



**COMMENTS ON THE DRAFT "REGULATION OF THE EUROPEAN CENTRAL BANK ON OVERSIGHT REQUIREMENTS FOR SYSTEMICALLY IMPORTANT PAYMENT SYSTEMS"**

<b>Contact details (will not be published)</b>	Ms.	Caroline Neyrinck
	<a href="mailto:c.neyrinck@ebaclearing.eu">c.neyrinck@ebaclearing.eu</a>	
	+ 32 2 643 27 82	
<input type="checkbox"/>	The comments provided should <u>NOT</u> be published	

The table below shall serve as a template collecting comments received in a standardised way.

- Please **add** to the table **only issues where you consider that a follow-up is necessary**, i.e. no general statements like “We welcome the regulation.”
- All comments should be **separated per issue** concerned so that a thematic sorting can be easily applied later on (i.e. one row for each issue).
- If needed, replicate page 2 for the provision of further comments.

The assessment form consists the four items which are suggested to be filled as follows:

- **Originator:** Name of the originator and ISO code of the country of the originator (e.g. NAME (AT/BE/BG/...))
- **Issue** (states the topic concerned): General comment, Recitals, Article number, Definitions, Terminology
- **Comment:** Suggestion for amendment, clarification or deletion
- **Reasoning:** Short statement why the comment should be taken on board

**Originator:**

<b>Name of the originator (e.g. name of the company or association)</b>	<b>ABE CLEARING S.A.S. à capital variable (EBA CLEARING)</b>	ISO code of the country of the originator	EU
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**Comments on the Regulation of the European Central Bank on oversight requirements for systemically important payment systems:**

Issue	Comment	Reasoning
<p>1. Criteria for identification as SIPS</p> <p>Article 1.3 and Article 2 (15)</p>	<p>Amendment and clarification</p>	<p>1.3 A payment system shall be identified as a SIPS if (a) [...]; and (b) at least two of the following occur over a calendar year:</p> <p>(i) [...];</p> <p>(ii) its market share is at least one of the following:</p> <ul style="list-style-type: none"> <li>- [...]</li> <li>— <del>5% of total volume of euro-denominated cross-border payments at euro area level;</del></li> <li>- [...]</li> </ul> <p>[...].</p> <p>and:</p> <p><del>2(15) 'cross-border payment' means a payment between participants established in different countries;</del></p> <p>Use of a concept of 'cross-border payments' should be avoided in the ECB Regulation which applies in the euro area. This is seen as particularly important in the context of identification of systems processing SEPA payments that are or will be subject to the ECB Regulation. The criteria used in the ECB Regulation should ensure a level playing field among all FMIs clearing and/or settling SEPA payments, thereby avoiding to incentivise arbitrage in favour of less or non-regulated arrangements and more broadly fragmentation of the SEPA infrastructure landscape.</p> <p>References to 'cross-border payments' in the ECB Regulation could be removed, the more since payment traffic between participants established in different countries cannot be reliably identified at the level of a payment system -- in particular having regard to 'multinational' participants acting from a single location (or more) for the purpose of sending and receiving transfer orders through a system.</p> <p>It is further noted that the volume criteria in Article 1.3 relate to the total volume of euro-denominated payments at euro area level. It is assumed that it is intended that volumes are calculated by reference to the aggregate of (single) payments in large value payment systems and (bulk) payments in retail payment systems.</p> <p><b>Additional request for clarification:</b></p> <p>In case it would be envisaged that a different interpretation of the requirements shall apply for retail payment systems as opposed to large value payment systems, it is suggested that the ECB Regulation expressly states the same. Conversely, if the requirements would in their implementation be neutral from the viewpoint of large value or retail payment systems, a concern may rise from the viewpoint of ensuring a level playing field among all retail payment systems operating in SEPA.</p>

<p>2. Obligation of SIPS operator to ensure compliance</p> <p>Article 1.4</p>	<p>Amendment and clarification</p>	<p>1.4 SIPS operators shall <u>take measures to ensure compliance of the SIPS they operate with the requirements set out in Articles 3 to 21.</u></p> <p>While the CPSS-IOSCO Principles impose requirements on an FMI which includes the participants in a SIPS, it is noted that the ECB Regulation imposes obligations on the SIPS operator. The nature of the legally binding obligations of a SIPS operator must be clarified.</p> <p><b>Additional requests for clarification:</b></p> <p>It is suggested that a reference to compliance ‘with standards laid down in the ECB Regulation’ as opposed to compliance with ‘requirements set out in the ECB Regulation’ is considered. The CPSS-IOSCO Principles require an FMI to observe the standards laid down therein, and, in addition, assessment of an FMI’s observance with the standards may attract different ratings depending on the gravity and urgency of the need to remedy identified issues of concern. The aim that authorities should have sufficient powers to fulfill their respective tasks, including taking corrective action, is not put into question.</p> <p>Further, the intended legal effect of the use of the verb “to ensure” would merit a clarification. Whether compliance with the oversight standards implemented by the ECB Regulation is achieved, depends on, inter alia, the assessment methodology, the assessor’s judgment, the actual interpretation of the related oversight policies and adjacent implementation requirements, as well as on other instruments (e.g. the CPSS-IOSCO Disclosure Framework, the upcoming guidance for recovery planning). Further, requirements may evolve over time in the light of developments (e.g. evolving oversight policies, technological developments, evolution of international standards, lessons learned from crisis events). This leads to a concern that a SIPS operator could ‘virtually’ or ‘unwillingly’ not be in compliance with a directly applicable regulation of the ECB.</p>
<p>3. Definition of ‘participant’</p> <p>Article 2 (17)</p>	<p>Amendment</p>	<p><del>2 (17) ‘participant’ means an entity that is identified or recognised by a payment system and, either directly or indirectly, is allowed to send transfer orders to that system and is capable of receiving transfers from it shall have the meaning assigned to such term in Directive 98/26 EC;</del></p> <p>The definition of ‘participant’ should be aligned with the definition of Directive 98/26/EC as amended by Directive 2009/44/EC. This is felt of particular importance for both legal and risk considerations.</p> <p>Further, the inclusion of a reference to entities that are ‘recognised by a payment system and that are indirectly allowed to send transfer orders to such system or capable of receiving transfer orders from it’, as part of the definition of participants, poses a serious problem of interpretation regarding the scope of the requirements in the ECB Regulation that are related to participants. Addressable entities should, according to our reading of the CPSS-IOSCO Principles, be out of scope of requirements for FMIs. If a definition of indirect participants would be required for the purposes of Article 17, it is suggested that such definition is added.</p>
<p>4. Definition of ‘material’</p> <p>Article 2 (28)</p>	<p>Amendment</p>	<p>2 (28) ‘material’ qualifies a risk, a dependency and/or a change which may <u>significantly affect the ability of an entity to perform or provide services as expected.</u></p> <p>It is suggested to clarify the meaning of material by excluding insignificant divergences from the definition.</p>

<p>5. Identification of systems to which a cover (two) minimum requirement for credit risk applies</p> <p>Article 6.3 and Article 6.4</p>	<p>Amendment and clarification</p>	<p><del>6.3 A SIPS operator, including one operating a DNS of a SIPS with a settlement guarantee, that in the course of [...].</del></p> <p>and:</p> <p><del>6.4 A SIPS operator, including one operating a DNS of a SIPS with no settlement guarantee, but where participants face credit exposures [...]</del></p> <p>The criterion used in respectively Article 6.3 and Article 6.4 must allow a SIPS operator to unequivocally identify whether the requirements laid down therein apply to a given FMI. Use of the word ‘including’ is hence to be avoided.</p> <p>The implementation of the CPSS-IOSCO Principles should support a full recognition of systems separating the finality of payments and settlement of the system, often characterised as RTGS-equivalent systems. Use of the same expression ‘DNS’ to refer both to systems where there is a risk of an unwind on the one hand, and systems that provide for real time finality of transfer orders without the possibility of an unwind on the other hand, is not supported. In addition, sufficient room should be left for new developments in system designs.</p> <p>Particularly relating to the EURO1 system, there is a concern that the text of the ECB Regulation should not result in an interpretation, whether a contrario or otherwise, according to which the EURO1 system is a deferred net settlement system within the meaning one may derive from the CPSS-IOSCO Principles and the underlying works of the CPSS. The highly valued works of the CPSS on payment systems have consistently recognised the benefit of RTGS-equivalent systems combining finality of transfer orders in real time intraday and the liquidity saving benefits of a multilateral system. The implementation by the ECB Regulation of the standards laid down in the CPSS-IOSCO Principles should support a full recognition of the legal basis for the EURO1 system – the Single Obligation Structure – as a valid system design next to RTGS and multiple-batch processing, including for large value payment systems. This is of key importance from the viewpoint of the large value payment system EURO1 operating alongside TARGET2 in the euro area, in particular in the light of key consideration 2 for Principle 8 of the CPSS-IOSCO Principles and in the light of possible evolvments globally regarding requirements for DNS payment systems.</p> <p><b>Additional requests for clarifications:</b></p> <p>Based on a reading of the text of Article 6.4, it is assumed that a cover two minimum requirement will apply to any type of system design where participants face credit exposures resulting from a SIPS’ payment, clearing <u>or</u> settlement process. In that connection, the specific question arises whether retail payment systems, including but not limited to systems adopting a multiple-batch processing mechanism, should comply with a cover two minimum requirement.</p> <p>The reference to ‘a participant together with its affiliates’ in relation to the cover two minimum requirement for credit risk should be clarified in the context of the guidance relating to recovery and orderly wind down / resolution planning which is expected to be issued for consultation prior to the time of adoption of the ECB Regulation. In addition, the specific question arises whether credit risk coverage on a per group basis shall also apply to retail payment systems.</p>
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<p>6. Obligation of the SIPS operator to hold sufficient liquid resources</p> <p>Article 8</p>	<p>Clarification</p>	<p>8.3, 8.4, 8.5, 8.6: <i>"A SIPS operator shall, or shall ensure that the participants in the SIPS it operates, hold [sufficient] [additional] liquid resources [...]"</i></p> <p>The obligation to hold sufficient liquid resources may, depending on the legal and operational design of a SIPS, lie with the participants. It is suggested that all references in Article 8 to the obligation to hold sufficient liquid resources are clarified accordingly. A clarification in Article 8.12 where reference is made to cash or other assets may also be considered by referring to "it, or the participants in the SIPS it operates, maintains".</p>
<p>7. Obligation of the SIPS operator relating to final settlement</p> <p>Article 9</p>	<p>Amendment</p>	<p><i>"The SIPS operator shall <del>ensure</del> establish rules and procedures to provide final settlement no later than at the end of the intended settlement date."</i></p> <p>Given that reference is made to an obligation of the SIPS operator, the obligation should be reworded to relate to 'the establishment of rules and procedures to provide final settlement'.</p>
<p>8. Scope of public disclosure of default rules</p> <p>Article 12.4</p>	<p>Deletion</p>	<p><i>12.4 A SIPS operator shall publicly disclose the key aspects of <del>the its default</del> rules and procedures <del>outline in paragraph 2, including, as a minimum, all of the following:</del></i></p> <p><i>(a) the circumstances in which action shall be taken;</i></p> <p><i>(b) who shall take those actions;</i></p> <p><i>(c) the scope of the actions which shall be taken;</i></p> <p><i>(d) the mechanisms to address a SIPS operator's obligations towards non-defaulting participants.</i></p> <p>A publication in the public domain of default rules should be left to the discretion of a private sector FMI. A descriptive overview of the key points of an FMI's functioning as part of the CPSS-IOSCO Disclosure Framework requirements should be sufficient for the purpose of disclosure to the general public.</p> <p>In addition, differentiation of levels of publication of default or 'near default' procedures devised in particular to handle crisis situations should be fully allowed. Experience has shown that certain mitigating measures should be kept confidential such that markets do not anticipate on those thereby potentially causing the actual default of a given participant or participants in given countries. Further, each crisis situation having its own specificities, flexibility may be required, such as, for example, (i) to allow a SIPS operator to act in accordance with the guidance or policy of a national central bank or other supervisor of a given participant or in a given market, or also (ii) in cases where there is uncertainty and where different interpretations are applied in relation to the exact nature of an event susceptible to constitute a default.</p> <p>Default rules for a given SIPS should be left within the domain of the FMI and the relevant authorities. Recent crisis situations have confirmed the delicacy and potential disruptive effects of communication – or lack of communication -- around a (potential) default situation at a point where default rules may need to be triggered.</p>

<p>9. Risk based denial of access</p> <p>Article 16.2</p>	<p>Deletion</p>	<p><i>16.2 The access and participation criteria of paragraph 1 shall [...]. In compliance with the principle of proportionality, a SIPS operator shall set requirements that restrict access to the minimum possible extent. <del>If a SIPS operator denies access to an entity, it shall give reasons in writing for this, based on a comprehensive risk analysis.</del></i></p> <p>There should be no legal requirement for sharing or conducting a comprehensive risk analysis in relation to denial of access to a given individual entity. Access criteria should be objective and should be set on the basis of appropriate risk and efficiency considerations, thereby not unduly restricting participation in a system, and thus permitting fair access. Access should be granted based on a verification of compliance with the objective criteria.</p>
<p>10. Ongoing monitoring of access criteria</p> <p>Article 16.3</p>	<p>Amendment</p>	<p><i>16.3 A SIPS operator shall <u>establish rules and procedures to monitor participants' compliance with the SIPS's access and participation criteria on an ongoing basis.</u></i></p> <p>The wording of Article 16.3 should recognise decentralised risk management tools at the participants in relation to risks that are -- when incurred -- borne by the participants.</p>
<p>11. Information flows on tiered participation arrangements</p> <p>Article 17.1</p>	<p>Clarification</p>	<p>More clarity is needed on the expectations on a SIPS operator pursuant to Article 17 taking into account, among others, the following considerations:</p> <ul style="list-style-type: none"> <li>• Other than at the level of the system's rules governing participation in a SIPS, a SIPS operator should not be put in a position to be required to manage and assess risks arising from 'indirect participants'. The identification, monitoring and management of risks should be limited to indirect participants within the meaning of Directive 98/26/EC as amended by Directive 2009/44/EC and should not extend to addressable entities.</li> <li>• Information gathering by a SIPS operator should not enter the domain of access to payment data of customers of participants raising data protection and potentially system design concerns.</li> <li>• A SIPS operator and its board of directors should not be put in a position to be required to handle confidential and other sensitive commercial information pertaining to the bilateral relationship between a direct participant and the customers it serves.</li> </ul> <p>The identification, monitoring and management of risks arising in the bilateral relationship between a (direct) participant and its customers should be put at the level of the supervisor or regulator of the institution that participates as a direct participant in one or more systems. A reporting line between such institution and its supervisor or regulator with access for overseers of payment systems, similar to the information flows adopted for intraday liquidity reporting, would be highly preferred.</p>

<p>12. Efficiency and effectiveness of annual reviews</p> <p>Article 18 and others</p>	<p>Amendment</p>	<p>The requirements for annual reviews as are contained in many provisions of the draft ECB Regulation should be replaced by a requirement for an annual review when relevant or a review upon implementing a material change.</p> <p>The above suggestion is made from the perspective of an efficiency concern having regard to, inter alia, resourcing requirements and demands on key expert personnel.</p>
<p>13. Public disclosure of responses to the CPSS-IOSCO Disclosure Framework</p> <p>Article 20.5</p>	<p>Clarification</p>	<p>As regards the public disclosure of responses to the CPSS Disclosure Framework, absolute clarity is needed on the required level of disclosure for the purposes of complying with Article 20.5, as well as on the assessment methodology that shall be used by the ESCB.</p> <p>The thought is offered that publication of the results of an oversight assessment carried out by the overseer should not be anticipated or duplicated by a publication in the public domain of a (potentially different) self-assessment by the overseer. It is further noted that the ECB Regulation requires an annual publication, while the CPSS-IOSCO Principles refer to a review every two years.</p>
<p>14. Transition period to comply with requirements</p> <p>Article 24.2</p>	<p>Amendment</p>	<p>The transition period set forth in Article 24.2 must be revisited to allow a SIPS operator to effectively take measures for complying with the standards laid down in Articles 3 through 21 of the ECB Regulation as from the time these apply.</p> <p>In the case of EBA CLEARING, impacts on the governance of EBA CLEARING as SIPS operator would attract an implementation program of up to 2 annual governance cycles.</p> <p>In the case of EURO1, (new) requirements for systemically important payment systems which have an impact on elements of the design of EURO1 would attract a period of up to 2 years for implementation.</p> <p>In the case of STEP2, and depending on the interpretation of the requirements in relation to retail payment systems, a minimum period of 2 years is to be foreseen for bringing STEP2 -- which is not a SIPS at current -- in line with the requirements, and such period might need to be extended depending on the depth of the impact (e.g. legal basis, operational set up, functionality changes impacting the participants). In addition, for STEP2, a 'grace period' may need to be considered for the starting time of the works towards compliance in the light of the practical consideration that full use of resources shall be dedicated to accompany a successful completion of SEPA migration by 1 February 2014.</p>