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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: scope

Subject Matter
Cash penalties: scope

Question
(a) Are there exceptional situations where the cash penalty mechanism provided for under Article 7(2) of CSDR should not be applied?
(b) How should Article 7(12) of CSDR apply in respect of cash penalties due to, and owed by, a participant against which insolvency proceedings are opened?

(c) What reference data should CSDs use when identifying the financial instruments subject to cash penalties under Article 7 of CSDR?
(d) Should cash penalties apply in the case of settlement fails relating to transactions which were intended to be settled before the date of application of cash penalties requirements and which failed and are still failing on and after the date of application of cash penalties requirements?

ESMA Answer

18-10-2022

Original language

[ESMA7015604448 CSDR Settlement Discipline Q&A 4]

(a) Yes. In addition to situations where insolvency proceedings are opened against the failing participant in accordance with Article 7(12) of CSDR, cash penalties should not be applied in the following situations where settlement cannot be performed for reasons that are independent from the involved participants:

i. ISIN suspension from settlement due to a reconciliation issue under Article 65 (2) and (6) of the RTS on CSD Requirements;

ii. ISIN suspension from trading, such as for example under Article 32(1), Article 52(1), Article 69(2) of MiFID II or Article 40(1) of MiFIR;

iii. settlement instructions involving cash settlement outside the securities settlement system operated by the CSD if, on the respective day, the relevant payment system is closed for settlement;

iv. technical impossibilities at the CSD level that prevent settlement, such as: a failure of the infrastructure components, a cyber-attack, network problems.

CSDs should report the concrete cases falling in the above-mentioned categories to their competent authorities, and the competent authorities should have the possibility to ask the CSDs to apply cash penalties in the future in similar cases, if they consider the non-application of penalties unjustified.

(b) As of the date of the opening of insolvency proceedings against a participant, Article 7(12) of CSDR applies and, therefore, Article 7(2) shall cease to apply to the settlement fails caused by the insolvent participant and consequently:

(i) Cash penalties should no longer be calculated in respect of settlement fails caused by the insolvent participant;

(ii) Cash penalties calculated in respect of settlement instructions involving the insolvent participant until that date should be managed separately i.e. not be included in the aggregated net amounts referred to in Article 17 of the RTS on Settlement Discipline; and

(iii) Cash penalties should not apply to settlement instructions relating to the liquidation of positions of an insolvent participant.

(c) In order to have a consistent approach across CSDs, CSDs should identify the financial instruments subject to cash penalties on business day D+1, based on data available from ESMA registers and databases (as well as based on other sources of information, if the necessary information is not covered by the ESMA registers and databases) on business day D (i.e. the date of publication in the ESMA registers and databases or other sources of information).

Without prejudice to the due diligence to be performed by CSDs, the following registers and databases published by ESMA could be used by CSDs for the application of cash penalties under Article 7 of CSDR:

1. To identify the financial instruments referred to in Article 5(1) of CSDR which are admitted to trading or traded on a trading venue, and the asset type to which they belong, as well as the trading venues on which they are admitted to trading or traded, for the purpose of determining the market values referred to in Article 7 of the Commission Delegated Regulation (EU) 2017/389: Financial Instruments Reference Database (FIRDS).
2. To identify the most relevant market in terms of liquidity referred to in Article 4(1)(a) of MiFIR, for the purpose of determining the market values referred to in Article 7(a) of the

Commission Delegated Regulation (EU) 2017/389: Financial Instruments Transparency System (FITRS).

3. To identify the shares referred to in Article 7(13) of CSDR, having their principal trading venue in a third country, which are exempted from the application of cash penalties under Article 7 of CSDR: List of exempted shares (having their principal trading venue located in a third country).
4. To verify if the place of trading indicated in a settlement instruction is an SME growth market, for the purpose of applying the penalty rates referred to in points 3 and 6 of the Annex to the Commission Delegated Regulation (EU) 2017/389: List of Trading Venues/ Systematic Internalisers/ Data Reporting Service Providers.

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

According to Article 76(5) CSDR, each of the settlement discipline measures referred to in Article 7(1) to (13) shall apply from the date of application specified for each settlement discipline measure in Commission Delegated Regulation (EU) 2018/1229.

According to Article 7(2) CSDR, a CSD must establish a penalty mechanism which will serve as an effective deterrent for participants that cause fails.

Furthermore, according to Article 16(2) of Commission Delegated Regulation (EU) 2018/1229, cash penalties shall be calculated and applied at the end of each business day where the settlement instruction fails to settle. The objective of the cash penalties is to sanction the non-delivery of the security on each business day after the intended settlement date, in other words the continuous settlement failure. Where a transaction failed to settle before the date of application of the settlement discipline measure referred to in Article 7(2) of CSDR and continues to be in settlement failure after that date, cash penalties are to be paid for each business day in which the transaction continues to fail to be settled after that date.