Reply Form

**to the Consultation Paper on Technical Advice on the Scope of CSDR Settlement Discipline**

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 **9 September 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\_SETD\_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\_ SETD\_nameofrespondent.

For example, for a respondent named ABCD, the reply form would be saved with the following name: ESMA\_CP1\_ SETD\_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 | Xchange Now e.V. |
| Activity | Other |
| Are you representing an association? |  |
| Country / Region | Germany |

# Questions

1. Do you agree with ESMA’s proposal regarding the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions? Please specify which cases you agree with and which cases you don’t agree with (if applicable). Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_1>

We **disagree** with ESMA’s proposal for the suspension of the SDR in the cases of:

- Transactions during and after insolvency. We believe actions of the failing party likely contributed to insolvency and therefore should not be exempt from penalties. The question of the seniority of such claim should first be decided by the courts.

- Similarly, a reconciliation that results in the unauthorized creation or deletion of securities cannot resolve the failing party from liability. In fact, isn’t it likely that the discrepancy was the cause of the failure?

- Penalties for incorrect settlement instructions should be handled separately in the case of insolvency.

- No penalties for incorrect settlement instructions when liquidating the positions of an insolvent participant.

- Transactions with straight-through-processing (STP) should NOT be excluded because a reduction in failures to deliver is one of the promised benefits of STP.

- Suspension of settlement due to reconciliation issues because reconciliation should be part of the on-going audit activities at financial firms.

We **agree** with ESMA’s proposal to suspend SDR in the following cases:

- The admission that “All transactions should receive codes similar to the T2S settlement system of the ECB so that CSDs can identify whether a transaction is a trade or not” is a clear admission that ESMA cannot tell what a transaction is!

- We agree that all transactions should receive codes similar to the T2S settlement system of the ECB so that CSDs can identify whether a transaction is a trade or not

- No penalties if a trading venue operator (MTF/OTF) or market operator has suspended trading of certain ISIN.

- No penalties if the settlement of a securities issuance has been suspended, naturally, as settlement cannot take place.

- securities transfers without payment on CSD accounts in connection with the (de-) mobilization of collateral.

- For settlement instructions with cash settlement outside the settlement system operated by the CSD, when the system is closed on the relevant day, but only the cash portion should be exempt. However, if the securities settlement remains within the CSD system, it should not be exempt.

- Technical failures on the part of the CSD as these are beyond the control of the participant.

- For the settlement of securities affected by sanctions or anti-money laundering measures, again, as this is beyond the control of the participant. However, each participant MUST be required to reconcile the debit and credits within its records to match its holdings of such securities with its internal records of institutional and household accounts.

- Suspension of settlement due to a court, police, or regulatory order, to the extent that such order results in the suspension of all activity for that security. Once again, participants must be required to continue reconciliation within their own records between the number of shares they hold (at CSD, corporate records, etc.) with the number of shares on their records as held by investors (household or institutional

<ESMA\_QUESTION\_SETD\_1>

1. ESMA would like to ask for the stakeholders’ views on the costs and benefits of the implementation of the respective exemptions from settlement discipline (based on the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions). 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’s proposal - underlying causes of settlement fails that are considered as not attributable to the participants in the transactions** |  | |
|  | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  |  |
| **Compliance costs:**  **- One-off**  **- On-going** | N/A |  |
| **Costs to other stakeholders** | N/A |  |
| **Indirect costs** | N/A |  |

<ESMA\_QUESTION\_SETD\_2>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SETD\_2>

1. Do you have other suggestions regarding the underlying causes of settlement fails that are considered as not attributable to the participants in the transactions? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_3>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SETD\_3>

1. If you have answered yes to the previous question, 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.

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

<ESMA\_QUESTION\_SETD\_4>

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<ESMA\_QUESTION\_SETD\_4>

1. Do any of the exemption proposed above breaks the immunization principle? Please provide arguments.

<ESMA\_QUESTION\_SETD\_5>

We take this opportunity to object to the immunization principle in general. Qhen a counterparty fails to deliver due to the failure to receive from a different counterparty, the former should be debited the penalty as an incentive to force delivery from the counterparty. This is especially important until such time as ECB or ESMA is able to identify trade-for-trade who failed to deliver to whom.

<ESMA\_QUESTION\_SETD\_5>

1. Which of the exemptions proposed above do you think can be filtered out before penalties are applied in an automated way? And which ones can only be exempted ex-post, as part of the already existing appeal mechanism at CSDs?

**Please provide details regarding the cost for ex-ante filtering compared to ex-post exemption via the appeal mechanism.**

<ESMA\_QUESTION\_SETD\_6>

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<ESMA\_QUESTION\_SETD\_6>

1. For exemptions that can be filtered out in advance, do you think that a CSD would prefer to implement this filter or not? Also considering the very large number of appeals they might have to deal with and also the costs it will entail.

<ESMA\_QUESTION\_SETD\_7>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SETD\_7>

1. Do you agree with ESMA’s proposal regarding the circumstances in which operations are not considered as trading? Please specify which cases you agree with and which cases you don’t agree with (if applicable). Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_8>

We agree with ESMA that the following transactions are not considered as trading transactions:

- Securities transfers without payment to CSD accounts.

- Market claims, corporate actions on shares (dividends, interest), securities distributions (stock dividends, bonus issues), restructurings (conversions, stock splits, redemptions, takeover offers).

- The process of the technical creation of securities, including the transfer from the CSD account to the issuer's account.

- The creation and redemption of fund units in the primary market.

- Realignment measures.

<ESMA\_QUESTION\_SETD\_8>

1. ESMA would like to ask for the stakeholders’ views on the costs and benefits of the implementation of the respective exemptions from settlement discipline (based on the circumstances in which operations are not considered as trading). 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’s proposal - circumstances in which operations are not considered as trading** |  | |
|  | **Qualitative description** | **Quantitative description/ Data** |
| **Benefits** |  |  |
| **Compliance costs:**  **- One-off**  **- On-going** |  |  |
| **Costs to other stakeholders** |  |  |
| **Indirect costs** |  |  |

<ESMA\_QUESTION\_SETD\_9>

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<ESMA\_QUESTION\_SETD\_9>

1. Do you have other suggestions regarding circumstances in which operations are not considered as trading? Please justify your answer and provide examples and data where available.

<ESMA\_QUESTION\_SETD\_10>

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<ESMA\_QUESTION\_SETD\_10>

1. If you have answered yes to the previous question, 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.

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

<ESMA\_QUESTION\_SETD\_11>

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<ESMA\_QUESTION\_SETD\_11>

1. Do any of the exemption proposed above breaks the immunization principle? Please provide arguments.

<ESMA\_QUESTION\_SETD\_12>

We take this opportunity to reiterate our objection to the immunization principle in general. Qhen a counterparty fails to deliver due to the failure to receive from a different counterparty, the former should be debited the penalty as an incentive to force delivery from the counterparty. This is especially important until such time as ECB or ESMA is able to identify trade-for-trade who failed to deliver to whom

<ESMA\_QUESTION\_SETD\_12>

1. Which of the exemptions proposed above do you think can be filtered out before penalties are applied in an automated way? And which one can only be exempted ex-post, as part of the already existing appeal mechanism at CSDs?

**Please provide details regarding the cost for ex-ante filtering compared to ex-post exemption via the appeal mechanism.**

<ESMA\_QUESTION\_SETD\_13>

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<ESMA\_QUESTION\_SETD\_13>

1. For exemptions that can be filtered out in advance, do you think that a CSD would prefer to implement this filter or not? Also considering the very large number of appeals they might have to deal with and also the costs it will entail.

<ESMA\_QUESTION\_SETD\_14>

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<ESMA\_QUESTION\_SETD\_14>

1. Which transaction types based on the codes allowed by T2S (or potentially other codes such as ISO transaction codes) should be exempted from settlement discipline measures? Please provide the codes, their definition and arguments to justify the exemption.

<ESMA\_QUESTION\_SETD\_15>

We take this opportunity to reemphasize our strong objection to ESMA picking-and-choosing which transaction are exempt and which are not. Each exemption must be clearly stated and definitely monitored to prevent abuse by market participants.

<ESMA\_QUESTION\_SETD\_15>