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Central Securities Depositories Regulation (CSDR) Regulation (EU) No 909/2014- PTR-CSDR

Topic
CSD questions - Provision of services in another Member State

Subject Matter
Provision of services in other Member States

Question
(a) Article 23(3) of CSDR relates to the provision of notary and central maintenance services in another Member State. Its paragraph (e) specifically provides that “where relevant, [a CSD shall communicate to the NCA of the home Member State] 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)” i.e.
the corporate law of the Member State under which the securities are constituted.

i. Does Article 23 of CSDR apply to all types of securities (such as shares, bonds, etc.)?

ii. What type of assessment should the CSD provide to the home Member State NCA?

(b) Under Article 23(3)(b) of CSDR, should the “programme of operations” include information on core services and on the ancillary services a CSD intends to provide in the other Member State?

(c) Under Article 23(3)(e) of CSDR, a CSD is required to provide, where relevant, an “assessment of the measures [it] intends to take to allow its users to comply with the national law referred to in Article 49(1)”. Should the CSD provide one assessment per security issue?

(d) Where an applicant CSD is already providing core services referred to in Article 23(2) of CSDR in another Member State, how do the authorisation procedure set out under Article 17 of CSDR and the passporting procedure set out in Article 23 of CSDR interplay?
(e) For the purposes of Article 23(3) of CSDR, which changes to the provision of cross-border services should be considered as changing the range of the services provided within the territory of a host Member State?
(f) Article 23(3)(e) CSDR provides that “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)”. When should it be considered relevant to provide such assessment?
(g) For the purposes of Article 23(6) of CSDR, what happens if the NCA of a host Member State disapproves of the assessment referred to in Article 23(3)(e) of CSDR?
(h) Article 23(2) of CSDR specifies that the procedure for providing services in another Member State shall apply to authorised CSDs that intend to provide certain services in relation to “financial instruments constituted under the law of another Member State referred to in Article 49(1)”.
For the purpose of Article 23(2) of CSDR, which law should be considered as “the law under which securities are constituted” as referred to in Article 49(1) of CSDR and which Member State(s) should be considered as the host Member State(s) for the purpose of Article 23(3) to (7) of
CSDR?

ESMA Answer

31-03-2021

Original language

(a) Answer provided by the European Commission in accordance with article 16b(5) of the ESMA Regulation (please see the related Disclaimer below):

i. Yes, Article 23 of CSDR applies to all types of securities as defined under Article 2(8) of CSDR, that means financial instruments as defined in point (15) of Article 4(1) of Directive 2014/65/EU, whether admitted to trading on regulated markets or MTFs, traded on trading venues, or not.

ii. National laws referred to in Article 49(1) of CSDR govern the relationship between issuers and holders of such securities or any third party, such as ownership rights, voting rights, dividends and corporate action, which for the sake of clarity, is not the national law of the home NCA that will receive this communication.

Therefore, to assess that these measures allow its users to comply with the applicable securities law, the CSD should not only communicate the measures it intends to take and the procedure it intends to follow, but should also provide actual evidence that the proposed measures ensure compliance. To that end, independent legal opinions may be requested in order to certify that the rules and procedures set out by the CSD allow their users to comply with each applicable national law.

(b) Yes, the programme of operations required under Article 23(3)(b) of CSDR should cover both the core and ancillary services the CSD intends to provide in the other Member State.

(c) No. The NCA should require the CSD to provide an assessment of the measures it intends to take to allow its users to comply with the national law referred to in Article 49(1) at least for each type of financial instruments in respect of which it intends to provide the services referred to in points 1 or 2 of Section A of the Annex to CSDR.

(d) Without prejudice to NCAs from the home and host Member States agreeing to start the procedure set out in Article 23 of CSDR in advance and to run both procedures in parallel, the procedure set out in paragraphs (3) to (7) of Article 23 of CSDR applies to ‘authorised CSDs’, and thus only as of the day when a CSD is authorised under Article 17 of CSDR.

Therefore, where an applicant CSD already provides (and intends to continue providing) core services as referred to in Article 23(2) of CSDR, the communication of the information

required under Article 4(3) of the RTS on CSD Requirements by the CSD to its NCA in its application for authorisation under Article 17 of CSDR or in any subsequent update thereof shall not *per se* trigger any of the deadlines set in Article 23 of CSDR.

As from the granting of its authorisation under Article 17 of CSDR and until the completion of the procedure set out in Article 23 of CSDR, including the period during which a disapproval from the NCA of the host Member State of an assessment referred to in Article 23(3)(e) of CSDR would be challenged in accordance with point (g) below, the CSD:

- can continue to provide the core services referred to in Article 23(2) of CSDR that it provided in other Member States before the granting of its authorisation under Article 17 of CSDR and for which it has communicated to its NCA the information required according to Article 23(3) of CSDR immediately upon its authorisation;
- must stop providing the services that it used to provide before being authorised by the home NCA but for which it has not communicated to the home NCA the information required according to Article 23(3) of CSDR immediately upon its authorisation; and
- must not start providing within the territory of a host Member State any core service referred to in Article 23(2) of CSDR that it did not provide before the granting of its authorisation under Article 17 of CSDR.

Please refer to point (e) below on the changing of the range of services, to determine whether a service should be deemed as already provided or not.

(e) The following changes should be considered as changing the range of services provided within the territory of a host Member State:

- Provision of another core service (referred to in point 1 or 2 of Section A of the Annex to CSDR)
- Provision of service(s) in relation to another type of financial instrument

For this purpose, the following types of financial instruments (as referred to in Article 42(1)(d)(i) of the RTS on CSD Requirements) should be taken into account:

a)transferable securities referred to in point (a) of Article 4(1)(44) of Directive 2014/65/EU

b) sovereign debt referred to in Article 4(1)(61) of Directive 2014/65/EU,

c) transferable securities referred to in point (b) of Article 4(1)(44) of Directive 2014/65/EU, other than sovereign debt referred to in Article 4(1)(61) of Directive 2014/65/EU,

d) transferable securities referred to in point (c) of Article 4(1)(44) of Directive 2014/65/EU,

e) exchange-traded funds as defined in point (46) of Article 4(1) of Directive 2014/65/UE (ETF)

f) units in collective investment undertakings, other than ETFs,

g) money-market instruments, other than sovereign debt referred to in Article 4(1)(61) of Directive 2014/65/EU,

h) emission allowances,

i) other financial instruments (to be specified by the CSD).

(f) "Where relevant" should be understood as meaning that the CSD must provide an assessment whenever there are requirements under the national law that it has determined as being relevant for the users of each cross-border service it provides or intends to provide.

(g) Where the NCA of the host Member State refuses to approve such assessment it shall, within three months from the date of transmission of the communication referred to in Article 23(4) of CSDR, provide the CSD's NCA with the full written reasons for its disapproval, including the specific national requirements which are not complied with and may suggest appropriate measures to be taken by the CSD to allow its users to comply with the national law referred to in Article 49(1) of CSDR.

In such case, the CSD should submit an updated assessment referred to in Article 23(3)(e) of CSDR to its NCA, which should transmit it to the NCA of the host Member State which will review it under the procedure set out in Article 23(6) of CSDR.

Where the NCA of the host Member State disapproves of the updated assessment, that NCA shall within three months from the date of transmission of the updated assessment provide the CSD's NCA with a fully reasoned written decision confirming its disapproval. including the specific national requirements which are not complied with and may suggest appropriate

measures to be taken by the CSD to allow its users to comply with the national law referred to in Article 49(1) of CSDR.

This second reasoned decision should clearly state the way in which an appeal against such decision can be lodged. Only when such matters are settled definitively should the procedure set out under Article 23 of CSDR be considered as being completed.

(h) Answer provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation (please see the related Disclaimer below):

Article 49(1) of CSDR establishes the issuer's 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 the conditions referred to in Article 23.

Article 49(1) also provides that, 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 latter should be interpreted in the light of Recital 56 of CSDR and therefore be understood as the law governing the relationship between the issuer and holder and their respective rights and duties attached to the securities such as voting rights, dividends and corporate actions.

If the national law of an issuer, including substantive law and conflict of laws rules, allows a law different from the law of the issuer to govern some securities (e.g. bonds) or certain aspects of their issuance, it is possible for 'the national law under which securities are constituted' to be or to include that different law.

For instance, if the national law of the issuer determines that any issue of shares should be governed by the national law of the issuer, indeed the national law of the issuer would be the 'law under which the securities are constituted' in the meaning of Article 49(1) of CSDR. This would seem to be the case for most shares. It is, however, possible that in case of debt securities, the national law of the issuer allows that the law governing the issue can be chosen contractually.

For the purpose of Article 23(2) of CSDR, by default, the 'law under which the securities are constituted' in the meaning of Article 49(1) of CSDR should be the ‘standard’ law of the issuance for each type of financial instruments per host Member State (i.e. for shares, the national law of the issuer, and for bonds, the law that has been contractually chosen to

govern the issuance).

However, without prejudice to the above-mentioned default approach, if, for a certain type of financial instruments, the issuer determines that the national law of the issuer should be complied with through measures to be taken by the CSD, two cases may exist:

1. Upon information from the issuer, the CSD determines that it should take measures to allow its users to comply not only with the 'standard' law of the issuance, but also with the national law of the issuer. In this case, in order to provide notary or central maintenance services in relation to such type of financial instruments, the CSD should perform the assessment as per Article 23(3)(e) of CSDR and apply the process under Article 23(3) of CSDR for the respective type of financial instruments covering the laws of both host Member States, with the involvement of the competent authorities in both host Member States;
2. Upon information from the issuer, the CSD determines that it should take measures to allow compliance only with the national law of the issuer. In this case, in order to provide notary or central maintenance services in relation to such type of financial instruments, the CSD should perform the assessment as per Article 23(3)(e) of CSDR and apply the process under Article 23(3) of CSDR for the respective type of financial instruments covering only the national law of the issuer and involving the competent authority in the issuer's jurisdiction. A CSD should only perform the assessment as per Article 23(3)(e) of CSDR once per type of financial instruments and per host Member State.

The following example may illustrate this approach:

A CSD from Member State A would like to provide notary or central maintenance services in respect of bonds whose terms and conditions are governed by the law of host Member State B (law contractually chosen to govern the issuance).

For the purpose of Article 23(2) of CSDR, the CSD should perform the assessment as per Article 23(3)(e) of CSDR of the measures the CSD intends to take to allow its users to comply with the law of host Member State B. Consequently, the competent authority of host member State B would be involved in the procedure under Article 23(2) of CSDR.

If an issuer from Member State C issues bonds whose terms and conditions are governed by the law of Member State B (law contractually chosen to govern the issuance) and informs the CSD that it has determined that:

1. in addition to the national law of Member State B as law of the issuance, the national law of Member State C (issuer's law) would also require the CSD to take measures to allow its users to comply with it, then the CSD would need to perform the assessment as per Article 23(3)(e) of CSDR in respect of both the national law of host Member State B and the national law of host Member State C and involve competent authorities of both host Member State B and host Member State C. If the CSD has already been subject to the procedure for providing services in respect of bonds in host Member State B, then it would only need to be subject to the procedure for providing services in respect of bonds in host Member State C; or that
2. only the national law of Member State C (issuer's law) would be relevant for the measures the CSD would need to take to allow its users to comply with the national law referred to in Article 49(1) of CSDR, then the CSD would be subject to the procedure for providing services with respect to that type of financial instruments in host Member State C. The CSD would thus need to perform the assessment as per Article 23(3)(e) of CSDR of the measures the CSD intends to take to allow its users to comply with the national law of host Member State C referred to in Article 49(1) of CSDR relevant for bonds and only the competent authority of host member State C would need to be involved in the procedure under Article 23(2) of CSDR.

[1] „*The Authority shall forward questions that require the interpretation of Union law to the Commission. The Authority shall publish any answers provided by the Commission*“.[3]
https://www.esma.europa.eu/questions-and-answers