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| From: | Presidency |
| To: | Working Party on Financial Services and Banking Union (CSDR) Financial Services Attachés |

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| Subject: | Cross-border provision of services - Presidency compromise |
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Cross-border provisions of services

Presidency compromise

The Presidency has prepared a partial compromise on cross-border provision of services based on the comments to the proposal originally made by French predecessors, based on the discussion that took place on the Council working group at July 7 and written comments that have followed that discussion.

For the better understanding of whole picture the Presidency has decided to provide whole text of appropriate chapter of CSDR with incorporated changes proposed by the Commission in bold and the changes proposed by Presidency in red. Existing text is in grey.

The changes are of no substantial character as the Presidency is trying to lessen the administrative burden place on the CSDs in passporting. For this reason the passporting and group colleges concept has been maintain, as if the choice is between placing the additional burden on CSDs or supervisors, the answer is less burden for CSDs. The college issue would be discussed in separate non-paper dedicated to them, but this non-paper and provision on the cross-border provision of services should be read in alliance with the provision on the colleges.

The assessment under Article 23(3) point (e) should be limited only in relation to shares as that is more tide to the corporate law, is more complicated and requires further knowledge of corporate arrangement of particular host Member State. Further changes are of technical character that should simplified the procedure or follow the changes proposed by the Commission in paragraph 2.

In Article 49(1) second subparagraph the Presidency proposes to streamline the requirements and limit to scope only on the law of financial instrument issued, which is ensure by clarification of law of the issue for shares and other securities. This limitation should make the situation easier for the bond market and thus enhance competition of the services provided by CSD in the EU. The Presidency in this matter propose to deviate from the opinion of ESMA to the current text of the CSDR.

The Presidency would like to invite the Member States to comment on the proposed changes in the compromised text.



Existing provisions

EC proposal**PCY proposal for meeting on 17 October**

(17) The procedure set out in Article 23 of Regulation (EU) No 909/2014 regarding the provision by CSDs of notary and central maintenance services in relation to financial instruments constituted under the law of a Member State other than that of their authorisation has proven to be burdensome and some of its requirements are unclear. This has resulted in a disproportionately costly and lengthy process for CSDs. The procedure should therefore be simplified to better dismantle the barriers to cross-border settlement in order for authorised CSDs to fully benefit from the freedom to provide services within the Union. It is also set beyond the doubt what law of Member State is relevant for the assessment under Article 23 and the obligation is streamline to lessen the burden place on CSDs.

Article 23 Freedom to provide services in another Member State

1. An authorised CSD may provide services referred to in the Annex within the territory of the Union, including through setting up a branch, provided that those services are covered by the authorisation.

~~2. An authorised CSD that intends to provide the core services referred to in points 1 and 2 of Section A of the Annex in relation to financial instruments constituted under the law of another Member State referred to in Article 49(1) or to set up a branch in another Member State shall be subject to the procedure referred to in paragraphs 3 to 7.~~

2. An authorised CSD or a CSD that has applied for authorisation pursuant to Article 17 that intends to provide the core services referred to in Section A, points 1 and 2, of the Annex, in relation to financial instruments constituted under the laws of another Member State referred to in Article 49(1), second subparagraph, or to set up a branch in another Member State shall be subject to the procedure referred to in paragraphs 3 to 7 of this Article. The CSD may provide such services only after it has been authorised pursuant to Article 17, but not earlier than the relevant date applicable in accordance with paragraph 6.

~~3. Any CSD wishing to provide the services referred to in paragraph 2 within the territory of another Member State for the first time, or to change the range of those services~~



~~provided shall communicate the following information to the competent authority of the home Member State:~~

- ~~(a) the Member State in which the CSD intends to operate;~~
- ~~(b) a programme of operations stating in particular the services which the CSD intends to provide;~~
- ~~(c) the currency or currencies that the CSD intends to process;~~
- ~~(d) where there is a branch, the organisational structure of the branch and the names of those responsible for the management of the branch;~~
- ~~(e) where relevant, an assessment of the measures the CSD intends to take to allow its users to comply with the national law referred to in Article 49(1).~~

3. Any CSD wishing to provide the services referred to in paragraph 2 of this Article in relation to financial instruments constituted under the law of another Member State referred to in Article 49(1), second subparagraph, for the first time, or to change the range of those services provided shall submit documents with the following information to the competent authority of the home Member State:

- (a) the host Member State;**
- (b) a programme of operations stating in particular the services which the CSD intends to provide;**
- (c) the currency or currencies that the CSD intends to process;**
- (d) where there is a branch, the organisational structure of the branch and the names of those responsible for the management of the branch;**
- (e) an assessment of the measures the CSD intends to take to allow its users to comply with the ~~national law~~ of another Member State referred to in Article 49(1), second subparagraph, in relation to shares.**

Explanation:

The assessment of the measures should apply only to the shares as it is burdensome procedure and the knowledge of corporate law of host Member State is most needed.

~~4. Within three months from the receipt of the information referred to in paragraph 3, the competent authority of the home Member State shall communicate that information to the competent authority of the host Member State unless, by taking into account the provision of services envisaged, it has reasons to doubt the adequacy of the~~



~~administrative structure or the financial situation of the CSD wishing to provide its services in the host Member State.~~

~~The competent authority of the host Member State shall without delay inform the relevant authorities of that Member State of any communication received under the first subparagraph.~~

4. Within 1 month from the receipt of the information referred to in paragraph 3, the competent authority of the home Member State shall communicate that information to the competent authority of the host Member State unless, by taking into account the provision of services envisaged, it has reasons to doubt the adequacy of the administrative structure or the financial situation of the CSD wishing to provide its services in the host Member State. **Within the same period, where ~~Where~~ the CSD already provides services to other host Member States, the competent authority of the home Member State shall also inform the passporting college referred to in Article 24a.**

The competent authority of the home Member State shall inform the CSD of the date of transmission of the communication to the host Member State without delay.

The competent authority of the host Member State shall without delay inform the relevant authorities of that Member State of any communication received under the first subparagraph.

Explanation:

There is added requirement to inform CSD of the date of transmission as that is the relevant date for provision of services or setting a branch.

~~5. Where the competent authority of the home Member State decides in accordance with paragraph 4 not to communicate all the information referred to in paragraph 3 to the competent authority of the host Member State it shall give reasons for its refusal to the CSD concerned within three months of receiving all the information and inform the competent authority of the host Member State of its decision in relation to point (a) of paragraph 6. Where information is shared in response to such a request the competent authority of the host Member State shall not issue the communication referred to in point (a) of paragraph 6.~~

5. Where the competent authority of the home Member State decides in accordance with paragraph 4 not to communicate ~~all~~ the information referred to in paragraph 3 to the competent authority of the host Member State, it shall ~~give~~ **provide a fully**



reasoned reasons decision for its refusal to the CSD concerned within **13** months of receiving all the information and inform the competent authority of the host Member State and the passporting college referred to in Article 24a of its decision.

Explanation:

The Presidency proposes to issue decision (as a procedural act of competent authority) in case of refusal of passporting.

6. The CSD may start providing the services referred to in paragraph 2 in the host Member State under the following conditions:

(a) on receipt of a communication from the competent authority in the host Member State acknowledging receipt by the latter of the communication referred to in paragraph 4 and, where relevant, approving the assessment referred to in point (e) of paragraph 3;

(b) in the absence of any receipt of a communication, after three months from the date of transmission of the communication referred to in paragraph 4.

6. The CSD may start providing the services referred to in paragraph 2 of this Article in relation to financial instruments constituted under the law of host Member State referred to in Article 49(1), second subparagraph, or set up a branch in the host Member State at the earliest of the following dates:

(a) after 1 month from the date of transmission of the communication referred to in paragraph 4 from the competent authority of home Member State to the competent authority of host Member State;

(b) on receipt of a communication from the competent authority of the host Member State approving the provision of services in the host Member State.

The competent authority of the home Member State shall immediately inform the CSD of the date of transmission of the communication referred to in paragraph 4.

Explanation:

It is minor technical change to streamline the legal clarity for the CSD in order to make clear when the provision of service might start or the branch might be set – one month from transmission of the information. The information was provided to CSD by home MS by requirement in paragraph 4.

7. In the event of a change in any of the information communicated in accordance with paragraph 3, a CSD shall give written notice of that change to the competent authority of the home Member State at least one month before implementing the change. The



~~competent authority of the host Member State shall also be informed of that change without delay by the competent authority of the home Member State.~~

7. In the event of a change of the information set out in the documents submitted in accordance with paragraph 3 of this Article, a CSD shall give written notice of that change to the competent authority of the home Member State at least 1 month before implementing the change. The competent authority of the host Member State and the passporting college referred to in Article 24a shall also be informed of that change without delay by the competent authority of the home Member State.

Article 49 Freedom to issue in a CSD authorised in the Union

1. An issuer shall have the right to arrange for its securities admitted to trading on regulated markets or MTFs or traded on trading venues to be recorded in any CSD established in any Member State, subject to compliance by that CSD with conditions referred to in Article 23.

~~Without prejudice to the issuer's right referred to in the first subparagraph, the corporate or similar law of the Member State under which the securities are constituted shall continue to apply.~~

~~Member States shall ensure that a list of key relevant provisions of their law, as referred to in the second subparagraph, is compiled. Competent authorities shall communicate that list to ESMA by 18 December 2014. ESMA shall publish the list by 18 January 2015.~~

Without prejudice to the issuer's right referred to in the first subparagraph, the corporate or similar law of the Member State under which the securities are constituted shall continue to apply. The corporate or similar law of the Member State under which the securities are constituted includes:

(a) for shares the ~~corporate or similar~~ law of the Member State where the issuer is established incorporated; and or

(b) for other securities than shares the ~~governing corporate or similar~~ law of the Member State under which the securities are issued.

Member States shall compile a list of key relevant provisions of their law, as referred to in the second subparagraph. Competent authorities shall communicate that list to ESMA by 18 December 2014. ESMA shall publish the list by 18 January 2015. Member States shall update that list regularly and at least every 2 years. They



shall communicate the updated list at those regular intervals to ESMA. ESMA shall publish the updated list.

Explanation:

Following the comments from MS and concerns voiced the Presidency decided to deviate from the opinion of ESMA and limit the assessment and potential requirement for passporting only on the law of the MS under which the securities are issued (in ESMA opinion for bond securities so called contractual law).

The CSD may charge a reasonable commercial fee for the provision of its services to issuers on a cost-plus basis, unless otherwise agreed by both parties.

2. Where an issuer submits a request for recording its securities in a CSD, the latter shall treat such request promptly and in a non-discriminatory manner and provide a response to the requesting issuer within three months.

3. A CSD may refuse to provide services to an issuer. Such a refusal shall be based only on a comprehensive risk assessment or if that CSD does not provide the services referred to in point (1) of Section A of the Annex in relation to securities constituted under the corporate or similar law of the relevant Member State.

4. Without prejudice to Directive 2005/60/EC of the European Parliament and of the Council (1) and Commission Directive 2006/70/EC (2), where a CSD refuses to provide services to an issuer, it shall provide the requesting issuer with full written reasons for its refusal.

In the case of a refusal, the requesting issuer shall have the right to complain to the competent authority of the CSD that refuses to provide its services.

The competent authority of that CSD shall duly examine the complaint by assessing the reasons for refusal provided by the CSD and shall provide the issuer with a reasoned reply.

The competent authority of the CSD shall consult the competent authority of the place of establishment of the requesting issuer on its assessment of the complaint. Where the competent authority of the place of establishment of the requesting issuer disagrees with that assessment, any one of the two competent authorities may refer the matter to ESMA, which may act in accordance with the powers conferred on it under Article 19 of Regulation (EU) No 1095/2010.



Where the refusal by the CSD to provide its services to an issuer is deemed to be unjustified, the responsible competent authority shall issue an order requiring the CSD to provide its services to the requesting issuer.

5. ESMA shall, in close cooperation with the members of the ESCB, develop draft regulatory technical standards to specify the risks to be taken into account by CSDs when carrying out a comprehensive risk assessment, and competent authorities assessing the reasons for refusal in accordance with paragraphs 3 and 4, and the elements of the procedure referred to in paragraph 4.

ESMA shall submit those draft regulatory technical standards to the Commission by 18 June 2015.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

6. ESMA shall, in close cooperation with the members of the ESCB, develop draft implementing technical standards to establish standard forms and templates for the procedure referred to in paragraph 4.

ESMA shall submit those draft implementing technical standards to the Commission by 18 June 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1095/2010.