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| 18 December 2014 |

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| Reply form for the Technical Advice under the CSDR  |
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| Date: 18 December 2014 |

Responding to this paper

The European Securities and Markets Authority (ESMA) invites responses to the specific questions listed in the ESMA Consultation Paper - D Technical Advice under the CSDR, published on the ESMA website.

***Instructions***

Please note that, in order to facilitate the analysis of the large number of responses expected, you are requested to use this file to send your response to ESMA so as to allow us to process it properly. Therefore, please follow the instructions described below:

1. use this form and send your responses in Word format;
2. do not remove the tags of type <ESMA\_QUESTION\_TA\_CSDR\_1> - i.e. the response to one question has to be framed by the 2 tags corresponding to the question; and
3. if you do not have a response to a question, do not delete it and leave the text “TYPE YOUR TEXT HERE” between the tags.

Responses are most helpful:

1. if they respond to the question stated;
2. contain a clear rationale, including on any related costs and benefits; and
3. describe any alternatives that ESMA should consider

**Naming protocol:**

In order to facilitate the handling of stakeholders responses please save your document using the following format:

ESMA\_ TA\_CSDR \_NAMEOFCOMPANY\_NAMEOFDOCUMENT.

E.g. if the respondent were ESMA, the name of the reply form would be ESMA\_ TA\_CSDR \_ESMA\_REPLYFORM or ESMA\_CE\_AIFMD\_ESMA\_ANNEX1

To help you navigate this document more easily, bookmarks are available in “Navigation Pane” for Word 2010 and in “Document Map” for Word 2007.

Responses must reach us by **19 February 2015**.

All contributions should be submitted online at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input/Consultations’.

***Publication of responses***

All contributions received will be published following the end of the consultation period, unless otherwise requested. **Please clearly indicate by ticking the appropriate checkbox in the website submission form if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure.** Note also that a confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA’s Board of Appeal and the European Ombudsman.

***Data protection***

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Disclaimer’.

# General information about respondent

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| Are you representing an association? | No |
| Activity: | Central Counterparty |
| Country/Region | Germany |

Q1: What are your views on the proposed basis for the cash penalty calculation?

<ESMA\_QUESTION\_TA\_CSDR\_1>

1.) Eurex Clearing welcomes ESMA’s approach to harmonize the penalty calculation within Europe and that a simple approach is preferred. Due to the fact that ESMA proposes that penalties relate to the “value of a transaction”, further clarification is needed to have a unified approach to start the penalty calculations. For instance, for bonds it is unclear whether the accrued interest should be taken into account. Therefore we would prefer ESMA to set a clear standard whether or not the notional value with accrued interest should be used for bonds.

2.) For cleared transactions the lack of cash will not be subject to a buy-in process. If a Clearing Members fails to transfer cash on time, Eurex Clearing immediately assesses if this Clearing Members is in technical default.

3.) The price that forms the basis for a penalty rate is the main driver to make calculations for a basic penalty amount. ESMA determines which price market participants should take for a reference. For an effective application of a harmonized penalty regime ESMA’s considerations have to be further developed. The technical advice highlights that in some cases a methodology is required that should be referring as much as possible to criteria related to the markets data available across trading venues and brokers (27). We want to point out that the number of such cases should not be underestimated and the fact that a theoretical price can only be achieved in difficult ways should be subject to further considerations. In order to ensure a harmonised approach ESMA should introduce a unique EU-wide reference price for any ISIN (see also point 8 below).

4.) For partial deliveries ESMA should also outline that in a settlement chain a penalty might possibly not be passed on to the full extent. For instance, if the delivering participant fails to perform on 50% of the outstanding amount, but the receiving participant can satisfy the claim of a further receiving participant to 70% (e.g. based on own holdings), different values of transactions apply. In this case it is noteworthy that the penalty calculation can only be based on the legal claim against the counterparty. This example shows how legal relationships matter to determine the relevant claim that the penalty is based on. ESMA’s technical advice should not leave out that each settlement between counterparties within a settlement chain is subject to separate penalty calculations. At the same time ESMA notes that a penalty regime cannot replace a claim and can only be regarded as an add-on (37) at a later stage. So ESMA does mention and describe the design of the penalty as an add-on to any claim in compensation. This add-on will change in the settlement chain due to the fact that each receiving participant will not necessarily base its calculations on the same value of the transaction.

<ESMA\_QUESTION\_TA\_CSDR\_1>

Q2: What are your views on the proposed approach regarding the categories of financial instruments and the penalty rates? In particular, do you consider that these penalty rates could dis-incentivise trading in small caps? Please provide evidence to support your views.

<ESMA\_QUESTION\_TA\_CSDR\_2>

5.) Eurex Clearing supports ESMA’s view that the category of underlying transaction to which the settlement instruction relates should not lead to different penalty rates. The objective at all times should be to take into account major operational aspects and to prevent the implementation of features these with no rationale or with limited effect in a European penalty regime.

6.) Eurex Clearing supports the central determination and distribution of the penalty rate per ISIN in order to avoid misinterpretations of the asset type (e.g. equity vs. fund etc.)

To cope with the proposal to align the penalty rates with the financing costs, a EU-wide applicable penalty rates per ISIN level should be published and duly updated.

7.) Again a central penalty calculation per ISIN would be crucial for a successful harmonization. Alternatively, a central reference rate to cover the borrowing cost could be identified.

8.) ESMA also provides a quantitative advice by issuing penalty rates for bonds and cash and announces to keep these penalty rates updated on an ad hoc basis. This table is a first step to harmonize penalties throughout the European Union more effectively. The table should be reviewed and extended with necessary information to enable market participants to use these regulatory driven parameters. We assume that the penalty rate should be applied per day based on a calculation per annum and ask to avoid misunderstanding by outlining the penalty rates with specific examples on ISIN level. Furthermore, to avoid interpretation issues caused by different securities reference data, we propose to publish a comprehensive List of ISINs with relevant price and penalty data.

9.) ESMA envisages an ad hoc review but this table should rather be subject to regular review, e.g. yearly, to plan and allocate resources for adjusting the penalty regime. These penalty rates have to be provided in a technical format to automate the transfer and to limit operational risk for any modifications.

10.) Eurex Clearing acknowledges that the intended increase of the settlement efficiency could be achieved by a more distinct assignment of penalty rates based on the alternative borrowing cost. Otherwise fails could become subject to tactical arbitrage consideration of market participants.

11.) The liquidity component is analysed at the every beginning of ESMA’s technical advice and identified as one important driver to set a penalty level. However the asset category is not a vital component to determine the liquidity of a specific ISIN. The specific ISIN should be taken into account when setting liquidity factors to reflect market developments. This data should be available in a simple format that could be processed by market participants.

<ESMA\_QUESTION\_TA\_CSDR\_2>

Q3: What are your views on the proposed approach regarding the increase and reduction of the basic penalty amount?

<ESMA\_QUESTION\_TA\_CSDR\_3>

12.) The mechanism to redistribute the full amount of the collected penalty is a complex process throughout the settlement chain. Therefore we support ESMA’s actions to align the collection of penalties by setting up a penalty regime with the same calculation assumptions. From a CCP perspective we operate a closed redistribution mechanism with our Clearing Members only. The clearing house is always in the middle of a settlement chain and does not take the position of the delivering or receiving participant.

13.) ESMA includes feedback from the industry and raises the awareness in certain cases a failed delivery can be reasonably explained. In these cases the delivery participant should not face a penalty. However ESMA steps back and misses to draw the line for these exceptions on European level. Therefore the guidance for failed delivery that should not be fined should be elaborated in detail to limit the competent authority’s discretionary power in favor of a harmonized penalty regime. Additionally the competent authorities should be obliged to publish via ESMA the cases that can be regarded as a fail.

<ESMA\_QUESTION\_TA\_CSDR\_3>

Q4: What are your views on the proposed approach regarding the cash penalties in the context of chains of interdependent transactions?

<ESMA\_QUESTION\_TA\_CSDR\_4>

14.) A harmonization of the penalty regime is vital to the functioning of redistribution throughout the settlement chain. Only equally fined transactions can be forwarded and therefore a penalty regime with detailed rules for the penalty calculation is a prerequisite.

<ESMA\_QUESTION\_TA\_CSDR\_4>

Q5: Do you agree with the proposed frequency of one year for the assessment of the substantial importance of a CSD in another Member State?

<ESMA\_QUESTION\_TA\_CSDR\_5>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_TA\_CSDR\_5>

Q6: What are your views on the proposed indicators?

<ESMA\_QUESTION\_TA\_CSDR\_6>

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<ESMA\_QUESTION\_TA\_CSDR\_6>

Q7: What are your views on the proposed thresholds?

<ESMA\_QUESTION\_TA\_CSDR\_7>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_TA\_CSDR\_7>

Q8: Do you believe that the proposed indicators and thresholds are relevant in the case of government bonds? If not, please provide details and arguments.

<ESMA\_QUESTION\_TA\_CSDR\_8>

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<ESMA\_QUESTION\_TA\_CSDR\_8>