

25 May 2022

**Have your say process - give your feedback on: Financial markets
- Central Securities Depositories (review of EU rules)**

**The CSDs of the Deutsche Boerse Group
Response Annex**

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Please kindly see below the detailed feedback to the “Have your say” process for the CSDR REFIT.

Background:

The European Commission published in March 2022 its legislative proposal for the REFIT of Central Securities Depositories Regulation, aiming to enhance the efficiency of the EU's settlement markets, while safeguarding financial stability. This is a key component of the 2020 Capital Markets Union Action Plan.

The High-level Forum on CMU - subgroup on Capital market infrastructure - also provided some important recommendations on the CSDR (i.e., facilitate the servicing of domestic issuance in non-national currencies, enhance the cross-border provision of settlement services in the EU, and on settlement discipline regime).

CSDR REFIT in a nutshell:

1. Simplify **passporting** for Central Securities Depositories – although this objective would be welcomed, we believe it may not be achieved as the current wording still allows for Member States to raise national-based barriers that counter the objectives of cross-border efficiency. This is contrary to what was outlined by the High Level Forum on CMU and CSDR.
2. Improve **the alignment and cooperation between supervisory authorities** - although this is a key objective for the review, we are uncertain that this can be achieved by the proposed establishment of two different types of colleges, which raises questions with regard to efficiency. We understand though that this should not mimic the EMIR experience, which would delay supervisory decisions and hurt CSD's competitiveness in time-to-market for new initiatives.
3. Facilitating the **provision of banking-type ancillary services** – proposal provides a positive alteration that adjusts the conditions

under which CSD can access commercial bank money and opens the possibility of servicing between banking/non-banking CSDs.

4. **Settlement discipline regime** – unfortunately, we note the choice of the Commission to postpone the mandatory buy-in regime, in detriment of a more efficient settlement across the EU. On the penalties front, we are concerned about the increased internalisation of trades by the market. We support re-calibrating the scope of transactions subject to the settlement discipline regime but recommend considering the inefficiencies caused by the lack of a central database for penalties reference data, and due to the Regulatory Technical Standards Article 19 related to CCPs.

We support clarification in the scope of cash penalties and mandatory buy-ins in Article 7 of Regulation (EU) No 909/2014, and specifying which categories of transactions are excluded.

5. **Regulatory coherence** – we highlight the importance of contemplating the review of CSDR in harmony with other ongoing legislative files such as the AIFMD, the SFD and FCD, ESAP, and also the now completed Pilot regime for FMIs, to ensure and consolidate the stabilising and safekeeping roles of CSDs.

Key messages

1. Passporting regime

Within the EU, the common rule is that financial services passporting regimes allow businesses authorised in one Member State to provide their services throughout the single market, thereby enhancing competition. In other areas, not governed by a passport, minimal additional requirements are imposed by host Member States' authorities for entities providing services cross-border. Oddly, in the CSD cross-border services dimension, CSDs may only provide services for financial instruments constituted under the law of another Member State under a special procedure requiring the agreement of the host Member State, based on the CSD's compliance with the host Member State's corporate laws and cooperation of the home and host authorities, before, and in some cases after, obtaining a passport.

While we understand that the proposal pursues to overcome some L1 and L2 current constraints, we believe it falls short of the High Level Forum for Capital Markets Union recommendations to strengthen the CSD passport and facilitate the servicing of domestic issuance in non-national currencies. The current restrictions go against the CMU and CSDR aim to **harmonise settlement rules and set the conditions for a seamless cross-border EU Capital Markets**. It is therefore appropriate that the Commission improves the Passporting regime in terms of its efficiency and promotion of the provision of cross-border services.

Notwithstanding, we believe that the current changes still do not fully achieve the set goals. The following elements should provide further evidence in this regard:

- i. Today **national corporate and/or other relevant laws are taking precedence over EU rules in certain jurisdictions and become entry barriers for CSDs** in the other EU Members States, and the current draft proposal does not eliminate this problem if not reinforce it. Here again, the High Level Forum for the CMU warned against the hurdles of maintaining a fragmentation of the post-trade landscape along national lines.
- ii. We note in this regard that the newly added requirement of updating on a bi-yearly basis the “list of key provisions” does not tackle the issues around the lack of harmonised criteria for determining the relevant legislation, nor does it provide quality standards for the list. Once again, we raise the attention to the fact that by re-writing CSDR rules in a restrictive manner, some **Member States create artificial barriers** via national law, i.e., creating conditions and requirements corresponding to the features of the sole local CSD and targeting the operational processes admitted by other EU member states and even CSDR. This practice, too, hinders the efficient provision of cross-border services.

Hence, we would urge the Commission to revisit the text of **Article 23** (which remains mostly unaltered in this proposal) and to reconsider the changes of **Article 49**, which still allows Member States to determine relevant legislation that needs to be complied with, without harmonised criteria.

2. Cooperation between supervisory authorities

We note the goal to improve regulatory convergence in the CSDR interpretation by NCAs, as well as **cooperation among these authorities**. However, as mentioned above, the process of Article 23 in its current wording creates a great obstacle for a seamless CMU. In this regard, we highlight that according to our experience, the problem lies in the domestic interpretation/gold-plating of rules and not on a lack of cooperation *per se* amongst NCAs. Even in the event of the setup of a college to establish CSD passport, NCAs around the table would not be able to solve issues related to the interpretation of the law. In our view, ESMA does have a role to play in achieving convergence in the application of the CSDR cross-border requirements the same way throughout the EU as required by the CMU. But this **should be a harmonising, consultative role** focused on the relation and coordination among NCAs, and **not turning out to become another layer adding complexity** to the supervisory structure. Indeed, we are concerned that the proposed solution, a **college of regulators, with two different structures, will be a heavy, slow and cumbersome solution**, especially as more coordination/interaction of too many NCAs might not be efficient (as previous EU legislations have readily proven), leading to hindering EU CSDs competitiveness and to inefficiencies.

Time-to-market is one of the key competitive factors in a global financial services industry. From our own experience with colleges, one of the biggest concerns relating to its adoption and use relates to its quite long time to come to a decision via a college structure or to address the many members’

questions/concerns. The proposed use of colleges has the potential to set EU CSDs at a competitive disadvantage vs. their non-EU peers resulting from the lengthy time to obtain regulatory agreement to release new links, passports, or new services. This does not seem to be fully in line with the CMU and HLF wish to enhance the cross-border provision of settlement services in the EU.

We, therefore, believe that the ESMA and the EBA have a role to play in achieving convergence towards the NCAs and RCAs, but rather in a **non-duplicative fashion** with effective supervision remaining at the level of the NCA and achieving efficient cooperation between the NCAs, who are best-placed thanks to a comprehensive and deep knowledge of the activities of the respective CSDs. This should be achieved by altering the proposal for Article 24a (6) a), by removing the reference to supervision.

3. Banking-type ancillary services

Central bank money settlement is the first choice for CSDs under the CSDR. At the time of the CSDR drafting, there were lengthy discussions on the better (and also most risk-averse) set-up to allow CSDs to provide limited banking services. Which led to the CSDR creating the only example of a limited banking license in Europe to allow seamless settlements in several currencies.

We understand that the Commission's legislative proposal aims at **enhancing the possibilities for CSDs with a banking license to provide banking-type ancillary services** under CSDR to CSDs without a banking license, allowing for much-awaited synergies between CSDs. Furthermore, a **possible access to commercial bank money** represents an additional opportunity for CSDs without a banking license to approach business opportunities that might be dormant or even yet unexplored, on top of the expected review of the thresholds applicable to these today.

We believe this thresholds' review via Regulatory Technical Standards, developed jointly by ESMA and EBA, has the potential to resolve the current limitations in a positive and proportionate manner.

Finally, regarding the liquidity management, we would like also to make it clear that the notion of the business day should take into account the business day of the currency market.

4. Settlement discipline

The Settlement Discipline Regime and the buy-in requirements are key elements of the CSDR to avoid settlement fails, which can have significant repercussions on market trust and stability. In particular, the mandatory nature of the buy-in requirements is a key aspect of the rules to ensure a consistent up-take of such back-office procedures and avoid penalizing market participants who do so on a voluntary basis. The core elements of the Settlement Discipline Regime should be only fine-tuned, as substantial efforts and investments have already taken place. Here we praise the decision taken with regards to Article 7 and the distinction introduced regarding CCP vs. non-CCP transactions. Nonetheless, we believe that

complementing the settlement discipline to **specify the period during which a claim can be raised** could give certainty and stability: currently, contractually and following the current ECSDA Framework, customers can challenge the calculation of settlement penalties within 1 month period. However, after that, there is still a legal risk that the client would submit an appeal (civil law claim), or not pay at all and ultimately fully block the payment process.

With regards to the **suspension of the mandatory buy-ins (MBI)**, we fear that the high settlement fail rates in the EU will continue to be much higher than in comparable jurisdictions over the next years. While the Commission proposes to further analyse the fail-rates with the possibility to introduce MBIs through an implementation act, more time will be lost during this analysis. This is especially worrying since the application of the SDR had been postponed repeatedly, too. It is important to have a clarification on **how the settlement efficiency data and the transactions in scope will be defined** (if changes to the SDR scope will be made as a result of CSDR REFIT, then only the “new scope” should be subject to the efficiency assessment). In addition, we believe it would be important to specify **when participants are deemed “attributable for a fail” related to penalties**, as certain transactions should not be in scope anymore. An example of this would be when the same participant is both paying and receiving party in a settlement transaction, or when CSDs generate instructions on behalf of their customers as it may be the case for market claims.

For the sake of clarity, it should be acknowledged that **cash penalties are calculated on a daily basis** for each business day that a transaction fails to be settled after its intended settlement date until the transaction was either actually settled or bilaterally cancelled. Referencing to the buy-in process (“*whichever is the earlier*”) is not practically feasible for CSDs. We also wonder how a reasonable assessment could be made of settlement efficiency on the EU as a whole (within or beyond T2S) or a single EU market versus e.g., the US market or Japan. Therefore, point b) (“*settlement efficiency in the Union has not reached appropriate levels considering the situation in third-country capital markets that are comparable in terms of size, liquidity as well as instruments traded, and types of transactions executed on such markets*”) should be eliminated from the text. In this context we would like to raise that the proposed text in **Article 69(4)** ‘whichever is earlier’ should be rephrased to ‘penalties apply until settled or stopped’. The current formulation does not cater for the necessary legal certainty.

On another point, we would like to raise the need to **review and clarify the concept of “same day settlement”**: CSDs wishing to obtain a banking license might have concerns that the definition of “same day settlement” in relation to pre-arranged funding agreements does not provide sufficient guidance (or alternatively: is not specific enough) and could create uncertainty around what specific arrangements are required. We consider that the ability to liquidate collateral and financial instruments, as part of the CSD’s own assets, is dependent on the market standards for settlement cycles and we

interpret the requirement to sell securities on a “same day” basis or “on the same business day” to allow for settlement according to each type of financial instruments and trading venue rules (OTC, T + n days) after the trade date, i.e. up to two business days based on the European market standard for settlement cycles of T+2.

We fully support the **clarification in the scope of cash penalties and mandatory buy-ins set out in Article 7** of Regulation (EU) No 909/2014, and specifying which categories of transactions are excluded. We are particularly interested on transactions that failed for reasons not attributable to the participants and transactions that do not involve two trading parties, from the primary market, corporate actions, reorganisations, creation and redemption of fund units and realignments.

We also support the exclusion of all primary market transactions - subscriptions, redemption, switches and all technical instructions generated to mirror movements taking place in the book of a Fund or Transfer Agent should remain out of scope - as well as having a clear way of identifying these instructions at the level of the market.

5. Regulatory coherence

On a related note, we must underline, that along the CSDR REFIT, other legislative processes are currently taking their due course. Given their potential impact on the activities of CSDs, they should be **seen in full coordination with the CSDR review**, to ensure a tight and efficient framework. Here we point to **the AIFMD, the SFD and the FCD, ESAP and the Pilot regime for FMIs**.