

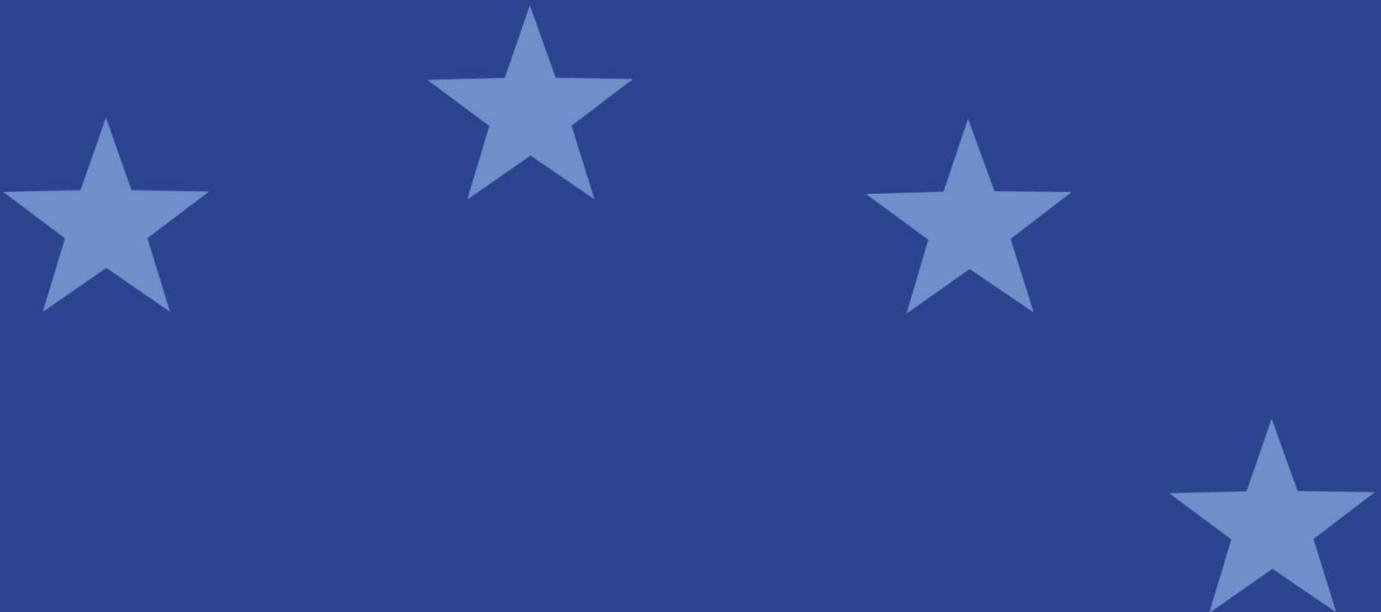


European Securities and  
Markets Authority

# Consultation Paper

**Regulatory Technical Standards on the CSD Regulation**

**The Operation of the Buy-in Process**



## Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

1. respond to the question stated;
2. indicate the specific question to which the comment relates;
3. contain a clear rationale; and
4. contain quantitative elements to justify the arguments raised.

ESMA will consider all comments received by **6 August 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 close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. 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 not to disclose the response 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 [Legal Notice](#).

### Who should read this paper

This document will be of interest to all stakeholders involved in the securities markets. CSDR and the related technical standards will affect not only CSDs but also their participants, CCPs, and other entities. Given the provisions on the recognition of non-EU based CSDs this document may also be of interest to a number of non-EU stakeholders.



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# 1 Executive Summary

## Reasons for publication

On 7 March 2012 the European Commission (EC) proposed a Regulation on improving securities settlement in the European Union (EU) and on central securities depositories (CSDs) and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (CSDR). On 18 December 2013, the European Parliament and the Council of the European Union agreed the CSDR text. On 26 February 2014, the Permanent Representatives Committee, on behalf of the Council of the European Union, confirmed the agreement with the European Parliament (EP). On 15 April 2014, CSDR was formally adopted by the EP. On 16 July 2014 the EP and the Council published the agreed text, ready for publication in the OJ. Finally, the CSDR was published in the OJ on 28 August 2014 and entered into force on 17 September 2014.

CSDR introduces a buy-in process and confers to ESMA the power to draft technical standards on this matter.

ESMA has consulted on all the CSDR technical standards from 18 December 2014 to 19 February 2015. The consultation received 65 responses. Many of the responses called for changing the approach on buy-in with a move of the responsibility for the execution of the buy-in at trading level. ESMA has further analysed the issue and identify possible options that will serve as the basis for its cost-benefit analysis. This second Consultation Paper (CP) is limited to the provisions on buy-in of the draft RTS and is seeking input and quantitative elements from stakeholders on the different options reported below.

## Next steps

ESMA will consider the responses it receives to this CP when finalising the TS for submission to the EC in September 2015.

ESMA will finalise the cost-benefit analysis regarding the proposed operation of the buy-in process, and include this in the Final Report to be submitted to the EC.

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## Acronyms and definitions used

CCP	Central counterparty
CP	Consultation Paper
CSD	Central Securities Depository
DA	Delegated act to be adopted by the EC
EC	European Commission
ESCB	European System of Central Banks
ESMA Regulation	Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
ESMA	European Securities and Markets Authority
EU	European Union
ITS	Implementing Technical Standards
NCA	National Competent Authority
OJ	The Official Journal of the European Union
OTC	Over-the-counter
OTF	Organised trading facility
RTS	Regulatory Technical Standards



## 2 The operation of the buy-in process

### Article 7(15) (c) to (h) CSDR

*ESMA shall, in close cooperation with the members of the ESCB, develop draft regulatory technical standards to specify (1) the details of operation of the appropriate buy-in process including the timeframes to deliver the financial instruments, (2) the circumstances under which the extension period could be prolonged, (3) the timeframe that renders buy-in ineffective for operations composed of several transactions, (4) a methodology for the calculation of the cash compensation when buy-in fails or is not possible, (5) the conditions under which a participant is deemed consistently and systematically to fail to deliver the financial instruments, and (6) the settlement information a CSD shall provide to CCP and trading venues to enable them to process the buy-in.*

#### *Buy-in process*

1. Under Article 7 (15) (c) CSDR, ESMA is required to specify the process for the operation of the buy-in, including the timeframe to deliver the financial instruments.
2. In the previous CP (ESMA/2014/1563)<sup>1</sup> issued on 18 December 2014, the buy-in process was described in Section 2.4 of the CP (the draft RTS as included in Annex I to the CP of 18 December 2014), and covered by questions 7-10.
3. As noted in the previous CP, an ESMA survey of current practices demonstrated that there is currently no uniform approach to buy-in by the CSDs, CCPs and trading venues.
4. In their answers to the CP, stakeholders generally stressed that the CSD should not be involved and exposed to risks in the buy in process. Some respondents call for the buy-in to be executed by a bank or an execution dealer, not connected to parties in the failed transaction.
5. In their answers to the consultation, many expressed the view that the buy-in mechanism should be operated at the trading party level and not at the level of the participants that are intermediaries (settlement agents) or at settlement level (CSDs). It was also proposed to co-ordinate multiple buy-ins by appointing the same intermediary to execute the buy-ins. Having a global view, this intermediary would be able to measure the impact of the buy-ins on the market.

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<sup>1</sup> [http://www.esma.europa.eu/system/files/2014-1563\\_csd\\_r\\_ts.pdf](http://www.esma.europa.eu/system/files/2014-1563_csd_r_ts.pdf)



6. In light of the above ESMA decided to conduct a second consultation to gather additional data from market participants on the operation of the buy-in process. The particular focus of this consultation is on which entity shall be responsible for operating the buy-in process for OTC transactions that are not centrally cleared. Stakeholders input and quantitative elements will help ESMA to finalise the approach to be adopted for the draft RTS and relevant cost-benefit analysis.

*The options to consider*

7. The following options are analysed in this consultation paper. For each option the strengths and weaknesses of it are described. Stakeholders are invited to provide feedback and quantitative elements to sustain those on the relevant options and arguments associated to each option:

Option 1 – Trading level execution

Option 2 – Trading level with fall-back option execution

Option 3 – CSD participant level execution

8. Draft RTS corresponding to each of the different options are included in Annex 2 of this CP and should be referred to in response to the questions in this consultation.

*Option 1 – Trading level party executing the buy-in*

9. In option 1, the trading party, i.e. the party at the origin of the transaction, is responsible for the buy-in. Some stakeholders called for this approach in their answers to the previous consultation paper that dated 18 December 2014.
10. With this approach, the buy-in rules would have to apply throughout the settlement chain up to the trading parties. As the trading party could be the participant itself, the direct client of the participant or could involve several intermediaries, the rules of the CSDs and the contracts between the different intermediaries would have to ensure the application of the buy-in framework.
11. In the event of settlement fails, the status of the settlement instruction would have to be notified to the trading parties, through the chain of intermediaries. When the trading party is informed it would have to contact its counterparty, comply with the buy-in rules' requirements and keep the CSD and its counterparty informed at every key step as required by the rules. An information flow would need to be set up through the chain of intermediaries.



12. Finally, if the buy-in was not successful, or was only partially successful, the cash compensation would be paid by the trading party. However, it is important to note that the CSDR requires the failing participant to reimburse the entity that executes the buy-in. This might be interpreted as requiring the participant to be legally liable for the payment. Thus this option might be exposed to legal challenges.

#### *Strengths of option 1*

13. The arguments in support of this approach are the following:
  - a. The parties responsible for the buy-in are the trading parties that entered into the transaction which failed to settle. The parties would have all information necessary in order to apply the buy-in under optimal conditions e.g. they are aware of the reason for the fail, the nature of the transaction and their counterparties.
  - b. In case of fails of settlement chains, it would allow the failing party to pass-on the buy-in notice to the party that did not deliver the financial instruments in the previous transactions as the parties have all the necessary information. This would limit multiple buy-ins.

#### *Weaknesses of option 1*

14. However this option presents several weaknesses:
  - a. The option relies on each intermediary in the settlement chain ensuring the execution of the buy-in through contractual arrangements. However, the participant and the intermediaries have no incentive to ensure an appropriate contractual framework as they would not be responsible for the buy-in process. If a party documents the requirement in a different way or does not document it, it would not apply to the trading party or would apply in a different manner to the CSDR requirements. Enforcement against the trading party may be impossible or extremely difficult (in particular with third country counterparties), as it would only be supported by a set of contractual arrangements between counterparties where neither party has an interest in meeting the terms of the contract.
  - b. The absence of certainty on the application of the buy-in might completely pre-empt the level 1 text. Therefore this option may not be legally sound. In addition, from a cost-benefit analysis perspective, it would void the analysis conducted by the European Commission when the CSDR was proposed, given the inapplicability of an essential requirement of that regulation.
  - c. The trading party may not be supervised by the National Competent Authority (NCA) supervising the CSD. This may be because it is located in another Member State or

because the trading party is not a supervised entity. It would therefore be complicated, costly or potentially impossible for a NCA to obtain information and enforce the buy-in rules.

- d. The extraterritoriality aspects may render the framework more complex in the event that a linked third country CSD is used by a participant. In these scenarios that CSD would not be subject to the CSDR, nor in the event that an intermediary in the settlement chain is located outside of the Union. Indeed in the absence of direct interest (“skin in the game”) of the parties in the chain, there would be no incentive to ensure the appropriate buy-in requirements are applied.
  - e. A complex communication and notification flow would have to be set up throughout the chain of intermediaries.
  - f. The CSDR<sup>2</sup> provides that “the failing participant shall reimburse the entity that executes the buy-in for all amounts paid in accordance with paragraph 3, 4 and 5 including any execution fees resulting from the buy-in...” paragraph 3 relates to the initiation of the buy-in process, and paragraphs 4 and 5 relates to exemptions. It means that from a legal point of view, the trading party’s liability should be documented as an alternative in anticipation or reimbursement of the obligation of the failing participant. Unless the failing trading party pays the amount due for the buy-in, the failing participant would be liable. It is important to note that it is only when the failing participant is subject to insolvency proceedings that the buy in rules do not apply<sup>3</sup>.
  - g. Furthermore, the CSDR provides that when the price of the bought-in financial instruments has decreased compared to their price at the time of the trade, the difference shall be paid by the failing participant<sup>4</sup>. This means that the liability of the failing participant to pay compensation remains.
15. In view of the above, in consideration of the drafting of the level 1 text, we can conclude that if the trading party does not pay, because of insolvency proceedings or other reasons, the liability of the failing participant cannot be fully excluded from the buy-in. This uncertainty introduces a cost component equal to that which is referred to below in one of option 2. In addition this option is exposed to a significant risk of not producing any effect, thus pre-empting the level 1 text. It is therefore exposed to legal challenges.

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<sup>2</sup> See Article 7(8) of the CSDR

<sup>3</sup> See Article 7(12) of the CSDR

<sup>4</sup> See Article 7(6) of the CSDR



## Questions for consultation

**Q1: Please provide evidence of how placing the responsibility for the buy-in on the trading party will ensure the buy-in requirements are effectively applied.**

**Please provide quantitative cost-benefit elements to sustain your arguments.**

**Q2: Please indicate whether the assumption that the trading party has all the information required to apply the buy-in would be correct, in particular in cases where the fail does not originate from the trading party, but would rather be due to a lack of securities held by one of the intermediaries within the chain.**

### *Option 2 – Trading level executing the buy-in with fall-back option*

16. As in the option 1, in option 2 the trading party, i.e. the party at the origin of the transaction, is responsible for the buy-in. However, in case the trading party does not perform the buy-in, the participant would be responsible for paying the cash compensation. Nevertheless the participant has the right to request to be further reimbursed by its clients, up to the trading party, according to the contractual arrangements in place. It is important to keep in mind that the cash compensation is not equal to the principal amount of the transaction but to the difference between the price of the transaction and the current price of the securities i.e. the variation.
17. Under this option, it could be envisaged that should the failure to execute the buy-in be due to the insolvency of the trading party, the participant would not be liable for the payment of the cash compensation. As a result, the participant would not need to cover for the risk of default of the trading party and therefore would not need to request collateral.
18. As in option 1, the buy-in rules would need to be reflected in the contracts of the intermediaries in the settlement chain up to the trading parties and the communication flow would have to be set up.

### *Strengths of option 2*

19. The strengths identified in option 1 apply also to option 2. However, a few other points should be considered.

20. The responsibility of the failing participant in relation with the cash compensation will help on the enforcement of the buy-in rules in two aspects. First, it would incentivise the participant to enter into a strong contract with its client that would appropriately reflect the buy-in rules and responsibilities of the trading party as the participant would have a personal interest to protect itself. Second, enforcement of the payment for the cash compensation against the participant of the CSD should be easier than against a trading party as it would likely be a supervised entity.
21. All parties within the chain are potentially subject to be asked to pay the cash compensation if the buy-in is not executed, so all the parties have an interest in making sure that the buy-in is executed or the instruction is cancelled. In other words, this potential stick for the participant to be held responsible should the buy-in not be executed by the trading party incentivises the set-up of an efficient buy-in process.
22. This approach is also better aligned with the drafting of the level 1 text that provides for the failing participant responsibility for the payment of the buy-in costs and the price difference as explained under option 1. As explained above the participant would be able to recover this cost from the relevant client.
23. Under option 2, the financial situation of the entity responsible for the buy-in process would be duly considered as in case of insolvency proceedings initiated against that party, the fall back responsibility of the participant would be dis-applied. Therefore, the only reason for the participant to request ex-ante collateral to cover its exposure would be because it does not believe that the contractual arrangements with its clients are actually enforceable.

#### *Weaknesses of option 2*

24. Similarly to option 3, it could be argued that given that the participant would be responsible for the payment of the cash compensation (i.e. variation between the transaction value and current value of the securities), it might collateralise that risk at an increased cost to the participant. It is however important to note that the risk of the participant can be mitigated by the strength of the contract it will conclude with its client, the importance of building the appropriate communication flow and the monitoring of the process. Furthermore, the absence of payment of the cash compensation in the event of trading party default significantly reduces the counterparty risk to which the participant is exposed. Therefore it does not seem justified for the participant to require margins to cover the risk of being potentially being asked to pay the cash compensation because: 1) this risk is very remote; 2) the participant can recover this cost from its client.

25. In terms of number and value of the buy-in at risk of reaching the point of payment of the cash compensation, we need to consider the impact of the MiFIDII/MiFIR, which is expected to bring a significant portion of securities traded OTC to OTF. It should also be considered that only a portion of the failed instructions will not settle by the end of the extension date, that only a part of this portion would be subject to the buy-in, and again only a part would not be bought-in following two days after the end of the buy-in. Therefore to assume that the participants would collateralise 100% of their transactions for a very limited number of transactions that would be bought-in under this option is unlikely. It is more likely to envisage that the collateralisation would apply only to the clients which the CSD participants consider risky counterparties that would not fulfil their contractual obligations. This should represent a minority of the CSD participants' clients, thus making the cost element for participants attached to this option negligible.

### Questions for consultation

**Q3: Should you believe that the collateralisation costs attached to this option are significant, please provide detailed quantitative data to estimate the exact costs and please explain why a participant would need to collateralise its settlement instructions under this option.**

**Q4: If you believe that option 1 (trading party executes the buy-in) can ensure the applicability of the buy-in provisions are effectively applied, please explain why and what are the disadvantages of the proposed option 2 (trading party executes the buy-in with participant as fall back) compared to option 1, or please evidence the higher costs that option 2 would incur. Please provide details of these costs.**

#### *Option 3 – CSD participant level executing the buy-in*

26. Under this option, the participant is responsible for the buy-in process. When the buy-in is not possible the participant would be responsible for the payment of the cash compensation.
27. This option presents both strengths and weaknesses that are analysed below.

#### *Strengths of option 3*

28. Under option 3, the buy-in obligation results from the transposition of the requirement in the rules of the CSD that are binding upon the participant. As the CSD is under the direct supervision of the NCA, the NCA will have the ability to ensure the buy-in rules are appropriately applied. So the binding effect of clear rules is reinforced compared to a situation where it depends on a chain of contracts between intermediaries.



29. Participants are usually supervised entities and therefore the ability to get information and supervise the application of the buy-in rules would be more straightforward than for options 1 and 2 - the trading party may not be a supervised entity.
30. As the participant and CSD have a direct relationship, the flow of information already exists and is shorter and therefore more efficient (less time would be required than in options where there is a chain of intermediaries).
31. This option is aligned with the drafting of the level 1 text<sup>5</sup> that provides that the failing participant shall reimburse the entity that executes the buy-in. In both cases the responsibility lies at participant's level, failing and receiving participants.
32. This option would incentivise the participant to establish a prudent relationship with its clients and take responsibility for 'their' trading parties. Furthermore, although the participant is responsible for the buy-in process, it can contractually require reimbursement or support from its clients e.g. for the actual performance of the buy-in. Furthermore the participant can provide information services to its clients so that they remain informed.

#### *Weaknesses of option 3*

33. The parties responsible for the buy-in are not the trading parties that entered into the transaction that failed to settle. The participants may not have all information necessary in order to apply the buy-in in optimal conditions e.g. they may not know the reason of the fail, the nature of the transaction and their counterparties.
34. In case of fails of settlement chains, it would be difficult to allow the failing participant to pass-on the buy-in notice to the participant that did not deliver the financial instruments in the previous transactions as it would not have all the necessary information, thereby limiting multiple buy-ins could not be possible.
35. When there is a direct relationship between the transaction and the settlement instruction (segregated account, short settlement chain), the trading party will be in the hands of the settlement agent for the performance of the buy-in, unless they conclude an agreement in order to set a contractual framework allowing for the outsourcing of this function, while maintaining the responsibility at participant level.

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<sup>5</sup> article 7(8) of the CSDR



36. The costs of the buy-in process would be significant as the participants being always responsible for the execution of the buy-in would need to require collateral from their clients in order to protect themselves against the risk of paying the costs of the buy-in. Under this option, the participants might ask for collateral for up to 100% of their settlement instructions, i.e. call for margins to cover the difference between the initial transaction value and the current securities value. This cost might be substantial.
37. Transforming the settlement activity into a fully collateralised system might be contrary to the objective of the level 1 text.
38. The costs of this full collateralisation might not justify the potential benefits of reduced settlement fails that the buy-in regime can achieve.
39. Increasing the costs of investing in securities would render EU securities markets less attractive and this would be contrary to the objectives of the CSDR and of the Capital Markets Union.

### **Question for consultation**

**Q5: Please provide detailed quantitative evidence of the costs associated with the participant being fully responsible for the buy in process and on the methodology used to estimate these costs.**



## **Annex 1 - Summary of Questions**

**Q1: Please provide evidence of how placing the responsibility for the buy-in on the trading party will ensure the buy-in requirements are effectively applied.**

**Please provide quantitative cost-benefit elements to sustain your arguments.**

**Q2: Please indicate whether the assumption that the trading party has all the information required to apply the buy in would be correct, in particular in cases where the fail does not originate from the trading party, but would rather be due to a lack of securities held by one of the intermediaries within the chain.**

**Q3: Should you believe that the collateralisation costs attached to this option are significant, please provide detailed quantitative data to estimate the exact costs and please explain why a participant would need to collateralise its settlement instructions under this option.**

**Q4: If you believe that option 1 (trading party executes the buy-in) can ensure the applicability of the buy-in provisions are effectively applied, please explain why and what are the disadvantages of the proposed option 2 (trading party executes the buy-in with participant as fall back) compared to option 1, or please evidence the higher costs that option 2 would incur. Please provide details of these costs.**

**Q5: Please provide detailed quantitative evidence of the costs associated with the participant being fully responsible for the buy in process and on the methodology used to estimate these costs.**

## Annex 2 –Draft Technical Standards on the operation of the buy-in under the different options

Whereas:

- (1) In order to support an integrated market for securities settlement, the buy-in process should be harmonised and should include some common requirements. Given the importance of incentivising timely actions to address settlement fails, it is important to keep all relevant involved parties informed during the process.
- (2) Regulation (EU) No 909/2014 refers to participants in different infrastructures, CSDs, CCPs and trading venues. It is essential for the correct identification the entity responsible for executing a buy-in that parties and participants are distinguished, where parties are the trading parties in an OTC transaction or in a trading venue or the clearing members in a CCP, and participants are participants to a securities settlement system of a CSD.
- (3) The buy-in process should provide for a way to address settlement fails without jeopardising the risk profile of CSDs, CCPs or trading venues. Buy-in should not imply any unnecessary risk taking by a CSD, a CCP or a trading venue. A CSD or a trading venue should therefore not perform the buy-in as counterparty on its own account.
- (4) The settlement of an instruction aims at ensuring the final settlement of a transaction concluded between trading parties. For transactions executed on a trading venue and for transactions cleared by a CCP, the trading venue members and the clearing members respectively are the parties to the transaction and therefore the parties that should perform the buy-in. They have the relevant information to execute it. For transactions not executed on a trading venue nor cleared by a CCP,

### Either Option 1 and 2 (trading party)

*the buy-in should be performed by the trading parties that concluded that transaction. The original parties are the ones with the relevant information on why the settlement failed and who the relevant counterparty responsible for it is.*

### Option 3 (Participant)

*the CSD participants are the immediate parties to be identified by the CSD as being responsible for not delivering the relevant instruments. Therefore, in order to ensure the efficiency of the buy-in process, the CSD participants should be responsible for the buy-in process affecting these transactions.*

- (5) Given the different parties involved in a settlement chain, they need to be informed of the status of the buy-in process at key points in time. This information should be formalised by way of



notification in order for the counterparty to be alerted on the status of the actions to settle the transaction and take action as need be.

**(6) Either Option 1 and 2 (trading party)**

*The buy-in agent will act upon request from the receiving party, but the cost will be borne by the failing party. It is appropriate to set a framework so that the buy-in agent will act in the interest of the failing party.*

**or Option 3 (participant)**

*The buy-in agent will act upon request from the receiving participant, but the cost will be borne by the failing participant. It is appropriate to set a framework so that the buy-in agent will act in the interest of the failing participant.*

**(7) Either Option 1 and 2 (trading party)**

*In order to limit the number of buy-ins and preserve liquidity of the market for the relevant instrument, the failing party should be allowed to deliver the financial instruments to the receiving party up to the moment when it is informed that the buy-in agent is appointed. As from that point in time, in order to prevent a situation where the receiving party would receive twice the financial instruments from the buy-in agent and from the failing party, the failing party should be able to deliver the financial instruments to the buy-in agent or to the entity performing the auction with the approval of that agent or entity.*

**or Option 3 (participant)**

*In order to limit the number of buy-ins and preserve liquidity of the market for the relevant instrument, the failing participant should be allowed to deliver the financial instruments to the receiving participant up to the moment when it is informed that the buy-in agent is appointed. As from that point in time, in order to prevent a situation where the receiving participant would receive twice the financial instruments from the buy-in agent and from the failing participant, the failing participant should be able to deliver the financial instruments to the buy-in agent or to the entity performing the auction with the approval of that agent or entity.*

- (8) A settlement instruction that is not eligible for partial settlement may fail for the entire amount of financial instruments of that instruction, even if part of the financial instruments is available for delivery to the account of the delivering participant. As the purpose of the buy-in is to address settlement fails, the receiving participant should accept partial settlement from the last business day of the extension period, so that a buy-in will only be performed for the non-delivered financial instruments. Partial settlement should not apply to settlement instructions that have been put on hold by a participant, since this may indicate that the financial instruments in the account do not belong to the client for which the instruction has been entered into the system. For the same reason, the financial instruments received as part of the buy-in process should be delivered to the



receiving participant, even if the amount of such instruments allow only settlement of part of the settlement instruction.

- (9) With the aim to balance the uncertainty resulting from the buy-in process and the interest of the parties to close the transaction, in case the buy-in fails, in the absence of express communication of the receiving party choice, the buy-in process should be terminated and the cash compensation should be paid.

**(10) Only necessary for Option 2**

Contractual arrangements between parties of a settlement chain can only produce their effects if the parties have an economic interest in making sure that the terms of a contract are complied with. Therefore, for the buy-in process to be effectively applied, CSDs participants should be responsible for the cash compensation in case the buy-in process is not applied through the appropriate contractual arrangements.

In some circumstances, a financial instrument may no longer be available on the market, for instance when a financial instrument has been redeemed or converted, in which case a buy-in is no longer possible. The buy-in process should in that case be accelerated, so that cash compensation could be paid before the end of the buy-in process, thus limiting the period of uncertainty.

**(11) Either Option 1 and 2 (trading party)**

*A transaction may in some cases be part of a chain of transactions and instructions. In order to avoid that a buy-in has to be performed for each settlement fail in a chain of transactions a CSD should allow the parties to pass on the buy-in notification, which could be further passed on to other parties involved in the cause of the settlement fail. The CSD should remain informed of the pass-on and of the identity of the party receiving that notification.*

**or Option 3 (participant)**

*A transaction may in some cases be part of a chain of transactions and instructions. In order to avoid that a buy-in has to be performed for each settlement fail in a chain of transactions, a CSD should allow its participants to pass on the buy-in notification, which could be further passed on to other participants involved in the cause of the settlement fail. The CSD should remain informed of the pass-on and of the identity of the participant receiving that notification.*

*Article XX*

**Definition**

- 'party' means a party to a transaction including a member of a trading venue and for transactions cleared by a CCP, a clearing member or a CCP.

## SECTION 3

### **Details of operation of the appropriate buy-in process**

(Point (c) of Article 7(15) of Regulation (EU) No 909/2014)

#### Article 12

##### **General**

1. The buy-in process shall be initiated at the end of the business day following the elapse of the extension period.
2. The buy-in process shall comprise the following elements:
  - (a) the notifications, as specified in Article 13;
  - (b) the appointment without undue delay of a buy-in agent, where relevant;
  - (c) the execution of the buy-in process through the acquisition of the securities by the buy-in agent or through an auction;

##### **Either Option 1 and 2 (trading party)**

*(d) the completion of the buy-in process through the delivery to the receiving party by the buy-in agent or the entity executing the auction, of all or some of the bought-in securities and the payment of the cash compensation for the non-delivered securities to the receiving party by the failing party.*

##### **or Option 3 (participant)**

*(d) the completion of the buy-in process through the delivery to the receiving participant by the buy-in agent or the entity executing the auction, of all or some of the bought-in securities and the payment of the cash compensation for the non-delivered securities to the receiving participant by the failing participant.*

#### Article 13

##### **Notifications**

1. The notifications referred to in point (a) of Article 12(2) shall be served upon the following steps and contain the following information:
  - (a) without delay upon the initiation of the buy-in process, a notification specifying the settlement fail it relates to;

- (b) without delay upon the appointment of the buy-in agent, a notification specifying the date of the appointment and the name of the buy-in agent;
  - (c) on the last business day of the buy-in process, a notification specifying the results of the buy-in process;
  - (d) as the case may be, without delay, upon election of a choice made pursuant to Articles 15(1)(b) or (c), 15(2)(b) or (c) and 15(3)(b), a notification of such choice;
  - (e) as the case may be, at the latest upon the last business day of the deferral period, a notification specifying the results of the deferred buy-in process.
2. For transactions executed on a trading venue and not cleared by a CCP, the receiving party shall provide the relevant notifications referred to in paragraph 1 to the failing party and to the trading venue which shall transmit it to the CSD.
  3. For transactions cleared by a CCP, the CCP shall provide the notifications referred to in paragraph 1 to the failing clearing member and to the CSD.
  4. **Either Option1 and 2 (trading party)**

*For transactions not executed on a trading venue nor cleared by a CCP, the receiving party shall provide the notifications referred to in paragraph 1 to the failing party and ensure that the CSD is informed of the initiation, execution and results of the buy-in.*

**or Option 3 (participant)**

*For transactions not executed on a trading venue nor cleared by a CCP, the receiving participant shall provide the notifications referred to in paragraph 1 to the CSD, which shall transmit it to the failing participant.*

#### *Article 14*

### **Appointment of the buy-in agent and execution**

1. For transactions executed on a trading venue and not cleared by a CCP, the rules of a trading venue shall provide that the receiving party shall appoint a buy-in agent. The trading venue shall appoint a buy-in agent where the receiving party does not do so within two business days following the elapse of the extension period.
2. For transactions cleared by a CCP, the rules of a CCP shall provide that the CCP shall appoint a buy-in agent or shall execute a buy-in through an auction.

3. **Either Option1 and 2 (trading party)**

*For transactions not executed on a trading venue nor cleared by a CCP, the receiving party shall be responsible for appointing a buy-in agent and a CSD shall include in its rules that:*

- (a) the participant shall ensure that the receiving party informs it of its choices pursuant to Article 15(3)(b) or (c);*
- (b) the participant shall inform the CSD with respect to the choices it was informed of pursuant to point (a).*

**Or Option 3 (participant)**

*For transactions not executed on a trading venue nor cleared by a CCP, a CSD shall include in its rules that:*

- (a) the receiving participant appoints a buy-in agent;*
- (b) its participants inform the CSD about the results of the buy-in and the choice made pursuant to Article 15(3)(b) or (c).*

4. **Either Option1 and 2 (trading party)**

*The buy-in agent shall not have any conflict of interests in the execution of the buy-in process and shall execute the buy-in process on the terms most favourable to the failing party, in accordance with Article 27 of Directive 2014/65/EU.*

**or Option 3 (participant)**

*The buy-in agent shall not have any conflict of interests in the execution of the buy-in process and shall execute the buy-in process on the terms most favourable to the failing party or participant, in accordance with Article 27 of Directive 2014/65/EU.*

5. **Either Option1 and 2 (trading party)**

*Failing parties shall be allowed to deliver the securities until the receipt of the notification referred to in Article 13(1)(b).*

*The failing parties shall thereafter be allowed to deliver the securities to the buy-in agent or to the entity that executes the buy-in auction upon agreement of that entity.*

**or Option 3 (participant)**

*Failing parties for transactions executed on a trading venue or cleared by a CCP and failing participants for transactions that are not executed on a trading venue nor cleared by a CCP shall be allowed to deliver the securities until the receipt of the notification referred to in Article 13(1)(b).*

*The failing parties or participants shall thereafter be allowed to deliver the securities to the buy-in agent or to the entity that executes the buy-in auction upon agreement of that entity.*

*Article 15*

**Completion of the buy-in process**

1. For transactions executed on a trading venue but not cleared by a CCP:
  - (a) when the buy-in has been successful, the securities shall be delivered to the receiving party and the failing and receiving parties shall ensure that the settlement instruction is cancelled;
  - (b) where the buy-in failed, the receiving party shall notify without delay to the trading venue and to the failing party whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing party shall pay to the receiving party the cash compensation;
  - (c) where the buy-in results in a partial delivery of securities, the receiving party shall accept the bought-in securities. For the non-delivered securities, the receiving party shall notify without delay to the trading venue and to the failing party whether it prefers to defer the execution of the buy-in or to receive cash compensation. In the absence of such notification, the failing party shall pay the cash compensation to the receiving party.
  
2. For transactions cleared by a CCP:
  - (a) where the buy-in has been successful, the securities shall be delivered to the receiving clearing member, and upon completion of the buy-in process, the CCP shall ensure that the settlement instruction is cancelled;
  - (b) where the buy-in failed, the CCP shall notify without delay to the failing clearing member whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing clearing member shall pay to the CCP the cash compensation, which the CCP shall pass to the receiving clearing member;
  - (c) where the buy-in results in partial delivery of securities, the receiving clearing member shall accept the bought-in securities. For the non-delivered securities, the receiving clearing member shall notify without delay to the CCP whether it prefers to defer the buy-in process or to receive the cash compensation. In the absence of such notification, the failing clearing member shall pay to the CCP the cash compensation, which the CCP shall pass to the receiving clearing member.

3. **Either Option1 (trading party)**

*For transactions not executed on a trading venue nor cleared by a CCP:*

- (a) where the buy-in has been successful, the securities shall be delivered to the receiving party and the failing and receiving parties shall ensure that the settlement instruction is cancelled;
- (b) where the buy-in failed, the receiving party shall notify to the failing party without delay whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing party shall pay to the receiving party the cash compensation;
- (c) where the buy-in results in a partial delivery of securities, the receiving party shall accept the bought-in securities. For the non-delivered securities, the receiving party shall notify to the failing party without delay whether it prefers to defer the buy-in or to receive the cash compensation. In the absence of such notification, the failing party shall pay to the receiving party the cash compensation.

**or Option 2 (trading party with the participant as a fall back)**

*For transactions not executed on a trading venue nor cleared by a CCP:*

- (a) where the buy-in has been successful, the securities shall be delivered to the receiving party and the failing and receiving parties shall ensure that the settlement instruction is cancelled;
- (b) where the buy-in failed, the receiving party shall notify without delay to the failing party whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing party shall pay to the receiving party the cash compensation;
- (c) where the buy-in results in a partial delivery of securities, the receiving party shall accept the bought-in securities. For the non-delivered securities, the receiving party shall notify to the failing party without delay whether it prefers to defer the buy-in or to receive the cash compensation;
- (d) where the CSD does not receive the information referred to in Article 13(3)(c) on the results of the buy-in on the business day following the end of the buy-in process, it shall notify the failing participant of the absence of evidence that the buy-in process was performed;
- (e) where the failing participant does not provide to the CSD the evidence that the buy-in process was performed or that the trading party is subject to an insolvency proceeding, within one business day following the notification referred to in the first subparagraph, the failing participant shall pay the cash compensation to the receiving participant. The CSD rules shall provide that the participant shall recover that amount from its client.

**or Option 3 (participant)**

*For transactions not executed on a trading venue nor cleared by a CCP:*

- (a) where the buy-in has been successful, the securities shall be delivered to the receiving participant and the failing and receiving participants shall ensure that the original settlement instruction is cancelled;
  - (b) where the buy-in failed, the receiving participant shall notify without delay to the CSD whether it prefers to defer the buy-in, or whether it prefers to receive the cash compensation. In the absence of such notification, the failing participant shall pay to the receiving participant the cash compensation;
  - (c) where the buy-in results in a partial delivery of securities, the receiving participant shall accept the bought-in securities. For the non-delivered securities, the receiving participant shall notify without delay to the CSD whether it prefers to defer the buy-in or to receive the cash compensation. In the absence of such notification, the failing participant shall pay to the receiving participant the cash compensation.
4. The buy-in is deemed to be impossible only when the relevant securities do not exist any longer as a result of the actions taken by the issuer of such securities. In such case, the receiving party or participant shall receive the cash compensation.

For transactions cleared by a CCP, the CCP shall transfer the received cash compensation to the receiving clearing member.

*Article 16*

**Partials**

When the relevant securities are available in the account of the delivering participant, partial settlement offered by CSDs in accordance with Article 3(9) shall be applied from the last business day of the extension period, irrespective of any contractual choice made by the participants.

*Article 17*

**Minimising the number of buy-in processes**

**Either Option 1 and 2 (trading party)**

1. *For transactions referred to in Article 15 (3), the failing party that is failing because of a failed receipt of securities can pass-on to the party causing the fail the notification referred to in point (a) of Article 12(2). The latter party in turn can pass on the notification to the party that originally caused the settlement fail. The party who has caused the settlement fail and who receives that notification shall pay to the receiving party identified in the notification the amounts referred to in Article 7(6) and (8) Regulation (EU) No 909/2014 or the cash compensation.*

2. *A receiving party who is also a failing party can pass on the notification referred to in point (a) of Article 12(2) to the party that originally caused the settlement fail. In such case, the former party shall not perform the buy-in as a receiving party.*
3. *A party who has passed on the notification referred to in point (a) of Article 12(2) shall ensure that the CSD is informed that it has passed-on that notification and of the identity of the party receiving that notification.*
4. *A party passing-on a notification referred to in point (a) of Article 12(2) shall notify the party in receipt of that notification and both shall ensure that the CSD is informed of the initiation, execution and results of the buy-in process.*

**Or Option 3 (participant)**

1. *For transactions referred to in Article 15 (3), the failing participant that is failing because of a failed receipt of securities can pass-on to the participant causing the settlement fail the notification referred to in point (a) of Article 12(2). The latter participant can in turn pass on the notification to the participant that originally caused the settlement fail. The participant who has caused the settlement fail and who receives that notification shall pay to the receiving participant identified in the notification the amounts referred to in Article 7(6) and (8) Regulation (EU) No 909/2014 or the cash compensation.*
2. *A receiving participant who is also a failing participant can pass on the notification referred to in point (a) of Article 12(2) to the participant that originally caused the settlement fail. In such case, the former participant shall not perform the buy-in as a receiving participant.*
3. *A participant who has passed on the notification referred to in point (a) of Article 12(2) shall inform the CSD that it has passed-on that notification and of the identity of the participant having received that notification.*
4. *A participant passing-on a notification referred to in point (a) of Article 12(2) shall notify the participant in receipt of that notification and inform the CSD about the initiation, execution and results of the buy-in process.*