



European Securities and
Markets Authority

Reply form for the Technical Advice under the CSDR





European Securities and
Markets Authority

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:

- i. use this form and send your responses in Word format;
- ii. 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
- iii. 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:

- i. if they respond to the question stated;
- ii. contain a clear rationale, including on any related costs and benefits; and
- iii. 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_RE-PLYFORM 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 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 under the heading 'Disclaimer'.

General information about respondent

Are you representing an association?	No
Activity:	Central Securities Depository
Country/Region	Belgium

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

<ESMA_QUESTION_TA_CSDR_1>

We support the mark to market approach proposed by ESMA, provided that there is clarity on the reference price to be used and provided that CSDs are able to access a single and reliable source for such prices. There must be a workable harmonised source for CSDs to access reference prices for the relevant instruments, and thereby ensuring a level playing field across the EU. In practice, it remains to be confirmed how a single source of price data can be established, and we believe that ESMA must explore practical options with market participants and relevant authorities prior to the finalisation of its advice. Any monopoly supplier would have to cover reference prices for almost all global securities on a daily basis (given the international coverage of the ICSDs) and would probably raise important competition law issues. Allowing CSDs to locate their own reference price from their own providers would be more practical but would inevitably mean that different CSDs would be using different prices for the same security fails; creating an unlevel playing field across Europe. We do not believe that ESMA has considered the consequences of "reference prices" in sufficient detail.

The ESMA approach for partial deliveries is very complex to implement. Partial indicators cannot be amended by a CSD. So if a participant was to opt-out of partials, a CSD cannot override that choice. As a result if a participant does not accept a partial delivery, the penalties will have to apply to the total amount of the failing settlement instruction.

<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>

We welcome ESMA's approach of taking into account liquidity and in particular the borrowing costs when specifying the rates for different categories of financial instruments. But we believe the structure of the fines themselves is (i) inconsistent with the structure for Buy-ins and (ii) inconsistent with the categories used by ESMA to distinguish different asset types for the purpose of fails reporting in the draft RTS on settlement discipline. In particular, the distinction between government bonds and corporate bonds in relation to penalty rates is not consistent with the use of a single category for debt instruments under Article 4(2)(d)(ii) of the draft RTS on settlement discipline. ESMA should also be aware that there is currently no global standard (ISO 10962) available for categorising of corporate bonds, and that these should as a result rather be defined as debt instruments issued by non-public authorities. To be meaningful, fails reporting should reflect the categories of financial instruments subject to different penalty rates.

We do not understand the methodology that has been used to set the rates in the ESMA Consultation Document and there is no analysis of their effects. The rates should indeed be higher than the relevant borrowing costs, but the daily fines chosen appear to be significantly in excess (between three and ten times the market borrowing costs). Of course, for many securities in scope (illiquid securities, UCITS etc) borrowing might not even be possible or even practical (due to unavailability of stock).

Fines could be directly related to the liquidity of the instrument as we argued in our 2014 Consultation response; where a security is highly liquid (such as an EU government debt security or a FTSE100 equity) borrowing is always a possibility. For other securities it becomes more problematic and it would be prudent to exempt illiquid securities from the buy-in and SDR wherever possible. MiFID definitions of liquidity could be used for consistency. Borrowing is not systematically available; not all CSDs offer borrowing programs, and availability depends on the size of the borrowing pools which vary in accordance with liquidity of security

We also note that the structure used by ESMA would result in SME transactions (with a deferral of the buy-in process) being fined for far longer than liquid equities. This would further disincentivise market making in such securities or even trading them in the first place. This would appear to run counter to the objectives of Capital Markets Union to make SMEs more attractive to investors.

<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>

We agree that no increases or decreases of the penalty rate should be foreseen at this stage. As explained in our response to the ESMA Discussion Paper in 2014, a system involving increases and/or decreases would make the implementation of the penalty mechanism very complex and would lead to various problems in relation to the "passing on" of penalties.

We also welcome ESMA's proposal to allow CSDs, in limited circumstances and on an ad hoc basis, to decrease the penalty rate to zero (e.g. if a fail is caused by circumstances outside the control of the failing participant). It is appropriate to include a more general rule whereby penalties could be set to zero for all fails which are not due to a lack of cash or of securities.

<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>

We share ESMA's view that the "passing on" and "netting" of penalties should be sufficient to address issues related to chains of interdependent transactions, whether identifiable by the CSD or not. We agree that, for the sake of simplicity of the penalty mechanism, the parameters of penalty calculation should not be changed in cases of chains of interdependent transactions.

<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>

We have serious reservations on the proposed standards for the following reasons:

- The text of CSDR level 1 as published in the Official Journal is not the text that was formally approved in the Trilogue discussions early 2014. According to the officially approved version, the definition of substantial importance was only relevant when the activities of a CSD **that has established a branch** have become of substantial importance in that host Member State. The part of the text "**that has established a branch**" has been omitted – probably during the revision by the linguists – representing a substantive change versus the text officially approved. The officially approved text reduces the scope of the definition of substantial importance significantly compared to the one considered by ESMA and brings the required supervisory cooperation to more practical and reasonable levels.
- Moreover, as already pointed out by ECSDA in October 2014, we believe that the Commission mandate to ESMA on the definition of systemic importance is not coherent with the definitions of home/host regulation as defined in Art 23. Home/host arrangements are only applicable in relation to notary and central maintenance services, not in relation to settlement or any other CSD service. The document assumes that as soon as a CSD offers services to parties located, or incorporated in another country, there is a home/host authority relationship. This is inconsistent with the need to make an assessment under Art. 23 of where the service is performed. Euroclear CSDs have no intention to exercise their passport merely because they have participants from other jurisdictions.
- Linking the central maintenance service with participants' location is, in our view not consistent with the approach in CSDR that central maintenance and other account maintenance are different services. The distinguishing factor between central maintenance and other account operation is in our view that the involvement of the issuer or the issuer's agent is required before a CSD can provide securities accounts at the top tier level. The relevance of this service should therefore be linked to the issuer's jurisdiction or the jurisdiction of the governing law of the issue. Otherwise, central maintenance and other account maintenance are not distinct services.

We therefore believe ESMA and the European Commission have to review substantially the technical advice and bring it in line with the intentions and texts of the co-legislators, and with the agreed scope of home/host arrangements as included in CSDR Article 23.

<ESMA_QUESTION_TA_CSDR_5>

Q6: What are your views on the proposed indicators?

<ESMA_QUESTION_TA_CSDR_6>

SEE ANSWER TO QUESTION 4

<ESMA_QUESTION_TA_CSDR_6>

Q7: What are your views on the proposed thresholds?

<ESMA_QUESTION_TA_CSDR_7>

SEE ANSWER TO QUESTION 4

<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>

SEE ANSWER TO QUESTION 4

<ESMA_QUESTION_TA_CSDR_8>