NORDIC SECURITIES ASSOCIATION

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Comments to the Discussion Paper from ESMA regarding Draft Technical Standards for the Regulation on improving securities settlement in the European Union and on central securities depositories (CSD) from the Nordic Securities Association (NSA)[1].

General Comments

The Nordic Securities Association (NSA) welcomes the opportunity to comment on the ESMA Discussion Paper on Draft Technical Standards for the CSD Regulation (CSDR).
The different holding models for securities in the EU (direct, indirect and mixed) are clearly recognized in the level 1 legislation. Those models as well as the diversity in CSD business models in the EU should be taken into account when ESMA drafts the technical standards. The technical standards should of course be flexible enough to cover the different models.
The NSA has focused its comment on the settlement discipline part of the Discussion Paper and in general we fully support the comments from the European Banking Federation (EBF). Further to comments sent by the EBF we have some observations and comments mainly from a Nordic view on the Discussion Paper.

[1] The Nordic Securities Association ("NSA") represents the common interests of Member firms in the Nordic securities dealers associations towards external stakeholders primarily in the Nordic market but also on European and international issues of common interest. Members of the NSA are the Danish Securities Dealers Association, the Finnish Federation of Financial Services, the Norwegian Securities Dealers Association and the Swedish Securities Dealers Association.

Settlement discipline

We find the settlement discipline regime on the CSDR level I very heavy and detailed. The regime might have some unintended consequences for the functioning of local securities markets and we therefore encourage ESMA to adopt pragmatic level II provisions. It should be noted that we have not detected any market failures in the Nordic securities markets. Quite to the contrary, the settlement efficiency is on a high level with very few exceptions. In our opinion the technical standards must be flexible enough to allow room for different markets structures. The rules must also be compatible with all the holding structures (direct and indirect) in the EEA. Furthermore, it is of utmost importance that rules do not produce unjustified costs, such as unnecessary changes of IT and administrative systems before joining a new technical platform (for exampleT2S).

Settlement internalisers

We are not against the principle of quarterly reporting of internalized settlement but we are of the opinion that the proposed requirements are too detailed and too costly. Furthermore we are not sure of the reasons for those detailed requirements. Such requirements should be based on a clear assessment of the need for the relevant authorities to require such detailed information. As far as we know there is no market failure in this area.
Regarding the proposed standards for settlement internalisers we also have some doubts if the proposed detailed reporting is covered by the mandate in the level 1 legislation.
Article 9 states that settlement internalisers shall report to the competent authorities the aggregated volume and value of all securities transactions that they settle outside securities settlement systems on quarterly basis. According to article 9.2 ESMA may in close cooperation with the members of the ESCB, develop draft regulatory technical standards further specifying the content of such reporting.
In our opinion all delegation of powers must be clear, precise and detailed. The limits of the delegation, which the delegation may not exceed, should be clear. It is essential that the delegation of powers to the Commission and ESMA should be precisely described by the legislator. Otherwise the possibility to scrutinize the delegation could be jeopardized.
The limits of the delegation could be set out directly in the article or in the delegation (the mandate), but it should be possible to understand the aim of and the content of the delegation. Comparing the delegation in article 9 of CSDR with for example the delegation in article 9 of EMIR and article 9 of the Short selling Regulation gives the impression that the delegation in CSDR is not far from a "carte blanche" to the Commission and ESMA. In the light of the legal uncertainty created by the loose mandate we are of the opinion that ESMA should take a careful stand and not stretch the mandate to much.
Furthermore, we have some doubt that the far-fetching information requirements proposed by ESMA could not be seen as a non-essential element of the legislative act (costs and administrative burdens).

Communication procedures and standards

In our opinion technical aspects of settlement (such as matching standards or message standards) should not be included in the forthcoming binding Technical Standards. Such standards change over time and some standards may sooner or later be outdated.
Regarding the discussion in question 3 and 4 about relevant communication procedures and standards to ensure STP and the matching procedure it should be clarified that those rules are limited to (aimed for) the participants in a CSD and not include for example end investors in direct holding systems. It is clear that the concept of participants is limited to certain financial institutions according to the definition in article 2.19 and the forthcoming technical standards must be limited to participants in CSDs, CCPs and trading venue. The only exception is in article 6.1 which require investment firms to put in place certain arrangements between the investment firms and their professional clients. It is of utmost importance that the rules regarding settlement discipline not include end investors in for example direct holding systems. There is no mandate for such inclusion and also no rationale.

Recordkeeping

Regarding record-keeping, article 29 (3) and (4) ESMA states that LEI could be considered as the code for identifying legal entities under CSDR. In our opinion the level 1 legislation does not mandate CSDs to harmonize data records or to introduce LEI. Imposing the use of LEI for the purpose of recordkeeping is unlikely to bring any substantial benefits. It should be further noted that the scope of any requirements to use LEI would need to be carefully considered. If the requirements were to include account holders/end investors at the CSD it would in the Nordic direct holding market include several hundred thousand companies. The impact of such proposals will fall mainly on the smallest holders and should be more carefully studied. Besides the significant administrative costs this would mean for the concerned companies, it would also be a serious break of the stated principle that CSDR should be neutral in relation to different holding models in the EU.
The technical standards for CSDR are clearly not the right place to promote the use of LEI. LEI should be used and allowed to be used when available for the entity in question. In case an entity does not already have an LEI based on other requirements stemming from EU legislation, a unique client code with basic details or BIC codes should be accepted.

Transitional provisions

Finally, we want to mention that we are not sure how to interpret some of the transitional provisions and the rules on entry into force in the regulation and it would be of great value if ESMA could clarify those provisions and rules.

One issue is the measures to address settlement fails. In CSDR article 15 of the Short-selling regulation is deleted. The reason is of course that article 15 should be replaced by the rules in article 7 of the CSDR. For article 7 or the article deleting article 15 of the Short Selling regulation there is no transitional provision and those articles could therefore enter into force twenty days after the publication of CSDR in the Official Journal. The problem is however that the rules in the CSDR regarding buy-in must be further specified in forthcoming level 2 legislation. In EMIR it was stated that the obligations should not be applied before the technical standards were adopted and had entered into force (recital 93). No such recital exists in CSDR but we presume that the same principle should be applicable.

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