

Terms of Reference User Committee “Creation”

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Clearstream Banking AG

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Introduction

This cover note has been established to directly link the regulatory requirements related to the Central Securities Depositories Regulation (CSDR) with the Terms of Reference of the User Committee of the securities settlement system "Creation" of Clearstream Banking AG.

In accordance with:

1. CSDR Article 28 (CR348), the relevant entity is required to

Establish user committees for each securities settlement system it operates.

The Company operates the securities settlement systems CASCADE and Creation and offers services through both systems. Consequently, the Company established two user committees.

Evidence:

The Executive Board approved to constitute a user committee and approved its terms of reference with effect from 20 December 2018. The first meeting is planned to take place in March 2019.

1. CSDR Article 28 (CR356, CR358, CR359), the user committee shall

report directly to the management body (paragraph 2), advise the management body (paragraph 3) and submit non-binding opinions to the management body containing detailed reasons regarding the pricing structures of the CSD (paragraph 4)

Evidence:

Clearstream Banking AG has a two-tier board structure and is therefore currently managed by an Executive Board which is supervised by a Supervisory Board. For the purpose of the CSDR, the term "Executive Board" as used in this document shall specify as "management body" in CSDR Article 28.

1. Scope of application and definitions

- (1) These Terms of Reference (the "**ToR**") shall apply to the User Committee "Creation" (the "**Committee**") of Clearstream Banking AG (the "**Company**").
- (2) The Committee shall be established and maintained pursuant to Art. 28 Regulation (EU) 909/2014 (CSDR) in order to advise the executive board of the Company (the "**Executive Board**") with respect to
 - (a) CSDR Matters (as defined in Article 2 (1) below), and
 - (b) Consultation Matters (as defined in Article 2 (2) below);to the extent, this would not constitute a breach of law, a breach of an order of a court of competent jurisdiction or applicable governmental, quasi-governmental, or regulatory body.
- (3) Without prejudice to Article 2 (1) and (2), the Committee will advise the Executive Board on CSDR Matters (as defined in Article 2 (1)) and Consultation Matters (as defined in Article 2 (2)).
- (4) Notwithstanding anything to the contrary in these ToR, the Executive Board shall not have any obligation to accept any proposal made by, or take any action proposed by, the Committee, and any deliberation and/or decision of the Executive Board with respect to any such proposal shall be made at the sole discretion of the Executive Board, with no obligation whatsoever to the Committee in respect of such deliberation or decision or the reasoning thereof.
- (5) For the purposes of these ToR, "**Business Days**" shall be those days (other than Saturday or Sunday) on which commercial banks in Frankfurt/Main are open for general business.

2. CSDR Matters and Consultation Matters

- (1) The "**CSDR Matters**" with respect to the Committee shall be the following:
 - (a) The Committee shall advise the Executive Board on key arrangements that impact on its member, including the criteria for accepting issuers or participants in the securities settlement system "Creation" and on service level. Service level shall include the choice of clearing and settlement arrangement, operating structure of the central securities depository, scope of products settled or recorded, use of technology for the operations of the central securities depository and relevant procedures.
 - (b) The Committee may submit non-binding opinions to the Executive Board, containing detailed reasons regarding the pricing structures of "Creation" of the Company.

The advice of the Committee shall be independent from any direct influence of the Executive Board.

- (2) The Executive Board may seek advice and recommendation from the Committee with respect to all matters which, in view of the Executive Board, are of relevance for the business of the Company and its relationship with clients ("**Consultation Matters**"), in particular

- (a) business and marketing strategy,
- (b) development of new products
- (c) general market trends and requirements.

3. Information rights regarding CSDR Matters

- (1) The Executive Board shall, subject to applicable law and subject to potential conflicts of interest between the Committee Members (as defined below) and the Company, provide the Committee with all information and documents necessary to perform its functions pursuant to Article 2 (1), including, but not limited to
 - (a) Results of audits / audit findings relating to the criteria for accepting issuers or users to the securities settlement system "Creation",
 - (b) Results of audits / audit findings relating to the Committee's mandate,
 - (c) Results of audits / audit findings, which may impact the level of provision of services by the Company, including results of audits on business continuity.
- (2) The Company shall
 - (a) promptly inform the Committee and the competent authority of any decisions in which the Executive Board decides not to follow the advice of the Committee with respect to any CSDR Matters. The Committee may inform the competent authority of any areas in which it considers that the advice of the Committee with respect to any CSDR Matters has not been followed,
 - (b) regularly inform the Committee of the performance of the Company's securities settlement system,
 - (c) in addition to the information pursuant to (a) above, annually inform the competent authority of any decisions of the Executive Board following the advice of the Committee, as well as any decisions where the Executive Board has decided not to follow the advice of the Committee.
- (3) Committee Members shall not be provided with information that may place them or the Selected Members at a competitive advantage.

4. Reporting to the company

The Committee shall regularly report to the Executive Board on the CSDR Matters and on the Consultation Matters; Minutes of the Meetings (both as defined below) shall be shared with the Executive Board.

5. Committee Members

- (1) The Company will invite issuers (which may include issuer agents) and participants in the securities settlement system "Creation" to participate in the Committee based on the admission criteria mentioned in Article 5.1 below (such invitees each a "**Selected Member**").
- (2) The Committee consists of representatives of Selected Members (each a "**Committee Member**"), where each Committee Member represents one Selected Member.
- (3) Each Committee Member shall be appointed to serve for a period commencing on the date of such appointment, and ending on the last day of the calendar year (the "**Term**") following the year in which such appointment was made, provided that such appointment shall in each case be extended by such period (not exceeding one month) as the Company requires to invite the Selected Members with respect to the following Term and take such steps as it considers necessary in relation to the appointment of the successor Committee Members. The term of a substitute Committee Member (s. Article 5.2. (5)) shall end at the same date. Nothing shall prevent any person from serving consecutive Terms.
- (4) Following the appointment of the Committee Members, the final composition of the Committee shall be communicated to the competent authority, including the classification on whether the respective Committee Member is a representative of an issuer, a participant or both.

5.1 Admission criteria

- (1) The criteria that are relevant for the admissibility of a Selected Member are the following:
 - (a) Should be issuer of securities in the Company as an issuer CSD (which may include issuer agents) or participant and
 - (b) Should represent the largest participants and issuers (which may include issuer agents) of the securities settlement system across the Company's business areas.
- (2) The Company strives to achieve a balanced composition of representatives of both issuers and participants.

5.2 Election mechanism

- (1) In due time prior to the expiry of each Term, the Company shall carefully compile a list of Selected Members. The choice of these Selected Members shall be sufficiently justified, laid down in writing and have base on the criteria defined under Article 5.1.
- (2) Subsequently, the Company shall invite each Selected Member to nominate one representative with respect to the following Term. Each Selected Member shall notify the Company of the name of its proposed Committee Member and provide a curriculum vitae required to verify compliance with the following criteria which a proposed person should fulfill:

- (a) occupy a senior management position within the Selected Member,
 - (b) have appropriate expertise and experience in relation to the CSDR Matters and the Consultation Matters,
 - (c) be able to commit time and energy to the role of the Committee Member, and
 - (d) be proficient in spoken and written English and German.
- (3) The Executive Board of the Company will examine whether the proposed Committee Members fulfill the requirements under the foregoing paragraph (2) and either appoints the candidate or rejects the candidate and asks the respective Selected Member to propose another Committee Member in accordance with this Article 5.2. The Executive Board shall reject a candidate only if he/she does not satisfy the criteria set forth above or other material reasons exist which, in the discretion of the Executive Board, would hinder an appointment as Committee Member.
- (4) The Company shall maintain a list of all Committee Members including the relevant contact details (address, phone number, fax number, email address).
- (5) The Chairperson (as defined below) and the Company shall be informed of any withdrawal of its Committee Member by each Selected Member without undue delay. Sub-sections (2) and (3) shall apply *mutatis mutandis* to the replacement of such Committee Member.
- (6) The Executive Board may review the composition of the Committee based on the criteria defined in Article 5.1, and may decide, at any time, to appoint additional Committee Members. Those additional Committee Members shall be appointed for the current Term applicable to the other Committee Members. Except for the term of office, the provisions of Article 5.1 and Article 5.2 shall apply *mutatis mutandis* to the election and appointment of those Committee Members.

6. Chairperson and Committee Secretary

- (1) At the first Meeting of the Committee, the Committee shall appoint a Committee Member by majority vote of the Committee Members to serve as chairperson of the Committee (the "**Chairperson**") and a second one as his/her deputy. If the Chairperson ceases to be a Committee Member or resigns as Chairperson, the Committee shall appoint a new chairperson. In the meantime, or when the Chairperson is not present at a Meeting (as defined below) in person or when desired by the Chairperson the deputy shall perform his/her functions.
- (2) The Chairperson chairs the Meetings (as defined below). He/she liaises with the Executive Board and acts as spokesperson of the Committee. The Chairperson is independent from any direct influence by the Executive Board.
- (3) The Company appoints a representative of the Company to serve as secretary of the Committee (the "**Committee Secretary**") who shall take the minutes and perform administrative duties.

7. Guests

The Company shall appoint members of the Executive Board as representatives of the Company to attend the Meetings (as defined below) as permanent or non-permanent guests ("Guests"). Guests are not entitled to vote. To provide for the necessary independence of the Committee from any direct influence by the management of the Company, the Chairperson is moreover entitled to exclude representatives of the Company from being present during discussions and/or the voting process on specific topics.

8. Meetings

- (1) The Committee shall meet at least two times per year. Meetings shall be held at the premises of the Company or any other location as determined by the Committee Secretary.
- (2) Any Committee Members or Guests who do not attend in person may participate by telephone and/or video conference.
- (3) The Committee Secretary shall convene a meeting of the Committee (a "**Meeting**") at his/her own initiative or at the request of the Chairperson, his/her deputy, or any two Committee Members (provided such request is accompanied by a draft Agenda (as defined below) for such Meeting). The ordinary Meetings shall be scheduled at the end of each calendar year for the following calendar year.
- (4) The Committee Secretary and the Chairperson shall align on an agenda specifying in reasonable detail the matters to be discussed at each Meeting (the "**Agenda**").
- (5) To provide the Committee with the necessary tools to perform its role the Chairperson is entitled to ask the Executive Board of the Company to provide the necessary information and/or to nominate experts to be invited as guests to the Meeting.
- (6) A notice of a Meeting shall:
 - (a) Be delivered to each Committee Member and Guest in writing, by email and/or facsimile no later than fifteen business days prior to the date of such Meeting;
 - (b) Specify the date, time and location of the Meeting;
 - (c) Set out the arrangements to attend by telephone and/or video conference; and
 - (d) Set out the Agenda. Materials providing reasonable background in relation to matters to be discussed shall be delivered no later than ten business days prior to a Meeting.
- (7) Minutes shall be taken of all Meetings (the "**Minutes**"). A first draft of the Minutes shall be made available within fifteen business days after the meeting. The Chairperson ensures that the Minutes of the Committee are a complete and accurate record of the committee discussions. These Minutes shall be shared with the Executive Board and the Committee Members and maintained by the Company.
- (8) At the beginning of each Meeting, the Chairperson determines whether there is a sufficient and balanced representation of participants and issuers in order to proceed with the meeting.

9. Voting

- (1) All decisions and recommendations made by the Committee shall be made at a Meeting by majority vote of the Committee Members present (in person or by telephone/video conference).
- (2) For the purpose of all voting procedures hereunder each Committee Member shall have one single vote. In the event that any vote is tied, the Chairperson shall have the casting vote.

10. Confidentiality

- (1) Each Selected Member and Committee Member agrees during the relevant Term and for two years thereafter
 - (a) not to disclose any Confidential Information (as defined by the Company) to third persons,
 - (b) not to use any Confidential Information for its own benefit, the benefit of any of its Affiliates¹ or a third person, in particular to facilitate the implementation or development of services competing with those of the Company and
 - (c) use all reasonable efforts to keep the Confidential Information in confidence, in particular to procure that the Authorised Persons as defined below are bound by confidentiality obligations to the Selected Member comparable to these confidentiality obligations hereunder.
- (2) A Selected Member or a Committee Member shall be allowed to share Confidential Information with employees of such Selected Member and its Affiliates (employees who have received Confidential Information together with the Committee Members, the “**Authorised Persons**”) solely for the purpose of and to the extent necessary to prepare for the CSDR Matters and Consultation Matters on a need-to-know basis. Upon request of the Company, the identities of the Authorised Persons shall be disclosed to the Company.
- (3) Upon receipt of a written request, the Selected Member and Committee Member shall, subject to any mandatory provision of applicable law or regulation requiring them to retain the Confidential Information for audit or legal purposes, promptly, either (a) return all documents or materials (including computer media) containing Confidential Information; or (b) permanently destroy, erase or delete all the Confidential Information (including all copies thereof).
- (4) In case of any breach of this confidentiality obligation by the Selected Member, the Committee Member or any person referred to under (2), such Selected Member shall be liable for any foreseeable damages the Company caused by that breach and shall promptly notify the Company thereof.

11. Conflict of Interest; Competition Law

- (1) Each Committee Member shall inform the Chairperson of any potential or actual conflict of interest.

¹ “Affiliate” shall include any entity, partnership or person that, directly or indirectly, controls, is controlled by or is under common control with such Selected Member, where the term “control” means the possession of (i) 50% or more of the voting rights in the general meeting of an entity, partnership or person or (ii) the power, directly or indirectly, whether by contract or ownership, to direct or cause the direction of the management and affairs of an entity, partnership or person, including investment decisions.

- (2) The Chairperson will not allow a Committee Member to cast his/her vote on a particular matter if he determines or has reasons to believe that the Committee Member has an actual or a potential conflict of interest in relation to that particular matter.
- (3) Some Selected Members in this Committee may – with regard to certain other Selected Members – potentially be regarded as competitors or potential competitors and any action taken to exchange commercially sensitive information or prevent, restrict or distort competition between (potential) competitors can be a violation of competition laws, in particular Article 101 of the Treaty on the Functioning of the European Union.
 - (a) Therefore, Selected Members / Committee Members who are (potential) competitors must refrain from sharing any commercially sensitive information, i.e. information which could potentially reduce strategic uncertainty in the market in parts by reducing the uncertainty about their or a competitor's future behaviour or being otherwise being suitable of removing competitive pressure from the market. Commercially sensitive information includes, but is not limited to, prices and price components, price changes and any elements which might affect prices profit margins, costs and cost strategies fees charged from clients and discounts/rebates granted to clients, clients or groups of clients with whom the participants have, or do not have, business relations, plans in relation to geographic or product markets, plans concerning the design, production, distribution or marketing of particular products and corporate strategy and investment plans.
 - (b) The Committee Members shall adhere closely to the agenda and avoid discussions about other topics which may result in an exchange of commercially sensitive information between competitors.
 - (c) The Committee Members shall refrain from discussing topics which might be critical from a competition law perspective. In particular, they must not reach any sort of unlawful (horizontal or vertical) agreement or understanding, such as price fixing or the division or allocation of markets.
 - (d) Minutes will be prepared for each Meeting and circulated in accordance with Section 8 (7). Any objections regarding the content of the minutes should be raised without undue delay.
 - (e) Failure to comply with these principles may have serious consequences for the legal entities and natural persons involved, including invalidity of contracts, fines, payment of damages to third parties who suffered harm as a result of anti-competitive behaviour, and reputational risk and damage.

12. Fiduciary duties; limitation of liability

- (1) No Committee Member shall, to the extent legally possible, owe any fiduciary duties to the Company, the shareholders of the Company, any directors, managers or officers of the Company or its shareholders, clients of the Company or any other person by reason of such service on the Committee or the appointment of a Committee Member.
- (2) In exercising its rights or performing its duties under these ToR, the Company shall only be liable *vis-à-vis* any Selected Member or any Committee Member in case of intention or gross negligence and unless the damage results from a negligent violation by the Company of essential obligations. In case of slight negligence, however, the liability of the Company is restricted to the extent of the typical and foreseeable damage.

- (3) Nothing in this Article, however, shall exclude or restrict any statutory liability for damages incurred as a result of injury to life, body or health.

13. Publication

These ToR will be published on the website of the Company.

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