German Banking Industry Committee

Die Deutsche Kreditwirtschaft

Comments

Public consultation on post-trade in a Capital Market Union: dismantling barriers and strategy for the future

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Comments on the public consultation on post-trade in a Capital Market Union: dismantling barriers and strategy for the future

General comments

The **German Banking Industry Committee (GBIC)** is the joint committee operated by the central associations of the German banking industry. These associations are the Association of German Banks (Bundesverband deutscher Banken, BdB), for the private commercial banks, the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks fi-nance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.
GBIC warmly welcomes the opportunity to comment on the consultation document on post-trade services in a Capital Market Union.

We would like to highlight three general remarks at the beginning:

- Currently, there is a large group of changes in European market structures due to the implementation of post-crisis regulations (such as T2S, MiFID II, CSDR etc.) that have yet to show whether they deliver their intended effect. Thus it might be too early to discuss the impact of such significant changes at this stage. We would therefore like to encourage the European Commission to carry out quantitative studies to analyse whether any market deficiencies continue to exist after implementation of the post-crisis regulations.
- Deficiencies in regulation/legislation in the EU and/or globally should always be differentiated from possible improvements/developments in the markets themselves. While the first require adequate action by the authorities in charge (e.g. harmonisation of taxation, or clarification of insolvency protection of asset owners across the European legislations), the latter should be left to open market forces aiming for improved efficiencies.
- We highly appreciate the conclusions laid down in the EPTF report. However, redundant and/or parallel work streams should be avoided.

QUESTION 1

a) Which of the trends are relevant for shaping EU post-trade services today? Please indicate in order of importance.

(i) increased automation at all levels of the custody chain;
(ii) new technological developments such as DLT;
(iii) more cross-border issuance of securities;
(iv) more trading in equities taking place on regulated trading;
(v) improved shareholder relations;
(vi) a shift of issuances to CSDs participating in T2S.

Trend	1	2	3	4	5	6
increased automation at all levels of the custody chain				X		
new technological developments such as DLT;		X				
more cross-border issuance of securities					X	
more trading in equities taking place on regulated trading			X			
improved shareholder relations	X					
a shift of issuances to CSDs participating in T2S						X

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Both an increase in automation and new technological developments (e.g. smart automation, robotics, chatbots, artificial intelligence / machine learning) can have significant effects on post-trade services. Smart automation, for instance, is already applied in the context of repetitive operational processes (e.g. standardised data cleansing, data comparison, data quality enhancement). It remains, however, difficult to quantify the exact impact of each of those developments on post-trade services. The disruptive character of any of those developments can change its nature and hence the demand for such services. Any changes, both operational and structural, should be market-driven. Any comment on mass adoption of DLT would be premature at present. However, we do see a potential for future application. The exact economic benefits of the technology are still to be demonstrated.

Our current understanding and view of DL technologies with regard to securities markets (particularly post-trading), which we have already laid out in our response to ESMA's Discussion paper ESMA/2016/773, is as follows:

- Although mass adoption of DLT would currently be premature, we see a potential for future application. The economic benefits of the technology, however, are still to be demonstrated.
- The technology may prove especially valuable in post-trading services. Among other potential benefits, standardised information, which is commonly used, could be exchanged using the technology.
- In order to foster innovation in the EU, regulations should be flexible and should not constitute an impediment.
- Regulatory objectives will not be altered by DLT but the organisation, circumstances and responsibilities of securities markets could be modified, which would, in turn, require adjustments to certain regulations.
- Necessary changes to the rules should be seen in a global context and should be coordinated with non-EU regulators and global standard-setters.

However, we do not see how an increase in cross-border issuance of securities, more trading in equities taking place on regulated [markets] or improved shareholder relations will have an effect on post-trading services, since any increase in quantities is not likely to change the existing post-trading infrastructure.

b) Are there other trends that are not listed above? Please describe and indicate in order of importance.

- New client demands – speed (real-time) / choice (flexible / unbundled services) / access to information (data / transparency) resulting in pricing shifts with a continued focus on fee compressions.
- Widespread regulation regarding capital markets and subsequent regulatory reporting.
- Focus on transparency in the post-trade space with enhanced "know-your customer" (KYC) processes, reporting requirements and impact on preferential account structures.
- Focus on cybersecurity – asset and investor protection, and data (i.e. client data) protection.
- Development of alternative assets such as, for instance, virtual currencies, trading and processing of non-securities goods or assets.
- Potential threat of future fragmentation of liquidity and markets (following Brexit).
- Cultural changes, i.e. move towards a different approach to working, for example agile / distinct staff preferences (millennials).
- New / increasing competition.

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c) For each trend, please indicate if the impact on post-trade markets is:
(i) positive - explain why and indicate if EU policies should further encourage the trend
(ii) mixed - explain why and indicate if EU policies should further encourage the trend or address negative implications
(iii) negative - explain why and indicate if EU policies should specifically address negative implications.

(i) Increased automation at all levels of the custody chain;
POSITIVE
Areas likely to prove advantageous: investor protection, asset mobility and/or liquidity. Moreover, increasing volumes and reduction of human errors will be drivers in this development.

(ii) New technological developments such as DLT;
MIXED
New technological developments will need balanced consideration. Innovation, especially in respect of automation, de-layering operational processes, reducing actors, reducing cost, increasing speed and creating issuer transparency (e.g. through central asset registers) as well as asset protection would be positive. However, a single set of standards and governance would be required including transparency of the participants in the DL, eligibility and other vital factors. Furthermore, legal harmonisation is required for DLT if it is to be operated across borders. This will also need cooperation at the global level. Technology should be considered neutral and should not be linked to geographical issues. Harmonised regulations for financial services should acknowledge that new technology can help by applying the same rules for the same services.

(iii) More cross-border issuance of securities;
MIXED
So far, we are not aware of this being a major trend. Following implementation of the CSDR, issuers will have the option of issuing in their preferred jurisdiction but whether CSDs will actually offer such services across borders remains to be seen. It could be seen as positive if issuers issued their securities in markets where most of their investors are located and thus create more demand for their securities. However, we believe that further harmonisation of conflict-of-laws rules could help a lot in this respect.

(iv) More trading in equities taking place on regulated trading;
MIXED
This could contribute to automation. Trades at regulated trading venues are typically or often centrally cleared and subsequently settled in a matched block at the CSD level. It could also lead to a further risk concentration at the level of CCPs with highlighting their risk-models and systemic importance. As another result, CSD volumes that remain to be settled will be reduced, having a potential impact on large infrastructure projects and their ability to repay the investments (e.g. T2S).

(v) Improved shareholder relations;
POSITIVE
Improving investor and issuer confidence is essential for European market stability. Improvements to achieve better transparency in custody chains including asset servicing will also be of benefit to issuers. This could render European markets more attractive to foreign investors and potentially increase capital inflows. However, this trend will have to be closely monitored in order to ensure that the relevant parties in the process cooperate on technological aspects and bear the resulting costs on a shared basis.

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(vi) A shift of issuances to CSDs participating in T2S

MIXED

We are not aware of a significant shift of issuances from non-T2S CSDs to T2S-CSDs. Issuers are, in our opinion, rather focused on where their investor base is located. But creating a 'shift' for issuance to T2S markets would marginalise non-T2S markets and could materially impact the viability and profitability of a market, creating market risk, volatility and jeopardising solvency. At the same time such a shift could create an incentive for non-T2S markets to join the platform in order to benefit from harmonised processes and the larger investor base.

d) Please specify the four main trends that will be the most important for EU post-trade
(i) in the next five (5) years
(ii) in the next ten (10) years

Trend	5 Years	10 Years
increased automation at all levels of the custody chain	X	X
new technological developments such as DLT	X	X
more cross-border issuance of securities		X
more trading in equities taking place on regulated trading	X	
improved shareholder relations	X	
a shift of issuances to CSDs participating in T2S		X

QUESTION 2
a) Do you agree that the possible benefits of DLT for post-trade include the following elements? Please indicate in order of importance and add your comments if needed.
(i) real-time execution of post-trade functions;
(ii) certainty on 'who owns what' where no intermediaries are involved;
(iii) redefining of the role of financial markets infrastructures;
(iv) changes to financial markets structure and competition between intermediaries and financial markets infrastructures;
(v) lowered costs;
(vi) others (explain).

Trend	1	2	3	4	5	6
real-time execution of post-trade functions	X					
certainty on 'who owns what' where no intermediaries are involved		X				
redefining of the role of financial markets infrastructures				X		
changes to financial markets structure and competition between intermediaries and financial markets infrastructures					X	
lowered costs			X			
others (explain)						X

Comments:

(i) real-time execution of post-trade functions;

Such a trend would require a full review of the post-trade landscape from pre-funding and settlement instructions to handling of corporate actions.

(ii) certainty on 'who owns what' where no intermediaries are involved;

Dependent on legal certainty regarding the records in the DL/protocol, also taking into account the validation mechanisms and governance of the DL. Furthermore dependent on future functions in a DLT set-up, particularly, if the DL is operated between intermediaries, whereby end-beneficiary information might still be located on proprietary systems.

(iii) redefining of the role of financial markets infrastructures;

Determining which intermediaries will still exist / be required in the future for certain functions, which ones will not exist and which ones will be new.

(iv) changes to financial markets structure and competition between intermediaries and financial markets infrastructures;

none

(v) lowered costs;

Costs may come in different ways and pricing models will change accordingly to reflect more of a cost- and value-based component pricing model. Implementation costs of DLT must also be taken into account.

(vi) others (explain).

Changes to credit risk and liquidity requirements, especially if shortened settlement cycles are achieved; still at the same time with the changed roles of intermediaries, the safe-keeping aspect and linked liabilities, the asset servicing aspect (focused on local regulations and requirements), tax processing and possibly providing liquidity and removing risks are important functions that still need to be fulfilled.

Furthermore, regarding the potential benefits of DLT, please refer to GBIC's response to ESMA's Discussion paper ESMA/2016/773, attached as Appendix 1 to this response.

b) Do you agree that the list below covers the possible risks that DLT may bring about for post-trade markets? Please indicate in order of importance and add your comments if needed.
(i) higher operational risks;
(ii) higher legal risks related to unregulated ways in which services would be provided;
(iii) changes to financial markets structure and competition between intermediaries and financial markets infrastructures;
(iv) others – please specify.

Possible Risks	1	2	3	4
higher operational risks			X	
higher legal risks related to unregulated ways in which services would be provided		X		

changes to financial markets structure and competition between intermediaries and financial markets infrastructures	X			
others – please specify				X

Regarding the possible risks that DLT may bring about for post-trade markets, please refer to GBIC's response to ESMA's Discussion paper ESMA/2016/773, attached as Appendix 1 to this response.

c) Does the existing legal environment facilitate or inhibit current and expected future technological developments, such as the use of DLT?
(i) It facilitates – explain how and provide concrete examples;
(ii) It inhibits – explain how and provide concrete examples;
(iii) It is technology neutral – explain why and provide concrete examples.

It inhibits. Regarding the existing legal environment, please refer to GBIC's response to ESMA's Discussion paper ESMA/2016/773, attached as Appendix 1 to this response.

d) Do you have specific proposals as to how the existing post-trade legislation could be more technology neutral?

- Industry participants need to work together with regulators to ensure that a sound / controlled legal and regulatory framework is developed within which the technology operates, however, regulators should not try to regulate the technology itself.
- It should allow for reframing the whole settlement process – usually the current post trade process has grown, based on the past and the technical capabilities at that time, DLT (or at some point another new technology) may allow for a complete reframing and reset of the ecosystem and introduce new services and stability.
- Accepted standards need to be set.
- Allow for digitalisation of assets and harmonisation across the euro area, currently several countries still require the issuance of a security in paper-certified form. New ways of issuance (and consequently trade, settlement and custody) could be created in the future. At the same time, a digital register could serve the same purpose as the issuance of a global note and could be recognised as the means for registration in book-entry form.

QUESTION 3
a) Please list and describe the post-trade areas that are most prone to systemic risk.

i) The concentration of clearing to a limited number of CCPs globally.

ii) Availability and mobility of collateral and liquidity

b) Describe the significance and drivers of the systemic risk concern in each of the areas identified.

i) Significant increase in volumes cleared through CCPs increases the systemic importance of CCPs. This risk is increased if the CCP is part of a larger entity or a multi-product CCP (e.g. LCH Clearnet / EuroCCP) and covers a wide range of markets and participants including cross-border, creating contagion risk. There is concentration risk in few, systemically important CCPs. The growing risk concentration in CCPs means the systemic consequences of a CCP default could be unprecedented. CCP failure could lead to serious systemic disruption, which requires a comprehensive recovery and resolution planning. On the other hand, concentration can be beneficial regarding interoperability, process efficiency and standardisation.

Clearing obligations may further increase this risk.

ii) Regulation has improved the quality of collateral, which has reduced risk, but at a cost of increased demands on a limited pool of collateral. A liquidity crisis could (further) lead to a credit crisis and impact default funds.

c) Describe solutions to address the systemic risk concerns identified or the obstacles to addressing them.

i) Sufficient 'skin in the game' at CCP level, sufficient risk and margin processes and models, sufficient CCP supervision, sufficient recovery and resolution planning.

ii) Harmonisation of collateral management activities – the work of the CMH-TF of the T2S-AmiSeco needs to be monitored and supported.

QUESTION 4

a) What are the main trends shaping post-trade services internationally? Please list in order of importance and provide comments if needed.

Trend	1	2	3	4
internationally agreed principles for financial markets infrastructures to the extent that they harmonise the conduct and provision of post-trade services		X		
lack of full harmonisation of internationally agreed principles for financial markets infrastructures			X	
the growing importance of collateral in international financial markets	X			
others – please specify				X

(i) internationally agreed principles for financial markets infrastructures to the extent that they harmonise the conduct and provision of post-trade services;

The CPMI-IOSCO principles for financial market infrastructures (PFMI) will remain a driver for further harmonisation of the conduct and provision of post-trade services, particularly regarding EU-legislation. EMIR, SFTR and CSDR are the latest pieces of legislation aiming at implementing the PFMIs in the EU. However, it seems that not all markets around the globe implement those in the same way. While in the EU a stricter interpretation of some elements such as, for instance, the communication channels between

CSDs and participants according to the CSDR, is desired, although the PFMI explicitly leave room for the use of proprietary standards, there may be a different development elsewhere.

(ii) lack of full harmonisation of internationally agreed principles for financial markets infrastructures;

The PFMI provides a good and solid basis for internationally agreed principles aimed at harmonising financial market infrastructures and the conduct and provision of post-trade services. However, given that CCPs apply different risk management procedures and margin requirements and CSDs utilise different settlement processes and cut-off times during the day, certain areas may need a review and update. The same applies to the different interpretation of the PFMI by different markets around the globe when transposing the PFMI into local law (please also see our example in (i) above).

(iii) the growing importance of collateral in international financial markets;

Collateral is the new requirement for any exposure in the post-trade market. Unsecured exposures are rare. It remains to be seen whether collateral will still be needed in connection with securities settlements. This can depend on the Level 2 measures to the CSDR as regards penalties and buy-in provisions with regard to settlement fails (Art. 7 CSDR)

(iv) others – please specify.

b) Which fields of EU post-trade legislation would benefit from more international coherence? Please explain why.
(i) clearing;
(ii) settlement;
(iii) reporting;
(iv) risk mitigation tools and techniques;
(v) others – please specify.

Risk mitigation – global standards and cooperation are of critical importance.

All four points require international coherence, particularly in the light of DLT developments. Any introduction of unregulated, non-domestically aligned services require true globally harmonised standards in order to inter-operate with new and already existing services in a DLT environment.
Clearing – from a clearing member perspective, certain CCP risks exist. Particularly any competition among CCPs by reducing margin requirements in order to get more volume is worrisome. It should be clarified that clients cannot be held liable beyond their CCP margins and default fund contributions. We therefore believe that standardised margin behaviour should be considered by lawmakers.

c) What would make EU financial market infrastructures more attractive internationally? In each case, please provide concrete example(s).
(i) removal of legal barriers;

Yes, easier access to European markets, without the requirement to obtain multiple legal due diligences. Clarity about who owns what in an insolvency situation while settlement is taking place within a securities holding chain across borders.

(ii) removal of market barriers;
(iii) removal of operational barriers;

Greater interoperability seems possible and could lead to process efficiency. In addition, it will make resources available for further market developments.

(iv) others – please specify.

d) Would EU post-trade services benefit from:
(i) more competition – please explain in which area (clearing, settlement, trade reporting), and how this could be achieved
(ii) more consolidation – please explain in which area (clearing, settlement, trade reporting), and how this could be achieved.

Transaction Reporting: Each trade should only be reported once to a single regulator / single mandated body (e.g. ARM) with a clear strategy from the regulator as to what purpose the reporting serves, how the reports are to be analysed and what consequences are to be taken. Transaction reporting is currently dysfunctional with a single trade being reported multiple times to meet various, often conflicting, regulatory regimes, and sometimes to several recipients (e.g. TRs or NCAs, ECB) with little transparency as to what the reported information is used for by the recipient or regulator concerned.

QUESTION 5
(a) What should the EU post-trade markets look like:
(i) 5 years from now;

The suggested timeframe is too short for a detailed vision, however, our members consider that the consolidation of post-trade providers (e.g. CSDs and custodians) will continue.
Post-trade regulation will have been completed regarding all current areas of post-trade and all major EU-rules will have been implemented throughout the EU. Settlement efficiency will significantly increase also due to more activity being carried out at trading venues.
A few DLT solutions will have been adopted by the industry for some specific use-cases. Large-scale solutions can be built on these for whole-market solutions.
Following Brexit, there has been no fragmentation of liquidity in the clearing space with the location policy being resorted to increased supervisory activity for non-EU cleared derivatives.
The harmonisation of securities laws has been addressed from a policy point of view and is now being implemented as regards the conflict-of-laws issues.

(ii) 10 years from now.

No comment.

(b) Please list main challenges to deliver on the vision you described above and rank, in the order of priority, which of those challenges should be addressed first:
(i) fragmentation of EU markets – please define in which market segments;
(ii) need for greater EU harmonisation of legal and operational frameworks – please define where;
(iii) need for more competition within the EU – as defined in your answers above;

(iv) need for greater consolidation – as defined in your answers above;
(v) lack of international competitiveness;
(vi) need for more regulatory coherence internationally;
(vii) financial stability issues;
(viii) others – please specify.

Trend	1	2	3	4	5	6	7	8
fragmentation of EU markets		X						
need for greater EU harmonisation of legal and operational frameworks	X							
need for more competition within the EU							X	
need for greater consolidation				X				
lack of international competitiveness						X		
need for more regulatory coherence internationally			X					
financial stability issues					X			
others								X

c) Please explain your views on each of the issues you listed above.

QUESTION 6
a) Do you agree that there are fewer barriers for cross-border provision of clearing and settlement services and processes than 15 years ago? Please explain.

Yes. We agree with the assessment given in the EPTF-Report.

b) If you agree that certain barriers have been removed, for each of those please explain what were the main drivers removing those barriers?

We agree with the assessment given in the EPTF-Report. We would also like to point out that solutions for many of the dismantled barriers were found by the private sector/market participants as described in the table on pages 22 and 23 of the EPTF report.

Furthermore, the settlement platform Target-2 Securities (T2S) improved CSD interoperability (by using cross-border links and "bridges" between national CSDs) and streamlined cross-border transactions and made them more efficient. Following the development of the T2S platform, improved harmonisation and synchronisation between regulatory and private initiatives took place (e.g. Corporate Actions Standards: CAJWG and E-MIG (EU Commission driven) and T2S CASG).

QUESTION 7
a) Which of the below issues listed by the EPTF as remaining barriers constitute a barrier to post-trade? Please select from the list.

1. Fragmented corporate actions and general meeting processes;
No comment.

2. Lack of convergence and harmonisation in information messaging standards;

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We agree with the EPTF report.

3. Lack of harmonisation and standardisation of Exchange Traded Funds (ETF) processes;
We agree with the barrier, however, we do not agree with the proposed solution (see below response to Q8).

4. Inconsistent application of asset segregation rules for securities accounts;
We disagree (please also see response to Q7c) below.

5. Lack of harmonisation of registration and investor identification rules and processes;
The transposition of Art. 3a Shareholders Rights Directive will tackle this barrier. For more details, please refer to Question 9.

6. Complexity of post-trade reporting structure;
Yes.

7. Unresolved issues regarding reference data and standardised identifiers;
Yes.

8. Uncertainty as to the legal soundness of risk mitigation techniques used by intermediaries and of CCP's default management procedures;
Yes

9. Deficiencies in the protection of client assets as a result of the fragmented EU legal framework for book-entry securities;
No, although we agree that the current EU legal framework fails to establish legal certainty with regard to ownership rights of end-investors in securities held through an intermediary. We do not believe that this constitutes a barrier in post-trade (please see further below in Q7c).

10. Shortcomings of EU rules on finality;
Yes.

11. Legal uncertainty as to ownership rights in book-entry securities and third party effects of assignment of claims;
This question relates to two different issues. The first issue relates to securities and the second to claims. Already in 2001 and 2003, the Giovannini Reports advocated in favour of the identical legal significance of book entries of securities to a securities account throughout the EU and for conflict-of-laws rules. Accordingly, the European Commission sought advice from the Legal Certainty Group that presented its advice in 2008.

It remains unclear why in 2017 the fragmented EU legal framework for book-entry securities is still considered a barrier to post-trade activities. Since 2003, when the second Giovannini Report was published, EU law has not changed in this respect.

As this issue is closely linked to questions regarding issue 9 further above, we would like to comment on it together with issue 9 (please see further below in Question 7c).

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Conclusion: We consider all issues listed by the EPTF as barriers to post-trade except issues 4, 9 and perhaps 11.

12. Inefficient withholding tax collection procedures.
b) Are there other barriers to EU post-trade not mentioned in the above list?
(In the second part of the questionnaire you will be asked to give more detailed views on those issues that you consider to be barriers.)
c) If there are issues that you think are not barriers, please explain why.

We agree that "EPTF **barrier 4**" had to be seen as a barrier regarding the inconsistent interpretation of the rules, particularly in AIFMD and UCITS. However, following ESMA's opinion on asset segregation dated 20 July 2017 (ESMA34-45-277), we are of the opinion that asset segregation rules should not be applied inconsistently any longer.

ESMA rightly sets out in paras. 59 to 61 of the opinion: "only minimum EU-wide segregation requirements should be prescribed. This approach would on the one hand, leave room for stricter requirements or different account structures, if national laws (on ownership, insolvency, tax or fiscal matters) in Member States, or clients' preferences, make them necessary. On the other hand, this approach would acknowledge insolvency protection provided by some account structures. The proposed approach would therefore deviate from the options discussed in the original consultation and the CfE."

We welcome ESMA's proposal that "the EU framework regulating asset segregation regime shall focus on:

- ensuring that assets are clearly identifiable as belonging to the AIF or UCITS,

and

- ensuring that investors receive adequately robust protection by avoiding the ownership of the assets being called into question in case of the insolvency of any of the entities in the custody chain."

The EPTF states that the current EU legal framework fails to establish legal certainty with regard to ownership rights of end-investors in securities held through an intermediary (page 85). This statement is correct since there is no harmonisation of substantive law on book-entry-securities in the EU.

Nevertheless, we do not see this fact constituting a barrier in the sense of a "EPTF **barrier 9**" as no risk for end-investors or for client asset protection exists as a result of the lack of an EU legal framework for book-entry securities. Client asset protection is a question of sound bookkeeping and proper national substantive law and proper supervisory law. Without an EU legal framework it might be more complicated than with an EU legal framework to define the legal position of end-investors but unless there is a worldwide harmonisation there will always be legal questions as to which law applies. There will be no deficiencies in client asset protection if national law provides for client asset protection and supervisory law ensures that securities holdings chains only lead to national law with adequate client asset protection. We do not deny that harmonising substantive law of book-entry securities would simplify determining the legal position of end-investors but we disagree with the notion that there is currently a problem with client asset protection – at least in Germany and under German (supervisory) law.

Further to this barrier 9, the assessment as regards "EPTF **barrier 11**" should be considered. The EPTF proposes a harmonisation of conflict-of-laws rules to eliminate this barrier. We welcome that idea. We hope that the European Commission takes into account, when harmonising conflict-of-laws rules, the Hague Securities Convention of 2004. An EU-regulation should be in line with international instruments that set international legal standards.

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Since it has proved to be fairly complicated to harmonise substantive law on book-entry securities, it seems appropriate to begin with a conflict-of-laws rule as EPTF suggests under EPTF barrier 11. Contrary to the proposal under EPTF barrier 11 it is suggested under EPTF barrier 9 to harmonise substantive law in order to improve client asset protection. We therefore encourage the EU Commission to take a clear position as regards the harmonisation of substantive law of book-entry securities. Since the delivery of the advice by the Legal Certainty Group in 2008, no concrete action has been taken. Harmonising substantive law can mean major changes to legal systems and technical operations. No member state would undertake such changes when it is foreseeable that they might not last because of upcoming EU-proposals. Market participants and national authorities and legislators need certainty about whether they have to expect EU legislation or whether they can discuss and implement national reforms.

d) Please list what you consider to be the 5 most significant barriers.

Complexity of post-trade reporting structure;
Uncertainty as to the legal soundness of risk mitigation techniques used by intermediaries and of CCPs' default management procedures;
Shortcomings of EU rules on finality;
Legal uncertainty as to ownership rights in book-entry securities and third-party effects of the assignment of claims.

QUESTION 8 (APPLICABLE TO ALL BARRIERS MENTIONED ABOVE FROM 4.1 TO 4.8)
a) Do you agree with the definition and the scope of the barrier? If not, please explain how it should be better described or what, according to you, its scope is.
b) Do you have any evidence proving the existence of this barrier and its implications in terms of costs or other detrimental effects?
c) Will the solution proposed by EPTF address the issue? Is there any need for further or different action to remove the barrier?

Barrier 4.1: Diverging corporate actions and [annual] general meeting processes
a) No. The **processing of corporate actions**, which may or may not require a response from the shareholder and include dividends, to mention just one of many examples, **already functions smoothly as a rule even in cross-border situations**. Given the approximately 5,300 listed companies across Europe, of which half will probably carry out at least one corporate action every year, the total number of corporate actions processed annually is likely to be quite substantial. It is thanks to a very high level of standardisation that this largely happens without disruption. We therefore believe that there is no barrier concerning corporate actions.

With regard to the **processing of [annual] general meetings,** the main barrier is not the processing itself, but the differences in company law systems in Europe.

b) No comment.

c) Yes. We agree that further industry actions as well as Commission action when acting under its empowerment to develop implementing acts for the Shareholder Rights Directive are sufficient.

Concerning **Corporate Actions** we also think that there is no barrier. We would therefore recommend that the Level 2 legislation for the Shareholders' Rights Directive should as far as possible avoid

interfering with existing processes if they function smoothly. This also goes for the processing of corporate actions, for example. It also applies to the **channels of communication** between banks, which are already secure and efficient. When it comes to communication between banks and clients/shareholders, **banking confidentiality** and **data protection** considerations have to be taken into account.

With regard to the **[annual] general meeting processes**, we also believe the solutions proposed by the EPTF address the issue. However, we would like to point out that the Annual General Meeting (AGM) standards were conditionally endorsed by Germany because they refer **only to electronic communication,** which is regularly not used when communicating with retail investors.

Pertaining to the implementing acts under the Shareholders Rights Directive, we furthermore suggest the following:

1. In the absence of a harmonised company law regime in the EU, the delegated acts need to take account of the national requirements, which in each country form the basis of a self-contained system.

2. At the same time, the requirements set by the delegated acts should be as standardised as possible, firstly to enable intermediaries to manage their practical implementation, i.e. succeed in supporting communication between around 5,300 companies and their shareholders, and secondly to ensure that the processes for handling bearer and registered shares are largely the same.

3. Intermediaries' costs of supporting the communication between around 5,300 companies and their shareholders should be borne by the companies.

Against this background we add the following **specific proposals:**

- How will intermediaries and/or their service providers be able to receive information about the [annual] general meetings of all European listed companies?
  By requiring companies to publish information about the [annual] general meeting
  - either in a central European dissemination medium
  - or in every national central law gazette so that information about all [annual] general meetings are available in one place in each member state.

  Intermediaries cannot trawl through the internet every day looking for company announcements.

- How can intermediaries process the information efficiently?
  - Create a standardised format (in terms of layout and content) for all information about [annual] general meetings and for the publication of this information by all listed companies.
  - The **official invitation to the [annual] general meeting** (issued in line with local legal requirements) should be **preceded by a standardised summary** of the relevant dates and deadlines. At least the following items should be included:
    - date of publication
    - date of the [annual] general meeting
    - place of the [annual] general meeting
    - deadline for registering attendance
    - record date
    - ISINs of shares with voting rights
    - ISINs of shares carrying attendance rights but no voting rights

- contact details for ordering admission cards
- contact details of the company and, if applicable, the service provider organising the meeting with a link to its or their website(s)
- any country-specific requirements which need to be met in order to attend the [annual] general meeting or exercise voting rights
- convening method (postal, electronic, combined)
- link to the agenda and further information about the meeting on the company's website.

➢ How can the information about the [annual] general meeting be presented in a way, which is readily comprehensible to shareholders?
- Companies should be required to publish the standardised summary not only in the language of their home state, but also at least in English too.
- It would be disproportionate to require translation into the languages of all member states.

➢ How should the information be forwarded to shareholders/intermediaries, including in a cross-border context?
- If the company is domiciled in another member state, it should only forward information – with a link to the relevant website – about where to find the invitation to the [annual] general meeting in the national law gazette or on the company's website (no documents should be forwarded).
- For [annual] general meetings of companies in the same member state, the current procedure should be retained, provided that national requirements are compatible with the directive.

➢ How can it be ensured that shareholders receive information in time?
- There is no one-size-fits-all answer for Europe since company law is not harmonised.
- Requirements concerning record dates differ (sometimes even between different classes of share), one reason being differences in information requirements (push vs. pull).
- **Minimum periods should be introduced** (1) for the time between publication of the invitation to the [annual] general meeting and the record date, (2) for the time between the record date and the deadline for registration, which must be after the record date, and (3) for the time between publication of the invitation to the [annual] general meeting and the deadline for registration.
- These minimum periods should take account of the workload involved for intermediaries, otherwise it will not be possible to inform shareholders in time.

➢ How can the exercise of voting rights be facilitated? How can shareholders vote across borders?
➢ National lawmakers should ensure that it is possible to vote electronically or by mail and/or that companies appoint a proxy, to whom intermediaries can forward voting instructions directly.

Barrier 4.2: Lack of convergence and harmonisation in information messaging standards

a) Yes

b) No comment.

c) EPTF should not promote any particular standard such as ISO20022 due to completion reasons. But it is possible to define general requirements which a standard should meet. It is important that messaging standards eliminate manual processing for intermediaries as far as possible. In our view, the processing of corporate actions functions well, and different messaging standards are not the source of problems. If there are barriers, they are rooted in different company law systems and other legal requirements, which demand manual processing.

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Barrier 4.3: Lack of harmonisation and standardisation of exchange traded funds (ETF) processes

Yes, we consider it to be a barrier. The European ETF market is indeed subject to certain legal obstacles and considerable fragmentation with regard to certain "multi-issued" products.

In the primary market, legal and consequently operational issuance structures differ and the fragmentation of the European post-trade environment acts as an impediment to delivering an efficient and liquid market.

In the secondary market, fragmentation of the European ETF industry through cross-listing of products in various European markets arises because market participants are required to deal with settlement rules that differ significantly across markets, impairing fungibility. In certain cases it might take up to three days to move ETF shares between two European CSDs due to re-registration requirements.

A specific case is the legal issue related to the settlement of multi-issued Irish ETFs in Germany to enable the fulfilment of stock exchange trades at Europe's leading ETF trading venue Frankfurt Stock Exchange via the ECB's T2S platform against central bank money.

ETFs domiciled in Ireland are often set up in Euroclear UK & Ireland (EUI) for stock exchange settlement purposes in the UK. EUI serves as a central clearing facility for both Ireland and the UK. However, EUI does not perform a 'notary function' for the ETFs as the third-party ETF registrars, subject to rudimentary regulation and supervision, perform this function.

For this reason in particular, a CSD link pursuant to section 5 para 4 of the German Safe Custody Act (*Depotgesetz*) cannot be established. In order to create such link, an Issuer CSD is required to perform the notary function as counterpart. Issuers of Irish ETFs therefore often use separate tranches to be issued in Germany via CBF (either with DE or IE ISIN) and in the UK/ Ireland via EUI.

Depending on the legal structure chosen in Germany, this leads to a situation, where legally the same ETF issued in different tranches carries either different ISINs (IE in EUI and DE in CBF) or the same ISIN. This may lead to impediments or delays in the post-trade environment (e.g. risk management, onward deliveries, re-registration).

T2S will bring improved efficiency in some cases, but not all European markets are part of T2S (or even of the EU in the near future), so market participants may well continue to experience delays in moving shares between European CSDs.

We do **not** believe that modifying a national law of one EU member state (e.g. the German Safe Custody Act) would be an appropriate solution in order to enhance the processes of ETFs of another member state. Taking into account that the German Safe Custody Act has been working well for the custody and settlement of securities in general and has been recognised as a good protection for investors **for more than 120 years**, a European solution should rather be envisaged. Although we acknowledge the specific problem of multi-issued securities (e.g. Irish ETFs), a modification of specifically the German law just to resolve one specific issue or problem which could arise in different circumstances in other member states as well, should be avoided. The issue should rather be addressed as part of a potential revision of

European securities law which would ensure that all member states need to adapt and modify their relevant laws and regulations to the same extent.

Barrier 4.4: Complexity of post-trade reporting structure
a) Yes.
b) No comment.
c) No comment.

Barrier 4.5: Unresolved issues regarding reference data and standardised identifiers
a) Yes
b) n.a.
c) We strongly support the EPTF findings, descriptions, consequences and proposed way forward.

Barrier 4.6: Uncertainty as to the legal soundness of risk mitigation techniques used by intermediaries

a) Yes, the description in 4.6 of the consultation paper is correct and addresses an important point which we support.
b) No comment.
c) The solutions proposed by the EPTF should help addressing the issue.

Barrier 4.7: Deficiencies in the protection of client assets as a result of the fragmented EU legal framework for book entry securities

a) No.
b) No.
c) The EPTF states that the current EU legal framework fails to establish legal certainty with regard to ownership rights of end-investors in securities held through an intermediary (page 85). This statement is correct since there is no harmonisation of substantive law on book-entry securities in the EU. Nevertheless, we do not see this fact constituting a barrier in the sense of a "EPTF **barrier 9**" as no risk for end-investors or for client asset protection exists due to the lack of EU legal framework for book-entry securities. Client asset protection is a question of sound bookkeeping and proper national substantive law and proper supervisory law. Without an EU legal framework it might be more complicated than with an EU legal framework to define the legal position of end-investors but unless there is worldwide harmonisation there will always be legal questions as to which law applies. There will be no deficiencies in client asset protection if national law provides for client asset protection and if supervisory law ensures that securities holding chains only lead to national law with adequate client asset protection.

We do not deny that harmonising substantive law of book-entry securities would simplify determining the legal position of end-investors but we disagree with the notion that there is currently a problem with client asset protection – at least in Germany and under German (supervisory) law.

Further to this barrier 9, the assessment as regards "EPTF **barrier 11**" should be regarded. The EPTF proposes a harmonisation of conflict-of-laws rules to eliminate this barrier. We welcome that idea. We hope that the European Commission takes into account, when harmonising conflict-of-laws rules, the Hague Securities Convention of 2004. An EU-regulation should be in line with international instruments that set international legal standards.

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Since it has proved to be fairly complicated to harmonise substantive law of book-entry securities, it seems appropriate to begin with a conflict-of-laws rule as EPTF suggests under EPTF barrier 11. Contrary to the proposal under EPTF barrier 11 it is suggested under EPTF barrier 9 to harmonise substantive law in order to improve on client asset protection. The EU Commission should commit itself quickly on whether it still wants to harmonise substantive law of book-entry securities or not. Its unclear position during the past nine years since the delivery of advice by the Legal Certainty Group in 2008 hinders national reforms in that field. Harmonising substantive law can mean major changes to legal systems and technical operations. No one will undertake such changes when is obvious that they might not last because of upcoming EU-proposals. Market participants and national authorities and legislators need certainty as to whether they have to expect EU legislation or whether they can discuss and implement national reforms.

Barrier 4.8: Shortcomings of EU rules on finality
a) Yes.
b) No opinion.
c) No comment.

QUESTION 9
a) Do you agree with the definition and the scope of the barrier? If not, please explain how this barrier should be better described or what, according to you, its scope is.
b) Do you have any evidence proving the existence of this barrier and its implications in terms of costs or other detrimental effects?
(i) Please provide examples where lack of harmonised shareholder identification or registration rules resulted in an undesirable outcome (e.g. unreliable data, deprivation of service to shareholders or issuers, high costs or other burden).
(ii) Provide examples where the barrier actually prevented shareholder identification or registration in an appropriate manner, cost and timeline.
(iii) Provide examples where lack of harmonised registration rules resulted in issuer's decision not to choose certain CSD for issuing securities cross-border.
Where necessary, please indicate if the evidence in your reply is confidential.
c) Will the solution proposed by EPTF address the issue? Is there any need for further or different action to remove the barrier?

a) No, with regard to shareholder identification. The new Shareholders Rights Directive itself establishes a new barrier. Art 3a leaves it to the member states to set a threshold up to 0.5 % for shareholder identification. For this reason, intermediaries will have to take into consideration every single threshold (e.g. 0.1 %, 0.25 %, 0.3 % etc.) in the EU. In a cross-border context, intermediaries will have to comply with these differing requirements, which will definitely lead to additional costs and operational risk.

With regard to shareholder identification we have the following specific proposals:
Art. 3a SHRD II and also the Level 2-measures proposed by the European Commission will initiate the minimum European harmonisation of the shareholder identification. For this purpose, we consider the following requirements for the transposition to be useful.

- As mentioned above under Question 8c, companies should be required to publish information about the [annual] general meeting either in a central European dissemination medium or in every national central law gazette so that information about all [annual] general meetings is available in one place in each member state.

- The information about shareholder identity should be collected by a central platform/information hub to avoid several reporting channels, which might hamper smooth communication between both sides, the companies and the intermediaries.
- To reduce the effort of shareholder identification for intermediaries, thresholds should be valid, ideally on a European-wide harmonised scale.
- To facilitate the process of shareholder registration, it should be possible for intermediaries to report their retail clients in an aggregated and anonymous manner.
- The companies should be required to publish the relevant threshold for the identification of shareholders in absolute figures (x shares) to simplify the process for the intermediaries.
- It should be possible to use existing and efficient channels of communication at national level as far as possible with regard to formats and contents to send information on shareholders' identity to the CSD and the registrar services.
- The costs of shareholder identification should be borne by the companies.

QUESTION 10
The code of conduct focuses on addressing withholding tax barriers to investment through improvements to the efficiency of relief procedures. Which other issues or approaches could be explored?

The OECD developed the TRACE Implementation Package (IP) a year ago. This model suggests that financial institutions can enter into Authorised Intermediary (AI) agreements with the tax authorities of the source country. In their capacity as Authorised Intermediaries, they can then claim withholding tax relief on behalf of customers on a pooled basis. Investors have to provide a properly completed standardised Investor Self Declaration (ISD) to the Authorised Intermediary, which is then required to report investor-specific information to the source country. This regime would abolish the need to obtain certificates of tax residency for each investor and there would be no requirement to pass confidential investor information upstream. The TRACE Implementation Package includes an application for a Financial Institution to request authorisation from source countries to act as an Authorised Intermediary and includes a sample contract that could be used between the source country and the Financial Institution. The investor self-declaration forms would enable the investor to benefit from tax relief at source under the regime when presented to a participating Authorised Intermediary.

The Commission's Tax Barriers Business Advisory Group (T-BAG), which was set up in 2010 with the aim of considering the follow-up to the Commission's Recommendation on Withholding Tax Procedures from a business perspective, and to identify any remaining fiscal barriers affecting the post-trading environment, released a report in 2013 in which it suggested that the TRACE approach be implemented in EU Member States.

Governments should take steps to implement a standardised and harmonised system for both simplified tax refund procedures and tax relief at source procedures. The most advanced work in this area has been the development by the OECD Member State governments of the TRACE Implementation Package (TRACE IP) of which certain features, such as the ability of financial institutions to participate voluntarily in the relief system, should be retained. The Commission should investigate why TRACE has remained a theoretical model and what improvements/amendments are required.

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QUESTION 11
Please describe the barrier(s) not mentioned by the EPTF that exist today by:
a) Describing the barrier, its scope and the actors affected by such barrier. Are there any specific barriers that apply to specific products such as EU ETS allowances?
b) Providing evidence that proves the existence of the barrier.
c) Describing what solutions would dismantle the barrier and if there are any obstacles to achieving that solution.

The new Shareholders Rights Directive itself establishes a new barrier. Art 3a leaves it to the member states to set a threshold up to 0.5 % for shareholder identification. For this reason, intermediaries will have to take into consideration every single threshold (e.g. 0.1 %, 0.25 %, 0.3 % etc.) in the EU. In a cross-border context, intermediaries will have to comply with these differing requirements, which will definitely lead to additional costs and operational risk.

QUESTION 12
Do you agree that the issues listed below need to be followed closely in the future?
1. National restrictions on the activity of primary dealers and market makers;
2. Obstacles to DVP settlement in foreign currencies at CSDs;
3. Issues regarding intraday credit to support settlement;
4. Insufficient collateral mobility;
5. Non-harmonised procedures to collect transaction taxes.
If not, please explain why:
a) any issue should be added to the watchlist;
b) any issue should be removed from the watchlist.

	Yes	No	Don't Know
National restrictions on the activity of primary dealers and market makers		X	
Obstacles to DVP settlement in foreign currencies at CSDs	X		
Issues regarding intraday credit to support settlement	X		
Insufficient collateral mobility	X		
Non-harmonised procedures to collect transaction taxes			X

1. National restrictions on the activity of primary dealers and market makers;
Not relevant for post-trade activities

2. Obstacles to DVP settlement in foreign currencies at CSDs;
will become apparent as part of the CSDR implementation, could be problematic for non-bank CSDs

3. Issues regarding intraday credit to support settlement;
this could have an impact on daily processing and might require a change in operations, but is not considered to be a real barrier. No great change is expected to already existing procedures in T2S. Regarding Euroclear or Clearstream, mobility of the collateral could be limited depending on segregation requirements.

4. Insufficient collateral mobility;

this could qualify for the watch list in conjunction with possibilities of re-using received collateral for other purposes. Operational procedures regarding cut-off times should not be an issue.

QUESTION 13
Please make additional comments here if areas have not been covered above. Please, where possible, include examples and evidence.

No comment.