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Comments on consultation document – proposal for amendments to the Act on Settlement Systems (lagen (1999:1309) om system för avveckling av förpliktelser på finansmarknaden) (the "Act") and the Resolution Act (lagen (2015:1016) om resolution) – implementation of Recital 7 of the Settlement Finality Directive (Directive 98/26/EC) in Sweden

Dear Sir/Madam,

CLS Bank International ("CLS") appreciates the opportunity to submit these comments regarding the Act and the Resolution Act. CLS agrees that it is essential to remove any uncertainty with regards to the ability of its Swedish members[1] to access the CLS system (the "CLS System") and other systems governed by the laws of a country outside the EEA ("foreign settlement systems").[2] Accordingly, CLS welcomes this constructive initiative and fully supports the efforts made by the Swedish government to take action to address the implications of Brexit as soon as possible. CLS would be pleased to work with the Swedish government to put in place appropriate arrangements to protect the participation of its Swedish members (and, by extension, the customers of those members) post-Brexit.

1. Introduction to the CLS System

CLS is the operator of a financial market infrastructure that is the predominant global settlement system for foreign exchange transactions. CLS is a special purpose corporation organized under the laws of the United States of America and is supervised by the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York.[3] The CLS System is currently designated by the Bank of England (since the CLS System's rules (the "Rules") are governed by English law) and notified as a designated system to the European Securities and Markets Authority ("ESMA") in accordance with the SFD and is therefore protected by the Act on that basis. In addition, CLS is subject to collective oversight by the CLS Oversight Committee pursuant to a protocol (the "Protocol") established by the central banks whose currencies are settled in the CLS System, including various European central banks (e.g., the National Bank of Denmark, the European Central Bank, the

[1] Currently, Svenska Handelsbanken AB, Swedbank AB, Skandinaviska Enskilda Banken AB and Nordea Bank AB are members. After Nordea's relocation to Finland we expect that Nordea Bank AB's membership will end.

[2] CLS is also pleased to note that the proposed amendments to the Resolution Act will extend various protections to foreign settlement systems (in addition to systems that are designated under the Settlement Finality Directive ((Directive 98/26/EC), the "SFD"). CLS understands the critical need for a member in resolution to continue to participate in financial market infrastructures since removing access at the point it is most needed risks exacerbating the liquidity concerns of the member and reduces the likelihood of success of the resolution plan. CLS therefore fully supports the proposed amendments to the Resolution Act. CLS notes that certain other jurisdictions that have either implemented Recital 7, or are in the process of implementing Recital 7, are taking a similar approach.

[3] In 2012, CLS was designated a systemically important financial market utility (FMU) by the United States Financial Stability Oversight Council under Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Hungarian National Bank, the Central Bank of Norway, the Sveriges Riksbank[4] and the Bank of England and other central banks).[5]

By way of background, as a systemically important financial market infrastructure, it is important for CLS to ensure that it is at all times in compliance with the requirements set forth in the CPMI-IOSCO's Principles for Financial Market Infrastructures (the "PFMI"), including Principle 1 (*Legal basis*)[6] and Principle 8 (*Settlement finality*).[7] However, the SFD's protections (as implemented in Sweden and elsewhere) are only afforded to systems that are governed by the law of a member state. Post-Brexit, the Rules will no longer be governed by a member state's law. If the CLS System should cease to be protected by the settlement finality and other provisions under the Act, CLS has been advised by its Swedish counsel that it would no longer be able to provide CLS with an acceptable legal opinion and there would no longer be a legal basis for CLS's current Swedish members (or their third party clients) to continue to safely participate in CLS, as required by the PFMI. This would be a critical issue for the Swedish members (and their third party clients), as it would adversely affect their ability to settle foreign exchange transactions with finality across the books of CLS. As a result, the Swedish members would either need to establish contingency plans (which are likely to be time consuming and expensive – indeed, as we move closer towards Brexit, the time available to successfully restructure is running out)[8] or, in a worst-case scenario, could ultimately need to settle their foreign exchange transactions bilaterally outside the CLS System, resulting in numerous adverse consequences,[9] including reputational risk, settlement risk (i.e. the risk of delivering one leg of currency transactions while not receiving the other leg from the counterparty) and significant adverse liquidity ramifications. Accordingly, CLS seeks to take all necessary steps in order to ensure that, as soon as possible, the CLS System and its Swedish members will be fully assured that Swedish legal protections will continue to apply post-Brexit. As noted above, this matter is extremely time sensitive in light of the occurrence of Brexit in March next year and CLS's members cannot afford to wait for the outcome with respect to a possible transition period.

2. CLS Comments

CLS would like to highlight for your attention the comments below, including certain issues that CLS believes should be addressed, as well as proposed amendments to the draft legislation.

- Approval Process. In order to ensure that the CLS System (and other foreign settlement systems) will be approved prior to Brexit, it would be helpful to have a better understanding of the application process and timing. CLS would like to apply as soon as possible, regardless of whether or not the amendment is in effect (which we understand should be in early January). As noted above, it is important to provide a high degree of certainty to CLS's Swedish members and

[4] See *Riksbankens övervakning av den finansiella infrastrukturen*, 18 May 2018, p. 5; see also J. Molin, "Hur har Riksbanken hanterat den finansiella krisen?", *Penning- och valutapolitik* 1/2010 p. 133.

[5] The Protocol can be found at the following address: https://www.federalreserve.gov/paymentsystems/cls_protocol.htm

[6] Principle 1 provides that "An FMI should have a well-founded, clear, transparent, and enforceable legal basis for each material aspect of its activities in all relevant jurisdictions."

[7] Principle 8 provides that "An FMI should provide clear and certain final settlement, at a minimum by the end of the value date. Where necessary or preferable, an FMI should provide final settlement intraday or in real time."

[8] CLS notes that the EBA has urged firms to speed up preparations for a hard Brexit: http://www.eba.europa.eu/-/eba-publishes-opinion-to-hasten-the-preparations-of-financial-institutions-for-Brexit; the EBA cautions firms to be prepared sooner rather than later for a hard Brexit, and that this is more difficult if there is uncertainty for very much longer around the status of English-law systems like the CLS System.

[9] Cf. prop. 2015/16:5 p. 447 f.

other stakeholders, including their clients and counterparties, that this matter will be addressed prior to Brexit.[10]

- Additional Timing Considerations. It is currently uncertain exactly how and when Brexit may impact the position of CLS (and other systems governed by English law) as a matter of Swedish law, since this depends on any final Brexit agreement, including the exact scope of a possible transitional agreement that is still to be finalised. We note that, to the extent the current transition provisions between the UK and the EU (as set out in the draft withdrawal agreement) are ultimately agreed, CLS's expectation is that, for the purposes of EU law (and thereby also Swedish law), the UK would continue to be treated as an EU member state.[11] Accordingly, to the extent that a withdrawal agreement on such terms is ultimately ratified by the UK and the EU, CLS believes that the application of the Act with respect to specific foreign settlement systems should not come into effect until the end of the relevant transition period, currently expected to be December 2020. CLS therefore suggests that the effective date and time of approval should be closely coordinated between the FSA and relevant foreign settlement systems. We would welcome the FSA's thoughts regarding this issue.

- Need for transparency regarding equivalent third country systems. As described above, CLS is a systemically important financial market infrastructure. Accordingly, for the sake of financial stability, it is important for all stakeholders to be able to confirm the applicability of Swedish finality protections, including the specific date and time that such protections start to apply. CLS therefore proposes that the FSA reflect the names of approved foreign settlement systems on its website.

- Specific considerations for systems that are currently designated in the UK. CLS believes that specific considerations should apply with respect to systems that are currently designated under the English legislation that implements the SFD in the UK ("UK Systems"). In particular, CLS suggests that when the FSA considers the application of a foreign settlement system, there should be a presumption that factors (a) and (b) of the proposed amendment (set out below in CLS's revised text) have been met.

- Proposed Substantive Changes to the Proposed Amendments to the Act. As noted above, CLS is currently subject to oversight by the Riksbank (and other central banks) through a collective oversight arrangement, established by an agreed-upon Protocol. As a result of this arrangement, the Riksbank regularly receives detailed information about CLS and participates in person in regular meetings with CLS, its lead regulator and senior representatives from the other central banks. There is an established process for providing information to the central banks, and for handling confidential information. The Riksbank also has the right to request additional information directly from CLS. As indicated in the Protocol, CLS remains subject to individual central bank policies and the oversight arrangement does not prejudice or constrain the statutory or other responsibilities of participating central banks. In light of this arrangement, as well as the

[10] CLS notes that numerous jurisdictions have already implemented Recital 7 (e.g., Belgium, Finland, Germany and Spain) and that France, Netherlands, and Norway are also in the process of implementing Recital 7 (and CLS has reviewed draft legislation in these jurisdictions).

[11] This follows from Article 6 and Article 122(6) of the draft withdrawal agreement.

Riksbank's deep familiarity with CLS[12] and continued access to information about CLS, CLS believes that it would be appropriate to amend the current draft to provide that approval may occur in the event that the third country financial market infrastructure is subject to collective oversight, including the Riksbank or the FSA. In this circumstance, the proposed requirements (a) through (c) would not apply.[13]

Please see CLS's proposed revised text below:

> On the application and after having sought the Riksbank's opinion, the Financial Supervisory authority may decide that a foreign settlement system, defined as one in which the laws of a state outside the EEA shall be applied, shall be treated as equivalent to a settlement system notified by an EEA member state to the European Securities Markets Authority or the EFTA Surveillance Authority.
>
> A decision in accordance with the first paragraph may be taken if:
>
> 1. the foreign settlement system is subject to collective oversight, including by its primary regulator from a jurisdiction that is a member of the Organization for Economic Co-operation and Development[14] as well as either by the Riksbank or the Swedish Financial Supervisory Authority; or
> 2. in all other cases:
>
>   a. the system satisfied the safety requirements that may be occasioned by its activities and it has been organised in a manner that allows the financial positions of the participants in the system to be assessed,
>
>   b. the administrator is subject to satisfactory supervision by a public authority or any other competent organ, and
>
>   c. there is reason to assume that the Financial Supervisory Authority will obtain continuous information about the activities.

[12] CLS notes the following Riksbank publications, which specifically reference CLS: "CLS Bank – förbättrad riskhantering på valutamarknaden", *Finansiell stabilitet* 2/2001 p. 54; *Finansiell stabilitet* 2018:1 p. 40; and *Statement of opinion with regard to Nordea Bank AB's application for permission to implement merger plans*, 4 June 2018 (reference number 2018-00559). See also §§ 3.3.1, 3.3.5 and 3.3.8 Terms and Conditions for RIX and monetary instruments RIX Instructions, Annex A7, Special instructions for dealing with disruptions and https://www.riksbank.se/sv/finansiell-stabilitet/det-finansiella-systemet/den-finansiella-infrastrukturen/system-i-den-finansiella-infrastrukturen/.

[13] CLS has concerns regarding the potential implications of (a) through (c) when applied to a foreign settlement system, such as the CLS system, with members in 24 jurisdictions.

[14] We understand that reference to the OECD is not unknown in Swedish legislation, in order to indicate states whose legal arrangements are broadly in line with reasonable expectations of good order (see, for instance, 3 § förordning (1987:778) om placering av fondmedel under Kammarkollegiets förvaltning, 20 § fastighetsmäklarförordning (2011:668), 11 § förordning (1992:1303) om krigsmateriel, 70 b § avfallsförordning (2011:927), 11 § förordning (2014:1075) om producentansvar för elutrustning, 2 § förordning (2017:186) om automatiskt utbyte av land-för-land-rapporter på skatteområdet, 5 § lag (2015:912) om automatiskt utbyte av upplysningar om finansiella konton, Bilaga 2 Finansinspektionens föreskrifter och allmänna råd (FFFS 1998:30) om stora exponeringar and H 4 Allmänna råd to Chapter 6, 14 § and Bilaga 8 to Finansinspektionens föreskrifter och allmänna råd (2003:10) om kapitaltäckning och stora exponeringar; see also item 2.9 in the Commission's Delegated Regulation (EU) No. 809/2004).

We thank you for your consideration and would be pleased to discuss any of the points raised in this letter if that would be helpful.

Sincerely,

Gaynor Wood
General Counsel

cc: Lauren Alter-Baumann, Head of Regulatory Strategy
Lewis Lee, Senior Legal Counsel
Dino Kos, Chief Regulatory Officer