

# Position paper



**MARCH, 13<sup>TH</sup>, 226**

5 STREAMS:

- (1) SUPERVISION
- (2) ASSET MANAGEMENT
- (3) TRADING
- (4) POST-TRADE
- (5) PILOT REGIME / DLT

## EXECUTIVE SUMMARY

The MIS package is a major initiative aimed at achieving both regulatory and operational progress, building on the existing regulatory framework and the philosophy of the SIU, with a view to strengthening the European financial marketplace, improving the efficiency of processing chains, and encouraging long-term investment through favourable market conditions.

France Post-Marché (FPM), the association representing post-trade stakeholders in France and playing a significant role in the overall competitiveness of the European market, **welcomes the EC's initiatives aimed at strengthening the integration, competitiveness and efficiency of the Single Market for capital, while making several recommendations** to ensure the operational consistency of the reforms, regulatory stability and investor protection, **while preserving the objective of avoiding any unjustified increase in costs for all participants in the value chain and, by extension, for end clients.**

The association also wishes to recall that, notwithstanding the progress proposed in the package, **many barriers to integration identified in the AMI-SeCo report remain unaddressed.**

**On Supervision**, FPM supports strengthening ESMA's role, including the possibility of direct supervision of infrastructures of significant size, provided that any extension of its powers is strictly framed at EU level by the legislator (Parliament and Council) and articulated with the EC's implementing prerogatives. **However, FPM regrets the absence of an explicit competitiveness mandate for ESMA, which should accompany the extension of its powers.** The association also calls for clarification of several aspects of the framework (e.g. the allocation of sanctioning powers between ESMA and NCAs) to avoid any layering of decision-making levels and to ensure effective political oversight by the legislator over Level 2 instruments.

**On Asset management**, FPM opposes the introduction of a depositary passport as such a measure is premature in the absence of sufficient harmonisation of national frameworks and a thorough impact assessment. It could weaken investor protection, increase legal and operational complexity, and create risks for the stability of the regulatory framework and for certain national ecosystems.

**On Trading**, FPM broadly supports the proposed developments, in particular the principle of interoperability between TVs and CCPs. The association nevertheless stresses the need to clarify the arrangements for implementation.

**On Post-trade**, FPM is supportive of the development of interoperability between CSDs, targeted to strengthen the integration and competitiveness of the European market. **It nonetheless emphasises the need to clarify the operational arrangements of the proposed model, particularly the hub-and-spoke architecture**, to avoid excessive complexity or additional costs for participants and end clients. FPM also supports initiatives aimed at improving the comparability of infrastructure fees and strengthening the harmonisation of rules facilitating cross-border activities, while underlining the importance of preserving certain local specificities. **Regarding the regulation of internalised settlement, FPM calls for caution**, considering that the current proposals are based on a confusion between the settlement mechanisms of CSDs and those of custodians.

**On Pilot Regime / DLT**, FPM welcomes the EC's intention to foster innovation and is highly supportive of the evolution of the Pilot Regime, particularly its extension and permanence. It nevertheless considers that certain clarifications are needed, notably regarding application thresholds, cash tokenisation mechanisms and certain inconsistencies in national legal frameworks. **By contrast, FPM expresses an unfavourable view on the scattered integration of DLT into several existing legislative texts, which could create regulatory confusion.** FPM recommends concentrating DLT-related developments within the Pilot Regime to ensure coherent and controlled implementation.

## 1. SUPERVISION

### *Master Regulation, Article 1*

FPM considers that the strengthening of supervisory tasks at European Union level must be accompanied by an explicit institutional framework to preserve regulatory predictability and avoid shifting substantive choices from Level 1 (co-decision) to implementing instruments.

In particular, the association requests that:

- The criteria for “significant size” and the allocation of sanctioning powers be defined with sufficient precision at Level 1.
- No-action letters be strictly framed, systematically published, and accompanied by an obligation to correct the regulatory framework under the oversight of Parliament and Council.
- Procedures for suspending technical standards may only be used on an exceptional and temporary basis, subject to effective political control.
- ESMA’s governance ensure regular accountability to the co-legislators regarding the use of these tools and their effects.

**FPM supports the extension of ESMA’s prerogatives, notably as direct supervisor of infrastructures of significant size.** However, in a rule-of-law logic at Union level, the association considers it essential that (i) structuring choices be decided at Level 1 by Parliament and Council, (ii) Level 2 empowerments be strictly circumscribed, and (iii) the exercise of implementing powers be subject to effective political oversight. Consequently, the Commission should assign ESMA a competitiveness mandate and specify the arrangements for implementing the strengthening plan.

#### **Competitiveness mandate: integration requested**

**FPM regrets that no competitiveness mandate is included among the planned developments for ESMA.** The inclusion of such a mandate in ESMA’s statutes would constitute the logical culmination of the search for operational efficiency and harmonisation of the European market.

**The extension of ESMA’s competences and the strengthening of its resources should be guided by this objective, already mentioned in the SIU consultation. This addition would also align with the practices of the CFTC in the US and the FCA in the UK, both of which have a competitiveness mandate.** It is imperative to eliminate uncoordinated national exemptions and prevent any domestic “gold-plating” of European law to ensure homogeneous implementation of the single rulebook.

**The revision of ESMA’s governance and resources is therefore an opportunity to incorporate this competitiveness requirement.** Among other things, the latter will be materialized by annual reporting on market competitiveness and competitiveness assessments for significant measures at European level.

#### **Developments regarding ESMA: favourable opinion with a need for clarification**

**As stated in the introduction, FPM welcomes the proposed developments, which constitute a notable step towards more comprehensive supervision and therefore towards greater harmonisation and efficiency of the European market.**

To ensure their effectiveness and sustainability, the association highlights the following points:

- **A reservation regarding the extension of ESMA’s scope of intervention over RTS:** the variable quality of ESMA’s recent work has at times made their operational implementation difficult. The association supports the possibility for the EC to totally or partially suspend RTS.
- **Clarification is expected on several issues:**
  - The **new executive board**, which is welcomed, should see its remit extended to regulatory work and not be limited solely to supervisory matters.
  - The **allocation of sanctioning powers between ESMA and NCAs** must be clarified to avoid complexity, regulatory layering and additional costs.
  - The **ability to issue no-action letters** is welcome in a convergence logic, if it remains exceptional, public, reasoned and accompanied, where necessary, by a correction of the framework under political oversight.
  - The **methodology for arbitrating** applicable national laws requires clarification.
  - The **supervision of significant asset managers** must be clarified to assess the related workload.
  - **More broadly, all these issues must converge towards simplification and regulatory consistency at European level.** Despite the transparency safeguards provided for, the

real balance will depend on how precise the Level 1 texts are, whereas the proposal still provides for extensive recourse to delegated and implementing acts.

- **Reinforcement of ESMA's staffing should prioritise profiles from the industry to bring operational expertise into the authority.**
- **The notion of significant size must be clarified:** while comprehensive supervision of critical infrastructures is essential, the possibility for any infrastructure to become significant at the request of its NCA weakens the notion and risks increasing complexity and costs.
- **This strengthening of ESMA, which also lightens certain tasks of NCAs, should also translate into savings and into new robust standards.**

FPM eventually considers that ESMA's success under its new model will depend largely on its ability to work closely with the industry to ensure the effective operational implementation of the measures adopted under its mandate.

## 2. ASSET MANAGEMENT

### *Master Directive*

FPM has focused its analysis on the proposed depositary passport, as it does not consider itself best placed to provide an opinion on the other asset management issues addressed in the MIS package.

### Depositary passport: unfavourable opinion

FPM wishes to alert the EC on its proposal to allow the appointment of a depositary outside the fund's home Member State: it is important to recall that the UCITS/AIF depositary function is a key component of the investor protection framework (safekeeping of fund assets, monitoring the regularity of decisions taken by the fund/management company, and monitoring the fund's cash flows).

For these reasons, **removing the requirement for a fund to appoint its depositary in the Member State where it is domiciled should be approached with the utmost caution.** The reasons why the association considers the introduction of a passport, as envisaged by the EC, to be inappropriate include the following:

1. **Inappropriate timing given the ongoing implementation of AIFMD II and the absence of a prior impact assessment:** the depositary passport option was not retained during the recent discussions on AIFMD II, for which derogatory clauses were provided as a substitute and will shortly enter into application. In the absence of any manifest urgency, the rationale for the passport initiative is inconsistent with the provisions adopted in the AIFMD review, especially as no impact analysis has been provided to justify its inclusion in the MIS package. It should be recalled that 84.2% of the responses collected in the context of the AIFMD review opposed the introduction of the passport. FPM regrets what may be described as legislative "stop-and-go" and considers this amendment ill-timed.
2. **Reduced investor protection:** the involvement of a depositary located in a different Member State creates distance and introduces additional complexity, resulting from differing interpretations and practices among national supervisors due to the lack of harmonisation of national laws. In the absence of harmonisation within the EU, major questions and uncertainties remain as to the applicable rules, for example in the event of the failure of an entity or the suspension of a fund. Full and prior European harmonisation of the tasks and obligations of fund depositaries must be achieved and verified before any passport is introduced, particularly from an investor protection perspective.
3. **Significant local specificities remain:** conditions for the establishment, authorisation and operation of funds; NAV calculation; treatment of NAV errors and compensation; status of the fund accounting function; fund investment policy; frequency of checks on investment restrictions; regulation of depositary activity; subscription/redemption/cancellation arrangements; merger/restructuring arrangements; insolvency law, etc. A thorough study

should be conducted by the European authorities to identify, address and harmonise these disparities. Without convergence, the introduction of the passport would require each depositary to have a perfect command of all local specificities, generating a need for additional expertise and therefore additional costs, which is contrary to the SIU.

4. **Stated objectives that are illusory and potential sources of risk:** the assertions put forward by the EC to justify the initiative are undocumented, unfounded and/or risk-generating. The argument concerning the cost of fund depositary services does not properly reflect the allocation of added value across the collective investment value chain and reveals the profit ambitions of non-European players in the context of their commercial expansion strategy. The arguments relating to service supply and quality advanced in favour of the passport concern only certain “small” markets, whereas the main markets are served by players with full command of their ecosystems and full compliance with standards. The role of the fund depositary is approached in a reductive manner in the justification provided by the Commission.
5. **The EC’s proposal does not call national supervision of funds into question:** effective harmonisation of supervisory tasks and actions, notably through ESMA’s coordinating role, is an essential prerequisite for establishing the passport. Without full convergence of supervision, there is a significant risk of circumvention through a fund appointing a depositary subject to a jurisdiction perceived as less stringent.
6. **A risk to regulatory stability:** the proposal runs counter to the stated objectives of stability and simplification of the European regulatory framework. The conditions are not in place for the implementation of the passport without generating additional legal complexity. The measure appears likely to benefit only non-European players and, in the longer term, could result in the crowding out of European players and a transfer of risk to non-European entities.
7. **Significant risks for the French market and its ecosystem:** the French market is both a major financial management centre and one of the main domiciliation centres for European funds; any incident involving a French fund deposited abroad would put the “France” brand for funds at risk.

**In conclusion, the concept of a “European passport” is positive and reflects a shared intention to allow the free provision of the same service throughout the EU. However, this concept cannot apply in all circumstances within a non-harmonised regulatory framework and in the absence of a precise analysis of the potential consequences of its introduction.**

The role of the European fund depositary is structuring in terms of both end-investor protection and the functioning of the European collective investment framework. For these reasons, it cannot be introduced incidentally through an initiative that is not specifically targeted, without in-depth study and without considering all stakeholders, foremost among them the depositaries themselves, their asset manager clients and all other stakeholders. FPM regrets that the arguments put forward by the European Commission are not substantiated and do not allow for this indispensable detailed analysis.

**In the current circumstances, introducing a “passport” would in no way further the objectives of the SIU as recalled in the MIS initiative.**

### 3. TRADING

*Master Regulation, Articles 2-3-7*

**As this topic is not central to the concerns of the association’s members, FPM is taking a position only on two matters directly linked to its perimeter:** (i) TV/CCP interoperability and (ii) the right to designate a CSD.

**Interoperability of TVs / CCPs: favourable opinion with attention points**

**FPM supports the principle of interoperability between TVs and CCPs and stresses the importance of the following points:**

- **Controlling overall risk** and thereby preserving the financial stability of the European market.
- **Respecting the choice of members or participants as to the CCP selected**, including where the counterparties to their transactions have chosen different CCPs linked by an interoperability arrangement.
- **The need for members or participants and CCPs to know the amounts** of margin calls resulting from interoperability.
- **A proportionate approach in requests** by a trading venue to access the services of a CCP.

#### **Open Access (Article 34c MiFIR): favourable opinion with further clarifications**

**FPM welcomes the right granted to members or participants of Trading Venues to designate any CSD established in the EU for settlement.** The association recommends the following additional clarifications:

- **Making the right of access subject to the existing access rules** provided for in Article 53 of CSDR.
- **Ensuring robust supervision and regulatory enforcement of the Open Access provisions by designating ESMA as the competent authority in the event of a complaint** relating to a refusal of access, in line with the provisions laid down for interoperability between trading venues and CCPs.

## **4. POST-TRADE**

*Master Regulation, Articles 4-6*

**FPM welcomes the EC's initiatives aimed at improving the functioning of post-trade in Europe and supports the logic of interoperability, competitiveness and comparability among market participants.**

**However, the association wishes to highlight certain limitations and questions, with a view to protecting operational chains and end clients.**

#### **Interoperability of CSDs: favourable opinion with points for attention**

**FPM supports the principle of interoperability between CSDs and considers that the general direction of the package is appropriate.**

**However, extending such interoperability may generate complexity. It is therefore essential to clarify its operational implementation** to ensure continuity of processing chains and smooth distribution, in line with current international standards. Without technical clarification, the multiplication of initiatives could create risks for participants and end clients. **Interoperability must also be implemented without generating unjustified additional costs for market participants.**

**The CSD hub-and-spoke model, which is a central measure of the MIS package, gives rise to the following observations:**

- **Conceptually, the association supports this initiative aimed at strengthening interoperability and competition between infrastructures**, which could help rationalise the market environment.
- **Technically, this model coexists with T2S**, which the association strongly encourages to remain the preferred solution where relevant.
- **Economically, reservations remain** regarding the risk of complexity and cost layering for CSDs, with potential repercussions for participants and end clients.

**The implementation of the hub-and-spoke model should therefore comply with several principles:**

- **All authorised CSDs should be able to become hubs** if the criteria of significant size are met.

- **Clear comparability of costs** between the hub/spoke model and direct access to the local CSD must be ensured.
- **A notion of proportionality** is necessary to preserve market balance.
- **At Level 2, a pragmatic approach** should ensure the operational simplicity of the system.

**FPM also welcomes the central role entrusted to T2S**, which promotes harmonisation of processing. However, the association regrets that the text does not more clearly affirm the obligation to connect to the platform, whereas the DCP model allows direct access for participants and constitutes a factor of operational efficiency.

**Eventually, alignment between TVIs and CSDs regarding the facilitation of intragroup outsourcing** would be desirable to ensure fair rules across infrastructures.

**FPM further recommends a project-based approach** to the development of CSD interoperability and considers that an implementation window of at least 24 months for the hub-and-spoke model would be necessary.

### Regulation of internalised settlement: confusion between CSD and custodian (TCC)

**The issue of internalised settlement has long attracted the EC's attention.** However, the subject was not addressed in the recent CSDR review, and the analyses published by ESMA remain limited, the last detailed study dating back to 2020.

**In this context, the EC's proposal to introduce new obligations for internalised settlement under the MIS package raises several reservations.**

**FPM considers that there is confusion between internal and external settlement:**

- These two methods are neither interchangeable nor always available for the same transaction.
- Internalised settlement concerns only a limited number of cases (collateral, securities lending, securities transfers, transactions between clients of the same TCC, etc.).
- Some CSDs do not allow external settlement between two clients of the same TCC.

**FPM also questions the link established by the EC between the use of internal settlement and post-trade fragmentation**, considering that the findings presented in the impact assessment do not properly reflect the reality of market practices. Several issues require clarification:

- **Penalties:** the absence of CSDR penalties on internalised settlement should be maintained, as implementing such a system would require very substantial investment for transactions that are often exempt.
- **Transaction reporting:** the obligation to provide detailed reporting by instrument type and transaction type should be dealt with at Level 2 to remain adaptable and avoid major operational impacts.
- **Communication of fees:** displaying fees could mislead clients by suggesting that internal and external settlement are always equivalent. Clarification is also expected regarding Article 34 (format for the display of prices).
- **Publication of fail rates:** the relevance of publication by internaliser is contested, since such internal fails have no impact on the overall functioning of the market.

**FPM considers it essential that any regulatory development be preceded by an in-depth ESMA analysis comparable to that carried out in 2020.** Such analysis should make use of all existing data to assess impacts accurately.

**Any evolution of the framework applicable to internalised settlement must include an analytical justification to avoid introducing excessive complexity or unjustified penalties.**

### Comparability and transparency of fees: favourable opinion with proposals

**FPM supports the objective of improved comparability of fees among market participants, which should be introduced from Level 1 onwards, distinguishing between the notions of comparability and transparency:**

- Comparability (a common reading grid) is necessary to improve market efficiency.
- Transparency should not be applied uniformly across participants: it is neither desirable nor justified for TCCs operating in a fully competitive environment and offering value-added services distinct from those of infrastructures.

**The introduction of a comparability grid among CSDs, available through ESAP, is welcomed, whereas the association opposes ESMA taking responsibility for creating a comparability grid for TCCs.**

**More broadly, the principles should be defined at Level 1**, while the detailed arrangements should fall within Level 2.

#### **Harmonisation of rules and cross-border logic: favourable opinion with proposals**

**FPM supports the objective of simplifying the cross-border distribution of funds within the EU. The association notably supports:**

- Strengthening the European CSD passport, for example through initiatives involving simplified notification/withdrawal procedures.
- Comparability of fees.
- Harmonisation of marketing communications.

**However, this support is accompanied by requests to preserve essential local specificities** (CSD model and Liquidity Management Tools (LMT) rules) and to limit operational and technical risks that could, in practice, recreate barriers to distribution.

**In this regard, FPM wishes the existing CSD model to be retained as the operational reference model for the market** and encourages the marketplace to draw inspiration from certain features of the French model. **This model has several advantages:** competitive cost compared with the Transfer Agent model, neutrality through direct access to T2S, operational efficiency with a high STP rate, robustness and efficient liquidity management. **These characteristics make it particularly well suited to cross-border and retail challenges, which are core pillars of the MIS package.** Nevertheless, developments in taxation, management of foreign currency payments, and the quality of order marking remain necessary to make the CSD model an ideal market standard.

**FPM identifies several expected benefits from these developments:** shorter cross-border launch times, lower administrative costs, improved fee comparability, more reliable execution flows, clearer documentation for investors, and better coordinated supervision.

#### **Data sharing among market participants: favourable opinion with nuance**

**FPM supports the objective of strengthening the sharing of CSD static data and Corporate Actions data, in line with the AMI-SeCo recommendations.**

The association considers that this initiative could be broadened by allowing all participants access to such data, to reduce sourcing costs from private vendors and improve the reliability of operational processing, particularly in cross-border contexts.

**In the same spirit, FPM supports the creation of a centralised database, accessible to all market participants, listing the UCIs that may be marketed in countries under ESMA supervision, together with their documentation.**

## **5. PILOT REGIME / DLT**

*Master Regulation, Articles 4-8-9 – Settlement Finality Regulation*

**The MIS package integrates DLT into European law through a twofold approach. On the one hand, it transforms the DLT Pilot Regime to facilitate its industrial adoption:** increase of the overall threshold (from €6bn to €100bn), permanence of the framework, and extension to conventional financial instruments. **On the other hand, it adapts several existing texts to ensure the principle of technological neutrality, allowing DLT to be used on the same footing as traditional systems.**

**FPM welcomes the EC's initiative to promote the deployment of DLT in securities markets and to strengthen Europe's attractiveness in financial technologies.** Nevertheless, the association distinguishes between two approaches:

- **FPM is highly supportive of the new version of the DLT Pilot Regime**, which is seen as a necessary development for the modernisation of capital markets, while considering that certain aspects should be adjusted.
- **FPM is more reserved regarding the “scattered” insertion of DLT into existing texts**, preferring to concentrate this issue within the Pilot Regime to limit risks for the market. The developments envisaged in the Settlement Finality Regulation (SFR) are, however, a notable exception.

#### **Pilot Regime: favourable opinion with a willingness to go further**

**The second version of the DLT Pilot Regime constitutes a major development**, capable of transforming an initially limited experiment into a sustainable and attractive operational framework for DLT market infrastructures in Europe.

**FPM particularly welcomes:**

- **The permanence of the framework**, which secures market participants' investments.
- **The opening of the regime** to a greater number of DLT infrastructure operators.
- **The easing of thresholds**, making the framework more realistic.
- **The widening of eligible assets**, allowing the development of new use cases.

However, several points require clarification:

- **Possible removal of thresholds:** these could be removed in certain cases, particularly where the DLT infrastructure is compatible with existing protocols between traditional infrastructures, which would ensure the fungibility of securities regardless of the technology used. Moreover, thresholds that are too restrictive could undermine the competitiveness of European players vis-à-vis US or Asia. Legal clarifications, notably concerning ownership of tokenised instruments, would nevertheless be necessary.
- **Cash tokenisation:** the absence of a satisfactory solution poses a risk to the success of the regime. Settlement in central bank digital currency (CBDC) should be prioritised, with stablecoins considered only in specific cases.
- **New services and the role of CSDs:** Articles 10b to 10g introduce a specific regulation for certain central securities depository services and allow the issuance and recording of DLT financial instruments outside a CSD, as well as their settlement between DLT account keepers having access to central bank money. This development could further fragment the European post-trade landscape and move away from the objective of infrastructure consolidation. It also raises financial stability concerns, particularly in the absence of legal protection equivalent to that afforded by systems recognised under the Settlement Finality Directive.

#### **Insertion of DLT into existing texts: reserved opinion**

**The revision of existing texts with a view to inserting DLT on the same basis as traditional systems, to ensure the principle of technological neutrality, raises numerous questions which, in the view of FPM, make this a matter for caution.**

**First, the package combines two approaches:** an implicit approach, modifying the general wording of the texts, and an explicit approach, directly referring to DLT in certain regulations. This coexistence calls into question the overall coherence of technological neutrality.

**Second, the main amendments concern CSDR and SFR, with differing impacts:**

- **CSDR:** DLT is recognised as a register-keeping and settlement technology, settlement in e-money tokens is authorised, and interoperability requirements with traditional infrastructures, notably T2S, are introduced. Some provisions, such as settlement of CSDR penalties in e-money tokens, could nevertheless create operational difficulties in the absence of prior agreement between the parties concerned.

- **SFR:** the text proposes to harmonise the rules relating to time of entry, irrevocability and settlement finality for all systems, including those based on DLT. FPM will publish a dedicated analysis of this regulation.

While the association acknowledges that the proposed technological adaptations are broadly moving in the right direction, **the coexistence of the DLT Pilot Regime and the DLT mentions into the existing regulatory corpus creates a risk of confusion for market participants.**

**In this context, FPM would favour concentrating the regulatory treatment of DLT within the Pilot Regime, to avoid unintended consequences linked to partial integration into other texts, notably CSDR.**

**The implementation of these developments will be technically complex and will require close coordination** between legal, operational and technological expertise to resolve several structuring ambiguities and ensure the effectiveness of the proposed framework.