Public consultation on Building a Capital Markets Union

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Question 11: What steps could be taken to reduce the costs to fund managers of setting up and marketing funds across the EU? What barriers are there to funds benefiting from economies of scale?

Question 17: How can cross-border retail participation in UCITs be increased?

The T2S Advisory Group (AG) members are in full agreement with the statement in the Green Paper (page 17), namely that *the regulatory cost of setting up funds and the barriers becoming authorised managers and selling them across borders* creates disincentives for both investors on and issuers of investment funds in the EU.
The AG is also in agreement with the Commission services in noting that minimising the costs and reducing these barriers would encourage new entrants and would enable investment funds to benefit from economies of scale. Such developments would also benefit retail investors insofar as they would make the acquisition of investment funds shares across the EU easier, less expensive and safer.

The existing barriers are particularly applicable to the model used in the EU for those Undertakings for Collective Investment in Transferable Securities **(**UCITS) and Alternative Investment Funds (AIFs) which are not traded on a listing or execution venue. In this model fund shares/units are continually issued and redeemed on the primary market with no secondary market activity. On the other hand on Exchange UCITS/AIFs and Exchange-Traded Funds (ETFs) follow a security lifecycle model with standardised primary and secondary market procedures.

Regarding settlement and for those UCITS/AIFs which are admitted for settlement in a CSD, the AG believes that the "link" arrangements between central securities depositories (CSDs) could enhance the safety of the distribution of these funds across borders. This is in particular relevant in the framework of the T2S settlement process. Namely, starting in June 2015, links between CSDs in T2S will offer real-time settlement in central bank money across 21 European states. The potential is great for the future EU market infrastructure to support in a harmonised and commoditised way the flow of capital between investors and issuers in the EU.

For the purposes of fully realising such potential, it is important for both the funds industry and the EU public authorities to consider removing the obstacles relating to the complexity of issuing and disseminating investment fund shares and the lack of shareholder transparency in cross-border holdings.

- **Proposals for future action**

The AG recognises that the funds industry associations and stakeholders should be in the lead when it comes to harmonising and simplifying procedures for the issuance and cross-border distribution of investment fund shares/units.

However, the AG members are of the view that progress in harmonising rules and practices for disclosure of cross-border shareholder information may require legislative and/or regulatory harmonisation at EU level. See also AG response to Green Paper question 32.

Question 26: Taking into account past experience, are there targeted changes to securities ownership rules that could contribute to more integrated capital markets within the EU?

The T2S AG has a profound interest in the issues related to the law applicable to the securities accounts held at central securities depositories (CSDs) as well as the rights stemming from the settlement of such securities. In addition and although T2S is a common infrastructure offering services to CSDs, the issues raised below are also relevant for legal issues stemming from the laws applicable to the CSDs' participants securities accounts.

According to the legal analysis concluded by the T2S team in 2013, the absence of a comprehensive legislative conflict-of-laws solution at the time of the T2S launch would not undermine legal certainty in T2S. Nevertheless, a harmonised framework should be considered and, in this regard, possible EU legislation might be better placed to deliver harmonisation in this area compared to national-level initiatives.
As identified by public and private actors alike, the harmonisation of securities law applicable to all dispositions of securities (acquisition/transfer/collateral) will improve the cross-border settlement and therefore, increase investments into European capital markets.[1] [2] In the context of the 21 European markets covered by T2S, the harmonisation of these legal concepts across the relevant jurisdictions would strengthen legal certainty in cross-border securities transactions. This in its turn would foster cross-border capital flow between issuers and investors in T2S markets.

Certain aspects regarding the lack of harmonisation in the securities ownership rules are already covered in the T2S Advisory Group (AG) publication entitled T2S Harmonisation Progress Report.[3] In this context, the AG has agreed that this harmonisation activity can be pursued after the launch of T2S.

1. Ownership of securities and collateral

Delivering more integrated capital markets as part of the Capital Markets Union (CMU) means achieving more clarity, transparency and consistency on the rules applicable to cross-border transactions over book-entry securities or other financial instruments. Fragmentation remains as regards the rules and principles on standards of segregation, the rights of re-use of securities pledged as collateral and on 'who can do what and when' in respect of securities and collateral (also within the meaning of the Financial Collateral Directive[4](FCD)) and whether such collateral enjoys client assets and/or client money protections.

This fragmentation exists not only across borders but, also, through the different tiers of holding chains (i.e., from (I)CSD level to end-user) but, more importantly, across the various chains of financial transactions, collateral arrangements and holding chains. For instance, in case securities are held through multiple intermediaries, uncertainties arise as to what ownership rights and/or other

[1] As set out in the two Giovannini Reports published in 2001 and 2003 as well as the Clearing and Settlement Legal Certainty Group's advice to the Commission published in August 2008.

[2] See also the ECB's answer to the Second Public Consultation (2011) concerning Legislation on legal certainty of securities holding and dispositions, accessible at http://www.ecb.europa.eu/paym/t2s/progress/pdf/hsg/mtg1/2011-jan-ecb-sld-en.pdf??c5b5b4a580f2ee24de295f5b8e4d9cc5. Therein the ECB already advises in favour of a more substantive harmonization to achieve the overall objectives of clarity and legal certainty.

[3] http://www.ecb.europa.eu/paym/t2s/progress/pdf/ag/fifth_harmonisation_progress_report_2015_04.pdf

[4] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, OJ L 168, 27.6.2002, p. 43–50, as amended.

entitlements the holders of securities accounts acquire. At each different level of the holding chain, the rights of account holders and the nature of their entitlements are typically defined by the relevant applicable law (also see below, on conflicts of laws). Such rights may amount to, for example, a legal title to book-entry securities recorded on the account, equitable or similar interest in the securities held by an intermediary at the upper tier (including those held in another jurisdiction), or co-ownership rights.

2. Conflict-of-laws

In a cross-border securities holding chain with multiple intermediaries, the laws of several jurisdictions might interfere in determining rights over securities/other financial instruments.[5] This poses the problem of identifying which law would ultimately apply to ascertain the legal position of the holder of securities. This includes the question which law determines what type of right each account holder acquires as a result of the acquisition of securities and the crediting of such securities on the account, whether such a right may be affected by factors with respect to the unauthorised transfers/commingling with the account provider's own assets, which law may affect the validity and enforceability of collateral delivered or earmarked on an account etc. The holding, transfer and mobilisation of securities via links among CSDs would be one example of a securities holding chain and thus subject to the uncertainties highlighted.

Contrary to what stated in the CMU Green Paper, p. 24, the introduction of T2S will not, per se, remove the legal risks potentially associated with the transfer and holding of securities across jurisdictions. The operational framework of T2S (cross-border and real time Delivery vs. Payment in central bank money) will strengthen the operational framework of cross-border settlement of securities and thus help the mitigation of cross border legal risks. However, T2S per se cannot address any legal risks stemming from differences that exist between national securities laws (rights on securities, law applicable on securities accounts, etc.).

Currently, the following EU conflict-of-law rules are relevant for the CSDs, their participants and some of the transactions carried out within the CSDs:

- According to Article 2(a) of the Settlement Finality Directive (SFD), the arrangement creating the 'system' must be governed by a law chosen by the participants, in which at least one of them has its head office;
- According to Article 8 of the SFD, in the event of insolvency proceedings being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system;
- According to Art. 9(2) of the SFD, the ownership rights of collateral holders are governed by the law of the Member State, where the register, account or centralised deposit system in which the securities are legally recorded is located (Place of the Relevant Intermediary Approach or PRIMA rule);
- Art. 9 Financial Collateral Directive (FCD) holds that the law applicable to proprietary effects of book entry securities collateral is that of the country in which the relevant account is maintained. Article 2(1)(h) Financial Collateral Directive specifies that the relevant account is the register or account in which the collateral (book entry securities) is provided to the collateral taker;
- Art. 24 Winding-Up Directive, in contrast, provides that the law applicable to the enforcement of proprietary rights in instruments (as per MIFID) be governed by the law of the Member State where the register, account or centralised deposit system in which those rights are recorded is held or located.

[5] This generic description is also fully applicable to the cross-CSD settlement model in T2S.

While Article 8 SFD captures all rights and obligations of an insolvent participant to a system, both Art. 9(2) SFD and Art. 9 FCD apply solely to collateral transactions and do not apply to other proprietary aspects relevant for intermediated securities holdings. Art. 24 Winding-Up Directive, on the other hand, is limited in its applicability to restructuring measures and winding-up proceedings. For securities booked to accounts outside of a collateral arrangement or a proceeding according to the Winding-Up Directive, there is no conflict-of-law rule applicable (see the work of the Commission's Legal Certainty Group). [6]

Proposals for future Commission agenda

1. The AG believes that the European Commission is best placed to launch any harmonisation initiative in this area.
2. As regards the contents of such harmonisation initiative, the AG would like to point out that it would be beneficial to consider carefully the pros and cons of the different solutions available. The first step should be a stock taking exercise. The AG, with the support of the ECB team, stands ready to provide input to the work of the EU Commission on the matter. In that respect, in order to achieve the goal of better identifying the concrete cases of conflict of law regimes, the AG stands ready to launch a stock taking exercise across the 21 national markets covered in T2S.
3. In addition, the AG would invite the Commission to consider the view that the scope of any legal initiative would not be limited to the CSDs but to encompass all financial institutions intermediaries and investors in the value chain involved in the issuance, investment, trade and post-trade of securities.
4. The AG would also like to further note that any EU harmonised rules should also be applicable to *all dispositions (e.g. transfer or securities, their collateral and security arrangements) and acquisitions* of securities**.** At the same time, any changes to the national securities ownership legal frameworks should contribute to enhance the security and the protection of the investor and the security of the transactions between investors and intermediaries, in particular the strict observance of the rule "no credit without debit" in the securities account of the purchaser and the seller, in order to avoid securities inflation.

[6] We refer to the work of the Legal Certainty Group and the Commission for more comprehensive legal assessments of questions of conflicts of laws and ownership rights, for example the 10th Discussion Paper of the Services of the Directorate-General Internal market and Services of 16 October 2012.

Question 27: What measures could be taken to improve the cross-border flow of collateral?

The T2S AG is of the view that the free flow of cross-border collateral, with efficient collateral management at pan-European level would facilitate the cross-border securities settlement in T2S. Such an objective would also support the key CMU aim of cross-border capital flow in the EU.

Cross-border collateral optimization is essential to addressing and resolving the gap between collateral supply and demand in EU. From the AG's perspective, the key functions of collateral optimization include:
• identifying collateral held in various locations,
• pooling collateral to meet various exposures,
• allocating mobilising collateral in an efficient way, such as based on price, risk, liquidity, haircuts and financing costs,, and
• creating networks to facilitate the efficient flow of collateral between counterparts.
It is increasingly clear there is a strong desire among market participants to allocate pools of collateral not only on a daily basis but intraday, and across geographic locations and jurisdictions.

The AG points out that T2S will already bring improvements to cross-border collateral management/optimisation. T2S will eventually ensure that, at least within the 21 T2S markets and 24 CSDs, there will be harmonised settlement cut-off times and real time DvP for cross-border settlement of securities (used for collateral services) in Central Bank Money. This harmonised settlement model will already remove some long standing operational barriers in the securities industry.

In addition, recent market developments by collateral solution providers offer considerable improvements to cross-border collateral management. Some providers are extending their services to help clients determine the optimal venues to execute and clear their trades by pricing the benefits and risks of collateral into the client's execution and clearing decisions.

However, despite T2S and market initiatives, several open issues remain. A critical example is "collateral ownership rights", i.e. legal risks which still exist along the chain of use of the same securities as collateral. The financial industry's most important concern relates to the valid acquisition of collateral and to related aspects which flow from that concern, such as "good faith acquisition" and loss sharing.

- **Proposals for future Commission agenda**

The AG considers it of utmost importance that financial collateral is provided in a legally sound way. The Financial Collateral Directive and the Settlement Finality Directive mark very important steps in that direction which are fully supported by the AG.

However, the AG thinks that more could be done to overcome any remaining legal and regulatory problems not covered by these Directives. Notably, the AG would welcome that the Commission addresses the issue of securities law, as per the AG response in question 26)

The AG understands that the Contact Group on Euro Securities Infrastructures (COGESI) expressed similar views and the AG would like to support these views.

Question 28: "What are the main obstacles to integrated capital markets arising from company law, including corporate governance? Are there targeted measures which could contribute to overcoming them?"

The Green Paper rightly identifies access of companies (SMEs and other enterprises) to non-bank financing as a key objective of the CMU agenda. This requires that issuing financial instruments, domestically as well as across borders, should be facilitated for all EU companies.

In this regard, **cross-border shareholder transparency**, i.e. the ability for issuers to identify who their owners are, wherever they are located within the EU, is of particular importance in an increasingly cross-border environment (in particular in the T2S cross-border context). Harmonisation of procedures and formats for the exchange of information, as well as harmonisation of national regulatory requirements, are important in order to mitigate the risks of "opaque" shareholder information. They would also foster better corporate governance frameworks for companies, in particular for SMEs.

During several years of analysis of cross-border efficiency issues in post-trading, the AG has identified as important targets for harmonisation the two connected areas of cross-border shareholder transparency and the registration procedures linked to the operating and regulatory frameworks of the issuer CSDs (central securities depositories).

Concerning shareholder transparency for registered securities, in most EU countries there are efficient models for identifying domestic shareholders. However, there is no common European model for enabling issuers to identify their owners in a cross-border environment. Issuers, and in particular medium size companies, have therefore highlighted that, as a consequence of increased cross-border activity in the EU (to be further supported by the introduction of T2S), shareholder transparency issues might emerge across borders. A key concern is how to retrieve specific shareholders' information via the CSD omnibus account link arrangements (investor-issuer CSD model).

The second area, which is related to the disclosure of shareholders, is that of **registration processes in the operating and regulatory frameworks of issuer CSDs**. Registration procedures for certain "registered" securities have long been recognised as one of the most difficult and complex areas for harmonisation in some jurisdictions. Procedures are usually based on long standing legal and regulatory rules (regarding the owner of a registered instrument or the investor's rights on the same asset). Registration processes, and the mechanisms used to transmit registration information across the holding chain, vary very considerably between European countries. They are particularly complex and can in some cases affect the issuance/central safekeeping services of a CSD, as well as settlement services.

Some market participants have identified the risk that if registration procedures remain non-harmonised, this may have a negative effect on the efficiency of cross-border settlement across CSDs (and consequently in T2S too). It could also affect market access, which is particularly important for issuers of financial instruments and for investor CSDs in CSD link arrangements.

As regards cross-border shareholder transparency, this topic was analysed by a T2S task force in 2011 (a report on the topic is available on the ECB/T2S website at https://www.ecb.europa.eu/paym/t2s/progress/pdf/subtrans/st_final_report_110307.pdf??df4de2ade84dec967ba2b3902a51d9d2). The report identifies three key areas of further work on harmonising cross-border shareholder transparency procedures:

1. Harmonisation of procedures for exchanging information on shareholders between investor and issuer CSDs. Here the CSD community could consider any follow-up actions, for example via ECSDA

2. Creation of ISO messages for shareholder identification. In this area the message standard setting bodies could follow up.
3. Launch of an EU legal initiative on shareholder transparency by the European Commission.

- **Proposals for future action**

Within this context, the AG is of the view that the European Commission proposal (COM/2014/213) for amending Directive 2007/36/EC on Shareholders Rights goes in the right direction. The AG takes note that one of the objectives of this proposal is the facilitation of *cross-border information (including voting) across the investment chain in particular through shareholder identification*.
The AG strongly supports the statement in the same proposal, namely that *a number of elements of corporate governance should, in view of cross-border relevance and importance be dealt with at European level in a more binding form to ensure a harmonised approach across the EU (e.g. shareholder identification etc.)*

As regards the connected topic of registration procedures, in 2012 a T2S task force (the Task Force on adaptation to cross-CSD settlement in T2S) formulated some proposals for further harmonisation of the processes for ownership rights creation during settlement (credits in securities accounts) [see link: http://www.ecb.europa.eu/paym/t2s/governance/ag/html/subadapt/index.en.html]. Based on the task force's analysis, the AG thinks that further harmonisation at EU level would be beneficial for a safer and more efficient cross-border securities settlement activity in the EU.

Question 29: What specific aspects of insolvency laws would need to be harmonised in order to support the emergence of a pan-European capital market?

In order to support safe and sound involvement of market participants in cross-border securities investment across T2S markets, the AG members have expressed the need for further work regarding the harmonisation of insolvency procedures. From a T2S perspective, these procedures affect all actors engaged in transfer orders relevant for T2S settlement (i.e. settlement instructions that lead to settlement in T2S). The AG is of the view that such harmonisation would also support the objective of cross-border investment activity within the EU capital market.

Such procedures dot not only relate to insolvency laws but may also relate to the different national regulatory requirements regarding insolvency situations (for example to the national transpositions of the Settlement Finality Directive) that are behind the diverging national insolvency procedures observed across EU Member States.

The AG agrees fully with the statement in the EC staff working document on CMU, page 20, namely that *minimum standards in this area would ensure that investors have greater clarity and predictability when it comes to the substantive insolvency rules affecting their claims.*

The AG recognises that in the last five years, there have been significant efforts which contribute to the reduction of the failure risk of financial institutions and market infrastructures and/or to limit the impact of a possible failure through recovery and resolution mechanisms. However, the current lack of standardised insolvency procedures could have an important impact on cross-border securities operations in the event of insolvency of CSD participants.

In the context of the T2S Community's discussions on the T2S-wide harmonised rules for settlement finality and on the T2S operational framework, the issue emerged concerning how to address cases of insolvency of a CSD participant - or a central bank's payment system participant - across borders in general and in particular in the highly integrated and interconnected environment of T2S. A key question is how to treat pending transfer orders (i.e. pending settlement instructions) in a cross-border transaction. This is an important question relevant for cross-border securities transactions among T2S markets but across all EU markets in general.

A dedicated T2S task force analysed the matter in 2014. Following a mapping exercise it became apparent that - in insolvency cases affecting CSD participants - there is considerable heterogeneity in the current rules and procedures followed by CSDs in different T2S markets and jurisdictions (i.e. 21 European markets). In some jurisdictions, transfer orders are put on hold or cancelled. In others, the accounts held by the declared insolvent participant with the CSD are blocked. This heterogeneity could generate uncertainty in cross-border contexts and discourage cross-border activity.

The task force considered some proposals for further action: among others (i) harmonisation of the information sharing process between CSDs and NCBs in T2S and (ii) some general principles on the identification and management of pending transfer orders across T2S markets. The T2S community of stakeholders are going to work further on these non-legal and rather technical and procedural issues.

In addition, the task force identified some further points requiring a wider harmonisation of insolvency procedures in Member States. The AG recognises that in most cases this may be due to divergence of national laws in implementing the Settlement Finality Directive. In other cases, harmonisation of insolvency procedures may require possible changes in national or European law regarding the measures to be taken after the acknowledgement of an insolvency procedure.

The AG is of the view that there is a need to reach harmonisation of operational insolvency procedures, measures and perimeters of application after acknowledgement of the opening of an insolvency proceeding, namely, not accepting new transfer orders, cancellation or recycling of instructions etc.

- **Proposals for future action**

One approach the Commission may wish to consider in the area of insolvency law could be that particular elements could be harmonised, for example by amending existing legislation, rather than launching, for the time being, new ones. In this context, the harmonisation of the Member States' transposition of certain EU legislation such Settlement Finality Directive (SFD), the Financial Collateral Directive (FCD) and the Winding-up Directive could be considered.

For example, one critical question to consider is the following: what are the effects of an insolvency event on the SFD protected transfer orders? Another one is which parties are in scope of these protections? SFD set out those insolvency proceedings should not have a retroactive effect on the rights and obligations of participants in a system (a CSD or TARGET2 participant in the T2S context). In the event of insolvency proceedings against such participant, SFD furthermore aimed at determining which insolvency law is applicable to the rights and obligations of that participant in connection with its participation in a system. The AG would support the harmonisation of these aspects via a revision of the SFD.

Further harmonisation of insolvency law at EU level could be developed over time. Any potential legal initiative in the long run should include the harmonisation of the Member States' insolvency laws relating to the insolvency of "participants in a system".

Question 30: What barriers are there around taxation that should be looked at as a matter of priority to contribute to more integrated capital markets within the EU and a more robust funding structure at company level and through which instruments?

The T2S community of stakeholders in the AG has identified the non-harmonised rules and practices across T2S markets for the treatment of withholding tax relief procedures as a barrier to full market access and fair competition across T2S. Namely, the fact that some Member States still restrict withholding responsibilities to entities established within their own jurisdictions creates a disadvantage for foreign intermediaries, forcing them to use local fiscal agents. In particular, the foreign intermediaries may be hampered in their access to the local issuer CSD, and similarly issuers of financial instruments may be forced to issue in their local CSD. In the end, these barriers to access result in hindrances for the free flow of capital and investments within the EU.

The AG has welcomed the recent Commission-sponsored initiative in the area, i.e. the set of recommendations issued by the Tax Barriers' Business Advisory Group (T-BAG). In order to observe the status of implementation of these recommendations within the 21 European markets that will connect to T2S, a survey was run in the T2S community in the course of 2014. The survey results clearly showed that none of the T2S markets was planning to fully comply with the T-BAG recommendations. This is partly due to the fact that national tax authorities were focusing on other higher priority initiatives aimed at tackling cross border tax fraud and tax evasion. These initiatives are in the area of US Foreign Account Tax Compliance Act (FATCA) and the various Intergovernmental Agreements (IGAs) designed to help Financial Institutions (FIs) comply with US FATCA. In addition, some T2S market representatives responded by saying that the T-BAG recommendations need to be updated and fully aligned with the international initiatives in this area.

In addition, the AG also acknowledges that both the Commission and the OECD, together with EU Member States, have been looking into tax relief procedures and have explored options to harmonise, remove barriers and create a level playing field since as early as 2001. However, it seems that Member States have in the past expressed reluctance to take this work forward

Without a harmonised, streamlined relief at source system, investors and intermediaries will continue to face the costly administrative burdens of diverging domestic procedures, excess tax will often be withheld and source markets will be less attractive to investors. In fact, as the tax burden on an investment return can be significant, investors may choose to invest locally in order to avoid dealing with complex and costly procedures. Residence countries will see their investor base eroded and will continue to face costs in the form of processing certificates of residence, underreporting of income, and/or over reporting of foreign tax credits. Source member states who continue to operate tax reclaim systems will continue to bear the costs associated with such a system, such as the stamping and certification of tax reclaim forms and processing refund payments.

- **proposals for further action**

The T2S AG would invite the Commission to consider the following actions in its future CMU agenda:

a) Although the AG supports the full range of the T-BAG recommendations, some of them are of particular importance for establishing a level playing field and fair market access framework in cross-border securities services (and consequently in T2S). More specifically, the recommendation regarding the **establishment of a common and standardised Authorized Intermediary Agreement (AIA)** between a financial intermediary and a member state (recommendation 1 of the T-BAG report) is of particular importance. A standardised AIA will ensure that market participants and intermediaries planning to offer

withholding tax agent services for financial transactions are faced with a single rule book and face no discrimination from national authorities. A single rule book will contribute to:

- Withholding tax agents having consistent guidance from Member States regarding applicability of tax withholding conditions, beneficiary tax information collection and distribution mechanism, apportioning of liability in case of mistakes, penalties and fines etc.
- Withholding tax agents having access to a consistent tax relief model that provides clear interpretation of tax relief conditions and guidelines from each Member State regarding the entitlement to tax treaty benefits and under which tax relief regime such benefits will be provided.
- Having simplified and standardised procedures, forms and information requirements, across all markets.
- Harmonised usage of automation and standards for the communication between withholding tax agents and fiscal authorities in order to provide the fiscal authorities with information pertaining to deduction of withholding tax on behalf of the customers of withholding agents.

b) The Commission could consider initiating a **legislative action** towards the implementation of T-BAG recommendations (current or updated version) as already anticipated in the T-BAG report (one of the implementation options).
c) to make sure that the T-BAG recommendations are in full alignment with other international initiatives on the withholding tax procedures (e.g. OECD)