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EBA CLEARING's COMMENTS ON THE

DRAFT "REGULATION OF THE EUROPEAN CENTRAL BANK AMENDING REGULATION (EU) No 795/2014 OF THE EUROPEAN CENTRAL BANK ON OVERSIGHT REQUIREMENTS FOR SYSTEMICALLY IMPORTANT PAYMENT SYSTEMS"

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EBA CLEARING's comments on the draft Regulation of the European Central Bank amending "Regulation (EU) No 795/2014 on oversight requirements for systemically important payment systems``

Issue	Comment	Reasoning
Explanatory notes	Clarification	The assessment by the Governing Counsel on the need to amend the SIPS Regulation in accordance with Article 24 of the SIPS Regulation is laid down solely in the recitals to the draft Regulation amending the SIPS Regulation. There is no explanatory note, as has been provided for other public consultations, that provides transparency including for the users of a SIPS.
Article 1.1 – draft changes to Article 1(3)(ii) on Subject matter and scope	Clarification	The draft changes foresee that payment traffic within the EU will be considered for the purpose of identification of payment systems that are subject to the Regulation, excluding payment traffic among entities participating in a system from (a) countr(y)(ies) that is/are not within the Union. The method for calculating the market share in accordance with Article 1(3)(ii) should be clarified, in particular regarding "one leg out" volumes sent to EEA countries that are not EU countries and in relation to non-EEA countries.
Article 1.1 – new draft section 1.3a in Article 1.3 on Subject matter and scope	Clarification	It should be clarified what a 'verification review' entails and how it relates to identification exercises to which the SIPS Operators are contributing. The article should specify the grounds for repealing a Decision. The article should also specify the criteria that apply for identification of a SIPS or re-classification as a non-SIPS.

Article 1.2 – definition (14)	No change to previous version	The newly proposed changes to the definition of 'deferred net settlement system' should be removed. The proposed amendment of the definition of a "deferred net settlement system" is not consistent with the PFMIs and the related objectives of previous reports by the CPMI (formerly CPSS). The rationale and envisaged benefits of the proposed changes are not apparent and no explanation is offered in this regard. A specific definition that would apply solely to a single type of FMIs (payment systems as opposed to other types of FMIs such as securities settlement systems) and to SIPS operators that are located in the Eurozone only, would lead to undesirable uncertainty regarding the interpretation of the requirements that the PFMIs seek to apply globally to ensure a level playing field. The proposed changes are not consistent with previous CPMI (formerly CPSS) reports, including in particular the report of November 2016 on fast payments, and the glossaries of terms used in payment and settlement systems which are commonly referred to in CPMI and Eurosystem reports and other material. The proposed extension of the definition of 'deferred net settlement system' to payment systems which require pre-settlement and do not provide for any deferred settlement is counterfactual. It establishes a fictitious equivalence of fundamentally different system designs. It disregards the substantial and generally recognized differences between pre-settlement and deferred settlement payment systems and unduly restricts the right of the participants in a system to limit their risk by choosing an appropriate system design.

Article 1.2 – definition (40)	Deletion or amendment	The draft changes to Article 2 of the SIPS Regulation contain a definition of independent directors which, in all but one important element, seems adequate. The one point we find objectionable is the disqualification of all members of the board who have a relationship to (*any and all*) SIPS participants from being considered independent. We believe that this approach does not reflect best practice, might not be fit for purpose and may be counterproductive. The wholesale exclusion of representatives of participant institutions from the iNED pool might run contrary to another significant regulatory objective, that of ensuring board competence through "an appropriate mix of technical skills, knowledge and experience both of SIPS and the responsibilities"[1]. The resulting extreme narrowing of the relevant talent pool might actually prove to be counterproductive. The Draft's definition of independence mirrors the definition included in EMIR with only two changes: it establishes a shorter "cooling off" period of wo rather than five years for past relationships of potential conflict; and it replaces the words "clearing members" with "participants". By essentially equating EMIR "clearing members" with SIPS participants, the Draft ignores a fundamental difference in the relationship of each of these parties with the respective CCP or SIPS. A clearing member has significant, risk-sensitive financial obligations towards the CCP, that are actively and continuously managed by both parties (margin requirements etc.). In the SIPS context, the only "financial obligation" that links user and SIPS is the annual payment of a set annual fee and a small percentage fee based on the transaction volume by the particular user. There is absolutely no transfer of counterparty credit risk as in the case of CCPs. Therefore, we believe that the transposition of the EMIR rule in the regulation of SIPS is not fit- for- purpose. When it comes to the definition of bank directors' "formal" independence, the ECB follows local best practice and stipulates that the criteria used "…should be based on national criteria defined in national legislation or by national competent authorities (NCAs)" of the country in which the supervised institution is based[2]. In view of the above, we would suggest that Article 2 (40) of the Draft either (a) defer to the independence definition of the jurisdiction of the country in which the SIPS is based or (b) introduce a materiality criterion that is in line with best practices, similar as for qualifying shareholdings, and fit for purpose.
Article 1.2 – definition (43)	Deletion	Reference is made to our reply under the draft changes to Article 6 and Article 8.

[1] See Draft Article 4.4. This language is the same as the SIPS regulation currently in effect.
[2] See ECB "SSM Supervisory Statement on Governance and Risk Appetite" (July 2016) p.8

Article 2 – definition (44)	Clarification	We note the newly inserted proposed definition of 'corrective measures', defined in the draft amendments to the SIPS Regulation as "a specific measure or action, regardless of its form, duration or gravity, that is imposed on a SIPS operator by a competent authority to remedy, or avoid a repetition of, non-compliance with the requirements of Articles 3 to 21 of the SIPS Regulation". Clarification would be welcome on the source for the definition. Measures imposed should be foreseeable and proportionate. A list of the measures or a description which includes more details should be published.
Article 1.3 (a) – draft changes to Article 4.2 on Governance	Clarification	We note the addition of the technical reference, typically used in national corporate governance codes, to effective governance. There is no unambiguous description of what constitutes effective governance arrangements. The PFMIs refer to national laws and regulations (which would include supervisory regimes stemming from EU law). Transparency on the rationale for the need to amend the SIPS Regulation in an oversight instrument in a manner which diverges from the key considerations of the PFMIs and the explanatory notes would be welcome.
Article 1.5 – draft changes to Article 6 on Credit risk	Amendment	Reference is made to the reply in relation to the draft changes to Article 8 below.

Article 1.6 – draft changes to Article 8 on Liquidity risk	Amendment	It is not within the remit of a SIPS operator, but of the users of a SIPS, to assess the impact of disallowing a system design which does not per se give rise to liquidity risk or credit risk of participants within the meaning of the SIPS Regulation. The newly introduced requirements of the Eurosystem go beyond the PFMI requirements. A one year transition period will not allow for completing a proper change management process and release planning both at the level of a SIPS Operator and each of the participants in a SIPS that are concerned by these new requirements and already engaged in other major regulatory reforms. We also note that the proposed imposition of a "financial obligation" would be unduly prescriptive and inconsistent with the principle of proportionality. It would create unnecessary liquidity and credit risk and is neither necessary nor appropriate to ensure same-day settlement if any one participant fails to settle. This risk could be equally and more efficiently mitigated by alternative arrangements. Prescription of a specific tool or arrangement to achieve the requirements is not in line with the PFMIs that allow for different means to satisfy the requirements relating to liquidity risk and credit risk. Consequently, if the newly proposed requirements under Article 8 are not removed, the proposal should at least allow for alternative arrangements which, in the case of a failure to settle by any single participant, equally ensure same-day settlement among all other participants.
Article 1.7 – draft changes to Article 10 on Money settlements	Clarification	The meaning of the words “endeavour to” in a legal instrument that is binding is unclear.
Article 1.9(b) – draft changes to Article 15.4 on Operational risk	Amendment	The text of the SIPS Regulation should allow for inclusion of cyber risk in the framework for the comprehensive management of risks, which would be more effective as opposed to a merely formal requirement for a separate framework for cyber risk. The introduction of the new paragraph in Article 15 as opposed to in Article 5 on Framework for the comprehensive management of risk, leads to two separate requirements that may relate to the same subject matter. It should be avoided that one cause of non-compliance would lead to two infringements. The prescriptive requirements in Article 15(4) contain vague requirements (‘sound level of situational awareness’, ‘process of continuous learning and evolving’ and ‘timely manner’) which leave too much room for interpretation for the instrument of a Regulation.

Article 1.12 – draft changes to Article 21.1 on Powers of a competent authority	Deletion	The proposed introduction in Article 21.1 (b) and (c) of new competences for the Eurosystem resembling supervisory measures by a supervisory authority is noted. These powers would typically be applicable in the context of investigations in the context of the launch of an investigation procedure on infringements (cfr. the framework in existence at the ECB in relation to on-site inspections). Should the provisions be maintained, the necessary safeguards on conflict of interest, separation of duties, and 'Chinese walls' at the ECB and the Eurosystem will have to accompany the exercise of any such powers. 'The treatment of the report (including disclosure and publication)' in 21 (b) should be deleted. Information that is gathered by a third party, as instructed by the SIPS operator, to satisfy an instruction by the Competent Authority should always be treated as confidential and is not eligible for publication or disclosure by the third party. For the SIPS operator, only the Regulation can set requirements regarding publication and disclosure. Finally, the Competent Authority should respect the confidentiality of information, e.g. because of it commercially sensitive nature.
Article 1.12 – draft changes to Article 21.2 on Powers of a competent authority	Clarification	The Eurosystem should postpone the entry-into-force of Article 21(1) until the Decision on the procedure and conditions has been published, since this provides for legal certainty.
Article 1.13 – draft changes to Article 22.1 on Corrective measures	No change to previous version	Proportionality does not warrant, in relation to observance of standards that have been the subject of a comprehensive oversight assessment and further are subject to assessments in the event of changes, that a suspected non-compliance can give rise to the imposition of corrective measures. In case of suspected non-compliance, an investigation should be instigated and imposition of corrective measures should relate to a formally adopted decision on an infringement. The text of Article 22.1 should be restored to the current version of the SIPS Regulation.
Article 1.13 – draft changes to Article 22.2 on Corrective measures	No change to previous version	The proposed changes to Article 22.2 are more vague, and the text of Article 22.2 should be restored to the current version of the SIPS Regulation.
Article 1.13 – draft changes to Article 22.3 on Corrective measures	No change to previous version	The written notice of an infringement should be accompanied by a reasoned opinion as to whether the SIPS Operator has committed an infringement and the corrective measure to be imposed. A specific motivation should be added in the notice where it is would be considered that there is a case requiring immediate action as referred to in Article 22.3. The text of Article 22.3 should be restored to the current version of the SIPS Regulation.

Article 2	Amendment	Article 25 of the SIPS Regulation should be complemented with a provision to foresee a transition period to achieve compliance with the requirements of the SIPS Regulation for a SIPS operator of a newly identified SIPS that was classified as a non-SIPS prior to such identification.