France Post-Marché

09/09/2024

France Post Marché Cover Letter to :

ESMA Consultation - Technical Advice on the Scope of CSDR Settlement Discipline

FRANCE POST MARCHE PRESENTATION

FRANCE POST-MARCHE was created in 1990, with the goal of gathering members of organizations in the Banking and Financial Services industry involved in activities with financial instruments and specifically post trade activities.

FRANCE POST-MARCHE is an integral part of the French, European and international financial ecosystem, supporting the increasingly interdependent players in the French financial marketplace.

FRANCE POST-MARCHE (FPM) is the leading association representing the post-trade business in France and Europe.

FPM represents through its 82 members a wide range of activities: market infrastructures, custodians, account-keepers and depositaries, issuer services, reporting, and data management services, with a total staff of 28,000 in Europe of which 16,000 in France.

Our members acting as financial intermediaries account for 26% of the European market.

MAIN VIEWS & CONCLUSIONS

The penalty regime is now in place for more than two years and has already showed in its ability to improve the settlement efficiency. Thus, we welcome the opportunity given by this consultation to take stock on this measure and potentially bring some beneficial changes should it be via the creation of new exemptions or simply via a regulatory recognition which brings the certainty and clarity a Q&A is less able to give.

Our main concern is for the penalty mechanism to keep helping improve the settlement efficiency. This means to remain fair by penalizing the right actor and not those that bear the consequences of a third actor's behavior (the ESMA's immunization principle). A transaction is rarely in isolation but one element of an investment decision. In fact, several transactions (and their settlements) may be in relation; not all the same type but all with the same settlement date (for example a sell on the market that needs a recall of the stock). Thus, an issue in terms of settlement will result in a chain of settlement fails and a chain of penalties, the latter replicating exactly the former.

36, rue Taitbout - 75009 Paris - France
Tél. 01 48 00 52 01 - e-mail : secretariat@france-post-marche.fr - www.france-post-marche.fr
Association Loi 1901 - Siren 400 427 910 • Siret 400 427 910 00023 • Code NAF 8559A

Any new exemption may create a distortion between these two chains and thus should be carefully assessed, especially when it is about the "non-trading" exemption. It is our view that penalties target the non-respect of the agreed date which can vary depending on the underlying transaction and thus, except in some cases, should be "transaction type agnostic".

Beyond the obligation of maintaining as much as possible the immunization principle, there is a risk the implementation of these exemptions faces some difficulties should it be in achieving an ex-ante filter or in using the type of transaction as a filtering criterion (see Q8, Q15, …).

Although some proposed exemptions sound desirable and justified, we are of the opinion that their implementation should be studied in a cost / benefit analysis. The likelihood of the case to be exempted should be weight against the ease of the exemption. If the use of the appeal process should be avoided and be a last resort solution, a too expensive automated way may not be more desirable.

Eventually we also want to use this consultation to recall the longstanding position from the industry to consider that penalties and mandatory buy-ins are two distinct things. Indeed, while penalties sanction the non-respect of the intended settlement date ("on which the parties to a securities transaction agree that settlement is to take place") whatever the underlying transaction is, the mandatory buy-in is, itself, a transaction that overrides the original one (the one that failed to settle). In other words, the penalties relate to settlement instructions while the mandatory buy-in is linked to a transaction. For example, if a portfolio transfer may be subject to penalty should it fail to settle, it is obvious that no mandatory buy-in should be initiated (otherwise the owner of the portfolio will be required to trigger a buy-in against itself). These two pieces of the settlement discipline regime deserve different treatments and firstly different scopes.

This distinction has been already reflected in CSDR level 2 with the buy-in requirement applying to parties to the transaction and penalties to the CSD's participants. And we welcomed the extra step made by CSDR Refit with these two distinct articles since it opened the door to different scopes. But unfortunately, although there is article 7 and article 7a, the latter relies on the scope of the former. This led to an undesirable choice to be made when answering to this consultation. Should we favor the mandatory buy-in or the immunization principle? Having in mind that penalties already apply and that, on the contrary, the introduction of a mandatory buy-in is subject to 2 cumulative conditions and will have to follow a legislative process with public consultation before being voted, we have chosen to favor the immunization principle and to keep our advocacy work for the future should the mandatory buy-in come into life. However, we want to express our regret that CSDR Refit does not allow to, ex-ante, make some penalizable types of transaction (those that actually do not correspond to a trading activity but are "operations" rather than "transactions") definitively out of the scope of the MBI.

Therefore, the answers to this consultation shall in no means be seen as an acceptance by FPM of the scope of exemptions for the buy-in.

We hope that the elements that we brought through this response to the Technical Advice on the Scope of CSDR Settlement Discipline will help ESMA in its further analysis of evolution of the exemption framework. We remain committed to help ESMA in this work and will be happy to discuss our document further if needed.

France Post-Marché

36, rue Taitbout - 75009 Paris - France
Tél. 01 48 00 52 01 - e-mail : secretariat@france-post-marche.fr - www.france-post-marche.fr
Association Loi 1901 - Siren 400 427 910 • Siret 400 427 910 00023 • Code NAF 8559A