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Additional Information

Level 1 Regulation
Central Securities Depositories Regulation (CSDR) Regulation (EU) No 909/2014- PTR-CSDR

Topic
Settlement discipline - Cash penalties: process

Subject Matter
Cash penalties: calculation

Question
(a) Is bilateral netting followed by aggregation of the amounts resulting in one credit and one debit amount per CSD participant in line with Article 17 of the RTS on settlement discipline? (b) Which rate should be applied (the securities rate or the cash rate) for the calculation of cash penalties in accordance with Article 7(2) of CSDR and Articles 2 and 3 of the

Commission Delegated Regulation (EU) 2017/389?
(c) Should cash penalties be applied to settlement fails in the case of receive free of payment ('RFP') settlement instructions, receive with payment ('RWP') settlement instructions, or crediting payment free of delivery ('CPFOD') settlement instructions (as referred to in Article 13(1)(g) of the RTS on Settlement Discipline), which are put on hold?
(d) When should penalty rates for financial instruments traded on SME growth markets apply, as set out in the Annex to the Commission Delegated Regulation (EU) 2017/389?
(e) Should the net amounts of cash penalties referred to in Article 17 of the RTS on settlement discipline be calculated and communicated only in Euros to the CSD participants?
(f) Article 3(2) of Commission Delegated Regulation 2017/389 provides that "The reference price referred to in paragraph 1 shall be used to calculate the level of cash penalties for all settlement fails, irrespective of whether the settlement fail is due to a lack of securities or cash." What should be the basis for calculating cash penalties in cases where the settlement instruction does not include any securities or when its security component is not related to its cash component (e.g. when two separate and opposite transactions between two participants result in a settlement instruction that consists in a delivery with payment or a payment free of delivery)?
(g) Is it admissible for Member States or CSDs to apply cash penalties rates that would differ from the penalty rates set in Commission Delegated Regulation (EU) 2017/389?
(h) Should cash penalties be applied from the intended settlement date (ISD) to new settlement instructions that are entered into a securities settlement system to replace failed instructions if penalties have already been applied to such settlement instructions between the ISD and the date on which the new instructions are entered into the securities settlement system?

ESMA Answer

18-10-2022

Original language

[ESMA70-156-4448 CSDR Settlement Discipline Q&A 3]

(a) Yes.

(b) The cash rate should be applied if the reason for the settlement fail is applicable to the leg of the transaction which delivers the cash, while the securities rate should be applied in case

the reason for the fail is applicable to the leg of the transaction which delivers the securities.

(c) Yes. Regarding receive free of payment ('RFP') settlement instructions, receive with payment ('RWP') settlement instructions, or crediting payment free of delivery ('CPFOD') settlement instructions (as referred to in Article 13(1)(g) of the RTS on Settlement Discipline), which are put on hold, cash penalties should be applied in order to penalise the non-timely settlement and foster settlement discipline, even if the participant who put the instruction on hold did not suffer from the non-delivery of securities or cash.

(d) The penalty rates for SME growth market instruments should only apply if the particular trade has actually taken place on an SME growth market. In order for these penalty rates to apply, the same information identifying the relevant SME growth market should be included in the field related to the place of trading in both corresponding settlement instructions.

(e) No. The net amounts of cash penalties referred to in Article 17 of the RTS on Settlement Discipline should be calculated per settlement currency and should not be converted into Euros.

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

In a situation where the settlement instrument does not imply the delivery of financial instruments, (e.g. an instruction for a payment free of delivery) or where a settlement instruction implies that one participant shall both deliver the financial instruments and pay a cash component (e.g. an instruction for delivery with payment) and the delivery of the financial instruments occurs but the payment of the cash leg fails, the basis for calculating the cash penalties shall be the cash component of the settlement instruction. This ensures, in line with Recital 12 of Commission Delegated Regulation (EU) 2017/389, a deterrent effect of cash penalties and incentivised timely settlement by failing participants.

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

The question refers to the possibility to set different penalty rates from those prescribed in Commission Delegated Regulation (EU) 2017/389 for the calculation of cash penalties for settlement fails.

Commission Delegated Regulation (EU) 2017/389 is a delegated act. The Commission is empowered[1] to adopt delegated acts in accordance with Article 67 CSDR to specify

parameters for the calculation of a deterrent and proportionate level of cash penalties. The objective of the delegated act is to supplement the EU legislative act.

The overall objective [2] of the CSDR is to increase the safety and efficiency of settlement in the Union by preventing any diverging national rules, to reduce the regulatory complexity for market operators and CSDs and to eliminate competitive distortions. Specifically, the objective[3] of the CSDR with respect to the settlement discipline regime is to *"…provide for uniform rules concerning penalties and certain aspects of the buy-in transaction for all transferable securities…, in order to avoid adversely impacting on the liquidity and efficiency of securities markets…*".

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[1] Regulation (EU) 909/2014, Art. 7(14).

[2] Regulation (EU) 909/2014, Recital 5.

[3] Regulation (EU) 909/2014, Recital 15.

Disclaimer in relation to the answers provided by the European Commission in accordance with Article 16b(5) of the ESMA Regulation[1]: these answers clarify provisions already contained in the applicable legislation. They do not extend in any way the rights and obligations deriving from such legislation nor do they introduce any additional requirements for the concerned operators and competent authorities. The answers are merely intended to assist natural or legal persons, including competent authorities and Union institutions and bodies in clarifying the application or implementation of the relevant legal provisions. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law. The views expressed in the internal Commission Decision cannot prejudge the position that the European Commission might take before the Union and national courts.

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[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