Reply Form

**to the Consultation Paper on Technical Advice on CSDR Penalty Mechanism**

Responding to this Consultation Paper

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

* respond to the question stated;
* indicate the specific question to which the comment relates;
* contain a clear rationale; and
* describe any alternatives ESMA should consider.

ESMA will consider all comments received by **29 February 2024.**

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

Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

• Insert your responses to the questions in the Consultation Paper in this reply form.

• Please do not remove tags of the type < ESMA\_QUESTION\_CSDR\_0>. Your response to each question has to be framed by the two tags corresponding to the question.

• If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.

• When you have drafted your responses, save the reply form according to the following convention: ESMA\_CP1\_CSDR \_nameofrespondent.

 For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_CP1\_CSDR \_ABCD.

• Upload the Word reply form containing your responses to ESMA’s website (**pdf documents will not be considered except for annexes**). 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 close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publicly 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 ‘[Data protection](https://www.esma.europa.eu/about-esma/data-protection)’.

**Who should read this paper?**

All interested stakeholders are invited to respond to this consultation paper. In particular, ESMA invites market infrastructures (CSDs, CCPs, trading venues), their members and participants, other investment firms, credit institutions, issuers, fund managers, retail and wholesale investors, and their representatives to provide their views to the questions asked in this paper.

# General information about respondent

|  |  |
| --- | --- |
| Name of the company / organisation | BNY Mellon |
| Activity | Credit institutions, CSDs, investment firms, market operators, e-money institutions, UCITS management companies, AIFs  |
| Are you representing an association? |[ ]
| Country / Region | Belgium |

# Questions

1. Do you agree with ESMA’s proposal? Which Option is preferable in your view? Please also state the reasons for your answer.

<ESMA\_QUESTION\_CSDR\_1>

We disagree with ESMA’s support for Option 4. We see this as the least appropriate option. This option will create complexity and lack of transparency for all parties in the custody chain, including for end investors. It will require system changes for CSDs, and possibly for some intermediaries.

We do believe that the current methodology for the calculation of penalties for shortages of cash is broadly sound, and we do not see any justification for significant changes.

With respect to the specific problem in DKK, we would suggest Option 3, as this is very close to the current methodology.

<ESMA\_QUESTION\_CSDR\_1>

1. Do you have other suggestions? If yes, please specify and provide arguments.

<ESMA\_QUESTION\_CSDR\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CSDR\_2>

1. Do you agree with the approach followed for the Option you support to incorporate proportionality in the Technical Advice? If not, please provide an indication of further proportionality considerations, detailed justifications and alternative wording as needed.

<ESMA\_QUESTION\_CSDR\_3>

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<ESMA\_QUESTION\_CSDR\_3>

1. What costs and benefits do you envisage related to the implementation of each Option? Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_4>

|  |  |
| --- | --- |
| **Option**  |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_4>

1. As a CSD, do you face the issue of accumulation of reference data related to Late Matching Fail Penalties (LMFPs), that may degrade the functioning of the securities settlement system you operate? If yes, please provide details, including data where available, in particular regarding the number and value of late matching instructions, as well as for how many business days they go in the past from the moment they are entered into the securities settlement system, and the percentage they represent compared to the overall number and value of settlement fails on a monthly basis (please use as a reference the period June 2022 – June 2023).

<ESMA\_QUESTION\_CSDR\_5>

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<ESMA\_QUESTION\_CSDR\_5>

1. What are the causes of late matching? How can you explain that there are so many late matching instructions? What measures could be envisaged in order to reduce the number of late matching instructions?

<ESMA\_QUESTION\_CSDR\_6>

A first preliminary comment is that the number of such very late instructions is small in comparison with the total number of settlement instructions.

A second preliminary comment is that the existence of such late instructions creates problems. The problem identified in this paper of CSDs having to maintain historical data in order to be able to calculate the penalties is an example of such problems. But there are other examples.

Such late instructions create problems for corporate action processing, as they may change the entitlements for a corporate actions event, with potentially knock-on tax implications. More generally, such late instructions, and the ensuing delay in settlement of transactions, affect the issuer/investor relationship, and the appropriateness of the records in the custody chain as the basis for this relationship.

In this context, it is useful to note that the FASTER legislative proposal of the European Commission includes in Article 9 a requirement for custodians to report positions relating to a dividend payment no later than 25 days after the record date. The logic of the FASTER proposal, and the expectation of the European Commission and of the tax authorities, is that this reporting will be definitive and complete at this point and will not be subject to later corrections. For this reporting to be definitive and complete, it will be necessary that by this point all relevant transactions, and any associated market claims, have been identified, and fully processed.

In this context, it is also useful to note that that Market Standards for Corporate Actions Processing and the T2S Corporate Actions Standards impose a time limit of 20 business days after record date for the detection of market claims.

To the question of what the reasons are for very late settlement instructions, it is very difficult to give specific answers. We believe that this is residual activity and that the specific underlying reasons for such late instructions may be very diverse.

At a high level we believe that all the steps taken to increase the efficiency, rigour and automation in post-trade processes, as a result of the introduction of CSDR late settlement penalties, but also as part of the introduction of T+1, and, potentially, of the FASTER tax measures, will contribute to reducing the number of late instructions.

We do also believe that other specific measures should be taken. On this point, please see our answer to Question 11.

<ESMA\_QUESTION\_CSDR\_6>

1. Do you agree with ESMA’s proposal to establish a threshold beyond which more recent reference data shall be used for the calculation of the related cash penalties to prevent the degradation of the performance of the systems used by CSDs? Please also state the reasons for your answer.

<ESMA\_QUESTION\_CSDR\_7>

As a matter of principle, we are opposed to the introduction of exceptions and thresholds in the design of the penalty mechanism, as we believe that it is important that the system be as simple and transparent as possible.

However, we do recognise that there is currently a problem with historical data and the degradation of the performance of systems used by CSDs.

For this reason, and given the low volume of transactions, we would agree with the introduction of an appropriate threshold, and the use of more recent reference data, as a short-term pragmatic solution.

Please see our answer to Question 11 for a more sustainable long-term solution.

<ESMA\_QUESTION\_CSDR\_7>

1. Do you agree with the threshold of 92 business days or 40 business days in order to prevent the degradation of the performance of the systems used by CSDs? Please specify which threshold would be more relevant in your view:

**a)92 business days;**

**b)40 business days;**

**c)other (please specify).**

**Please also state the reasons for your answer and provide data where available, in particular regarding the number and value of late matching instructions that go beyond 92 business days, 40 business days in the past or another threshold you think would be more relevant, and the percentage they represent compared to the overall number and value of settlement fails on a monthly basis (please use as a reference the period June 2022 – December 2023).**

<ESMA\_QUESTION\_CSDR\_8>

Please see our answer to Question 7. As we believe that the introduction of such a threshold should only be a short-term pragmatic solution, and should not be a definitive solution, we believe that the determination of the threshold should be based on pragmatic considerations.

<ESMA\_QUESTION\_CSDR\_8>

1. Do you agree that the issuer CSD for each financial instrument shall be responsible for confirming the relevant reference data to be used for the related penalties calculation? Please also state the reasons for your answer.

<ESMA\_QUESTION\_CSDR\_9>

Yes. This is a sound principle.

<ESMA\_QUESTION\_CSDR\_9>

1. In your view, where settlement instructions have been matched after the intended settlement date, and that intended settlement date is beyond the agreed number of business days in the past, the use of more recent reference data (last available data) for the calculation of the related cash penalties should be optional or compulsory? Please also state the reasons for your answer.

<ESMA\_QUESTION\_CSDR\_10>

As set out in our answers to Questions 7 and 8, we see the introduction of thresholds and the use of more recent reference data as a short-term pragmatic solution to deal with the problems of specific systems used by CSDs. On this basis, we suggest that the use of thresholds and more recent reference should be optional and should not be compulsory. If a CSD can comply with the standard design of the penalty mechanism, it would be preferable that it do so.

<ESMA\_QUESTION\_CSDR\_10>

1. Do you have other suggestions? If yes, please specify, provide drafting suggestions and provide arguments including data where available.

<ESMA\_QUESTION\_CSDR\_11>

We believe that the problem of CSDs having to maintain historical data can be solved by taking the approach of the Market Standards for Corporate Actions Processing and the T2S Corporate Actions Standards, with respect to the detection period for market claims. All, or most, European CSDs already apply a time limit of 20 business days after record date for the detection of market claims. We suggest that they complement this approach by applying the same time limit for the receipt of settlement instructions (i.e. a time limit of 20 business days after intended settlement date).

Such a step will increase rigour in post-trade processing and help reduce the problems identified in our answer to Question 6.

We believe that this step should also be complemented by a change to the point in time at which failing matched transactions are automatically cancelled. We believe that currently failing matched transactions are recycled for settlement for too long and should be automatically cancelled at an earlier point in time. Please see our answers to Questions 6 and 37 for more information on this point.

<ESMA\_QUESTION\_CSDR\_11>

1. Do you agree with the approach followed to incorporate proportionality in the Technical Advice? If not, please provide an indication of further proportionality considerations, detailed justifications and alternative wording as needed.

<ESMA\_QUESTION\_CSDR\_12>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CSDR\_12>

1. What costs and benefits do you envisage related to the implementation of the approach proposed by ESMA? Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_13>

|  |  |
| --- | --- |
| **Approach proposed by ESMA** |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_13>

1. If applicable (if you have suggested a different approach than the one proposed by ESMA), please specify the costs and benefits you envisage related to the implementation of the respective approach. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_14>

|  |  |
| --- | --- |
| **Approach proposed by respondent** (if applicable) |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_14>

1. Based on your experience, what has been the impact of CSDR cash penalties on reducing settlement fails (by type of asset as foreseen in the Annex to Commission Delegated Regulation (EU) 2017/389 since the application of the regime in February 2022? Please provide data and arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_15>

 Overall, we believe that the CSDR cash penalties mechanism has had a positive impact on settlement efficiency.

Our view is based on two main considerations. Firstly, there are data that are consistent with the view that there has been a positive impact.

BNY Mellon internal data on transactions settling at CSDs within the scope of the CSDR penalties mechanism show a slow and consistent improvement in average settlement rates from 95.84% in February 2022 to 97.09% in January 2024. Similarly, the data provided during the ESMA workshop on 26 September on settlement efficiency show a small but noticeable reduction in settlement fails in European markets since the introduction of the mechanism in February 2022.

A second consideration is that we believe that many of the basic features of the penalty mechanism are well-designed, as they create financial incentives for timely settlement.

<ESMA\_QUESTION\_CSDR\_15>

1. In your view, is the current CSDR penalty mechanism deterrent and proportionate? Does it effectively discourage settlement fails and incentivise their rapid resolution? Please provide data and arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_16>

At a high level, we do believe that the current CSDR penalty mechanism is deterrent and proportionate, and it does discourage settlement fails and incentivises timely settlement.

However, we do also believe that the logic of the system is that the size of the penalties should be calibrated appropriately so as to provide proper incentives, without creating damaging knock-on effects. The appropriate calibration may vary over time, and in different market conditions. Accordingly, it may be possible to improve the calibration of the penalties.

<ESMA\_QUESTION\_CSDR\_16>

1. What are the main reasons for settlement fails, going beyond the high level categories: “fail to deliver securities”, “fail to deliver cash” or “settlement instructions on hold”? Please provide examples and data, as well as arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_17>

It is helpful to divide the reasons for settlement fails into three categories, based on the lifecycle of a securities settlement instruction:

1/ Late instructions, specifically, the reasons for settlement instructions arriving late at the CSD

2/ Matching problems, specifically, once instructions have arrived at the CSD, the reasons why the settlement instructions fail to match at the CSD

3/ Lack of resources, specifically, once instructions have arrived at the CSD and have been matched, the reasons why a party has insufficient resources (securities or cash) to settle a trade.

Within category 3/, most settlement fails derive from a lack of securities, as securities, represented by different ISINs, are not fungible.

Settlement fails deriving from a lack of securities can be categorised into three subcategories:

1. Problems deriving from a lack of pooling (i.e. from split positions). In such a case, the trading party has sufficient securities, but the securities are not immediately available for settlement, as they are located in a different place.
2. Problems associated with failing receipts (i.e. a chain of failing transactions). In such a case, the trading party has arranged to have sufficient securities in order to settle a delivery, but has not yet received those securities.
3. Problems associated with a real shortage of securities. In such a case, the trading party has not yet arranged to have sufficient securities in order to settle a delivery.

In this context, we do want to highlight the following points:

* Within each of the categories, and each of the sub-categories, there may be many diverse underlying root causes for settlement fails.
* A single settlement failure (falling into subcategory (i) or (iii)) in a chain of transactions may well lead to multiple settlement fails (falling into subcategory (ii)).
* Settlement activity may represent very diverse underlying activity. The pattern of settlement activity for standard cash trading may be very different from the pattern of settlement activity for resource management activities such as collateral management and securities lending.
* Some resource management activities, such as securities lending activity, may be prone to higher settlement failure rates, as by their nature they are conducted within a very short period of time.

<ESMA\_QUESTION\_CSDR\_17>

1. What tools should be used in order to improve settlement efficiency? Please provide examples and data, as well as arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_18>

As mentioned in our answer to Question 17, settlement fails may have very diverse underlying root causes.

One major benefit of the current CSDR penalty mechanism for improving settlement efficiency is that it is an overarching tool that provides incentives for improved behaviour no matter what the underlying root cause of a settlement failure is.

We do, however, believe that the current CSDR penalty mechanism should be complemented by other more specific, and more targeted, tools and actions, by both the private and the public sectors.

In order to tackle settlement fails arising from late instructions and from matching problems, there is a need for improvements with respect to the confirmation/affirmation process, and the maintenance of standard settlement instructions (SSIs).

In order to tackle settlement fails resulting from a lack of pooling, there is a need for steps to improve CSD interoperability, as well as more generally to tackle the regulatory and market factors that push market participants to maintain positions in the same securities in different places. Tackling such obstacles to pooling is important not only for settlement efficiency, but also to help improve the ability of market participants to receive and to deliver securities collateral.

In order to tackle settlement fails resulting from failing receipts, there is a need both for improved partial settlement functionalities at the level of the CSD, as well as a greater use of partial settlement functionalities.

<ESMA\_QUESTION\_CSDR\_18>

1. What are your views on the appropriate level(s) of settlement efficiency at CSD/SSS level, as well as by asset type? Please provide data and arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_19>

With relation to the appropriate level of settlement efficiency, our starting position is that – everything else being equal – a higher rate of settlement efficiency is better than a lower rate.

As set out in our answers to questions 16, 17 and 18, we believe that there is scope to improve settlement efficiency in Europe.

Yet, at the same time, we do not believe that public authorities should set out explicit targets for settlement efficiency.

This is because settlement efficiency rates are dependent on a whole series of factors, many of which are external to individual capital market participants, and because any explicit settlement efficiency targets may have perverse effects.

Settlement efficiency rates are affected by such factors as:

* CSD functionalities
* CSD daily timetables (namely, the period of time during which a CSD is open for settlement)
* Liquidity of a security
* Increased participation in capital markets by issuers and investors (as new types of issuer will tend to issue less liquid securities, and new types of investor will have lower average volumes and will tend to be less automated)
* External shocks

In the event of a significant external shock to the European financial system, it is important that markets remain liquid, and that trading continues, even though the shock reduces overall rates of settlement efficiency. An explicit settlement efficiency target for market participants could dissuade market participants from continuing to trade and may thereby reduce the resilience and shock absorption capabilities of the financial system as a whole.

Rather than setting explicit targets for settlement efficiency, we believe that public policy action should focus on:

* improving the functioning of the markets and of market infrastructure; and
* optimising the current overarching framework to incentivise improvements to settlement efficiency.

<ESMA\_QUESTION\_CSDR\_19>

1. Do you think the penalty rates by asset type as foreseen in the Annex to Commission Delegated Regulation (EU) 2017/389 are proportionate? Please provide data and arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_20>

As set out in our answer to Question 15, we believe that the penalty rates have had a positive effect on settlement efficiency. We note that there are wide differences in individual rates, and the rationale for some of these differences is not fully clear.

<ESMA\_QUESTION\_CSDR\_20>

1. Regarding the proportionality of the penalty rates by asset type as foreseen in the Annex to Commission Delegated Regulation (EU) 2017/389, ESMA does not have data on the breakdown of cash penalties (by number and value) applied by CSDs by asset type. Therefore, ESMA would like to use this CP to ask for data from all EEA CSDs on this breakdown, including on the duration of settlement fails by asset type.

<ESMA\_QUESTION\_CSDR\_21>

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<ESMA\_QUESTION\_CSDR\_21>

1. In your view, would progressive penalty rates that increase with the length of the settlement fail be justified? Please provide examples and data, as well as arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_22>

We do not believe that progressive penalty rates are justified. If introduced, we believe that they will have counterproductive and perverse effects.

Progressive penalty rates will damage many of the principles that lie at the heart of the design of the current CSDR penalty mechanism.

These principles include simplicity, transparency, auditability, fairness and operational efficiency.

The current penalty mechanism is well-designed as it takes an approach that is based on individual transactions, while producing its effects at the level of systems.

Each individual penalty is explainable, and attributable, with reference to an individual transaction. In many cases, the individual penalty amounts are small and may not have any specific individual effect. The penalty mechanism produces its effects through the collective impact of penalties on systems and on patterns of activity.

For the mechanism to work correctly, penalties have to be transmitted down the custody chain to the party that is apparently at fault. Each party in the chain down to the end investor has to be able to recognise and understand both the source and the applicability of each penalty.

Progressive penalty rates create complexity and will make it more difficult for parties in the chain to recognise and to understand individual penalties.

Progressive penalty rates will damage the immunisation principle, whereby a party in the middle of a chain of failing settlement instructions is “immunised”, as the penalty amount that the party pays is compensated by the penalty amount that the party receives.

As transactions may be instructed and matched on different days, and as failing settlement chains are “dynamic” and may change over time as new instructions are matched, and other transactions settle, there is no guarantee with progressive penalty rates that the penalty rate on a receipt will be the same as the penalty rate on a delivery.

This in itself will generate anomalies, as innocent parties will be hit with net penalties.

The immunisation principle is also important to maintain the efficiency of the overall system. If the immunisation principle is damaged, then in a chain of failing transactions multiple parties in the chain may be incentivised to borrow securities, and to satisfy their individual delivery. This overborrowing is unnecessary and inefficient, and it may have the effect of exacerbating shortages of illiquid securities. In a chain of failing transactions, the net seller as the beginning of a chain should have an incentive to borrow securities, thereby settling all the transactions in the chain, while the other parties in the chain should not have an incentive to borrow.

A perverse effect of progressive penalties for late settlement is that it may create an incentive for parties to wait to send settlement instructions until they have the securities available. Such an incentive would exist if the penalties for late matching were lower than the penalties for late settlement (as a result of progressive penalties for late settlement). Such an outcome would be deeply undesirable as the key features of an efficient settlement system are both early matching, and early settlement.

As a result of their complexity, of the anomalies that they cause, and by the damage to the immunisation principle, progressive penalties will increase the number of bilateral claims, and will at the same time increase the difficulty of demonstrating the legitimacy of a bilateral claim.

Progressive penalties will also have the effect of increasing the complexity, and reducing the attractiveness, of European capital markets.

<ESMA\_QUESTION\_CSDR\_22>

1. What are your views regarding the introduction of convexity in penalty rates as per the ESMA proposed Option 2 (settlement fails caused by a lack of liquid financial instruments)? Please justify your answer by providing quantitative examples and data if possible.

<ESMA\_QUESTION\_CSDR\_23>

Please see our answer to Question 22. The introduction of convexity will increase complexity and opaqueness for no apparent benefit.

<ESMA\_QUESTION\_CSDR\_23>

1. Would it be appropriate to apply the convexity criterion to settlement fails due to a lack of illiquid financial instruments as well? Please justify your answer by providing quantitative examples and data if possible.

<ESMA\_QUESTION\_CSDR\_24>

Please see our answers to Questions 22 and 23.

<ESMA\_QUESTION\_CSDR\_24>

1. What are your views regarding the level of progressive penalty rates:

**a) as proposed under Option 1?**

**b) as proposed under Option 2?**

<ESMA\_QUESTION\_CSDR\_25>

As set out in our previous answers, and in particular in our answer to question 22, we believe that introducing progressive penalties will be damaging.

The penalty rates set out in Options 1 and 2 are not simply progressive. They also represent major increases in overall penalty rates.

Although we support the principle of a recalibration of penalties in order to contribute to creating appropriate incentives for timely settlement, we have major concerns about the size of the increases set out in Options 1 and 2.

Here are some considerations that set out our thinking:

1/ In many cases, there already are incentives for market participants to settle on a timely basis. These incentives include the use of the cash resulting from the settlement of a DVP transactions, the capital usage associated with pending transactions, as well as the operational burden of monitoring and managing settlement fails.

2/ A major increase in penalties creates the risk of unforeseen effects – through, for example, the impact on trading activities, and a potential diversion of activity from central market infrastructure because of the cost, risk and uncertainty generated by the penalty mechanism.

3/ One critical point is that the penalty mechanism of CSDs does not have full information as to the precise causes of a settlement fail. Accordingly, for an individual transaction, it may well impose the penalty on the innocent party. This is not in itself not necessarily a problem. If the absolute size of an individual penalty is low, then the individual penalty itself may not matter much, and the penalty mechanism will achieve its effect through the collective impact of penalties on a pattern of activity. And, of course, any innocent party can correct the penalty mechanism by making a bilateral claim against its counterparty, or against the party at fault. But a major increase in penalty size creates additional burdens and risk, through the increase in bilateral claims, and through the imposition of large penalties on parties that may be innocent.

4/ The fundamental rationale for the penalty mechanism is that it is a mechanism to deal with externalities (as there are costs associated with failing settlement, so that it is appropriate for a party with bad behaviour to compensate a party with good behaviour). Major increases in penalty rates (going beyond the compensation of external costs) will distort the market, as it will benefit some categories of market participants, at the expense of others.

5/ The proposal of progressive penalties, coupled with a major increase in size of penalties, is based on the idea that settlement failure can be analysed, and solved, on an individual transaction by transaction basis. This approach misses the point that settlement activity is a high-volume activity, and that many of the key drivers for settlement efficiency are not the idiosyncratic aspects of individual transactions but are rather the accuracy and efficiency of the systems used by market participants and by market infrastructures. The penalty mechanism works by creating incentives, directly or indirectly, to improve the operation of systems. Delivering improvements to systems takes time. Given the need for time to improve systems, imposing very high penalties on individual transactions may not have a short-term effect on improving overall settlement efficiency; it will rather create the incentives for market participants to avoid the specific types of trading or business activity that could incur such penalties.

Based on these considerations, we would urge ESMA to reconsider these proposals.

As mentioned previously, we support many of the key principles of the current design of the penalty mechanism, and we would urge ESMA not to change them. We do, however, believe that within the framework of the current principles of the penalty mechanism some re-calibration of the penalty rates in order to optimise their effect would be possible.

<ESMA\_QUESTION\_CSDR\_25>

1. If you disagree with ESMA’s proposal regarding the penalty rates, please specify which rates you believe would be more appropriate (i.e. deterrent and proportionate, with the potential to effectively discourage settlement fails, incentivise their rapid resolution and improve settlement efficiency). Please provide examples and data, as well as arguments to justify your answer. If relevant, please provide an indication of further proportionality considerations, detailed justifications and alternative proposals as needed.

<ESMA\_QUESTION\_CSDR\_26>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CSDR\_26>

1. What are your views regarding the categorisation of types of fails:

**a) as proposed under Option 1?**

**b) as proposed under Option 2?**

**Do you believe that less/further granularity is needed in terms of the types of fails (asset classes) subject to cash penalties? Please justify your answer by providing quantitative examples and data if possible.**

<ESMA\_QUESTION\_CSDR\_27>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_CSDR\_27>

1. What costs and benefits do you envisage related to the implementation of progressive penalty rates by asset type (according to ESMA’s proposed Options 1 and 2)? Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_28>

|  |  |
| --- | --- |
| **Progressive penalty rates (by asset type) - ESMA’s proposal Option 1** |   **Please see ESMA’s proposed Option 1 in Section 5.3 of this CP.** |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **Progressive penalty rates (by asset type) - ESMA’s proposal Option 2** |   **Please see ESMA’s proposed Option 2 in Section 5.3 of this CP.** |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_28>

1. Alternatively, do you think that progressive cash penalties rates should take into account a different breakdown than the one included in ESMA’s proposal above for any or all of the following categories:

**(a) asset type;**

**(b) liquidity of the financial instrument;**

**(c) type of transaction;**

**(d) duration of the settlement fail.**

**If you have answered yes to the question above, what costs and benefits do you envisage related to the implementation of progressive penalty rates according to your proposal? Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.**

<ESMA\_QUESTION\_CSDR\_29>

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|  |  |
| --- | --- |
| **Progressive penalty rates – respondent's proposal** *(if applicable)* |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_29>

1. Another potential approach to progressive penalty rates could be based not only on the length of the settlement fail but also on the value of the settlement fail. Settlement fails based on instructions with a lower value could be charged a higher penalty rate than those with a higher value, thus potentially creating an incentive for participants in settling smaller value instructions at their intended settlement date (ISD). Alternatively, settlement fails based on instructions with a higher value could be charged a higher penalty rate than those with a lower value. In your view, would such an approach be justified? Please provide arguments and examples in support of your answer, including data where available. What costs and benefits do you envisage related to the implementation of this approach? Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_30>

We do not see any benefits in these proposals, and we see major disadvantages. These proposals will increase the complexity of the mechanism, make the calculation and attribution of penalties more opaque, and damage the “immunisation” principle.

Please see our answers to Questions 22 and 25 for some more information on these points.

|  |  |  |
| --- | --- | --- |
| **Progressive penalty rates – based on the length and value of the settlement fail** | **Settlement fails based on lower value settlement instructions could be charged a higher penalty rate than those based on higher value settlement instructions** | **Settlement fails based on higher value settlement instructions could be charged a higher penalty rate than those based on lower value settlement instructions** |
|   | **Qualitative description** | **Quantitative description/ Data** | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_30>

1. Besides the criteria already listed, i.e. type of asset, liquidity of the financial instruments, duration and value of the settlement fail, what additional criteria should be considered when setting proportionate and effective cash penalty rates? Please provide examples and justify your answer.

<ESMA\_QUESTION\_CSDR\_31>

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<ESMA\_QUESTION\_CSDR\_31>

1. Would you be in favour of the use of the market value of the financial instruments on the first day of the settlement fail as a basis for the calculation of penalties for the entire duration of the fail? ESMA would like to ask for the stakeholders’ views on the costs and benefits of such a measure. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_32>

We do not see any benefits in this proposal, and we see major disadvantages. These proposals will increase the complexity of the mechanism, make the calculation and attribution of penalties more opaque, and damage the “immunisation” principle.

Please see our answers to Questions 22 and 25 for some more information on these points.

|  |  |
| --- | --- |
| **Use the market value of the financial instruments on the first day of the settlement fail as a basis for the calculation of penalties for the entire duration of the fail** |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_32>

1. How should free of payment (FoP) instructions be valued for the purpose of the application of cash penalties? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_CSDR\_33>

They should be valued using the same methodology as used for against payment transactions, in order to maintain the “immunisation principle”.

<ESMA\_QUESTION\_CSDR\_33>

1. Do you think there is a risk that higher penalty rates may lead to participants using less DvP and more FoP settlement instructions? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_CSDR\_34>

Please see our response to Question 33.

<ESMA\_QUESTION\_CSDR\_34>

1. ESMA is considering the feasibility of identifying another asset class subject to lower penalty rates: “bonds for which there is not a liquid market in accordance with the methodology specified in Article 13(1), point (b) of Commission Delegated Regulation (EU) 2017/583 (RTS 2)”. The information on the assessment of bonds’ liquidity is published by ESMA on a quarterly basis and further updated on FITRS. However, ESMA is also aware that this may add to the operational burden for CSDs that would need to check the liquidity of bonds before applying cash penalties. As such, ESMA would like to ask for the stakeholders’ views on the costs and benefits of such a measure. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_35>

|  |  |
| --- | --- |
| **Applying lower penalty rates for illiquid bonds** |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE  |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE  |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE  |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_35>

1. Do you have other suggestions for further flexibility with regards to penalties for settlement fails imposed on illiquid financial instruments? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_CSDR\_36>

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<ESMA\_QUESTION\_CSDR\_36>

1. How likely is it that underlying parties that end up with “net long” cash payments may not have incentives to manage their fails or bilaterally cancel failing instructions as they may “earn” cash from penalties? How could this risk be addressed? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_CSDR\_37>

It is not clear that this is a major problem. A party that misuses CSD functionalities in order to receive an undue cash penalty may always receive a bilateral claim from its counterparty.

Nonetheless, there are steps that should be taken to minimise the risk of any such cases.

Such steps include:

* Encouraging partial settlement
* Advancing the point in time at which matched failing transactions are automatically cancelled. Ideally, such a cancellation should take place around twenty business days after intended settlement date. Such a change will facilitate increased discipline in the settlement process, as required by a move to T+1, and as also required by elements of the FASTER withholding tax proposal.

<ESMA\_QUESTION\_CSDR\_37>

1. How could the parameters for the calculation of cash penalties take into account the effect that low or negative interest rates could have on the incentives of counterparties and on settlement fails? Please provide examples and data, as well as arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_38>

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<ESMA\_QUESTION\_CSDR\_38>

1. To ensure a proportionate approach, do you think the penalty mechanism should be applied only at the level of those CSDs with higher settlement fail rates? Please provide examples and data, as well as arguments to justify your answer. If your answer is yes, please specify where the threshold should be set and if it should take into account the settlement efficiency at:

**a) CSD/SSS level (please specify the settlement efficiency target);**

**b) at asset type level (please specify the settlement efficiency target); or**

**c) other (please specify, including the settlement efficiency target).**

<ESMA\_QUESTION\_CSDR\_39>

No. Such a step would be a major step backwards towards inefficient and fragmented European markets.

Although CSD functionalities and opening hours do have an impact on settlement efficiency rates, other important drivers of settlement efficiency include the type of securities, the type of activity, and the actions and internal processes of individual market participants.

Applying penalties only at CSDs with higher settlement fail rates would create fragmentation in European markets, would distort competition between CSDs, and would create particular problems for the application of penalties for settlement activity taking place in CSDs that use the T2S platform.

<ESMA\_QUESTION\_CSDR\_39>

1. Please specify what costs and benefits you envisage regarding the application of the penalty mechanism only at the level of the CSDs with higher settlement fail rates. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_40>

|  |  |
| --- | --- |
| **Application of the penalty mechanism only at the level of CSDs with lower settlement fail rates** |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE  |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE  |
| **Costs to other stakeholders** | TYPE YOUR TEXT HERE  |  TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_40>

1. Do you think penalty rates should vary according to the transaction type? If yes, please specify the transaction types and include proposals regarding the related penalty rates. Please justify your answer and provide examples and data where available. Please specify what costs and benefits you envisage related to the implementation of your proposal. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_41>

No. Penalty rates should not vary according to the transaction type, as this will damage the immunisation principle, given that chains of failing settlement instructions may be made up of transactions of different types.

|  |  |
| --- | --- |
| **Applying penalty rates by transaction types** |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE  |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE  |
| **Costs to other stakeholders** |  TYPE YOUR TEXT HERE |  TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_41>

1. Do you think that penalty rates should depend on stock borrowing fees? If yes, do you believe that the data provided by data vendors is of sufficient good quality that it can be relied upon? Please provide the average borrowing fees for the 8 categories of asset class depicted in Option 1. (i.e. liquid shares, illiquid shares, SME shares, ETFs, sovereign bonds, SME bonds, other corporate bonds, other financial instruments).

<ESMA\_QUESTION\_CSDR\_42>

The penalty rates should be calibrated so that parties have incentives for good behaviour, including, where appropriate, to borrow securities.

We do not see a direct linkage with stock borrowing fees as appropriate or feasible.

This is for several reasons. One major reason is that, even in the absence of penalties, parties have incentives to settle on time, given that a party that is failing to deliver securities in a delivery versus payment transaction will suffer the loss of the use of the cash, and will have to manage the counterparty risk. This means that any penalty should serve just as an additional incentive.

There are also a series of practical reasons as to why it would be difficult to link penalties to stock borrowing fees. Among these reasons are that stock borrowing fees vary over time, and depend, among other things, on counterparty credit ratings.

<ESMA\_QUESTION\_CSDR\_42>

1. Do you have other suggestions to simplify the cash penalty mechanism, while ensuring it is deterrent and proportionate, and effectively discourages settlement fails, incentivises their rapid resolution and improves settlement efficiency? Please justify your answer and provide examples and data where available. Please specify what costs and benefits you envisage related to the implementation of your proposal. Please use the table below. Where relevant, additional tables, graphs and information may be included in order to support some of the arguments or calculations presented in the table below.

<ESMA\_QUESTION\_CSDR\_43>

TYPE YOUR TEXT HERE

|  |  |
| --- | --- |
| **Respondent’s proposal** (if applicable) |    |
|   | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE  |
| **Compliance costs:****- One-off****- On-going** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE  |
| **Costs to other stakeholders** | TYPE YOUR TEXT HERE  |  TYPE YOUR TEXT HERE |
| **Indirect costs** |  TYPE YOUR TEXT HERE | TYPE YOUR TEXT HERE |

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<ESMA\_QUESTION\_CSDR\_43>

1. Based on your experience, are settlement fails lower in other markets (i.e USA, UK)? If so, which are in your opinion the main reasons for that? Please also specify the scope and methodology used for measuring settlement efficiency in the respective third-country jurisdictions.

<ESMA\_QUESTION\_CSDR\_44>

There are very significant differences in market structure, market practice and market volumes between the EU and the US.

As a result, it is difficult to produce statistics on EU and US settlement efficiency that are comparable.

Based on BNY Mellon internal data, it would be fair to say that in the past overall settlement efficiency has been higher in the US than in the EU. However, the recent improvement in settlement efficiency rates in Europe identified in our answer to Question 15 brings European settlement efficiency rates very close to US rates.

<ESMA\_QUESTION\_CSDR\_44>

1. Do CSD participants pass on the penalties to their clients? Please provide information about the current market practices as well as data, examples and reasons, if any, which may impede the passing on of penalties to clients.

<ESMA\_QUESTION\_CSDR\_45>

As a standard practice, and for standard activities, and unless BNY Mellon is at fault, BNY Mellon passes penalties, both debits and credits, to its clients.

<ESMA\_QUESTION\_CSDR\_45>

1. Do you consider that introducing a minimum penalty across all types of fails would improve settlement efficiency? Is yes, what would be the amount of this minimum penalty and how should it apply? Please provide examples and data, as well as arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_46>

No. We do not think that introducing a minimum penalty would increase settlement efficiency. And we think that introducing a minimum penalty would create complexity and anomalies.

There are two possible ways of interpreting the idea of a minimum penalty.

The first is that penalties that fall below the minimum are not applied. The second is that all penalties that are below the minimum are raised to the minimum level.

Both approaches would create complexity and would damage the immunisation principle.

For the first approach, it is difficult to understand how this change would increase settlement efficiency.

Of the two, the second approach is clearly the more damaging, as it would generate significant anomalies. Please see our answer to Question 25 for some additional information on this point.

<ESMA\_QUESTION\_CSDR\_46>

1. What would be the time needed for CSDs and market participants to implement changes to the penalty mechanism (depending on the extent of the changes)? Please provide arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_47>

Given that the time will depend on the extent of the changes, it is difficult to estimate the timeline for implementation.

<ESMA\_QUESTION\_CSDR\_47>

1. Since the application of the RTS on Settlement Discipline, how many participants have been detected as failing consistently and systematically within the meaning of Article 7(9) of CSDR? How many of them, if any, have been suspended pursuant to same Article?

<ESMA\_QUESTION\_CSDR\_48>

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<ESMA\_QUESTION\_CSDR\_48>

1. In your view, would special penalties (either additional penalties or more severe penalty rates) applied to participants with high settlement fail rates be justified? Should such participants be identified using the same thresholds as in Article 39 of the RTS on Settlement Discipline, but within a shorter timeframe (e.g. 2 months instead of 12 months)? If not, what criteria/methodology should be used for defining participants with high settlement fail rates? Please provide examples and data, as well as arguments to justify your answer.

<ESMA\_QUESTION\_CSDR\_49>

We do not believe that applying special penalties for participants with high settlement fail rates would be justified. In fact, we believe that applying such penalties would create the risk of damage to key elements of the European post-trade system.

This view is based on the following considerations.

1/ Such special penalties are not necessary as, firstly, the rates for late settlement penalties should be calibrated so that all market participants have incentives for timely settlement, and as, secondly, supervisory bodies already have existing powers with relation to bad behaviour by market participants.

2/ Such special penalties will create anomalies, and will damage, or create inappropriate incentives, for parties that are not at fault. This is because a CSD participant may be acting as an intermediary, and the settlement fail rates on a specific CSD account may reflect the activities of multiple underlying trading parties, some of which may have good behaviour, and some of which may have bad behaviour. Given that CSDs will not be able to distinguish between transactions of a party with good behaviour, and transactions of a party with bad behaviour, the application of special penalties creates the risk that parties with good behaviour will be unduly penalised, and with no ability of recourse.

<ESMA\_QUESTION\_CSDR\_49>

1. How have CSDs implemented working arrangements with participants in accordance with article 13(2) of the RTS on Settlement Discipline? How many participants have been targeted?

<ESMA\_QUESTION\_CSDR\_50>

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<ESMA\_QUESTION\_CSDR\_50>

1. Should the topic of settlement efficiency be discussed at the CSDs’ User Committees to better identify any market circumstances and particular context of participant(s) explaining an increase or decrease of the fail rates? Please justify your answer.

<ESMA\_QUESTION\_CSDR\_51>

Yes. The topic of settlement efficiency is an appropriate topic of discussion at CSD User Committees.

One reason for this is that the settlement efficiency rate of any individual market participant is affected by the settlement efficiency rate of other market participants, so that it is appropriate for there to be broad market discussions on how to improve settlement efficiency.

Another reason is that overall settlement rates are affected both by CSD functionalities and by CSD daily timetables. It is important that CSD User Committees discuss how to change CSD functionalities and CSD daily timetables in order to improve settlement rates.

<ESMA\_QUESTION\_CSDR\_51>