(2)(n), ESMA requires the application to include the list of outsourced services that the applicant CSD is providing or intends to provide. We agree with such a requirement as it is necessary to the competent authority for the purpose of the authorization process.

In parallel, ESMA’s proposal suggests, as per its art. 4 (3) & (4), that, where those services are to be “outsourced” (being intra-group or by means of an external party), the applicant CSD should provide with a description of the respective ancillary service or a description and a copy of such an outsourcing agreement.

BNY Mellon CSD is of the opinion that such a requirement is:

1. a duplication of the requirement as defined under art. 2(2)(n); and
2. not aligned with the level 1 Regulation that provides:
   1. in its art. 19 (1), that only the outsourcing of core services should be subject to authorization by the competent authority.
   2. in its art. 30(3), that “a CSD…shall make available upon request to the competent authority … all information necessary to enable them to assess the compliance of the outsourced activities with the requirements of this Regulation.”

BNY Mellon CSD therefore proposes for art. 4(3) and (4) to be deleted.

* Art. 5 – Financial reporting, business plan, RRP

With respect to art. 5(5)(b), BNY Mellon CSD is of the opinion that art. 5(5)(b) (i.e., the requirement for the CSD to submit the resolution plan) should be deleted.

Under CSDR art. 22(3), “the competent authority shall ensure that an adequate resolution plan is established and maintained”, and under CSDR recital (27), “… the competent authorities should ensure that an adequate resolution plan is established and maintained for each CSD in accordance with the relevant national law.”

As it is the responsibility of the competent authority to develop and establish the resolution plan (and the competent authority is the “owner” of the resolution plan), we do not believe it should be necessary, nor indeed appropriate, for the CSD to submit the resolution plan with the application for authorisation.

BNY Mellon CSD is of the opinion that references to the resolution plan in the draft ITS (Annex VI in the consultation paper) should also be deleted, for the same reasons.

Similarly, we would suggest that art. 50(1)(g), and item 10 in Annex II table B are deleted, because in that case, the competent authority can obtain the resolution plan from the relevant resolution authority pursuant to Directive 2014/59/EU.

* Art. 10 – Senior management, management body and shareholders

BNY Mellon CSD would like to raise ESMA’s attention on the self-declaration of any potential conflict of interest, that could become difficult to manage and redundant with other proposed requirements as per ESMA’s draft Technical Standards.

Under art. 10 (1)(c)(x), ESMA would impose the self-declaration of good repute to include a declaration of any potential conflict of interest. We are of the opinion that such a requirement should be redrafted according to the below:

“x. A declaration of any potential conflict of interests, at the time of the application for authorization by the CSD…”

In order to:

1. Not duplicate the regime as set out under art. 11 of ESMA draft technical standards, and
2. Not require the need to update the self-declaration of good repute where such a potential conflict of interest would arise after the completion of the authorisation process.

* Art. 18 – Transparency

With respect to art. 18(1), BNY Mellon CSD would like to remind that, as per art. 34 of Regulation (EU) N° 909/2014:

1. transparency on prices, fees and discounts/rebates applies to core service;
2. costs and revenues of core services should be accounted separately and disclosed to the competent authority;
3. costs and revenues of ancillary services should be accounted as a whole and disclosed to the competent authority.

BNY Mellon CSD is of the opinion that art. 18(1) (and recital (8) subsequently) should be redrafted according to the below:

*“1. An application for authorisation of a CSD shall contain relevant documents regarding pricing policy, including any existing discounts and rebates and conditions to benefit from such reductions for each core ~~and ancillary~~ services that are to be disclosed in accordance with Article 34 of Regulation (EU) No 909/2014.*

*2. The applicant CSD shall provide the competent authority with a description of methods used in order to make the information available for clients and prospective clients, including a copy of the fee structure and the evidence that the CSD services are unbundled.*

***3. The applicant CSD shall also provide the competent authority with information on the cost and revenue of ancillary services provided by the CSD, taken as a whole."***

* Art. 27 – portability

BNY Mellon CSD understands that such a provision is derived from EMIR. We would like to stress that:

1. as per CPMI-IOSCO PFMIs, while portability is a principle that applies to CCPs, it does not apply to CSDs;

CPMI\_IOSCO rather agrees that: “In the event that an FMI becomes non-viable as a going concern or insolvent, it is important that appropriate actions be taken that allow (a) the recovery of the FMI so that its critical operations and services may be sustained, or (b) the winding down of the non-viable FMI in an orderly manner, for instance by transferring the FMI’s critical operations and services to an alternate entity. Depending on the specific situation and the powers and tools available to authorities in relevant jurisdictions, these actions may be implemented by the FMI itself, by the relevant authorities, or by a combination of both.”

1. there is no requirements in the CDS Regulation to impose such a “portability” regime on CSDs. CSD Regulation rather put the responsibility on the competent authorities. See:
   * 1. recital (27), which provides that “Without prejudice to Directive 2014/59/EU of the European Parliament and of the Council ( 2 ), the competent authorities should ensure that an adequate resolution plan is established and maintained for each CSD in accordance with the relevant national law.”
     2. Art. 22(3), which provides that: “The competent authority shall ensure that an adequate resolution plan is established and maintained for each CSD so as to ensure continuity of at least its core functions, having regard to the size, systemic importance, nature, scale and complexity of the activities of the CSD concerned and any relevant resolution plan established in accordance with Directive 2014/59/EU.”

As a result, we are of the opinion that ESMA should redraft art. 27 according to the below:

***Transfer of participants and clients’ assets in case of a withdrawal of authorisation***

*An application for authorisation of a CSD shall contain the procedure put in place by the applicant CSD in accordance with Article 20(5) of Regulation (EU) No 909/2014.*

* Art. 30 – Operational risk

As per art. 19 (1) and art. 30 (4) of Level 1 Regulation:

* “An authorized CSD shall submit an application to the competent authority of its home member state where it wishes to outsource a core service to a third party…”
* “The outsourcing of a core service shall be subject to authorization under article 19 by the competent authority.”

We therefore suggest ESMA to redraft art. 30 (2) according to the below:

*“Where a CSD is willing to outsource through a third party a core service as defined under Section A of the Annex of Regulation (EU) n° 909/2014, the application for authorisation shall contain the information on these outsourcing agreements referred to in Article 30 of Regulation (EU) No 909/2014, entered into by the applicant CSD in accordance with Article 30 of Regulation (EU) No 909/2014, together with the methods employed to monitor the service level of the outsourced functions and a copy of the contracts governing such arrangements.”*

**Q16: What are your views on the proposed draft RTS on CSD review and evaluation (Chapter III of Annex II) and draft ITS (Chapter II of Annex VI)?**

* Art. 38 – Access to data by the competent authority

BNY Mellon CSD reminds that according to art. 22:

* it is the responsibility of the competent authority to review and assess compliance with the Regulation (EU) n° 909/2014;
* ESMA shall develop draft regulatory technical standards to specify the information that the CSD is to provide to the competent authority for the purpose of the review and evaluation.

We are therefore of the opinion that imposing additional assessment on the CSDs:

* Is contrary to the requirements as set out in the level 1 Regulation;
* Is too burdensome taking into account the requirements as set out in art. 26 of Regulation (EU) n°909/2014.

As a result, BNY Mellon CSD suggests this article to be redrafted according to the below:

*“For the purpose of the review and evaluation as referred to in Article 22(7) of Regulation (EU) No 909/2014, a CSD shall provide the information as defined in this chapter* ***~~together with a self-assessment on the CSD’s activities overall compliance with the provisions of Regulation (EU) No 909/2014 during the review period~~****, and any other information as requested by the competent authority.”*

* Art. 40 – Documents submitted that have been materially modified

For the sake of consistency and in order for such a requirement to remain sustainable both to CSDs and competent authorities, we are of the opinion that this article should be redrafted according to the below:

*“A CSD shall provide all documents submitted to the competent authority in the application for authorisation which have been* ***materially*** *modified in the review period.”*

* Art. 41 – Information relating to periodic events

Regarding the need to report on:

1. any changes affecting any links of the CSD, BNY Mellon CSD is of the opinion that only material changes to links will be of relevance to the competent authority;
2. Summary of types of manual intervention, BNY Mellon CSD is of the opinion that CSDs shall be required to report those manual interventions that are critical to the settlement efficiency or the stability of the settlement engine;
3. Information on measures taken to address the identified technical incidents, we are of the opinion that only those technical incidents that are critical/material to the services provided by CSDs, either core or ancillary, and therefore impacted the settlement engine availability or settlement efficiency would be of relevance to the competent authority.
4. Also, with respect to technical incidents, we would like clarification on

* Which type of conflicts of interest are targeted here?
* Which reporting would be expected from CSDs when the technical incident took place at the level of a service provider, as it can be that such a service provider will not be subject to CSD Regulation.

BNY Mellon CSD therefore proposes this article to be redrafted according to the below:

“*For each review and evaluation, the CSD shall provide to the competent authority,* ***where relevant****:*

*[…] (j) information on any* ***material*** *changes affecting any links of the CSD, including the mechanisms and procedures used for settlement;*

*[…] (n) information on measures taken to address critical technical incidents* ***~~and conflicts of interest~~*** *as well as the results thereof;*

*[…] (u) ~~information on any changes to the resolution plan established and maintained for the CSD so as to ensure continuity of at least its core functions, having regard to the size, systemic importance, nature, scale and complexity of the activities of the CSD concerned, and any relevant resolution plan established in accordance with Directive 2014/59/EU;~~*

*(u) in cases where the competent authority is also the resolution authority of the CSD, any information deemed necessary to ensure that the resolution plan established and maintained by the resolution authority ensures the continuity of at least the CSD core functions, having regard to the size, systemic importance, nature, scale and complexity of the activities of the CSD concerned, including any relevant resolution plan established in accordance with Directive 2014/59/EU;”*

* Art. 42 – Statistical data

As a general comment, BNY Mellon CSD would like to stress that:

1. Regulation (EU) N°909/2014 only requires ESMA to develop regulatory technical standards to specify the information that the CSD is to provide to the competent authority for the purpose of the review and evaluation as referred in art.22 of the CSD Regulation; we are therefore of the opinion that the statistical data as defined under art.42 are disproportionate to the objective pursued by art.22 of Regulation (EU) N°909/2014
2. CSDs are already subject to reporting obligation on statistical data to ESCB central banks.

In addition, we are of the opinion to several statistical data as required under art. 42 are difficult to provide or unclear:

1. Provision of nominal value and market value of securities maintained/centrally maintained **by asset class**: if no harmonisation on the different asset classes is implemented across CSDs, we are of the opinion that such a reporting will be meaningless; in parallel, we are unclear on the process to ensure that each and every ISIN will be assigned the same asset class classification if such a process is not centrally maintained.
2. Provision of nominal value and market value: we are uncertain on how CSDs would be in a position to provide with a market value on some specific instruments (for instance private issued securities).
3. Provision of nominal value and market value of securities maintained/centrally maintained **by country of incorporation of the participant/issuer:** we are uncertain on the relevance of such criteria for statistical purpose. Moreover, in some instances, CSDs are just not informed on the country of incorporation of the issuer.
4. Number, nominal value and market value of buy-in transaction: CSDs will only be able to provide with such information when such requirements will be enforceable and where such information will be available (see our comments on the buy-in regime under question 7 and 23).

**Q20: What are your views on the proposed draft RTS on banking type of ancillary services (Chapter VI of Annex II) and draft ITS on banking type of ancillary services (Chapter IV of Annex VI)?** BNY Mellon CSD would like to clarify that our understanding of art. 50 (3)(l)(ii), ie “*a programme of operations ...The programme of operations shall include a formal written commitment by the designated credit institution that:*

*(i) the credit institution shall not itself carry out any of the core CSD services referred to in Section A of the Annex to Regulation (EU) No 909/2014;*

*(ii)* ***the authorisation referred to in point (b) of Article 54(2) of Regulation (EU) No 909/2014 shall be used only to provide the banking-type ancillary services and not to carry out any other activities****;”*

is that the designated credit institutions would be allowed to perform non-banking-type ancillary services, for instance those services covered under Section B of the Annex the CSD Regulation.

**Q22: What are your views on the proposed draft RTS on CSD risk monitoring tools (Chapter III of Annex III)?**

* Art. 5 – Organisational structure

BNY Mellon CSD would like to raise ESMA’s attention to the requirement set out in art. 5 (5) (last sentence), where CSDs would be required to disclose the mandate and procedure of the risk committee.

We are of the opinion that such a requirement is disproportionate and should only be communicated to the competent authority, without being made available to the public.

We therefore propose this article to be redrafted according to the below:

*“5. …It shall have a clear ~~and public~~ mandate and procedures and access to external expert advice where it may find fit. “*

**Q23: What are your views on the proposed draft RTS on CSD record keeping (Chapter IV of Annex III) and draft ITS on CSD record keeping (Annex VII)?**

BNY Mellon CSD largely supports the ESMA approach towards record keeping.

Nevertheless, we still consider that some of the proposals will be difficult to achieve in a short timeframe because of the broader impact such a requirements would have (not only on CSDs but their participants and T2S):

* Art. 9(2) – Transaction/settlement instruction records
* Table 1 of Annex of Draft ITS on CSD record keeping

The ‘transaction type’ field/row is not designed fully according to standard ISO codes (highlighted codes do not exist). In addition, regarding this field there is currently no agreed harmonised market practice in the EU on how to populate the transaction type field as a new mandatory matching field (i.e. what value to assign for the different types of transactions).

|  |  |
| --- | --- |
| Reference: RTS on CSD requirements of Annex I, Article 4 (2) e) Transaction type (covering at least the transaction types specified in point e) of Article 4(2) of Regulation (EU) No… [RTS on settlement discipline]) | - TRAD (purchase or sale of securities executed on a trading venue)  - TRAO (OTC purchase or sale of securities)  - SECL/SECB (securities lending and borrowing)  - REPU/RVPO (repurchase transactions)  - COLL (collateral management)  - CORP (corporate actions)  - CUST (custody related operations)  - CCPC (CCP-cleared transactions related to the penalties) |

The “status type” codes are not designed taking into account available standard ISO codes (highlighted codes do not exist or have different acronym).

|  |  |
| --- | --- |
| Status type (in accordance with Article  4(1) of Regulation (EU) No… [RTS on  settlement discipline]) | MATY (matched settlement instructions that are not settled)  MATN (settlement instructions that are not matched)  HOLD (settlement instructions on hold)  PART (partially settled settlement instructions) FAIL (failed settlement instructions)  RECL (recycled settlement instructions) DELL (cancelled settlement instructions) SETL (settled settlement instructions) |

There are no ISO standard fields in messages to provide required information on buy-ins:

|  |  |
| --- | --- |
| Where a buy-in process is initiated for a transaction, the following details:  a) length of extension period;  b) where applicable, length of the deferral period;  c) length of the buy-in period;  d) if the buy-in is successful or not;  e) payment of cash compensation | Buy-in initiated: Y/N  Length of extension period: 2 digits  Length of deferral period: 2 digits  Length of the buy-in period: 2 digits  Buy-in successful: Y/N  Payment of cash compensation:  Y/N |

As a result, BNY Mellon CSD would like to stress that, should the ESMA further consider such additional ISO standards, sufficient time will be required to (i) ensure harmonization of the use of these new standards and (ii) enable changes to be brought to the IT systems of both CSDs and participants.

* Timing of implementation

Taking into account all the developments that will be required as a result of new ISO standards, implementation of the settlement discipline and in particular buy-in regime, BNY Mellon CSD is of the opinion that it is impossible for the CSDs and their participant to have the record-keeping requirement implemented by the end of 2016.

As a result, we are of the opinion that ESMA should propose for the alignment of the implementation of the recordkeeping requirements with the one of the settlement discipline regime.

**Q25: What are your views on the proposed draft RTS on reconciliation measures included in Chapter V of Annex III?**

With respect to the definition of “double-entry accounting” as proposed by ESMA under art. 1 (c), and the requirement set out in art. 14(2) BNY Mellon CSD would like to stress that CSD Regulation (EU) N° 909/2014 provides in its article 3 for the need to have securities recorded in book-entry form in a CSD.

Nevertheless:

1. There is no formal requirement as per CSDR for ESMA to further elaborate on the need to define “double-entry booking/accounting” requirements.
2. There are circumstances where “double entry-accounting will not fit with the formal definition as proposed by ESMA; depending on the way CSDs’ infrastructure and application are built, for instance in the context of links, investor CSDs may use internal nostro-types accounts that are mirroring the books of the issuer CSD.

* Art. 14 – General reconciliation measures

As a general comment, BNY Mellon CSD would like to highlight its understanding of reconciliation requirements as per Regulation (EU) N°909/2014; As per art. 37, CSD Regulation provides that “A CSD shall take appropriate reconciliation measures to verify that the number of securities making up a securities issue or part of a securities issue submitted to the CSD is equal to the sum of securities recorded on the securities accounts of the participants of the securities settlement system operated by the CSD and, where relevant, on owner accounts maintained by the CSD. **Such reconciliation measures shall be conducted at least daily**.”

It is our understanding that such a reconciliation process, while being performed daily, it would be performed taking into account information from previous day close of business.

As a result, we would like to stress that the requirement as defined under art. 14(1) should enable for reconciliation to be performed next day for previous business day, i.e. reconciliation of previous day closing balances on a daily basis.

* Art. 17 - Problems related to reconciliation

With respect to art.17 (1), BNY Mellon CSD would like to draw ESMA’s attention to the fact that (i) given our extended operating hours and (ii) taking into account that the reconciliation process is undertaken on a given day taking into account the information from the previous day close of business, the solving of reconciliation issue should take place “before the beginning of the settlement **on the business day following the business day where the CSD identified a reconciliation issue.”**

Regarding art. 17(2), BNY Mellon CSD is of the opinion that suspension of settlement because of reconciliation issues as not appropriate; for instances, it could result in (i) arbitrage whereby participant would re-direct their settlement instructions towards CSDs where settlement in that particular security would not be suspended, (ii) further risks posed to CCPs that would not be receiving the relevant securities as collateral, (iii) bias in the settlement efficiency and liquidity of markets where settlement would be suspended while trading would not, etc.

**Q26: Do you believe that the proposed reconciliation measures where other entities are involved in the reconciliation process for a certain securities issue within the meaning of Article 37(2) of CSDR are adequate? Please explain if you think that any of the proposed measures would not be applicable in the case of a specific entity. Please provide examples of any additional measures that would be relevant in the case of specific entities.**

BNY Mellon CSD is of the opinion that art. 16 does not take into account the practical arrangements that can be implemented when it comes to the holding of securities issues through CSDs.

Only considering the need for reconciliation requirements as per the involvement of other entities makes the reconciliation process as described under art. 16 impossible in some circumstances, which are:

* Circumstances where CSDs are an intermediary in the custody chain (i.e. no direct link with the issuer CSD); in such a scenario, the CSD will have to reconcile with the external notary (usually transfer agent) and such a reconciliation will be subject to the service level offered by such an external notary (which will not be subject to CSD Regulation). In addition to the periodicity of the reconciliation process, the CSD will not be entitled to suspend the settlement process in case of reconciliation issue.

As a result, BNY Mellon CSD proposes ESMA to redraft art. 16 according to the below:

“*Where other entities are involved in the reconciliation process for a certain securities issue within the meaning of Article 37(2) of Regulation (EU) No 909/2014* ***and where the CSD provides the central maintenance service for that issue****, the measures to be taken by the CSD and those other entities to ensure the integrity of the issue shall include at least:”*

**Q27: What are your views on the proposed reconciliation measures for corporate actions under Article 15 of the draft RTS included in Chapter V of Annex III?**

BNY Mellon CSD believes that it is important the RTS allow CSDs to comply with the Market Standards for Corporate Actions Processing. BNY Mellon CSD believes that the current text of art. 15(1) could be interpreted in a manner that would prevent compliance. We suggest that ESMA clarifies this point.

**Q31: What are your views on the proposed draft RTS on CSD links as included in Chapter IV of Annex IV?**

* Art. 4 – Condition for adequate protection

BNY Mellon CSD would like to raise concerns with respect to art. 4(1)(f) that provides that “A **requesting CSD that is not authorised to provide banking-type ancillary services** in accordance with Article 53 of Regulation (EU) No 909/2014 **shall not receive banking-type of ancillary services from a receiving CSD authorised to provide banking-type ancillary services** in accordance with Article 53 of Regulation (EU) No 909/2014, in relation to the settlement of the cash leg to be processed through the link”.

As per this article, it is our understanding that DvP links between CSD without a banking licence and CSD with banking licence would not be allowed. This is, to us, contrary to the current accepted market practice and current numerous CSD-to-CSD links as authorised by the EU competent authorities.

* Art. 6 – Reconciliation of links

BNY Mellon CSD would like to raise its concerns with respect to certain aspects of art. 6.

Regarding art. 6(1)(b), we would like to highlight that such daily reconciliation should be completed by close of business of next business day.

With respect to art. 6(3), BNY Mellon CSD is of the opinion that this requirements should be deleted as, should the suspension regime be further considered as per art. 17 of the draft RTS on CSD Requirements, it is only the CSD that centrally maintain the related securities that should be entitled with such a suspension. Nevertheless, we remain of the opinion that such a suspension regime would be detrimental to the settlement efficiency of the market as explained previously.

Regarding art. 6(4), we would like to highlight that corporate action processing in both CSDs should follow the Market Standards for Corporate Actions Processing and the RTS should fully allow CSDs to comply with these Standards. We believe that ESMA should clarify the text of this article.

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